Santa Clara University School of Law

Santa Clara Law Review

Volume 24 | Number 3 Article 2

1-1-1984

The Supreme Court Since 1937

Russell W. Galloway Jr.

THE SUPREME COURT SINCE 1937*

Russell W. Galloway, Jr.**

I. INTRODUCTION

This article presents a descriptive profile of the United States Supreme Court since the constitutional revolution of 1937. The discussion covers four major periods and their subdivisions. First came the Roosevelt Court (1937-46), which had an early period (1937-41) in which the liberals took control from the conservative old guard and a later period (1941-46) in which the Roosevelt appointees split into two warring factions.[1] Second was the more conservative Vinson Court (1946-53), with its early period of polarization (1946-49) and its subsequent period of conservative dominance (1949-53).[2] Third was the more liberal Warren Court (1953-69), which had an early period of emerging liberal activism (1953-57),[3] a middle period of retrenchment and restraint (1958-62),[4] and a third period of liberal dominance (1962-69).[5] Fourth came the Burger Court (1969-present),[6] which was a period of conservative dominance.

To set the stage, a brief description of the Supreme Court just before the constitutional revolution of 1937 is in order.[7] During the

---

* Supreme Court History Project, Publication No.8.

** Professor of Law, University of Santa Clara School of Law; J.D., 1965, Columbia University School of Law; Ph.D., 1970, Graduate Theological Union; Director, Supreme Court History Project; member, California bar.

1. *See* Galloway, *The Roosevelt Court: The Liberals Conquer (1937-1941) and Divide (1941-1946)*, 23 SANTA CLARA L. REV. 491 (1983).

2. *See* Galloway, *The Vinson Court: Polarization (1946-1949) and Conservative Dominance (1949-1953)*, 22 SANTA CLARA L. REV. 375 (1982).

3. *See* Galloway, *The Early Years of the Warren Court: Emergence of Judicial Liberalism (1953-1957)*, 18 SANTA CLARA L. REV. 609 (1978).

4. *See* Galloway, *The Second Period of the Warren Court: The Liberal Trend Abates (1957-1961)*, 19 SANTA CLARA L. REV. 947 (1979).

5. *See* Galloway, *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773 (1980).

6. *See* Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891 (1981).

7. For a more detailed discussion of the years preceding the constitutional revolution of 1937, see Galloway, *The Court That Challenged the New Deal (1930-1937)*, 24 SANTA CLARA L. REV. 65 (1984).

October 1935 Term, the Court waged war against the New Deal, and struck down a variety of federal and state anti-depression programs.[8] The following table shows the alignment of Justices at that time.[9]

TABLE 1

ALIGNMENT OF JUSTICES—OCTOBER 1935 TERM

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

On the far right were the so-called four horsemen: Van Devanter, McReynolds, Sutherland, and Butler, laissez faire conservatives all. Justice Roberts joined them in the October 1935 Term after several earlier Terms in the Court's center. Chief Justice Hughes walked a tightrope between the conservative and liberal blocs, first leaning one way, then another. The liberal trio, Justices Brandeis, Stone, and Cardozo, held down the left wing, dissenting as a bloc in several important and controversial anti-New Deal decisions.

II. DISCUSSION

A. *The Roosevelt Court (1937-46)*[10]

1. *The Roosevelt Court's Early Years: The Liberals Take Control (1937-41)*

The Roosevelt Court began with the constitutional revolution of

8. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (5-4 decision) (minimum wage legislation); Ashton v. Cameron County Water Improvement Dist., 298 U.S. 513 (1936) (5-4 decision) (bankruptcy); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (5-4 decision) (Bituminous Coal Conservation Act of 1935); Jones v. SEC, 298 U.S. 1 (1936) (6-3 decision) (Securities Act of 1933); United States v. Butler, 297 U.S. 1 (1936) (6-3 decision) (Agricultural Adjustment Act of 1933); Colgate v. Harvey, 296 U.S. 404 (1935) (6-3 decision) (state income tax).

9. Similar tables showing alignments of Justices will be presented later. In each case, Justices in the "liberal" and "conservative" columns are listed in the order of their alignment at the time as determined by statistical analysis of their voting patterns. This means, of course, that each Justice's position is based upon a comparison with the other Justices on the Court of that period, not upon any absolute measure of liberalism and conservatism.

10. *See* C. PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS

1937. In February 1937, President Franklin Roosevelt responded to the Court's attack on the New Deal by announcing his famous Court-packing plan. The following month, the Court made an abrupt about-face and seceded from the role of constitutional censor of economic reform legislation. Beginning with the landmark cases *West Coast Hotel Co. v. Parrish*[11] and *NLRB v. Jones & Laughlin Steel Corp.*,[12] the Court announced that the era of constitutional laissez faire was over.

Initially the constitutional revolution of 1937 was carried out without a single personnel change. Making the famous "switch in time that saved nine," Justice Owen Roberts broke ranks with the conservative four horsemen and created a new majority by lining up with Chief Justice Hughes and the three liberals, Brandeis, Stone, and Cardozo.

Dissent rates on the right promptly jumped to more than triple the level of the prior Term; dissent rates on the left dropped by more than two-thirds. The liberals took control and set in motion the two major trends that characterized the Roosevelt Court: judicial restraint in economic cases and liberal activism in civil liberties cases.[13]

In the next few years, the old guard began to retire, enabling Roosevelt to secure the constitutional revolution begun in 1937 by appointing New Dealers to fill their seats. First, the conservative Van Devanter resigned on June 2, 1937, and Hugo Lafayette Black replaced him.[14] Black, the Alabama "people's lawyer" and radical New Dealer, was probably more liberal than any prior Justice in Supreme Court history. He promptly staked out a position by himself on the far left.

A second conservative, Sutherland, resigned on January 18, 1938, and Roosevelt selected then Solicitor General Stanley F. Reed

---

AND VALUES, 1937-1947 (1948); Galloway, *supra* note 1.

11. 300 U.S. 379 (1937) (5-4 decision) (substantive due process; state minimum wage law for women upheld).

12. 301 U.S. 1 (1937) (5-4 decision) (federal commerce power; National Labor Relations Act upheld).

13. In addition to the *Parish* and *Jones & Laughlin* cases, famous liberal victories during the October 1936 Term included Helvering v. Davis, 301 U.S. 619 (1937) (7-2 decision) (spending power; Social Security old age benefits program upheld); Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (5-4 decision) (spending power; Social Security unemployment compensation program upheld); and De Jonge v. Oregon, 299 U.S. 353 (1937) (8-0 decision) (free speech; clear and present danger rule adopted).

14. The most intimate account of Black's life and thought is H. BLACK, JR., MY FATHER: A REMEMBRANCE (1975). Justice Black's only major extrajudicial statement of his views is H. BLACK, A CONSTITUTIONAL FAITH (1968).

to fill the empty seat.[15] Reed was a moderate New Dealer. Although not as radical as Justice Black, Reed moved immediately into the existing liberal bloc, close to Justices Brandeis and Stone.

These two successions alone were enough to break the power of the conservative wing. During the October 1937 Term, Justice McReynolds cast more dissents than all seven liberals and moderates combined. Justice McReynolds dissented twenty-eight times; Justice Brandeis, in contrast, dissented once.

The liberals, in short, were in full control by the October 1937 Term. They exercised that control vigorously, issuing landmark decisions in both economic and civil liberties cases. The most famous and characteristic decision of the Term was probably *United States v. Carolene Products Co.*[16] While confirming the new rule of judicial restraint in socio-economic cases, the Court suggested in a famous footnote that "more exacting scrutiny" might be appropriate where the government infringes explicit constitutional liberties, discriminates against insular minorities, or undercuts the legislative process.[17]

The swing to the left accelerated in the next few years. The liberal Justice Cardozo died on July 9, 1938, and Felix Frankfurter, a close friend of Roosevelt, was chosen to replace him.[18] One of the nation's foremost liberals and a protege of Justice Brandeis, Frankfurter promptly joined the Court's liberal wing. He disagreed with Justice Black in only one of the sixty-five cases in which both participated during Frankfurter's first Term.

On February 13, 1939, the liberal Justice Brandeis resigned. He was replaced by William O. Douglas, another of Roosevelt's inner circle of advisors and friends.[19] Douglas, arguably the most liberal Justice in the entire history of the Supreme Court, had been

---

15. For a brief biographical account concerning Reed, see 3 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES 1789-1969, at 2373-89 (1969).

16. 304 U.S. 144 (1938) (6-1 decision) (substantive due process).

17. *Id.* at 152 n.4. Other landmark cases decided during the Term included Johnson v. Zerbst, 304 U.S. 458 (1938) (6-2 decision) (criminal procedure; sixth amendment right of indigent defendant to appointed counsel); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (6-2 decision) (civil procedure; diversity jurisdiction); Lovell v. Griffin, 303 U.S. 444 (1938) (8-0 decision) (free speech; handbills); and Palko v. Connecticut, 302 U.S. 319 (1937) (8-1 decision) (criminal procedure; due process).

18. Among the many works on Frankfurter, the following are especially interesting: B. MURPHY, FELIX FRANKFURTER REMINISCES (H. Phillips ed. 1960); B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982).

19. Douglas' life is described in detail in his two-volume autobiography: W. DOUGLAS, GO EAST, YOUNG MAN (1974) and W. DOUGLAS, THE COURT YEARS 1939-1975 (1980). *See also* J. SIMON, INDEPENDENT JOURNEY, THE LIFE OF WILLIAM O. DOUGLAS (1980).

chairman of the Securities Exchange Commission and was a leader in the New Deal efforts to regulate private enterprise. Like Justice Frankfurter, Douglas moved squarely into the Court's liberal wing during his first Term,[20] as the following table shows.

TABLE 2

DISAGREEMENT RATES—OCTOBER 1938 TERM

	DOUGLAS	BLACK	FRANKFURTER	BUTLER	MCREYNOLDS
LIBERAL					
Douglas	---	0.0%	0.0%	58.8%	64.7%
Black		---	1.5%	32.1%	34.5%
Frankfurter			---	29.7%	31.3%
CONSERVATIVE					
Butler				---	2.2%
McReynolds					—

Voting data for Justices Frankfurter's and Douglas' first Term show a liberal rout. Justice Brandeis, for example, did not cast a single dissent in his last sixty-five cases. In contrast, McReynolds and Butler cast sixty-six dissenting votes, accounting for more than sixty percent of all dissents during the Term. Once again the liberals dominated in cases involving both economics[21] and civil liberties.[22] In response to the Court's growing liberalism, Roberts and Hughes, the swing votes in the constitutional revolution of 1937, shifted back toward the conservative pole.

In the October 1939 Term the shift to the left continued. On November 16, 1939, the conservative Justice Butler died leaving McReynolds as the only remaining member of the once dominant four horsemen. On February 5, 1940, Frank Murphy was seated to replace Butler.[23] Murphy, former governor of Michigan and Roosevelt's attorney general, was one of the most liberal Justices ever to sit on the Court. Murphy's arrival brought the number of Roosevelt appointees to five, an absolute majority.

The most notable patterns revealed by the voting data for the period after Murphy's seating are the cohesion and dominance of the

20. Douglas participated in only 18 cases during the Term.

21. *E.g.*, Mulford v. Smith, 307 U.S. 38 (1939) (6-2 decision) (federal commerce power); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939) (6-2 decision) (intergovernmental tax immunity).

22. *E.g.*, Hague v. C.I.O., 307 U.S. 496 (1939) (5-2 decision) (free speech and assembly); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (6-2 decision) (race; segregated schools).

23. *See* 4 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES, 1789-1969, at 2493-506 (1969).

Roosevelt bloc. In 133 of the 137 cases decided during the October 1939 Term, for example, the Roosevelt appointees banded together on the winning side. Justices Black, Douglas, and Murphy did not disagree a single time during the Term.

The Roosevelt bloc dominated the Court.[24] Dissent rates went down on the left and up on the right. McReynolds' dissent rate continued its steady climb, reaching the highest level (26.7%) of any Justice since the January 1838 Term. The three most conservative Justices cast eighty-two percent of the dissents during the October 1939 Term, and McReynolds cast twice as many dissents as the six most liberal Justices combined!

In the October 1940 Term the fortunes of the conservative wing fell to a new low when Justice McReynolds, the last of the four horsemen, resigned on January 1, 1941.[25] That left Justice Roberts, the Court's former swing vote, on the far right. In response to the Court's growing liberalism, Justices Roberts, Hughes, Stone, and Reed shifted to the right. Roberts and Hughes, the two most conservative Justices after McReynolds' retirement, dissented more than all six liberals combined. The Roosevelt appointees voted as a bloc in 150 of the 165 cases decided during the Term, and their combined five votes controlled the outcome. In short, the liberals ruled the roost.[26]

The October 1940 Term marked the end of the Roosevelt Court's first period. Perhaps the most striking voting pattern during the early years of the Roosevelt Court was the astonishing cohesion of the Roosevelt appointees. Black and Douglas, for example, agreed in 335 cases before recording their first disagreement! They agreed in every case during the first three Terms they were both on the Court. Of course, "Black and Douglas, the Damon and Pythias of the Court,"[27] are famous for their liberal partnership. It is perhaps even more surprising that Justices Black and Frankfurter, the lead-

---

24. Landmark liberal victories during the October 1939 Term included: Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (6-3 decision) (labor; antitrust exemption); Cantwell v. Connecticut, 310 U.S. 296 (1940) (9-0 decision) (freedom of religion); Thornhill v. Alabama, 310 U.S. 88 (1940) (8-1 decision) (free speech; labor picketing); and Schneider v. New Jersey, 308 U.S. 147 (1939) (7-1 decision) (free speech; access to public forum).

25. McReynolds was not replaced until the following Term.

26. The number of major liberal landmarks declined during the October 1940 Term, perhaps because of the onrush of World War II. The most famous decision of the Term, no doubt was United States v. F.W. Darby Lumber Co., 312 U.S. 100 (1941) (8-0 decision) (federal commerce power; Fair Labor Standards Act of 1938 upheld). This case was "a veritable graveyard for the leading economic ideas of the pre-1937 Court." R. GALLOWAY, THE RICH AND THE POOR IN SUPREME COURT HISTORY 147 (1983).

27. C. PRITCHETT, *supra* note 10, at 39.

ers of the Court's competing wings in the 1950's, agreed in 199 of the first 202 cases in which both participated. And Roosevelt's two other appointees, Reed and Murphy, were also closely aligned with Justices Black, Douglas, and Frankfurter. The following table shows the amazingly close agreement among the Roosevelt appointees during their early years.

TABLE 3

AGREEMENT RATES AMONG THE ROOSEVELT APPOINTEES— OCTOBER 1937, 1938 & 1939 TERMS

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

The liberals dominated throughout the early years of the Roosevelt Court. This liberal dominance emerged in March 1937 and became increasingly secure as the years passed. By the October 1940 Term, the Court had the 6-1-2 liberal majority shown in the following table.

TABLE 4

ALIGNMENT OF JUSTICES — OCTOBER 1940 TERM

LIBERAL	MODERATE	CONSERVATIVE
Douglas Black Murphy Frankfurter Reed Stone	Hughes ⟶	McReynolds Roberts

2. *The Roosevelt Court's Second Period: The Liberals Divide (1941-46)*

During the October 1941 Term, a new voting pattern emerged on the Roosevelt Court: the Roosevelt appointees split into a liberal, activist bloc and a moderate, restrained bloc.[28] This pattern would characterize the next few years and have effects lasting through the 1950's and into the 1960's. As the years passed, these two blocs—often called the Black and Frankfurter blocs respectively—increasingly battled each other for control of the Court, trading wins and losses for roughly two decades.

In the early years of the Roosevelt Court, Justice Frankfurter had tended to dominate the liberal bloc. An apostle of judicial restraint in the Holmes-Brandeis-Stone tradition, Frankfurter believed that judicial activism is wrong whether on behalf of conservative or of liberal causes. After a few years under Frankfurter's influence, Justices Black and Douglas, charter members of the activist bloc, began to call for a more aggressive posture, especially in dealing with constitutionally protected civil liberties.[29] Murphy later joined the activist group, after a year or so under Frankfurter's spell. Reed, meanwhile, lined up with Frankfurter as an advocate of moderation and restraint.

Three personnel changes occurred on the first day of the October 1941 Term that accelerated the rupture of the Roosevelt bloc. First, Harlan Fiske Stone was promoted to Chief Justice, succeeding Hughes, who had resigned effective July 1, 1941. Stone, a giant in Supreme Court history, was by consensus an ineffective Chief Justice who allowed intra-Court debates to degenerate into personal squabbles.[30]

Second, Robert H. Jackson, Roosevelt's brilliant and sharp-tongued Attorney General, was appointed to the Associate Justice position vacated by Stone.[31] Jackson lined up with the Frankfurter

---

28. *Cf.* C. PRITCHETT, *supra* note 10, at 39-40. "Some startling changes in judicial divisions occurred [during the October 1941 Term] . . . , and the Court began to give the appearance of flying apart in all directions. Looking backward, it is clear that the 1941-42 Term was definitely a turning point for the Roosevelt Court. With seven New Deal appointees this group may have felt a certain sense of relief from the previous constraint of being only a bare majority, or less than a majority, of the Court. The battle being won, they broke ranks."

29. The split between Douglas and Frankfurter was accompanied by intense personal hostility, especially on Frankfurter's part. *See* B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 261-68 (1982).

30. *See* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

31. For first-hand accounts of Jackson's views, see R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1954); R. JACKSON, THE STRUGGLE FOR JU-

bloc, adding his fiery personality to the anti-activist forces.[32]

Third, James F. Byrnes, Roosevelt's close friend and advisor, succeeded McReynolds, raising the number of Roosevelt appointees to seven.[33] With seven votes out of nine, the Roosevelt appointees no longer needed to preserve a solid front to control the Court, so attitudinal differences that had previously been latent came to the fore.

The emerging rift among the Roosevelt appointees is plainly visible in the voting statistics for the October 1941 Term. Frankfurter, for example, parted company with his former close allies, Douglas, Black, and Murphy, as the following table shows.

TABLE 5

FRANKFURTER'S DISAGREEMENT RATES — OCTOBER 1939 & 1941 TERMS

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

Justice Reed also moved away from the liberal activists and toward the center of the Court. Jackson and Byrnes lined up between Reed and Frankfurter, very near the center of the Court.

In short, the October 1941 Term saw Roosevelt's appointees split into an activist bloc which included Justices Black, Douglas, and Murphy, and a restrained bloc which included Justices Frankfurter, Jackson, Byrnes, and Reed. Stone, meanwhile, crossed over into the Court's conservative wing, taking the position next to Roberts, who now had sole possession of the right extreme.

Neither wing was dominant during the October 1941 Term. The emergence of the five-vote "restrained" faction pushed the liberal activists into writing more dissents. In fact, for the first time since the constitutional revolution of 1937, dissent rates were higher on the left than on the right. But the margin was very thin. On the average, the blocks traded wins and losses rather equally.[34]

DICIAL SUPREMACY (1940).

32. As Jackson described his position on the Court, "In general, I agreed with Chief Justice Stone that activism was no more appropriate on the part of the judiciary in favor of reforms than it was in knocking them down." L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2565. Over the years, Jackson developed an intense animosity toward Black.

33. For a brief account of Byrnes's career, see L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2517-34.

34. The most famous decisions of the Term included wins for both blocs. Conservative

In the October 1942 Term, the liberal-activist bloc was strengthened by the arrival of Wiley B. Rutledge to replace Justice Byrnes, who resigned after one Term to return to a position in the wartime executive branch.[35] "[A]n outspoken defender of the underdog,"[36] Rutledge immediately lined up with Justices Black, Douglas, and Murphy, bringing the activist wing to within one vote of majority status. Black, Douglas, Murphy, and Rutledge soon earned the nickname, the "libertarian four," because of their battle on behalf of individual liberties.

The Rutledge appointment completed the long string of personnel changes during the Roosevelt presidency. These changes, which are summarized in the following table, brought the Supreme Court to the most liberal posture in its entire history to that time.

TABLE 6

THE ROOSEVELT APPOINTMENTS

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

Voting data for the October 1942 Term show increased polarization on the Court. The libertarian four held down the Court's left wing. Frankfurter continued his sharp shift away from the liberal activists. Justices Jackson, Reed and Stone lined up in Frankfurter's moderate bloc, leaving Roberts to hold down the far right. The Court was more polarized than it had been in years, but neither bloc was dominant. Dissent rates on the left and right were again almost equal, with a slight margin in favor of the moderates.[37]

victories included Jones v. Opelika, 316 U.S. 584 (1942) (5-4 decision) (free speech; sale of literature on public street), and Betts v. Brady, 316 U.S. 455 (1942) (6-3 decision) (criminal procedure; right to counsel). Liberal activism prevailed in Skinner v. Oklahoma, 316 U.S. 535 (1942) (9-0 decision) (right not to be sterilized); Bridges v. California, 314 U.S. 252 (1941) (5-4 decision) (criminal procedure; contempt); and Edwards v. California, 314 U.S. 160 (1941) (9-0 decision) (ban on immigration of indigents into state rejected).

35. *See* F. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION (1965).

36. L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2595.

37. In spite of the even balance of power, the Term had a definitely liberal flavor. Important liberal decisions included Schneiderman v. United States, 320 U.S. 118 (1943) (5-3 decision) (denaturalization); West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943) (6-3 decision) (free speech; compulsory pledge of allegiance); United States *ex rel.* TVA

The following table shows the 4-4-1 lineup that emerged after the seating of Rutledge in the October 1942 Term. This lineup prevailed until the end of the October 1944 Term.

TABLE 7

ALIGNMENT OF JUSTICES — OCTOBER 1942 TERM

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

During the October 1943 and 1944 Terms, the Roosevelt Court continued to split along the same political lines. As the battle heated up, Justice Frankfurter moved farther away from his former liberal colleagues.[38]

TABLE 8

FRANKFURTER'S DISAGREEMENT RATES — OCTOBER 1939-43 TERMS

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

The libertarian four—Justices Black, Douglas, Murphy, and Rutledge—continued to make up the left wing. Jackson, Reed, and Stone joined Frankfurter in the center of the Court. All four moderates leaned toward the conservative pole, where Justice Roberts operated, often in splendid isolation.

Dissent and disagreement rates leaped to modern record levels

---

v. Powelson, 319 U.S. 266 (1943) (5-4 decision) (eminent domain); Martin v. City of Struthers, 319 U.S. 141 (1943) (5-4 decision) (free speech; door-to-door solicitation); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (5-4 decision) (free speech; tax on distribution of religious literature); McNabb v. United States, 318 U.S. 332 (1943) (7-1 decision) (criminal procedure; federal supervisory power); Wickard v. Filburn, 317 U.S. 111 (1942) (8-0 decision) (federal commerce power).

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

38. Frankfurter had the second most conservative voting record on the Court during the October 1942 and 1943 Terms.

reflecting the intense ideological and personal conflicts on the Court. Average dissents per case jumped from 1.25 in the October 1942 Term, a modern record, to 1.47 the next Term, and to 1.59 in 1944, which was nearly triple the average at the start of the Roosevelt era. Meanwhile, disagreement rates between the blocs leaped spectacularly. During the October 1943 Term, the first disagreement rates above forty percent were recorded in more than a century. In the October 1944 Term, Black and Roberts disagreed in 83 of the 151 decisions in which both participated! Their fifty-five percent disagreement rate was the highest of any since the August 1793 Term.

During this period, the liberal and "less liberal" wings continued to trade wins and losses rather evenly. No single bloc of Justices was dominant. The generally liberal character of the Court becomes clear, however, when one considers that Roberts, the Court's most conservative member, dissented nearly twice as often as any other Justice. In fact, Roberts' dissent rate broke the modern Court record two years in a row—30.2% for the October 1943 Term, and 35.9% for the October 1944 Term.

The outer limit of the Roosevelt Court's statistical swing to the left occurred in the October 1944 Term, when the average dissent rate of the three most conservative Justices was fifty percent above that of the three most liberal Justices.

TABLE 9

DISSENT RATES — OCTOBER 1944 TERM

JUSTICE	DISSENTS	DISSENT RATE
LIBERAL		
Black	28	18.2%
Douglas	23	15.4%
Rutledge	23	14.7%
Average	24.7	16.1%
CONSERVATIVE		
Frankfurter	25	16.2%
Stone	32	20.8%
Roberts	55	35.9%
Average	37.3	24.3%

On the other hand, the lowest dissent rates on the Court belonged to the moderate Justices, Jackson and Reed, indicating a lack of dominance by the libertarian four. Moreover, the flow of innovative landmark decisions seems to have eased as the 1940's progressed;

the judicial restraint that typifies wartime was clearly in effect.[39]

The October 1945 Term was a transition Term, setting the stage for the ensuing Vinson era (1946-53). First, Roberts resigned effective July 31, 1945. In an unusual bipartisan gesture, Truman appointed Harold H. Burton, a Republican, to succeed Roberts.[40] As expected, Burton promptly lined up with the Court's less liberal wing. Second, Chief Justice Stone died on April 22, 1946. Stone finished off his great career in the Court's right wing, closest to Reed and Burton and farthest from Douglas and Rutledge.

In general, the voting patterns for the October 1945 Term, last of the Roosevelt Court, were nebulous. Roberts' departure eliminated the last of the pre-Roosevelt conservative wing. The Court's new "right" wing was occupied by such liberals and moderates as Justices Stone, Frankfurter, and Reed. For the time being, this was a Court without conservatives. With the war over, the liberals apparently felt the time was ripe to make some new law, and the Court responded with a final outburst of liberal-activist decisions which marked the end of its "Roosevelt era."[41]

During its 1937-46 Roosevelt era, the Supreme Court initiated fundamental changes in American law. The Roosevelt Court was much more liberal than its predecessors. Its liberalism was especially evident in economic cases and civil liberties cases.

In cases involving essentially economic interests, the Roosevelt Court carried out its most famous constitutional revolution, rejecting the conservative activism that had dominated since the 1890's. The Court no longer declared economic reform legislation unconstitutional and instead adopted the deferential stance long advocated by liberal Justices Holmes, Brandeis, Stone, and Cardozo. The doctrine of substantive due process in economic cases and the related doctrine of liberty of contract were almost eliminated.[42] The commerce clause

---

39. Indeed, the most noted cases of the period were the infamous Japanese relocation cases, Korematsu v. United States, 323 U.S. 214 (1944) (6-3 decision) (exclusions from West Coast); and Hirabayashi v. United States, 320 U.S. 81 (1943) (9-0 decision) (curfew). A few minor liberal landmarks were decided, but they were not very far-reaching. *E.g.*, Thomas v. Collins, 323 U.S. 516 (1945) (5-4 decision) (free speech; "preferred position"); Screws v. United States, 325 U.S. 91 (1945) (5-4 decision) (conspiracy to violate civil rights); Smith v. Allwright, 321 U.S. 649 (1944) (8-1 decision) (race; "white primaries").

40. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2617-27, for an account of Burton's career.

41. *E.g.*, Morgan v. Virginia, 328 U.S. 373 (1946) (8-1 decision) (race; segregated common carriers); Pennekamp v. Florida, 328 U.S. 331 (1946) (9-0 decision) (free speech/fair trial); Marsh v. Alabama, 326 U.S. 501 (1946) (6-3 decision) (free speech).

42. *E.g.*, State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942); Olsen v. Nebraska, 313 U.S. 236 (1941); Curry v. McCanless, 307 U.S. 357 (1939); Driscoll v. Edison Light & Power

was invested once again with the broad scope that Chief Justice Marshall had established more than a century earlier.[43] Similarly, the Court broadly interpreted other federal powers.[44] The Court rejected the notion that the tenth amendment restricts the federal government by reserving large areas for exclusive state control.[45] It also discarded the doctrine of unconstitutional delegation of legislative power.[46]

The Court's deferential attitude toward economic legislation was applied not only to the federal government, but to the States as well. The elimination of the substantive due process/liberty of contract doctrine freed the States from far-reaching restraints[47] as did the softening of dormant commerce clause restrictions.[48] In short, the Roosevelt Court withdrew from the role of constitutional censor of socio-economic legislation and instead adopted the posture of judicial restraint characteristic of Holmes/Brandeis liberalism.

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

---

Co., 307 U.S. 104 (1939); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

43. *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. F.W. Darby Lumber Co., 312 U.S. 100 (1941); Mulford v. Smith, 307 U.S. 38 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

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

45. *E.g.*, United States v. F.W. Darby Lumber Co., 312 U.S. 100 (1941).

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

47. *See* cases cited *supra* note 42.

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

49. *E.g.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Thomas v. Collins, 323 U.S. 516 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940).

50. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY viii (8th ed. 1946).

business and trade regulation.[51]

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

The libertarian posture of the Roosevelt Court was perhaps most evident in first amendment cases. By the early 1940's, the doctrine that first amendment freedoms have a "preferred position" in our constitutional system had obtained majority support.[53] In a series of famous cases, the Court reinforced the freedoms of speech, press, and religion. The Jehovah's Witnesses won a number of victories, overthrowing the compulsory flag salute,[54] license taxes for the distribution of religious literature,[55] bans on the distribution of handbills,[56] bans on the distribution of literature in company towns,[57] and other similar restrictions.[58] The Court reinforced freedom of the press by increasing the protection for published comments on judicial proceedings[59] and by restricting the power of the Post Office Department to censor publications by denying second-class mailing privileges.[60] The Court also protected the first amendment rights of un-

---

51. *E.g.*, FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) (FPC); NBC v. United States, 319 U.S. 190 (1943) (FCC); FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942) (FPC); United States v. Morgan, 313 U.S. 409 (1941) (USDA). *See* PRITCHETT, *supra* note 10, at 167-97, which discusses "[t]he generally favorable attitude of the Roosevelt Court toward administrative legislation." *Id.* at 168.

52. *E.g.*, Thomas v. Collins, 323 U.S. 516 (1945); Korematsu v. United States, 323 U.S. 214 (1944); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

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

54. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), overruling Minersville School Dist. v. Gobitis, 310 U.S. 586 (1948).

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

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

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

58. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (first case incorporating first amendment freedom of religion into the due process clause of the fourteenth amendment); Schneider v. New Jersey, 308 U.S. 147 (1939) (seminal case on access to public forum).

59. *E.g.*, Craig v. Harney, 331 U.S. 367 (1947) (no contempt unless publication creates clear and present danger of obstruction of justice); Pennekamp v. Florida, 328 U.S. 331 (1946) (no contempt unless publication creates clear and present danger of obstruction of justice); Times-Mirror Co. v. Superior Court, 314 U.S. 252 (1941) (no summary contempt for newspaper comments on pending litigation).

60. Hannegan v. Esquire, 327 U.S. 146 (1946).

popular radical groups against government suppression.[61]

With several noteworthy exceptions such as the Japanese relocation cases,[62] the Roosevelt Court played an important role in the maintenance of civil liberties during World War II. The Court rejected efforts to punish individuals for issuing publications protected by the first amendment.[63] It insisted upon full compliance with the restrictions of the treason clause.[64] It overturned convictions for conspiracy to resist the draft based on insufficient evidence,[65] and prohibited denaturalization in the absence of "clear, unequivocal, and convincing evidence."[66] On this basis, Pritchett concluded in 1948:

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

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

---

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

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

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

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

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

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

67. C. PRITCHETT, *supra* note 10, at 117.

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

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

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

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

The record of the Roosevelt Court in criminal procedure cases was mixed. In cases involving the application of the Bill of Rights to federal criminal trials, the Court showed some characteristic liberal activism.[72] Similarly, the Court made occasional reforms by using its supervisory power over federal criminal procedure.[73] Moreover, the Court put some bite into the due process requirement that state criminal prosecutions comply with standards of fundamental fairness.[74] On the other hand, the Court rejected the contention voiced by Justices Black, Douglas, Murphy, and Rutledge that the fourteenth amendment makes the Bill of Rights applicable to the States and declined to engage in the liberal-activist criminal procedure revolution later carried out by the Warren Court.[75]

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

B. *The Vinson Court (1946-53)*[76]

1. *The Vinson Court's Early Years: Polarization (1946-49)*

When the 1946 Term opened on October 7, 1946, a new Chief

---

72. "The Roosevelt Court is clearly a Bill of Rights court. . . . The values enshrined in these provisions are closely related to the freedoms of the First Amendment, and the Roosevelt Court has to a considerable degree exhibited the same kind of concern for protection of the procedural rights of defendants in criminal cases that it has shown for the protection of civil liberties." C. PRITCHETT, *supra* note 10, at 137. On the other hand, restrictive interpretations were also adopted in a number of cases.

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

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

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

76. For a detailed discussion of substantive developments and voting patterns during the Vinson era, see C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT (1954). *See also*

Justice, Fred M. Vinson of Kentucky, occupied the central chair.[77] Vinson, Truman's close friend and political advisor, succeeded Harlan Fiske Stone, who had died in April 1946. The remaining eight Justices had been split 4-4 during the latter part of the divisive Stone era. The libertarian four, Rutledge, Murphy, Black, and Douglas, remained on the left. The more conservative proponents of judicial restraint, Frankfurter, Jackson, Burton, and Reed were on the right. Given the 4-4 split on the Court, Vinson moved into a position of great power at the start of his tenure.

The alignment that emerged in the October 1946 Term and prevailed until the end of the October 1948 Term was as follows:

TABLE 10

ALIGNMENT OF JUSTICES — OCTOBER 1946 THROUGH 1948 TERMS

LIBERAL	MODERATE	CONSERVATIVE[78]
Murphy		Jackson
Rutledge		Frankfurter
Black		←Burton
Douglas		←Vinson
		←Reed

A frequently noted irony of Supreme Court history is that the relatively liberal President Harry S. Truman moved the Court to the right by appointing four rather conservative Justices, while the more conservative President Dwight D. Eisenhower moved the Court to the left with his liberal appointments. The conservative effect of Truman's appointments was already evident during the October

---

Galloway, *The Vinson Court: Polarization (1946-1949) and Conservative Dominance (1949-1953)*, 22 SANTA CLARA L. REV. 375 (1982).

77. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2639-49 for a description of Vinson's career.

78. By the 1946 Term, all the pre-1937 conservatives were gone, and the moderates of the Roosevelt era had become the Court's new conservative wing. Use of the label "conservative" to describe the Vinson-Frankfurter wing is perhaps somewhat misleading. The Vinson Court's right wing was much more liberal than the conservatives who sat on the Court during earlier periods. In fact, all members of the Vinson Court were relatively liberal in economic cases. For this reason, contemporary commentators often used the labels "liberal-activist" and "liberal-restrained" to characterize the Vinson Court's left and right wings. *E.g.*, C. PRITCHETT, *supra* note 76, at 182-226. In retrospect, it appears that the Vinson-Frankfurter wing was generally more conservative than the libertarian four, so the labels "liberal" and "conservative" will be used here. But the reader should not equate the Vinson Court's brand of conservatism with that of the four horsemen and other pre-1937 conservatives.

1946 Term, which was marked by a sharp turn to the right in the Court's voting patterns.[79]

The cases which best illustrated the Vinson Court's conservatism during the October 1946 Term are *United Public Workers v. Mitchell*,[80] *United States v. United Mine Workers*,[81] and *Adamson v. California*.[82] These cases suggested a willingness to pull back

---

79. The shift to the right was noted by one important commentator as early as 1948.

> The Court's two post-Roosevelt appointees, Burton and Vinson, stand at the bottom of the table [on civil rights votes]. While they have not participated in a large number of cases, it is obvious that the net effect of their substitution for Roberts and Stone has been to shift the balance of the Court to the right on civil liberties matters, so that in an increasing number of instances Black, Douglas, Murphy, and Rutledge find it impossible to pick up the one additional Justice necessary to maintain the activist attitude toward judicial protection of civil liberties generally characteristic of the Roosevelt Court.

C. PRITCHETT, *supra* note 10, at 132.

The shift to the right, that began during Chief Justice Vinson's first Term and accelerated after the summer of 1949, reflected a general shift to the right in the nation. The most significant factor in the hardening of conservative attitudes in the late 1940's was undoubtedly the start of the Cold War. After Churchill's Iron Curtain speech in 1946, the nation entered an era in which fears of world-wide Communism reached panic proportions. The emergence of the House Un-American Activities Committee and the initiation of the federal loyalty-security program in the late 1940's were the forerunners of the McCarthy hysteria, which reached full force in the 1950-53 period. Along with the witch hunts came a shift to the right in other areas. Anti-labor sentiment gained ground, producing, most notably, the Taft-Hartley Act of 1947. President Truman's Fair Deal package of reform legislation died in Congress. In all, the mood of the nation was cautious and conservative.

80. 330 U.S. 75 (1947) (4-3 decision) (free speech; Hatch Act). This case upheld the constitutionality of the Hatch Act's restrictions on political activity by federal civil service employees.

81. 330 U.S. 258 (1947) (5-4 decision) (labor). In *United Mine Workers*, the Court upheld sanctions against John L. Lewis and the UMW for conduct during the bituminous coal strike of 1946. In the years prior to 1947, the Court had been strongly pro-labor. *United Mine Workers* indicated that the era of special judicial protection for labor was drawing to an end. Even Douglas and Black deserted the union on several major issues, leaving Murphy and Rutledge alone on the left. As early as 1948, *United Mine Workers* was recognized as both a turning point and as an indicator that the liberal Roosevelt Court had given way to a more conservative Vinson Court. "[A]lready the temper of the Court is changing, and a swing to the right is apparent in several fields . . . . At the moment my own guess is that the Roosevelt Court came to an end on that Thursday in March, 1947, when the John L. Lewis decision was handed down." C. PRITCHETT, *supra* note 10, at xiv.

82. 332 U.S. 46 (1947) (5-4 decision) (criminal procedure). *Adamson* involved a full-scale debate between the conservatives and liberals concerning the Court's role in state criminal cases. The four liberal activists contended in their dissenting opinions that the due process clause of the fourteenth amendment was intended to make all of the provisions of the Bill of Rights applicable to the States. If a fifth vote had been present, *Adamson* would now be viewed as the start of a major criminal procedure revolution. The five conservatives, however, held their majority together and rejected the incorporation theory, finding that the due process clause was intended only to ban state procedures which deny "fundamental fairness." As a result, the victory of the incorporation theory and the start of the criminal procedure revolution were delayed for another 15 years until the early 1960's.

from the liberal activism characteristic of the Roosevelt Court on first amendment, labor, and criminal procedure issues.[83]

Nevertheless, the swing to the right in the early years of the Vinson era did not lead to immediate conservative dominance. The liberals rallied somewhat in the October 1947 Term and managed to retain approximate parity with Jackson and Frankfurter through the end of the October 1948 Term, as the following table shows:

TABLE 11

DISSENT RATES—OCTOBER 1946 THROUGH 1948 TERMS

JUSTICE	CASES	DISSENTS	DISSENT RATE
LIBERAL			
Douglas	356	93	26.1%
Rutledge	362	94	25.9%
Murphy	355	81	22.8%
Black	362	78	21.5%
Average			24.1%
CONSERVATIVE			
Frankfurter	366	91	24.9%
Jackson	346	87	25.1%
Average			25.0%

The lowest dissent rates on the Court were posted by the moderate-conservatives, Vinson (13.6%), Reed (14.0%), and Burton (18.6%).[84]

Commentators have suggested that Truman went outside the Court for the new Chief Justice in an attempt to avoid further fric-

83. Interesting conservative decisions in bloc-voting cases during the October 1947 and 1948 Terms included Wolf v. Colorado, 338 U.S. 25 (1949) (6-3 decision) (criminal procedure; search and seizure); UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (5-4 decision) (labor; free speech); Goessaert v. Cleary, 335 U.S. 464 (1948) (6-3 decision) (equal protection; sex discrimination); Ludicke v. Watkins, 335 U.S. 160 (1948) (5-4 decision) (war power); United States v. Columbia Steel Corp., 334 U.S. 495 (1948) (5-4 decision) (antitrust); Bute v. Illinois, 333 U.S. 640 (1948) (5-4 decision) (criminal procedure; assistance of counsel); Bakery Sales Drivers Local 33 v. Wagshal, 333 U.S. 437 (1948) (5-3 decision) (labor).

84. Interesting liberal victories in bloc-voting cases in the October 1947 and 1948 Terms included Terminiello v. Chicago, 337 U.S. 1 (1949) (5-4 decision) (free speech); United States *ex rel.* Johnson v. Shaughnessy, 336 U.S. 806 (1949) (6-3 decision) (immigration); Saia v. New York, 334 U.S. 558 (1948) (5-4 decision) (free speech; prior restraint); Winters v. New York, 333 U.S. 507 (1948) (6-3 decision) (free speech; vagueness); Von Moltke v. Gillies, 332 U.S. 708 (1948) (6-3 decision) (criminal procedure; right to counsel); Oyama v. California, 332 U.S. 633 (1948) (6-3 decision) (equal protection; aliens). The most famous liberal decision was Shelley v. Kraemer, 334 U.S. 1 (1948) (6-0 decision) (race; restrictive covenants), which signaled a trend toward activism in the race relations area.

tion on a Court which was rapidly becoming famous for its internal feuds. Hostility between the libertarian four and the Jackson-Frankfurter pair had become especially intense, as illustrated by Jackson's blast at Black from Nuremberg, Germany on June 10, 1946. Vinson was well known for his skills as a mediator, and Truman may have hoped these skills would provide the Court a more harmonious working relationship.

Such hopes, however, did not bear fruit in Justice Vinson's first three Terms. Disagreement levels continued to rise. In the October 1946 Term, disagreement rates at the Court's extremes climbed past the forty percent level. In the October 1947 Term, disagreement rates of nearly fifty percent became common, and Black and Jackson disagreed in 50 of 100 cases. In the October 1948 Term, three pairs of Justices posted disagreement rates above fifty percent and Rutledge and Jackson disagreed in 60 of 110 cases.[85] The following table shows the very high disagreement rates at the Court's extremes during the October 1946 through 1948 Terms.

TABLE 12

DISAGREEMENT RATES — OCTOBER 1946 THROUGH 1948 TERMS

	FRANKFURTER	JACKSON
DOUGLAS	44.3%	46.0%
BLACK	43.1%	45.2%
RUTLEDGE	42.8%	44.1%
MURPHY	38.6%	42.1%

Concurrently, the Justices' dissent rates shot upward spectacularly to record levels. In fact, the Court's all-time record for average dissents per case was broken during both the October 1947 and 1948 Terms. The following table shows the striking increase in average dissent rates during the decade culminating in the October 1948 Term.

85. The disagreement rates between Rutledge and Jackson (54.5%) and Douglas and Jackson (53.2%) were modern records, surpassing the old record (53.0%) set by Black and Jackson during October 1944 Term.

TABLE 13

AVERAGE DISSENTS PER CASE—
OCTOBER 1939 THROUGH 1948 TERMS

TERM	AVERAGE DISSENTS PER CASE
Oct. 1939	0.59
Oct. 1940	0.71
Oct. 1941	1.11
Oct. 1942	1.24
Oct. 1943	1.45
Oct. 1944	1.58
Oct. 1945	1.37
Oct. 1946	1.70
Oct. 1947	2.01
Oct. 1948	2.13

Overall, the image that best fits the first period of the Vinson era is a badly split Court whose five-vote conservative wing and four-vote liberal wing were locked in sharp combat over control of the Court. Amid unprecedented outbursts of dissent and disagreement, the blocs traded wins and losses with neither side attaining dominance.

2. *The Vinson Court's Second Period: A Conservative Interlude (1949-53)*

During the 1949 recess, the libertarian four were shattered by three events. First, Frank Murphy died on July 2. Second, Wiley Rutledge died on September 10. Third, William O. Douglas was seriously injured in an avalanche on October 2. Douglas did not participate in the first sixty-one decisions issued during the Term. As a result of these developments, the Court's liberal wing was reduced from four to one for most of the Term, and control passed to the conservative wing.[86]

Moving swiftly, President Truman appointed his Attorney

86. Important conservative victories during the Term included: American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (4-3 decision) (labor; non-communist affidavits); United States v. Rabinowitz, 339 U.S. 56 (1950) (5-3 decision) (criminal procedure; search and seizure); and United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (4-3 decision) (alien admission). In one noteworthy area, race relations, a pattern of liberal activism was present. *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (9-0 decision); Sweatt v. Painter, 339 U.S. 629 (1950) (9-0 decision); Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949) (7-0 decision).

General, Tom C. Clark,[87] and his former Senate colleague, Sherman Minton,[88] to succeed Justices Murphy and Rutledge. Clark was seated on the first day of the October 1949 Term, and Minton was seated nine days later. In their first Term, Clark and Minton joined the Vinson bloc, bringing it up to five votes and making it the dominant group on the Court. Clark and Vinson disagreed in only one of the sixty-nine cases in which both participated during the Term. Minton and Vinson disagreed in only six of seventy-eight decisions. Burton and Reed provided the fourth and fifth votes that secured the Vinson bloc's majority.

The dominance of the Vinson bloc can be inferred from the exceptionally low dissent rates of its members. During the October 1949 Term, for example, Clark did not cast a single dissent, and Vinson cast only one dissent in eighty-four cases. The following table contrasts the dissent rates of the Truman appointees and Black, the Court's only liberal during most of the Term.

TABLE 14

DISSENT RATES—OCTOBER 1949 TERM

JUSTICE	CASES	DISSENTS	DISSENT RATE	CHANGE
Vinson	84	1	1.2%	−17.4%
Clark	72	0	0.0%	---
Minton	81	5	6.2%	---
Burton	86	8	9.3%	−9.1%
Black	86	29	33.7%	+12.6%

Black cast twice as many dissents as all four Truman appointees combined.

The four Justices who were not members of the Vinson bloc were split into two pairs. On the left were Douglas and Black. In response to the new conservative dominance, Black's dissent rate jumped to 33.7%, by far his highest one-Term dissent rate since he joined the Court in 1937.[89] On the right were Justices Jackson and

87. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2665-77. "Clark's personality and point of view resembled Vinson's." *Id.* at 2667. "As expected, Clark strengthened Vinson's position." *Id.* at 2668. Later, influenced by Earl Warren, Clark became more moderate.

88. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2699-2709. Minton was considered a liberal at the time of his appointment. However, "[r]ather than join the liberal bloc, he helped to strengthen the hand of Chief Justice Fred Vinson and to create a five-man conservative bloc . . . ." *Id.* at 2703. "Minton helped to destroy the liberal bloc's influence on civil liberties decisions . . . . No member of the Court during Vinson's seven years as Chief Justice had a less liberal record in this area." *Id.*

89. It was also the second highest one-Term dissent rate since 1798. Only Roberts'

Frankfurter. They disagreed with Douglas and Black substantially more than the Truman appointees did.

In general, the voting trends initiated during the October 1949 Term continued during the October 1950 Term. The five-vote Vinson bloc dominated the Court. Frankfurter and Jackson also held down positions in the right wing, reinforcing the conservative dominance that characterized the Term.[90] The liberal wing had only two members, Justices Douglas and Black. The 7-2 conservative majority characteristic of the period is shown in the following table.

TABLE 15

ALIGNMENT OF JUSTICES — OCTOBER 1949-51 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Douglas Black		Jackson Frankfurter Clark Minton Vinson Burton Reed

In response to the continuing conservative dominance, the dissent rates of the liberal Justices during the October 1950 Term shot up to the highest levels since 1798. Each Justice dissented thirty-five times in ninety cases, achieving 38.9% dissent rates that were well above previous modern records. In fact, Douglas and Black together cast as many dissents as both the entire Vinson bloc and Jackson.

The October 1951 Term marked the third consecutive Term of the conservative dominance that typified the second period of the Vinson era.[91] Once again, the Vinson bloc controlled the Court in

---

34.6% dissent rate during the October 1944 Term was higher.

90. The most famous conservative victory was, no doubt, Dennis v. United States, 341 U.S. 494 (1951) (6-2 decision) (Smith Act convictions of eleven top Communist Party officers affirmed). Other illustrative conservative victories included: Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (5-4 decision) (loyalty oath); Breard v. City of Alexandria, 341 U.S. 622 (1951) (6-3 decision) (free speech; door-to-door solicitation); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (6-3 decision) (dormant commerce clause); and Feiner v. New York, 340 U.S. 315 (1951) (6-3 decision) (free speech).

Important liberal victories were far fewer than the conservative victories. The most famous was Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (5-3 decision) (due process; subversive organizations list).

91. Conservative victories included: On Lee v. United States, 343 U.S. 747 (1952) (5-4 decision) (criminal procedure; electronic interception of oral communications); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952) (6-3 decision) (labor); Stroble v. California, 343

most cases. The balance of power can be illustrated by comparing the dissent rates of the four Truman appointees with the two liberals. On the average, the liberals dissented in nearly forty percent of the cases. Black's dissent rate of 43.2% was another modern Supreme Court record and marked the first time since 1798 that a Justice dissented in more than forty percent of the cases in a single Term. In contrast, the four Truman appointees dissented infrequently. Their average dissent rate was less than one-third of the liberals' average dissent rate.

TABLE 16

DATA CONCERNING DISSENTS — OCTOBER 1951 TERM

JUSTICE	DISSENTS	DISSENT RATE
LIBERAL		
Black	35	43.2%
Douglas	29	35.4%
Average	32.0	39.3%
CONSERVATIVE		
Burton	13	15.7%
Clark	1	1.5%
Vinson	12	14.5%
Minton	13	18.6%
Average	9.75	12.8%

Black and Douglas cast sixty-four dissents which was substantially more than the thirty-nine cast by all four Truman appointees combined.[92]

Perhaps the most interesting development revealed by the voting

---

U.S. 181 (1952) (6-3 decision) (criminal procedure; right to counsel); Sacher v. United States, 343 U.S. 1 (1952) (5-3 decision) (criminal procedure; contempt); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (6-2 decision) (deportation); Carlson v. Landon, 342 U.S. 524 (1952) (5-4 decision) (aliens); and Adler v. Board of Educ., 342 U.S. 485 (1952) (6-3 decision) (loyalty-security).

Despite the conservative dominance, a number of liberal decisions were issued during the Term, among them several unanimous decisions. *See, e.g.*, Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) (6-3 decision) (race); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (9-0 decision) (free speech); Rochin v. California, 342 U.S. 165 (1952) (8-0 decision) (criminal procedure; stomach pumping). The most famous case of the Term, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), drew three dissents from members of the Vinson bloc.

92. Beginning with Brannan v. Stark, 342 U.S. 451 (1952), there was a major burst of liberal dissents. In the 28 cases starting with *Brannan*, Black cast 19 dissents and Douglas 17. In the same 28 cases, the four Truman appointees cast a total of 8 dissents. The conservatives were clearly dominant.

data from the October 1951 Term was the takeover of the far right by the Vinson bloc. During each prior Term of the Vinson era, Justice Frankfurter and Jackson had arguably held down the positions on the far right, at least in terms of overall voting statistics. This pattern changed substantially during the October 1951 Term. Frankfurter, in particular, moved dramatically toward the Black-Douglas pole. He disagreed with Minton (46.9%) and Vinson (39.0%) more than with Black (35.5%) and Douglas (36.8%). Jackson remained right of center, but he too had a more liberal voting record than several members of the Vinson bloc.

The shift in the relative positions of the Vinson and Frankfurter-Jackson blocs reflected the increasing number of political liberties cases coming before the Court. By 1951, the McCarthy era was in full swing, and the most pressing issues facing the Court involved the government's pursuit of suspected subversives. In these cases, the "economic conservatives," Frankfurter and Jackson, tended to sympathize with the liberal viewpoint. The "political conservatives" of the Vinson bloc, in contrast, usually sided with the government in loyalty-security and subversion cases.[93]

In response to the politically sensitive cases that increasingly occupied the Court's attention, polarization between the Court's extremes shot back up nearly to the record set in the October 1948 Term. The average number of dissents per case was 2.02, second highest in the Court's history up to that Term. Twelve pairs of Justices had disagreement rates above forty percent, and disagreement rates of nearly fifty percent were common. Indeed, the disagreement rate between Justices Black and Reed was 56.8%. This was the highest one-Term disagreement rate since the 1790's.

The October 1952 Term was the final Term of the Vinson era. For the fourth consecutive Term, no personnel changes occurred. The voting data indicate that the conservative dominance which began in the October 1949 Term prevailed once again.[94] The conserva-

---

93. *See* G. SCHUBERT, THE JUDICIAL MIND 96-116 (1965), for a discussion of the terms "economic conservative" and "political conservative."

94. Given the commitment of the conservative wing to judicial restraint, it is not surprising that landmark cases were few. Conservative victories included: Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (5-4 decision) (antitrust); Poulos v. New Hampshire, 345 U.S. 395 (1953) (7-2 decision) (free speech); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (5-4 decision) (detention of alien); and United States v. Kahriger, 345 U.S. 22 (1952) (6-3 decision) (self-incrimination).

Liberal decisions included: Barrows v. Jackson, 346 U.S. 249 (1953) (6-1 decision) (race; restrictive covenants); Terry v. Adams, 345 U.S. 461 (1953) (8-1 decision) (race; voting); United States v. Rumely, 345 U.S. 41 (1953) (7-0 decision) (legislative investigation); Wieman

tive dominance can be illustrated by the dramatic imbalance between the dissent rates on the left and right. On the far left, Douglas's dissent rate leaped to *fifty percent*, obliterating the record set by Black in the prior Term. Douglas dissented in 51 of the 102 decisions in which he participated. Black's dissent rate dropped somewhat, but it was still the fifth highest since 1798. In contrast, the members of the controlling Vinson bloc had low dissent rates. Clark, for example, dissented in only six of ninety-four cases.

TABLE 17

DATA ON DISSENTS — OCTOBER 1952 TERM

JUSTICE	CASES	DISSENTS	DISSENT RATE
LIBERAL			
Douglas	102	51	50.0%
Black	101	39	38.6%
Average		45	44.3%
CONSERVATIVE			
Reed	101	9	8.9%
Minton	103	14	13.5%
Clark	94	6	6.4%
Burton	102	11	10.8%
Vinson	103	18	17.5%
Average		11.6	11.5%

The most striking statistical pattern was the astonishingly high disagreement rates between Justice Douglas and the conservatives. Justices Douglas and Jackson disagreed in 64.4% or fifty-eight out of ninety cases! This was the first one-Term disagreement rate above sixty percent since the 1790's,[95] and it broke the one-year-old modern record of 56.8%. The disagreement rate between Douglas and Clark (57.0%) also broke the record. Six members of the Court's conservative wing disagreed with Douglas in more than half of the cases.

---

v. Updegraff, 344 U.S. 183 (1952) (8-0 decision) (loyalty oath).

95. Douglas and Jackson had a 64.3% disagreement rate in the October 1949 Term. However, Douglas was absent most of the Term, and the figure is, therefore, based on only fourteen cases in which both participated.

TABLE 18

DOUGLAS' DISAGREEMENT RATES — OCTOBER 1952 TERM

JUSTICE	DISAGREEMENT RATE WITH DOUGLAS
JACKSON	64.4%
CLARK	57.0%
BURTON	55.0%
MINTON	52.5%
REED	51.5%
VINSON	50.5%

In short, the October 1952 Term marked a nadir of the post-1937 liberal wing. It was still another very strong Term for the conservatives, perhaps strongest of all for the Vinson bloc.

In summary, the Vinson era (1946-53) had two distinct periods with different voting patterns. During the October 1946, 1947, and 1948 Terms, a contest for control of the Court was waged between a five-vote conservative wing and a four-vote liberal wing. The struggle was often bitter and caused polarization to reach record levels, but neither side was dominant. A turning point occurred in 1949, when the liberal bloc was weakened by the deaths of Justices Murphy and Rutledge and a near-fatal injury to Douglas. At that time control passed to the conservative wing, and the second phase of the Vinson era began. During the 1949, 1950, 1951, and 1952 Terms, the Court was dominated by the conservative Vinson bloc with strong support from Jackson and mixed support from Frankfurter. The dissent rates of the two liberals rose to the highest levels since the 1790's in protest against the conservative tide.

Cases decided during the Vinson era reflect the conservative attitudes of the controlling Justices. Perhaps the most famous line of cases involved freedom of speech and association. In general, these first amendment rights took a severe beating. The ban on prior restraints was weakened.[96] The clear and present danger test was watered down, allowing Communist leaders to be convicted for advocating forcible overthrow of the government even though no showing

96. *E.g.*, Poulos v. New Hampshire, 345 U.S. 395 (1953) (7-2 decision) (permits for public meetings); Breard v. City of Alexandria, 341 U.S. 622 (1951) (6-3 decision) (ban on door to door magazine sales); United Public Workers v. Mitchell, 330 U.S. 75 (1949) (4-3 decision) (Hatch Act). "In summary, it would seem that seven years of the Vinson Court left prior restraint still suspect, but no longer unconstitutional on its face." C. PRITCHETT, *supra* note 76, at 49.

of imminent danger was made.[97] Government employees were forced from their jobs on the basis of associational ties and allegedly disloyal beliefs.[98] Loyalty oaths were imposed on government employees and labor union officials.[99] Associational rights of Communists were trampled by legislative investigations.[100] Protections for labor picketing eroded.[101] Although some liberal first amendment decisions were issued,[102] the overall record of the Vinson Court in this area was conservative.

The Court consistently upheld the government's position in citizenship and deportation cases. Suspected subversives were subjected to extremely egregious treatment in deportation cases.[103] Aliens were

---

97. Dennis v. United States, 341 U.S. 494 (1951) (6-2 decision) (Smith Act convictions of first-string Communist Party Leaders affirmed); *cf.* Feiner v. New York, 340 U.S. 315 (1951) (6-3 decision) (public speech punished as disorderly conduct); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (4-3 decision) (Taft-Hartley non-Communist affidavit requirement for labor union officers upheld). "Recent doctrinal developments and personnel changes on the Court have effectively stripped [the clear and present danger test] of the ideological support supplied it during the 1940's by the preferred-position argument." C. PRITCHETT, *supra* note 76, at 78.

98. *E.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952) (6-3 decision) (statute barring Communists from teaching jobs upheld); Bailey v. Richardson, 341 U.S. 918 (1951) (4-4 decision) (discharge of government employee based on undisclosed charges upheld).

99. Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (5-4 decision); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (9-0 decision); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (4-3 decision). *But cf.* Wieman v. Updegraff, 344 U.S. 183 (1952) (9-0 decision) (loyalty oath held unconstitutional).

100. *E.g.*, Sacher v. United States, 343 U.S. 1 (1952) (5-3 decision); Rogers v. United States, 340 U.S. 367 (1951) (5-3 decision); United States v. Fleischman, 339 U.S. 349 (1950) (5-2 decision); United States v. Bryan, 339 U.S. 323 (1950) (5-2 decision). *But see* United States v. Rumely, 345 U.S. 41 (1953) (7-0 decision) (legislative investigation); Christoffel v. United States, 338 U.S. 84 (1949) (5-4 decision) (contempt of Congress). The Vinson Court achieved "a record of timidity and confusion in dealing with the difficult problems posed by wholly new assertions of legislative investigatory powers." C. PRITCHETT, *supra* note 76, at 90.

101. *E.g.*, Building Serv. Employees Int'l Union v. Gazzam, 339 U.S. 532 (1950) (8-0 decision); International Bd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (5-3 decision); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (9-0 decision). "[T]he Thornhill principle has been confined to its narrowest limits . . . . [P]icketing . . . was quickly stripped of the constitutional protection tentatively accorded it by the Roosevelt Court." C. PRITCHETT, *supra* note 76, at 56.

102. *E.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (9-0 decision) (moving pictures); Kunz v. New York, 340 U.S. 290 (1951) (8-1 decision) (public speaking permits); Niemotko v. Maryland, 340 U.S. 268 (1951) (9-0 decision) (public speaking permits); Terminiello v. Chicago, 337 U.S. 1 (1949) (5-4 decision) (public speech causing breach of peace); Saia v. New York, 334 U.S. 558 (1948) (5-4 decision) (sound trucks); Winters v. New York, 333 U.S. 507 (1948) (6-3 decision) (vagueness).

103. *E.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (6-2 decision); Carlson v. Landon, 342 U.S. 524 (1952) (5-4 decision); United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950) (4-3 decision); Ahrens v. Clark, 335 U.S. 188 (1948) (6-3 decision); Ludecke v. Watkins, 335 U.S. 160 (1948) (5-4 decision).

excluded from re-entry into the United States with harsh and oppressive results.[104] In general, the Vinson Court refused to provide meaningful procedural or substantive protections for persons adversely affected.[105]

The Vinson Court was also very conservative in criminal procedure cases. Generally, the Court supported the government and rejected the efforts of defendants to impose constitutional controls on criminal prosecutions. Over strong dissents by the liberal activists, the Court refused to extend the basic protections of the Bill of Rights to state trials.[106] Moreover, the Court was typically very restrained and conservative in applying due process (fundamental fairness) limits on police and prosecutors.[107] Similarly, the Court was usually conservative in its enforcement of the Bill of Rights against federal police and prosecutors[108] and restrained in the exercise of its supervisory power over the federal criminal justice system.[109] Overall, the Vinson Court tended to erode the constitutional protections of criminal defendants, especially after 1949.[110]

In contrast, the Vinson Court was rather liberal in cases involving government regulation of essentially economic interests. In this area, the Holmesian doctrine of judicial restraint was dominant. The

---

104. Shaughnessy v. United States *ex rel* Mezei, 345 U.S. 206 (1953) (5-4 decision); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (4-3 decision).

105. *See* C. PRITCHETT, *supra* note 76, at 101-22.

106. The leading case was Adamson v. California, 332 U.S. 46 (1947) (5-4 decision) (privilege against self-incrimination); *cf.* Wolf v. Colorado, 338 U.S. 25 (1949) (6-3 decision) (fourth amendment; exclusionary rule).

107. *E.g.*, Stein v. New York, 346 U.S. 156 (1953) (6-3 decision) (coerced confession); Stroble v. California, 343 U.S. 181 (1952) (6-3 decision) (coerced confession; counsel); Gallegos v. Nebraska, 342 U.S. 55 (1951) (6-2 decision) (coerced confession); Fisher v. Pace, 336 U.S. 155 (1949) (5-4 decision) (summary contempt); Taylor v. Alabama, 335 U.S. 252 (1948) (4-3 decision) (coerced confession); Gryger v. Burke, 334 U.S. 728 (1948) (5-4 decision) (counsel); Bute v. Illinois, 333 U.S. 640 (1948) (5-4 decision) (counsel); Carter v. Illinois, 329 U.S. 173 (1946) (5-4 decision) (counsel); *cf. In re* Isserman, 345 U.S. 286 (1953) (5-4 decision) (attorney discipline). ***But see*** Rochin v. California, 342 U.S. 165 (1952) (8-0 decision) (stomach pumping).

108. *See, e.g.*, United States v. Kahriger, 345 U.S. 22 (1953) (6-3 decision) (privilege against self-incrimination); On Lee v. United States, 340 U.S. 747 (1952) (5-4 decision) (fourth amendment); Rogers v. United States, 340 U.S. 367 (1951) (5-3 decision) (privilege against self-incrimination); Darr v. Burford, 339 U.S. 200 (1950) (5-3 decision) (habeas corpus); United States v. Rabinowitz, 339 U.S. 56 (1950) (5-3 decision) (fourth amendment); Harris v. United States, 331 U.S. 145 (1947) (5-4 decision) (fourth amendment). ***But see*** Von Moltke v. Gillies, 332 U.S. 708 (1948) (6-3 decision) (waiver of right to counsel).

109. No major supervisory power cases were decided between McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957).

110. *See, e.g.*, C. PRITCHETT, *supra* note 76, at 146-76. "With the personnel changes of 1949, Jackson's belief that criminals were being given too much protection for the good of society tended to become the Court's majority view." *Id.* at 162.

Court refused to sit as a super-legislature exercising constitutional censorship over social welfare legislation. Economic substantive due process was a dead issue [111] and substantial support was given to the administrative agencies charged with regulating the market place.[112] On the other hand, labor unions, the special favorites of the earlier Roosevelt Court, received rough treatment from the Vinson Court.[113]

In one noteworthy area, race relations, the Vinson Court broke its normal pattern and engaged in aggressive liberal activism. Probably the most famous development was the use of the equal protection-state action theory to ban judicial enforcement of restrictive covenants.[114] There were other important developments as well. New emphasis was placed on the equality component of the prevailing "separate but equal" doctrine.[115] The court not only overturned exclusion of racial minorities from voting and from juries,[116] but ruled favorably for minorities in other contexts as well.[117] In general, the Vinson Court established a rather progressive record in race rela-

---

111. *E.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (8-1 decision); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949) (9-0 decision); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (9-0 decision); Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (9-0 decision).

112. *E.g.*, Allstate Constr. Co. v. Durkin, 345 U.S. 13 (1953) (Department of Labor; enforcement of Federal Labor Standards Act); NLRB v. Gullett Gin Co., 340 U.S. 361 (1951) (NLRB); United States v. United States Smelting & Mining Co., 339 U.S. 186 (1950) (ICC); SEC v. Chenery Corp., 332 U.S. 194 (1947) (SEC).

113. *E.g.*, NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953) (6-3 decision); Algoma Plywood & Veneer Co. v. NLRB, 336 U.S. 301 (1949) (7-2 decision); UAW v. Wisconsin Emp. Rel. Bd., 336 U.S. 245 (1949) (5-4 decision); Bakery Sales Drivers Local Union 33 v. Wagshal, 333 U.S. 437 (1948) (5-4 decision); United States v. Silk, 331 U.S. 704 (1947) (5-4 decision); United States v. United Mine Workers, 330 U.S. 258 (1947) (5-4 decision).

114. Barrows v. Jackson, 346 U.S. 249 (1953) (6-1 decision); Shelley v. Kraemer, 334 U.S. 1 (1948) (6-0 decision).

115. *E.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (9-0 decision); Sweatt v. Painter, 339 U.S. 629 (1950) (9-0 decision); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (9-0 decision).

116. *E.g.*, Avery v. Georgia, 345 U.S. 559 (1953) (8-1 decision) (jury discrimination); Terry v. Adams, 345 U.S. 461 (1953) (8-1 decision) (voting discrimination); Cassell v. Texas, 339 U.S. 282 (1950) (7-1 decision) (jury discrimination). With regard to jury discrimination, however, Pritchett has noted "a weakening of protective standards in the hands of the Vinson Court." C. PRITCHETT, *supra* note 76, at 164. *See, e.g.*, Moore v. New York, 333 U.S. 565 (1948) (5-4 decision).

117. *E.g.*, Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952) (6-3 decision) (equal representation by labor union); Beauharnais v. Illinois, 343 U.S. 250 (1952) (5-4 decision) (racial defamation); Graham v. Brotherhood of Locomotive Fireman & Enginemen, 338 U.S. 232 (1949) (7-0 decision) (equal representation by labor unions); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) (7-2 decision) (dormant commerce clause); *cf.* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (7-2 decision) (right of aliens to fishing licenses); Oyama v. California, 332 U.S. 633 (1948) (6-3 decision) (right of aliens to own land).

tions cases.[118]

Overall, however, the dominant characteristics of the Vinson Court were conservatism and restraint. Writing in 1951, John Frank called the Vinson era the Supreme Court's "passive period."[119] Frank also stated that "[T]he affirmative influence of the Court and the Constitution on American life since 1946 has been very little . . . . [C]ompared either with the other contemporaneous institutions of government or with some past Courts, the influence on the actual conduct of affairs is small."[120]

C. *The Warren Court (1953-69)*

1. *The Warren Court's Early Years: Emergence of Liberal Activism (1953-57)*

The Warren era began on the first day of the October 1953 Term, when Earl Warren was sworn in as Chief Justice.[121] Warren, a progressive Republican, was the most liberal Chief Justice in Supreme Court history.[122] The Vinson-Warren succession pushed the Court to the left and initiated a four-year period in which liberal-activism experienced a comeback from its nadir in the later Vinson years.[123]

A brief word is perhaps in order here to remind the reader about the historical setting in which the Warren era began. At the start of the October 1953 Term, the Eisenhower Administration was in its first year. The predominant concern of the era was the "Communist menace." The Korean War had just concluded, and fourteen months still remained before the United States Senate was to condemn Senator Joseph R. McCarthy. The United States economy was in the midst of a vast boom that had begun after World War II.

The first Term of the Warren era, however, was actually a continuation of the conservative interlude that began with the deaths of

---

118. "All in all, the liberal record of the Vinson Court in racial discrimination cases stands out in sharp contrast to the generally antilibertarian trend of its decisions in other fields." Pritchett, *supra* note 76, at 145.

119. Frank, *Court and Constitution: The Passive Period*, 4 VAND. L. REV. 400 (1951).

120. *Id.*

121. Vinson had died suddenly during the recess.

122. For a first-hand account of Warren's life and views, see E. WARREN, THE MEMOIRS OF EARL WARREN (1977). Eisenhower later said he selected Warren because he thought Warren was middle of the road. Eisenhower was highly displeased by the liberal activism of his nominee.

123. *See* Galloway, *The Early Years of the Warren Court: Emergence of Judicial Liberalism (1953-1957)*, 18 SANTA CLARA L. REV. 609 (1978).

Justices Murphy and Rutledge in 1949. Warren's voting record was moderately conservative in his first year, so the seven-two conservative majority characteristic of the 1949-53 period was still present. This left Justices Douglas and Black in splendid isolation as before. The conservative wing's dominance is demonstrated by comparing the dissent rates of Douglas (40.3%) and Black (38.6%) with those of Reed (13.3%) and Burton (14.1%), the two most conservative Justices during the Term. The polarization between Justices at the Court's extremes remained at the very high levels which prevailed since the Stone era.

The major event of the Term was *Brown v. Board of Education*,[124] the blockbuster decision outlawing segregated schools. *Brown*, of course, was a classic illustration of the liberal activism for which the Warren Court would later become famous. It was, however, the only landmark case of the October 1953 Term.[125] In general, the mood of judicial restraint that had dominated the Vinson era prevailed.[126]

A succession during the October 1954 Term did not affect the Court's balance of power. Robert H. Jackson, Frankfurter's ally in the cause of restraint and moderation, died on October 8, 1954. Eisenhower chose John Marshall Harlan to succeed Jackson.[127] Harlan, the conservative conscience of the Warren Court, promptly took over Jackson's position in the right wing with Frankfurter. Harlan remained at the Court's extreme right until his resignation in 1971.

The October 1954 Term, second of the Warren era, witnessed a sharp shift to the left in the Court's balance of power. Dissent rates on the left plunged to roughly half the level of the prior Term. In contrast, the dissent rate of Reed, the Court's most conservative Justice, doubled.

---

124. 347 U.S. 483 (1954) (9-0 decision).

125. Other cases with a liberal-activist tone included Leyra v. Denno, 347 U.S. 556 (1954) (5-3 decision) (criminal procedure; coerced confession); Bolling v. Sharpe, 347 U.S. 497 (1954) (9-0 decision) (school segregation); Hernandez v. Texas, 347 U.S. 475 (1954) (9-0 decision) (jury discrimination); Accardi v. Shaughnessey, 347 U.S. 260 (1954) (5-4 decision) (deportation); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (6-3 decision) (maritime personal injury).

126. *See, e.g.*, Galvan v. Press, 347 U.S. 522 (1954) (7-2 decision) (deportation); Barsky v. Board of Regents, 347 U.S. 442 (1954) (6-3 decision) (subversion); Irvine v. California, 347 U.S. 128 (1954) (5-4 decision) (electronic surveillance).

127. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2803-20. Harlan was an ex-Wall Street antitrust defense lawyer, and he carried his conservative, pro-business values into the Court.

TABLE 19

DISSENT RATES — OCTOBER 1953 & 1954 TERMS

JUSTICE	OCT. 1953 TERM	OCT. 1954 TERM	CHANGE
LIBERAL			
Douglas	41.4%	24.7%	−16.7%
Black	36.2%	16.0%	−20.2%
CONSERVATIVE			
Reed	16.2%	31.7%	+15.5%

The change in the Court's balance of power during the October 1954 Term reflected a liberal trend in the voting patterns of Justices Warren, Frankfurter, and Clark. All three shifted to the left of the Court's center. The following table shows the striking change in Warren's alignment in his first two Terms.

TABLE 20

WARREN'S DISAGREEMENT RATES—OCTOBER 1953 AND 1954 TERMS

JUSTICE	OCT. 1953 TERM	OCT. 1954 TERM	CHANGE
LIBERAL			
Douglas	36.9%	21.5%	−15.4%
Black	34.8%	16.5%	−18.3%
CONSERVATIVE			
Reed	25.4%	36.3%	+10.9%

In the spring of 1955, the Court issued decisions in several areas further reflecting its shift to the left. In four cases, the Court came to the aid of victims of the McCarthy-era witch hunts.[128] In the race relations area, the Court issued *Brown II*[129] and threw out a criminal conviction because of jury discrimination.[130] The Court also reversed the contempt conviction of a policeman who committed perjury in a gambling investigation.[131] These cases fueled the fires of

128. Peters v. Hobby, 349 U.S. 331 (1955) (7-2 decision) (discharge of federal employee); Bart v. United States, 349 U.S. 219 (1955) (6-3 decision) (House Un-American Activities Committee contempt sanctions); Emspak v. United States, 349 U.S. 190 (1955) (6-3 decision) (contempt sanctions); Quinn v. United States, 349 U.S. 155 (1955) (7-2 decision) (contempt sanctions).

129. Brown v. Board of Educ., 349 U.S. 294 (1955) (9-0 decision) (laying out the initial ground rules for remedying school segregation).

130. Williams v. Georgia, 349 U.S. 375 (1955) (6-3 decision).

131. *In re* Murchison, 349 U.S. 133 (1955) (6-3 decision).

anti-Court sentiment that was then emerging in response to the *Brown I* decision. The majority in these cases normally included Justices Douglas, Black, Warren, Clark, and Frankfurter. Justices Harlan, Burton, Minton, and Reed dissented most often.[132]

During the October 1955 Term, a development occurred within the Court's liberal wing that had important ramifications throughout the remainder of the Warren era. Earl Warren, after two Terms at the Court's center, moved squarely into the liberal camp with Douglas and Black, creating a tight, three-vote liberal bloc. The cohesion on the left is shown in the following table.

TABLE 21

DOUGLAS', BLACK'S AND WARREN'S AGREEMENT RATES—OCTOBER 1955 TERM

	Black	Warren
Douglas	95.7%	90.1%
Black	—	96.7%

The 96.7% agreement rate between Warren and Black was the highest rate for any pair of Justices in the four Terms that comprised the Warren Court's early years.

Harlan, during his first full Term on the Court, held a strongly conservative position. In fact, Harlan's voting pattern was distinctly the most conservative on the entire Court. Meanwhile, Frankfurter moved sharply to the right, leaving the position in the center that he had occupied during the prior Term. Frankfurtur initiated the close partnership with Harlan that would last until Frankfurter's retirement in 1962. Frankfurter and Harlan agreed in 90.4% (85/94) of the cases in which both participated during the Term.

The trend toward liberal activism that began in Earl Warren's first two Terms continued in the October 1955 Term. As the following table shows, the liberals dissented less frequently than the conservatives, a pattern drastically different from the 1949-53 period, when the liberals' dissent rates were triple or quadruple those of the conservatives.

---

132. During the Term the Court also reaffirmed its commitment to the constitutional revolution of 1937 upholding the master theme of judicial restraint in economic cases in the oft-cited case, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (8-0 decision) (substantive due process; equal protection).

TABLE 22

DISSENT RATES — OCTOBER 1955 TERM

JUSTICE	DISSENTS	DISSENT RATE
LIBERAL		
Douglas	22	23.4%
Black	16	17.0%
Warren	13	14.3%
Average	17.0	18.3%
CONSERVATIVE		
Burton	19	20.2%
Frankfurter	21	22.8%
Harlan	18	23.1%
Average	19.3	22.0%

As the table shows, however, neither the liberals nor the conservatives were dominant: the dissent rates at both extremes were in the same range.

Polarized bloc voting increased during the October 1955 Term. Three blocs were present: Douglas, Black, and Warren; Harlan and Frankfurter; and Minton, Reed, and Burton. In thirty of the ninety-four cases decided, the entire liberal bloc disagreed with at least one of the conservative blocs. Important liberal victories included *Cole v. Young*,[133] *Communist Party v. SACB*,[134] *Griffin v. Illinois*,[135] *Slochower v. Board of Education*,[136] *Pennsylvania v. Nelson*,[137] *Rea v. United States*,[138] and *United States* ex rel. *Toth v. Quarles*.[139] The conservatives also won a number of major victories including *United States v. DuPont*,[140] *Jay v. Boyd*,[141] *Black v. Cutter Laboratories*,[142] *UAW v. Wisconsin Employment Relations Board*,[143] and *Ullman v. United States*.[144]

133. 351 U.S. 536 (1956) (6-3 decision) (loyalty-security).

134. 351 U.S. 115 (1956) (6-3 decision) (communist registration requirement).

135. 351 U.S. 12 (1956) (5-4 decision) (equal protection clause requires a free trial transcript for an indigent defendant's appeal; seminal case of *Griffin-Douglas* rule).

136. 350 U.S. 551 (1956) (5-4 decision) (loyalty-security).

137. 350 U.S. 497 (1956) (6-3 decision) (landmark case holding that the Smith Act preempts the States from investigating and punishing subversion against the federal government).

138. 350 U.S. 214 (1955) (5-4 decision) (criminal procedure; exclusionary rule).

139. 350 U.S. 11 (1955) (6-3 decision) (courts martial).

140. 351 U.S. 377 (1956) (4-3 decision) (antitrust).

141. 351 U.S. 345 (1956) (5-4 decision) (deportation).

142. 351 U.S. 292 (1956) (6-3 decision) (loyalty-security).

143. 351 U.S. 266 (1956) (6-3 decision) (labor).

144. 350 U.S. 422 (1956) (6-2 decision) (subversion; privilege against self-incrimination).

The Supreme Court underwent two personnel changes during the October 1956 Term. The first, which involved a major change in the liberal-conservative balance of power, was the retirement of Sherman Minton on October 15, 1956 and the seating of William J. Brennan the following day. Minton had been a moderate conservative. Brennan, in contrast, would spend his lengthy tenure on the Court as a member of the liberal wing; in fact, he was destined to become elder statesman of the liberal cause after the resignation of Douglas in 1975.[145] Brennan promptly aligned himself with Earl Warren and the liberals, returning the liberal wing to four Justices.

The second change was the retirement of Stanley F. Reed on February 25, 1957, and the seating of his successor Charles E. Whittaker on March 24, 1957.[146] Reed began his Court tenure as a moderate liberal, but later, as the Court shifted to the left, he became a member of the conservative wing. In fact, he had the most conservative voting pattern on the Court during the October 1953 and 1954 Terms. Whittaker was also a conservative, however, so this change did not substantially alter the basic balance of power on the Court.[147]

The Court retained its relatively liberal posture in the October 1956 Term, as shown by the fact that the conservatives again dissented more frequently than the liberals.

---

145. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2849-65. During the Warren era, Brennan was the "bridge-builder between the liberal and conservative Justices." *Id.* at 2852.

146. *See id.* at 2893-2904; Note, *Mr. Justice Whittaker: The Man on the Right*, 19 SANTA CLARA L. REV. 1039 (1979).

147. "Whittaker immediately aligned himself with the conservative Justices on the Court." L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2896. "By and large, . . . Whittaker voted for what one would have to call the conservative position." *Id.* at 2898.

TABLE 23

DISSENT RATES—OCTOBER 1956 TERM

JUSTICE	DISSENTS	DISSENT RATE	CHANGE FROM PRIOR TERM
LIBERAL			
Douglas	28	22.9%	−0.5%
Black	24	20.9%	+3.9%
Warren	13	10.9%	−3.4%
Total	65		
CONSERVATIVE			
Frankfurter	35	28.5%	+5.7%
Harlan	33	27.3%	+4.2%
Burton	36	29.5%	+9.3%
Total	104	29.5%	+9.3%

The Court's liberalism during the October 1956 Term has been widely recognized in historical writing.[148] The most important and controversial issue of that Term involved the degree to which the government could infringe individual rights in order to identify and suppress allegedly subversive activities. Numerous other famous decisions were issued in fields such as labor relations, criminal procedure, and free speech.[149] The culmination of the trend and climax of the Warren Court's early years occurred on "Red Monday," June 17, 1957, one of the most notable days in the history of the Court, when the *Yates*, *Sweezy*, *Watkins*, *Jencks*, *Konigsberg*, and *Schware* decisions were issued.

A brief review is appropriate here. The most salient trend during Earl Warren's first four Terms was the reappearance of liberal activism on the United States Supreme Court. In the last Term of the Vinson era, the Court had only two liberals, Douglas and Black,

148. *E.g.*, A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 3-4 (1958).

149. The leading cases involving Communism, loyalty-security programs, and related issues included Service v. Dulles, 354 U.S. 363 (1957); Yates v. United States, 354 U.S 298 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957); Jencks v. United States 353 U.S. 657 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). Other major cases decided during the October 1956 Term included Roth v. United States, 354 U.S. 476 (1957) (6-3 decision) (free speech; obscenity); Mallory v. United States, 354 U.S. 449 (1957) (9-0 decision) (criminal procedure; *McNabb-Mallory* rule; federal supervisory power; prompt arraignment); Reid v. Covert, 354 U.S. 1 (1957) (6-2 decision) (court-martial); United States v. DuPont, 353 U.S. 586 (1957) (4-2 decision) (antitrust); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (7-1 decision) (labor; pre-emption); San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957) (6-2 decision) (labor; pre-emption).

and their dissent rates stood at modern record levels. The seven-vote conservative majority had nearly absolute control. Earl Warren brought the liberal bloc back to three when he lined up with Douglas and Black in the October 1955 Term after two Terms in the center. William Brennan added a fourth liberal vote when he joined the Court in 1956.

During this same period, the Court's conservative wing shrank from seven to four Justices. The replacement of Jackson by Harlan in 1955 and Reed by Whittaker in 1957 did not change matters, but the replacement of Vinson by Warren in 1953 and Minton by Brennan in 1956 were losses for the conservatives and gains for the liberals. During the same years, Clark moved out of the conservative wing and into the Court's center.

With increasing strength on the left came increasing dissent on the right. During the October 1953 Term, when they were dominant, the most conservative members of the Court had dissent rates below twenty percent. By the October 1956 Term, dissent rates on the right had risen to near the thirty percent level. Table 24 illustrates the shift to the left in the Court's balance of power in the early years of the Warren era.

TABLE 24

DISSENT RATES OF LIBERALS AND CONSERVATIVES—
OCTOBER 1953 AND 1956 TERMS

JUSTICE	DISSENT RATE		CHANGE
	OCT. 1953	OCT. 1956	
LIBERAL			
Douglas	41.4%	22.9%	−18.5%
Black	36.6%	20.9%	−15.7%
CONSERVATIVE			
Frankfurter	15.1%	28.5%	+13.4%
Burton	15.1%	29.5%	+14.5%

By the end of the October 1956 Term, the Court had the following closely-balanced 4-1-4 alignment:

TABLE 25

ALIGNMENT OF JUSTICES — OCTOBER 1956 TERM

LIBERAL	MODERATE	CONSERVATIVE
Douglas	Clark	Burton
Black		Harlan
Warren		Frankfurter
Brennan		Whittaker

2. *The Warren Court's Middle Period: The Liberal Trend Abates (1958-62)*

The Warren Court's trend toward liberal activism abated somewhat during the 1958-62 period. During this second or middle period of the Warren era, a highly polarized Court stepped back and adopted a relatively restrained posture that was less liberal than in the October 1955 and 1956 Terms.[150]

One cause of this retrenchment was the widespread public outrage that the Court's liberal activism had provoked.[151] The repressive mood of the late 1940's and early 1950's had softened to some degree, but the shadows of the Cold War, the McCarthy era, and the Korean War still lay heavily on the land. Several years were yet to pass before the next reform period would take hold of the American people. In the mid-1950's, tension continued to grow between the Court, the conservative forces within Congress, and the nation at large. This lead a well known constitutional scholar to observe:

> Dissenting Justices and constitutional lawyers are outspoken in protest; members of Congress are stunned though not silenced. Not since 1937 when F.D.R. declared war on the Nine Old Men, has judicial authority been so roundly criticized. One hears again a familiar echo: "Curb that Court before it destroys the nation."[152]

---

150. *See* Galloway, *The Second Period of the Warren Court: The Liberal Trend Abates (1957-1961)*, 19 SANTA CLARA L. REV. 947 (1979). In spite of the article's title, the shift to the right that characterized the Warren Court's middle period began in June 1958 and ended in April 1962. The relatively conservative period in the late 1950's has been identified by a number of commentators. *E.g.*, J. CASPER, THE POLITICS OF CIVIL LIBERTIES 68-75 (1972); G. SCHUBERT, THE JUDICIAL MIND REVISITED 102-04 (1974).

151. *See, e.g.*, C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960 (1961); *Why Supreme Court Is Under Fire*, U.S. NEWS & WORLD REPORT, June 27, 1958, at 44-46.

152. A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 3 (1958). The hostility toward the Court at the time was not based solely upon earlier decisions dealing with

As a result, the Court pulled back and adopted a more conservative, restrained attitude during the next few years.

The shift to the right that characterized the Warren Court's middle period began in the summer of 1958. Voting data show that the liberals still maintained a slight edge in the won-lost column in early 1958. The conservative wing took command in the summer of 1958, issuing a series of decisions which drew bloc-dissents from the liberal wing. For example, in the controversial anti-subversion field, the conservatives won *Beilan v. Board of Education*[153] and *Lerner v. Casey*.[154] Similarly, the conservatives prevailed in a series of divided criminal procedure cases, including *Knapp v. Schweitzer*,[155] *Gore v. United States*,[156] *Ashdown v. Utah*,[157] and *Crooker v. California*.[158] In the series of seventeen consecutive cases beginning with *Leng May Ma v. Barber*,[159] the four liberals cast thirty-seven dissents while the five moderates and conservatives cast only six.[160]

The voting pattern that emerged in June 1958 pitted a five-vote coalition of conservatives and moderates including Justices Harlan, Frankfurter, Burton, Whittaker, and Clark against the four liberals Douglas, Black, Warren, and Brennan. The two blocs were highly polarized. Eleven pairs of Justices had disagreement rates above fifty percent as the following table shows.

---

political subversion. An extremely bitter reaction to the landmark school desegregation decision, Brown v. Board of Educ., 347 U.S. 483 (1954), was also sweeping the nation. The Court's increasingly liberal attitude toward the procedural rights of criminal defendants, *e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956), had begun to elicit opposition. Moreover, the Court had added new fuel to the fire at the end of the October 1956 Term by reversing the conviction of a confessed rapist in another landmark decision, Mallory v. United States, 354 U.S. 449 (1957).

153. 357 U.S. 399 (1958) (5-4 decision) (loyalty-security).

154. 357 U.S. 468 (1958) (5-4 decision) (loyalty-security).

155. 357 U.S. 371 (1958) (6-3 decision) (privilege against self-incrimination).

156. 357 U.S. 386 (1958) (5-4 decision) (multiple punishment).

157. 357 U.S. 426 (1958) (7-2 decision) (coerced confession).

158. 357 U.S. 433 (1958) (5-4 decision) (right to counsel).

159. 357 U.S. 185 (1958) (5-4 decision) (deportation).

160. The cases did not suggest retrenchment in the volatile race relations area. Indeed, during the same end-of-Term crunch that produced the conservative landslide, the Court issued its landmark ruling in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (9-0 decision) (order requiring disclosure of NAACP membership lists overturned).

TABLE 26

DISAGREEMENT RATES ABOVE 50%
OCTOBER 1957 TERM

	DOUGLAS	BLACK	WARREN
CLARK	52.0%		
WHITTAKER	51.9%		
BURTON	55.8%	50.0%	50.5%
FRANKFURTER	56.7%	55.4%	54.0%
HARLAN	57.7%	57.8%	52.5%

Similarly, the average number of dissents per case soared to 2.21, an all-time record. Members of the Court were clearly waging an intense struggle for control.[161]

During the 1958 recess, conservative Justice Burton retired. Potter Stewart, Burton's successor, was seated on the second day of the October 1958 Term.[162] The Burton-Stewart succession did not alter the Court's balance of power. Stewart, a moderately conservative Cincinnati Republican, promptly assumed Burton's place in the moderate-conservative coalition.[163] For example, Stewart disagreed with Douglas in 49.9% of the cases in the October 1958 Term; in contrast, he disagreed with the conservative Whittaker in only 13.6% of the cases. Stewart's alignment preserved the conservative wing's narrow 5-4 majority.

With Stewart's support, the conservatives and moderates managed to retain the slight advantage in the won-lost statistics they had achieved the prior Term.[164] Justices Douglas, Black, and Warren had the highest dissent rates on the Court. Douglas' 36.4% dissent rate was the highest of any Justice since the October 1953 Term.

---

161. In this regard, the October 1957 Term is similar to the October 1948 Term, when the libertarian four challenged Vinson, Burton, Reed, Frankfurter, and Jackson for control of the Court. *See supra* pp. 586-87.

162. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2921-38.

163. "In the great majority of the cases in which the Court has divided along activist-passivist lines . . . he [Stewart] has clearly sided with those Justices commonly identified as favoring a passivist viewpoint." *Id.* at 2925-26.

164. Major conservative victories during the October 1958 Term included Barr v. Matteo, 360 U.S. 564 (1959) (5-4 decision) (defamation); Harrison v. NAACP, 360 U.S. 167 (1959) (6-3 decision) (abstention); Barenblatt v. United States, 360 U.S. 109 (1959) (5-4 decision) (subversion); Uphaus v. Wyman, 360 U.S. 72 (1959) (5-4 decision) (subversion); Frank v. Maryland, 359 U.S. 360 (1959) (5-4 decision) (criminal procedure; fourth amendment). Liberal victories included Vitarelli v. Seaton, 359 U.S. 535 (1959) (5-4 decision) (subversion); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (5-3 decision) (jury trial); Irvin v. Dowd, 359 U.S. 394 (1959) (5-4 decision) (criminal procedure; publicity); FHA v. The Darlington, 358 U.S. 84 (1958) (5-3 decision) (statutory construction).

Late in the Term, the liberals were badly defeated. In a string of fourteen cases decided in June 1959, the four liberal Justices cast thirty-two dissenting votes; the remaining Justices cast only five.[165] Thus, a basically conservative Term was capped by a strongly conservative finish.

The voting alignment that emerged during the October 1958 Term and remained until the resignations of Whittaker and Frankfurter in April 1962, is shown in the following table.

TABLE 27

ALIGNMENT OF JUSTICES — OCTOBER 1958, 1960 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Douglas	Clark →	Harlan
Black	Stewart →	Frankfurter
Warren		Whittaker
Brennan		

The Court remained intensely polarized throughout this period.

In contrast to the Court, the nation moved to the left during the October 1958 Term. For instance, the 1958 off-year election produced a democratic landslide, setting the stage for John F. Kennedy's presidential victory in 1960, and the reform movements that characterized the early 1960's.

Hostile public reaction to the Court's liberal outburst at the end of the October 1956 Term may have discouraged the Court from moving to the left with the nation. During the October 1957 and 1958 Terms, this reaction was at its peak. Numerous anti-Supreme Court measures were introduced in Congress. Posters proclaiming "Impeach Earl Warren" appeared. The assembled chief justices of the state supreme courts protested the Court's interventionist role. Conservative criticism of the Court abounded. Perhaps the Court was intimidated.

The liberals regained some of their lost ground during the October 1959 Term.[166] Dissent rates on the left fell. Meanwhile, dis-

165. Douglas and Warren both dissented in 9 of the 14 cases.

166. Important liberal victories during the Term included Hannah v. Larche, 363 U.S. 420 (1960) (7-2 decision) (civil rights); Talley v. California, 362 U.S. 60 (1960) (6-3 decision) (free speech); Bates v. City of Little Rock, 361 U.S. 516 (1960) (9-0 decision) (freedom of association); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (7-2 decision) (court-martial); Commissioner v. Acker, 361 U.S. 87 (1959) (6-3 decision) (tax). Conservative victories during the Term included Flemming v. Nestor, 363 U.S. 603 (1960) (5-4 decision)

sent rates on the right rose by roughly fifty percent. In contrast to the prior two Terms, conservative Justices Frankfurter, Harlan, and Whittaker cast more dissents than the three most liberal Justices Douglas, Black, and Warren. This temporary change coincided with a minor shift to the left by the Court's "swing" Justices: Clark moved closer to the center of the Court, and Stewart moved away from the conservatives, although he was still right-of-center.

Otherwise the voting patterns during this period were quite similar to the prior two Terms. Dissent and disagreement rates once again reached near record levels. The average dissent rate shot back up to 2.15 dissents per case. Disagreement rates between Justices at the Court's opposite extremes surpassed even the peak reached in the October 1957 Term. Justice Douglas, for example, disagreed with Harlan in sixty percent of the cases decided, and he disagreed with Frankfurter in 59.4% of the cases. Similarly Black disagreed with Frankfurter in 58.5% of the cases. These were the three highest one-Term disagreement rates in the entire sixteen Terms of the Warren era. Table 28 shows that eight pairs of Justices had disagreement rates above fifty percent.

TABLE 28

DISAGREEMENT RATES ABOVE 50% — OCTOBER 1959 TERM

	WHITTAKER	HARLAN	FRANKFURTER
DOUGLAS	55.2%	60.0%	59.4%
BLACK	52.1%	53.8%	58.5%
WARREN		51.6%	53.2%

In 1960, the political posture of the nation shifted to the left, initiating a liberal period that continued through the decade. In November, John F. Kennedy defeated Richard Nixon. Meanwhile the civil rights movement was developing rapidly after the first sit-ins in Greensboro, North Carolina in February 1960.

On the Supreme Court, however, the trend was the opposite. During the October 1960 Term, the conservative voting patterns that characterized the Warren Court's middle period continued. The Court moved back to the right, and the conservatives regained the

(procedural due process); DeVeau v. Braisted, 363 U.S. 144 (1960) (5-3 decision) (labor); Mitchell v. H.B. Zachery Co., 362 U.S. 310 (1960) (5-4 decision) (Fair Labor Standards Act); Abel v. United States, 362 U.S. 217 (1960) (5-4 decision) (criminal procedure; fourth amendment); Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (5-3 decision) (subversion); Inman v. Baltimore & Ohio R.R. Co., 361 U.S. 138 (1959) (5-4 decision) (Federal Employer's Liability Act).

edge in the win-loss statistics.[167] The renewed conservative trend is demonstrated by the Justices' dissent rates. Once again, Douglas dissented more than Frankfurter and Harlan combined. Douglas' dissent rate leaped to 40.5%, his highest since the October 1953 Term when the liberal wing was a powerless minority of two. The following table shows the conservative edge during the Term.

TABLE 29

DISSENT RATES — OCTOBER 1960 TERM

JUSTICE	DISSENTS	DISSENT RATE	CHANGE FROM PRIOR TERM
LIBERAL			
Douglas	45	40.5%	+10.3%
Black	29	26.1%	− 0.5%
CONSERVATIVE			
Harlan	21	19.4%	−13.9%
Frankfurter	21	19.8%	−15.3%

The conservative edge during the October 1960 Term coincided with a definite shift in the voting pattern of Tom C. Clark. During the prior Term, Clark had been aligned almost exactly between the two wings. Only one year later, Clark was distinctly aligned with

167. Most of the conservative victories involved questions regarding subversive activities. *See* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (5-4 decision); Scales v. United States, 367 U.S. 203 (1961) (5-4 decision); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (5-4 decision); *In re* Anastaplo, 366 U.S. 82 (1961) (5-4 decision); Konigsberg v. State Bar, 366 U.S. 36 (1961) (5-4 decision); Braden v. United States, 365 U.S. 431 (1961) (5-4 decision); Wilkinson v. United States, 365 U.S. 399 (1961) (5-4 decision); Polites v. United States, 364 U.S. 426 (1960) (5-4 decision); McPhaul v. United States, 364 U.S. 372 (1960) (5-4 decision). Other conservative decisions included Cohen v. Hurley, 366 U.S. 117 (1961) (5-4 decision) (attorney discipline); Green v. United States, 365 U.S. 301 (1961) (5-4 decision) (criminal procedure); Times Film Corp v. Chicago, 365 U.S. 43 (1961) (5-4 decision) (free speech).

In spite of the conservative edge in the voting statistics, a case can be made that the October 1960 Term saw the birth of a liberal-activist period that accelerated in April 1962 and extended until 1969. For example, Mapp v. Ohio, 367 U.S. 643 (1961), which is generally considered the "watershed" case which began the Warren Court's criminal procedure revolution, was decided during the Term. Other important liberal decisions included Torcaso v. Watkins, 367 U.S. 488 (1961) (9-0 decision) (freedom of religion); Noto v. United States, 367 U.S. 290 (1961) (9-0 decision) (subversion); Irvin v. Dowd, 366 U.S. 717 (1961) (9-0 decision) (criminal procedure; trial publicity); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (6-3 decision) (race; state action); Silverman v. United States, 365 U.S. 505 (1961) (9-0 decision) (criminal procedure; electronic surveillance); Monroe v. Pape, 365 U.S. 167 (1961) (8-1 decision) (civil rights); Shelton v. Tucker, 364 U.S. 479 (1960) (5-4 decision) (freedom of association); Boynton v. Virginia, 364 U.S. 454 (1960) (7-2 decision) (race); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (9-0 decision) (race; voting).

the conservatives, as Table 30 shows.

TABLE 30

CLARK'S VOTING PATTERN — OCTOBER 1959 AND 1960 TERMS

JUSTICE	DISAGREEMENTS WITH CLARK		DISAGREEMENT RATE WITH CLARK	
	OCT. 1959 TERM	OCT. 1960 TERM	OCT. 1959 TERM	OCT. 1960 TERM
LIBERAL				
Douglas	38	63	40.4%	57.8%
Black	30	49	32.6%	45.0%
Warren	23	39	25.0%	35.8%
Total	91	151		
CONSERVATIVE				
Harlan	33	23	35.1%	21.7%
Frankfurter	30	21	31.6%	20.2%
Whittaker	26	26	27.4%	23.9%
Total	89	70		

Note particularly Clark's extremely high (57.8%) disagreement rate with Douglas. On the basis of these votes, Clark must be classified as a member of the conservative bloc during the October 1960 Term. As a result of Clark's shift to the right, Stewart found himself in the middle between two four-vote wings.[168] Stewart leaned toward the right, but to a lesser degree than Clark.

Levels of disagreement and polarization remained at the high level that characterized the Warren Court's period of conservative resurgence. The average dissent rate (2.11 dissents per case) was the third highest of the Warren era. Five pairs of Justices disagreed in more than fifty percent of the cases.[169] A definite pattern of polarized voting involving two four-vote blocs emerged. The liberal wing included the cohesive three-vote group of Justices Black, Warren, and Brennan, with Douglas off to the left. Harlan and Frankfurter were closely aligned in the conservative wing, with Clark somewhat to the left and Whittaker somewhat to the right. Whittaker occupied the far right position during his last Term.

The conservative trend continued into the October 1961 Term.

168. The old saw familiar during Stewart's early years, "as Stewart goes, so goes the Court," was quite accurate in bloc-voting cases during the October 1960 Term. In the two prior Terms, Clark was the Justice who most frequently cast the controlling swing vote.

169. Douglas's disagreement rates with the conservatives remained at the very high levels typical of this period: 58.5% with Frankfurter, 56.5 % with Harlan, 55.0% with Whittaker, and 57.9% with Clark.

From October 1961 through March 1962, the liberals continued to dissent more often than the conservatives. The highest dissent rates were those of Douglas (30.3%) and Black (30.3%). Dissent rates of the conservatives, Whittaker (15.2%), Frankfurter (21.2%) and Harlan (21.2%), were lower.[170] The conservatives won several split decisions during these final months of the Warren Court's second period.[171]

An obvious hypothesis is that the abatement in the liberal trend was a response to adverse public opinion. The public outcry focused primarily on subversion and race discrimination cases and secondarily on criminal procedure cases. An examination of the Court's response in these areas may be of interest.

The voting data of the Court in the subversion cases show a clear retreat. During the October 1957 through 1960 Terms, nearly all the major subversion cases resulted in conservative victories, usually by a 5-4 margin. There can be almost no doubt that, over the protests of the four liberals, the Court's conservatives and moderates gave way to public opinion and curbed the growing liberalism that had characterized the 1955-57 period in this area.

In race discrimination cases, the voting data show quite a different trend. The Court did not split into liberal and conservative blocs on this issue. Instead, in most cases the Court unanimously supported the position of racial minorities. However, an argument can be made that the Court deferred to public reaction by simply refusing to confront the difficult issues. There were exceptions. In *NAACP v. Alabama ex rel. Patterson*[172] the Court gave constitutional protection to NAACP's membership list. *Cooper v. Aaron*[173] held that integration of public schools in Little Rock, Arkansas could not be delayed because of public defiance. *Gomillion v. Lightfoot*[174] and *Burton v. Wilmington Parking Authority*[175] indicated that the Court was ready to pick up the cudgel once again. But apart from

170. These percentages are based on the 33 cases decided before Whittaker left Court. They extended from the start of the Term through Teamsters Local Union v. Lucas Flour Co., 369 U.S. 95 (1962).

171. Machibroda v. United States, 368 U.S. 487 (1962) (6-3 decision) (criminal procedure; right of allocution); Oyler v. Boles, 368 U.S. 448 (1962) (5-4 decision) (criminal procedure; advance notice); Hill v. United States, 368 U.S. 424 (1962) (5-4 decision) (criminal procedure; right of allocution); Mechling Barge Lines v. United States, 368 U.S. 324 (1961) (5-4 decision) (administrative law); Killian v. United States, 368 U.S. 231 (1961) (5-4 decision) (loyalty-security).

172. 357 U.S. 449 (1958).

173. 358 U.S. 1 (1958).

174. 364 U.S. 339 (1960).

175. 365 U.S. 715 (1961).

these rather infrequent exceptions, the Court was quite restrained during the late 1950's and early 1960's on segregation issues.[176]

In the criminal procedure area as with the subversion cases, the Court split into two distinct blocs. The four liberals persisted in their demand for constitutional reform, but they were unable to win a clear victory. Instead the conservatives and moderates pulled their five votes together and kept the Court in a position of relative restraint. Only at the end of the period in the *Mapp* case,[177] did the Court inaugurate the activism that was to become one of the major hallmarks of the 1960's.

Perhaps the most telling evidence of the abatement of the liberal trend is simply the relative absence of landmark cases. Apart from *NAACP v. Alabama*, *Cooper v. Aaron*, and *Mapp v. Ohio*, major historic cases are lacking. Almost every Term in the 1960's saw more liberal landmark cases than the entire four years of the Warren Court's second period of conservative resurgence.

3. *The Warren Court's Final Years: A Heyday of Liberal Activism (1962-69)*

In 1962, the relatively conservative middle period of the Warren era ended, and the period of liberal activism for which the Warren Court is so famous began.[178] A major shift to the left occurred in April 1962, when the Court's three-vote conservative bloc was decimated by Whittaker's retirement on April 1, 1962 and the onset of Frankfurter's final illness on April 30, 1962. Suddenly the conservative forces were reduced from three to one, and the four-vote liberal bloc took control.

During the remainder of the October 1961 Term, the liberals had a 4-2-1 majority in most cases. Voting data show an immediate change in the balance of power. Dissent rates on the left plunged, while dissent rates on the right soared.

---

176. Jonathan Casper has speculated, "Perhaps the Court found shortly that more affirmative and aggressive action in favor of integration was politically infeasible or unwise." J. CASPER, THE POLITICS OF CIVIL LIBERTIES 180 (1972).

177. Mapp v. Ohio, 367 U.S. 643 (1961).

178. *See* Galloway, *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773 (1980).

TABLE 31

DISSENT RATES — OCTOBER 1961 TERM

JUSTICE	BEFORE APRIL 1, 1962	AFTER APRIL 1, 1962	CHANGE
LIBERAL			
Douglas	30.3%	21.2%	− 9.1%
Black	30.3%	15.7%	−14.6%
Warren	21.2%	11.8%	−10.2%
MODERATE & CONSERVATIVE			
Clark	6.1%	19.2%	+13.1%
Stewart	9.4%	19.2%	+ 9.8%
Harlan	21.2%	36.5%	+15.3%

Immediately the Court began issuing the liberal-activist decisions characteristic of the 1960's. The case which best symbolizes the onset of liberal control is *Baker v. Carr*,[179] the landmark decision holding that malapportionment of electoral districts presents a justiciable issue under the equal protection clause. Shortly thereafter, the Court decided *Engel v. Vitale*,[180] the controversial school prayer case. And on the last day of the Term, the Court issued its decision in *Robinson v. California*,[181] "incorporating" the eighth amendment ban on cruel and unusual punishment and confirming that the famous constitutional revolution in criminal procedure had begun. After years of minority status, the liberal activists eagerly began writing their favorite doctrines into law.[182]

On April 16, 1962, Byron R. White was seated to replace Justice Whittaker.[183] White, a former Rhodes Scholar and professional football star, turned out to be a moderate conservative, so his appointment did not substantially affect the Court's balance of power.

179. 369 U.S. 186 (1962) (6-2 decision). *Baker* was decided on March 26, 1962, in the brief period between the departures of Whittaker and Frankfurter. Warren later claimed that *Baker* was the most important case of his entire tenure. *See infra* note 234.

180. 370 U.S. 421 (1962) (6-1 decision).

181. 370 U.S. 660 (1962) (6-2 decision).

182. Other liberal victories in bloc-voting cases in the October 1961 Term included *In re* McConnell, 370 U.S. 230 (1962) (5-2 decision) (criminal contempt); Gallegos v. Colorado, 370 U.S. 49 (1962) (4-3 decision) (criminal procedure); Rusk v. Cort, 369 U.S. 367 (1962) (6-3 decision) (citizenship); Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962) (5-4 decision) (antitrust); FTC v. Henry Broch & Co., 368 U.S. 360 (1962) (6-3 decision) (trade regulation); ICC v. J-T Transp. Co., 368 U.S. 81 (1961) (6-3 decision) (common carriers).

183. For a biographical sketch of White, see L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2951-74.

He was, however, less conservative than Whittaker, especially in race cases. Therefore, the Whittaker-White succession comprised a minor shift to the left.

The second personnel change of 1962 was one of the most important in the history of the United States Supreme Court. After being absent from the Court since April 30, Frankfurter, the leader of the conservative wing, resigned on August 28, 1962. President Kennedy appointed Arthur J. Goldberg, a liberal, to fill the vacancy.[184] With the seating of Goldberg on the first day of the October 1962 Term, the liberal wing attained a five-vote majority consisting of Justices Douglas, Black, Warren, Brennan, and Goldberg. No longer would the liberal Justices have to tailor their decisions to pick up at least one vote from the conservative side. Henceforth, the contours of the Court's decisions lay entirely within the control of the liberals.

With the seating of Goldberg, the Court reached the most liberal posture in its history to that date. The following table shows the Court's underlying balance of power in the Goldberg years (1962-65).

TABLE 32

ALIGNMENT OF JUSTICES — OCTOBER 1962 THROUGH 1964 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Douglas	White	Harlan
Black	Clark	
Goldberg	Stewart →	
Warren		
Brennan		

The remarkable scope of the Court's shift to the left in the first decade of the Warren era becomes clear when one recalls that the conservative wing had a 7-2 majority as late as the October 1952 Term.[185]

Voting data for the October 1962 Term suggest that the liberal majority wasted little time making its presence felt. The swing to the left that began in the prior Term accelerated, reaching a point that

184. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 2977-90. Goldberg was "one of the most activist-liberal judges ever to occupy a seat on the Court." CASPER, THE POLITICS OF CIVIL LIBERTIES 80 (1972). Goldberg had been counsel for the United Steelworkers and the AFL-CIO earlier in his career. He was both an economic liberal and a civil libertarian during his brief tenure on the Court.

185. *See supra* p. 589, table 15.

deserves to be called liberal dominance. The following table shows the drastic drop in the liberals' dissent rates and the corresponding increase in the dissent rates of the moderates and conservatives.

TABLE 33

DISSENT RATES—OCTOBER 1960, 1961 & 1962 TERMS

JUSTICE	OCT. 1960 TERM	OCT. 1961 TERM	OCT. 1962 TERM	CHANGE
LIBERAL				
Douglas	40.5%	24.7%	18.0%	−22.5%
Black	26.1%	21.4%	16.2%	− 9.9%
Warren	13.9%	15.5%	7.4%	−11.5%
Brennan	18.9%	5.9%	5.4%	−13.5%
Average	26.1%	16.9%	11.8%	
MODERATE & CONSERVATIVE				
Clark	18.3%	14.1%	22.7%	+ 4.4%
Stewart	18.3%	15.5%	29.7%	+11.4%
Harlan	19.4%	30.6%	40.9%	+21.5%
Average	18.7%	20.1%	31.0%	

Harlan, the Court's sole remaining conservative, had the highest one-Term dissent rate (40.9%) of any conservative Justice since the constitutional revolution of 1937, a record that still stands today. In contrast, Justices Warren and Douglas had their lowest dissent rates since the start of the Warren era.

The October 1962 Term witnessed a tremendous outburst of liberal-activist decisions. Most remarkable was Green Monday, March 18, 1963, when the Court issued a series of landmark decisions including *Townsend v. Sain*,[186] *Gideon v. Wainwright*,[187] *Douglas v. California*,[188] and *Fay v. Noia*.[189] Clearly the constitutional revolution in criminal procedure was in full force. Other famous liberal victories were scattered throughout the Term: *NAACP v. Button*,[190] *Kennedy v. Mendoza-Martinez*,[191] *Gibson v. Florida*

186. 372 U.S. 293 (1963) (5-4 decision) (criminal procedure; habeas corpus).

187. 372 U.S. 335 (1963) (9-0 decision) (criminal procedure; assistance of counsel). *See* A. LEWIS, GIDEON'S TRUMPET (1964), for an account of this famous case.

188. 372 U.S. 353 (1963) (6-3 decision) (criminal procedure; equal protection). This is the *Douglas* of the famous *Griffin-Douglas* rule.

189. 372 U.S. 391 (1963) (6-3 decision) (criminal procedure; habeas corpus).

190. 371 U.S. 415 (1963) (5-4 decision) (first amendment; attorney solicitation).

191. 372 U.S. 144 (1963) (5-4 decision) (citizenship).

Legislative Investigation Committee,[192] *Peterson v. City of Greenville*,[193] *Abington School Dist. v. Schempp*,[194] *Sherbert v. Verner*,[195] and *Gastelum-Quinones v. Kennedy*.[196] Moreover, the Court unanimously pledged its allegiance to the rule of constitutional restraint in economic cases in the oft-cited case, *Ferguson v. Skrupa*.[197] Overall, the October 1962 Term may have been the most liberal and activist in the history of the United States Supreme Court.

During the October 1963 Term, the five-vote liberal wing continued to dominate the Court. Harlan's dissent rate of 37.6% was more than triple the average dissent rate of the liberals. In fact, Harlan dissented more than Justices Douglas, Goldberg, Warren, and Brennan combined. The extent of liberal dominance became quite apparent at the very end of the Term when a striking outburst of judicial activism occurred. Interestingly, Black showed signs of faltering from his characteristic liberalism during this stretch, dissenting in four of the liberal victories.

The Court again issued a series of landmark decisions during the October 1963 Term. For example, *Reynolds v. Sims*,[198] the second great case of the legislative reapportionment revolution, adopted the one person, one vote rule as the controlling test under the equal protection clause. *New York Times Co. v. Sullivan*,[199] the seminal case in the public defamation field, banned libel suits against public officials absent actual malice. The constitutional revolution in criminal procedure was carried forward in *Escobedo v. Illinois*,[200] *Malloy v. Hogan*,[201] and other cases. The Court's commitment to the ongoing struggle for the civil rights of racial minorities was confirmed in *Bell v. Maryland*,[202] *NAACP v. Alabama*,[203] and *Griffin v. School Board*.[204] Other liberal landmark decisions were issued as well.[205]

---

192. 372 U.S. 539 (1963) (5-4 decision) (subversion).

193. 373 U.S. 244 (1963) (8-1 decision) (prosecution of civil rights demonstrators).

194. 374 U.S. 203 (1963) (8-1 decision) (freedom of religion; establishment clause).

195. 374 U.S. 398 (1963) (7-2 decision) (freedom of religion; free exercise clause).

196. 374 U.S. 469 (1963) (5-4 decision) (deportation).

197. 372 U.S. 726 (1963) (9-0 decision) (substantive due process).

198. 377 U.S. 533 (1964) (8-1 decision).

199. 376 U.S. 254 (1964) (9-0 decision).

200. 378 U.S. 478 (1964) (5-4 decision) (right to counsel at police interrogation).

201. 378 U.S. 1 (1964) (5-4 decision) (incorporation of privilege against self-incrimination).

202. 378 U.S. 226 (1964) (6-3 decision) (prosecution of civil rights demonstrators).

203. 377 U.S. 288 (1964) (9-0 decision) (freedom of association).

204. 377 U.S. 218 (1964) (7-2 decision) (school desegregation).

205. *E.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964) (6-3 decision) (denial of passport); Jacobellis v. Ohio, 378 U.S. 184 (1964) (6-3 decision) (free speech; obscenity); Baggett v. Bullitt, 377 U.S. 360 (1964) (7-2 decision) (loyalty oath); Massiah v. United States, 377

When the October 1964 Term opened, the nation was preparing for a presidential election. The Democrats nominated incumbent President Lyndon B. Johnson, a liberal in areas dear to the Court such as race relations and aid for the poor. Johnson was elected by a landslide. The nation rejected the conservative Barry Goldwater in favor of another four years of Kennedy-Johnson policies. The liberal mood permeated Congress as well. For example, in 1964 Congress enacted both the Civil Rights Act of 1964, and the Economic Development Act of 1964 to declare its "war on poverty."

Voting statistics for the October 1964 Term show a continuation of liberal dominance.[206] For example, Warren and Brennan, the core of the liberal bloc, had dissent rates of only 5.7% and 2.2% respectively. Brennan's dissent rate was the lowest of any Justice since the start of the Warren era and the second lowest one-Justice/one-Term dissent rate during Warren's sixteen Terms on the Court.

The voting patterns, however, were quite different from prior Terms. There was almost no bloc voting. Patterns of agreement and disagreement were nebulous. Rather than dividing along the expected 5-3-1 lines, the Court tended toward a 2-5-2 voting pattern. In the center of the Court was a five-vote cluster comprised of Justices Warren, Brennan, Goldberg, White, and Clark. Douglas and Black were on the left and Harlan and Stewart were on the right.[207]

U.S. 20 (1964) (criminal procedure; right to counsel); Schneider v. Rusk, 377 U.S. 163 (1964) (5-3 decision) (denaturalization); Brotherhood of Railroad Trainmen v. Virginia *ex. rel.* Virginia State Bar, 377 U.S. 1 (1964) (6-2 decision) (attorney solicitation); Wesberry v. Sanders, 376 U.S. 1 (1964) (6-3 decision) (legislative reapportionment).

206. Major liberal decisions included Griswold v. Connecticut, 381 U.S. 479 (1965) (7-2 decision) (right of privacy); United States v. Brown, 381 U.S. 437 (1965) (5-4 decision) (bill of attainder); Dombrowski v. Pfister, 380 U.S. 479 (1965) (5-2 decision) (free speech; abstention); Pointer v. Texas, 380 U.S. 400 (1965) (9-0 decision) (criminal procedure; incorporation of confrontation clause); Cox v. Louisiana, 379 U.S. 559 (1965) (5-4 decision) (race; prosecution of civil rights demonstrators); Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (5-4 decision) (race; abatement of criminal prosecution of civil rights protestors); Katzenbach v. McClung, 379 U.S. 294 (1964) (9-0 decision), and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (9-0 decision) (constitutionality of Title II of the Civil Rights Act of 1964); McLaughlin v. Florida, 379 U.S. 184 (1964) (9-0 decision) (race; prohibition of interracial cohabitation).

207. Overall, the voting statistics suggest that the October 1964 Term marked a breaking of the ranks among the previously cohesive liberal forces. The last time this phenomenon occurred in the Court's left wing was during the 1940's. During the period prior to FDR's appointments, the liberals voted as a bloc, frequently in dissent. During the period immediately after the constitutional revolution of 1937, the liberals also voted as a tight bloc; they had to remain cohesive in order to muster a majority. By 1941, however, the liberal majority was assured, and there was no need for the members of the liberal bloc to vote together. As a result, they broke ranks and began to move toward a new position that split the former bloc members into new alignments. A similar process seems to have been at work during the October 1964

Voting data suggest that the October 1964 Term constituted a shift toward more conservative patterns. Dissent rates on the left increased substantially; those on the right dropped. As the following table shows, Douglas and Black actually dissented more than Harlan and Stewart.

TABLE 34

DISSENT RATES—OCTOBER 1963 & 1964 TERMS

JUSTICE	OCT. 1963 TERM	OCT. 1964 TERM	CHANGE
LIBERAL			
Douglas	14.8%	25.6%	+10.8%
Black	18.0%	27.8%	+ 9.8%
MODERATE & CONSERVATIVE			
Clark	18.9%	8.9%	−10.0%
Stewart	19.1%	19.3%	+ 0.2%
Harlan	37.6%	22.5%	−15.1%

Justice Goldberg resigned during the 1965 recess to become ambassador to the United Nations. During his three terms, Goldberg usually sided with the liberals, particularly with Warren and Brennan, thereby assuring liberal control over the Court's decisions.

TABLE 35

GOLDBERG'S DISAGREEMENT RATES

	LIBERAL		CONSERVATIVE
OCT. TERM	Warren	Brennan	Harlan
1962	17.8%	13.5%	39.8%
1963	12.1%	7.6%	39.8%
1964	14.2%	17.0%	26.7%

Obviously, the loss of Goldberg created a major hole in the liberal forces.

To replace Goldberg, President Johnson appointed his close friend and advisor, Abe Fortas.[208] At the time of his appointment,

---

Term. The liberals, having finally achieved a clear majority on the Court, broke ranks. The Court then moved toward a new consensus substantially to the left of the position that had been dominant during the late 1950's when the liberals had to compromise to pick up extra votes from outside their ranks.

208. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 3015-27.

Fortas was already known for his liberal views, and he was expected to fill Goldberg's slot in the liberal wing. The following table shows that Fortas fulfilled those expectations during his four Terms on the Court.

TABLE 36

FORTAS' DISAGREEMENT RATES

	LIBERAL				CONSERVATIVE
OCT. TERM	Douglas	Warren	Brennan	Marshall	Harlan
1965	19.8%	8.1%	11.6%	—	36.0%
1966	20.0%	11.7%	18.5%	—	50.5%
1967	16.5%	13.2%	9.3%	10.2%	30.8%
1968	22.4%	17.9%	15.5%	16.3%	40.0%

As one commentator put it, "Fortas, like Goldberg, continued to align himself with the Court's liberal group, almost solidifying the five-to-four division."[209]

In the nation at large, important events were taking place. The civil rights movement had produced a violent backlash as exemplified by events in Selma, Alabama during the spring of 1965. Later, in August, the failure of President Johnson's Great Society to keep pace with the rising expectations of the poor led to the Watts riot, first in a series of riots that extended over the next few years. The Vietnam war was emerging as a major political issue.

Despite both the loss of Goldberg and the turmoil in the nation, the Court shifted toward more liberal voting patterns during the October 1965 Term.[210] The dissent rates of Harlan, Stewart, and

209. *Id.* at 2959. "[F]rom his earliest days on the Supreme Court, Fortas was clearly identifiable as a judicial activist. In cases involving the rights of criminal defendants, civil rights, loyalty-security issues, and reapportionment, he almost always espoused the philosophy of liberalism that had been the hallmark of the Warren Court." *Id.* at 3023.

210. Moreover, the flow of major activist cases did not slow appreciably. During the October 1965 Term, noteworthy decisions were issued in several important legal fields. Criminal procedure cases included Miranda v. Arizona, 384 U.S. 436 (1966) (5-4 decision) (police interrogation); and Sheppard v. Maxwell, 384 U.S. 333 (1966) (8-1 decision) (trial publicity). Race relations cases included Katzenbach v. Morgan, 384 U.S. 641 (1966) (7-2 decision) (Voting Rights Act of 1965); United States v. Price, 383 U.S. 787 (1966) (9-0 decision) (Civil Rights Acts of 1866 and 1870); United States v. Guest, 383 U.S. 745 (1966) (5-4 decision) (Civil Rights Act of 1870); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (8-1 decision) (Voting Rights Act of 1965); Brown v. Louisiana, 383 U.S. 131 (1966) (5-4 decision) (prosecution of civil rights demonstrators); and Evans v. Newton, 382 U.S. 296 (1966) (6-3 decision) (segregated public parks). First amendment cases included Elfbrandt v. Russell, 384 U.S. 11 (1966) (5-4 decision) (loyalty oath); Memoirs v. Massachusetts, 383 U.S. 413 (1966) (6-3 decision) (obscenity); Rosenblatt v. Baer, 383 U.S. 75 (1966) (5-4 decision) (defamation of

White rose in comparison to the prior Term; those of Douglas and Black declined. The 2-5-2 voting pattern that emerged during the preceding Term continued. Justices Warren, Brennan, Fortas, White, and Clark occupied the center. Warren, Brennan, and Fortas leaned to the left, while White and Clark leaned to the right. Douglas and Black comprised the left wing and Harlan and Stewart the right.

Increased conflict and polarization characterized the national political scene in 1966. Demands for reform intensified. Widespread riots occurred in cities such as Chicago, Cleveland, and St. Louis triggering a growing conservative backlash. Symbolically, the proposed Civil Rights Act of 1966 died in the Senate. The Vietnam build-up continued, and vocal opposition to the war grew. An economic downturn complicated matters— during the 1966 bear market, the Dow Jones average dropped twenty-five percent in eight months. The Court, of course, was not insulated from these pressures.

Some major shifts in voting patterns on the Court occurred during the October 1966 Term. Generally, there was a trend toward a polarized 4-1-4 voting alignment.[211] The statistics show four Justices who leaned definitely to the left (Douglas, Fortas, Warren, and Brennan), one Justice in the middle (Black), and four Justices who leaned to the right—two slightly (White and Clark) and two decisively (Stewart and Harlan).

In particular, Black's voting pattern underwent a noteworthy shift during the October 1966 Term. For decades Black had occupied a position near the Court's extreme left, and he agreed with the liberals more often than with the conservatives. During the October

---

public official); and Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (5-4 decision) (defamation in labor disputes). Voting rights cases included Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (6-3 decision) (poll tax), in addition to Katzenbach v. Morgan, 384 U.S. 787, and South Carolina v. Katzenbach, 383 U.S. 301.

211. Victories for the liberal bloc included Reitman v. Mulkey, 387 U.S. 369 (1967) (5-4 decision) (race; California's open housing proposition); Afroyim v. Rusk, 387 U.S. 253 (1967) (5-4 decision) (citizenship); Giles v. Maryland, 386 U.S. 66 (1967) (5-4 decision) (criminal procedure; disclosure of evidence); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (5-4 decision) (free speech; loyalty oath); Spevack v. Klein, 385 U.S. 511 (1967) (5-4 decision) (criminal procedure; self-incrimination); and Garrity v. New Jersey, 385 U.S. 493 (1967) (5-4 decision) (criminal procedure; self-incrimination). Victories for the conservative bloc included Walker v. City of Birmingham, 388 U.S. 307 (1967) (5-4 decision) (prosecution of civil rights demonstrators); McCray v. Illinois, 386 U.S. 300 (1967) (5-4 decision) (criminal procedure; informer's privilege); Cooper v. California, 386 U.S. 58 (1967) (5-4 decision) (criminal procedure; search and seizure); Fortson v. Morris, 385 U.S. 231 (1966) (5-4 decision) (legislative reapportionment); and Adderley v. Florida, 385 U.S. 39 (1966) (5-4 decision) (prosecution of civil rights demonstrators).

1966 Term, in contrast, Black moved into a position very near the center of the Court. The following table demonstrates Black's shift to the right by comparing his alignment during the October 1962 and 1966 Terms.

TABLE 37

BLACK'S DISAGREEMENT RATES—OCTOBER 1962 & 1966 TERMS

JUSTICE	OCT. 1962 TERM	OCT. 1966 TERM	CHANGE
LIBERAL			
Douglas	18.0%	28.7%	+10.7%
Warren	11.5%	34.0%	+22.5%
Brennan	14.4%	30.6%	+16.2%
CONSERVATIVE			
Stewart	44.1%	33.0%	−11.1%
Harlan	53.6%	39.6%	−14.0%

Suddenly the liberal majority was in jeopardy, and it was once again possible for the moderates and conservatives to muster a five-vote coalition consisting of Black, White, Clark, Stewart, and Harlan. Voting data suggest that the Court's moderate and conservative Justices, encouraged by the defection of Black and the growing backlash within the nation, began to make a more serious effort to contest the liberal wing's dominance. Disagreement rates jumped to the highest levels since the October 1960 Term.[212] Similarly, the average dissent rate jumped from 1.47 to 1.99 per case, the highest during the 1960's.

In 1967 a personnel change occurred that re-established the dominance of the liberal wing. On the last day of the October 1966 Term Justice Tom C. Clark, a moderate conservative, resigned. He was replaced by Thurgood Marshall, a liberal, who was seated on the first day of the October 1967 Term.[213] Marshall promptly lined up with the liberals, and agreed with both Warren and Brennan in over ninety percent of the cases decided in the October 1967 Term, while disagreeing with Harlan in thirty percent of the cases. The

212. There were four disagreement rates of 50% or more, the first since the October 1962 Term: Douglas-Harlan (56.4%), Fortas-Harlan (50.5%), Fortas-Stewart (50.5%), and Douglas-Stewart (50.0%).

213. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 3063-92. Marshall, the Court's first black Justice, had been general counsel for the NAACP Legal Defense Fund from 1938 to 1961. He had argued most of the leading race cases before the Court, including Brown v. Board of Educ., 347 U.S. 483 (1954). He was expected to join the Court's liberal wing, and he did so.

Clark-Marshall succession gave the liberal wing the fifth vote it needed to retain the majority status it had enjoyed since October 1962. The following table shows the alignment on the Court after the arrival of Marshall.

TABLE 38

ALIGNMENT OF JUSTICES — OCTOBER 1967 & 1968 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Douglas	←Black	Harlan
Warren	White	
Brennan	Stewart→	
Fortas		
Marshall		

At this point, the Court arguably reached its most liberal-activist posture in its entire history. The five liberal activists were Justices Douglas, Fortas, Warren, Brennan, and Marshall. Although Black had moved distinctly to the right and was no longer the unbridled liberal he was during the 1930's and 1940's, he was still generally inclined to the left. White had been quite moderate since his arrival on the Court in 1962 and had even leaned slightly to the left during the October 1963 Term. Stewart had been a moderate conservative throughout his tenure. Even Harlan, the Court's only true judicial conservative, was far less conservative than many earlier Justices. Thus, the confluence of six liberals,[214] two moderates, and one conservative created the most liberal bench in the Supreme Court's history.

The dissent rates of the liberal Justices illustrate the extent of liberal dominance during the October 1967 Term: Marshall, 1.7%; Brennan 3.7%; Warren 5.5%; and Fortas 9.3%. Harlan dissented more than all four of these liberals. Major liberal victories during the Term included *Katz v. United States*,[215] *Green v. County School Board*,[216] *Flast v. Cohen*,[217] and *Jones v. Alfred H. Mayer Co.*[218]

Although now the Supreme Court had more liberal members than ever before, the nation was swinging away from liberalism in 1968. A mood of anger and frustration prevailed, especially after the

214. This count includes Black.

215. 389 U.S. 347 (1967) (7-1 decision) (criminal procedure; electronic surveillance).

216. 391 U.S. 430 (1968) (9-0 decision) (race; school desegregation).

217. 392 U.S. 83 (1968) (8-1 decision) (taxpayer standing).

218. 392 U.S. 409 (1968) (7-2 decision) (race; resurrection of Civil Rights Act of 1866).

assassinations of Martin Luther King and Robert Kennedy in the spring of 1968. On July 4, 1968, martial law was declared in Berkeley, California to quell disturbances arising in response to the French general strike. The stock market was gripped by the first stage of the bear market which would characterize 1968-70, and there was violence in the streets at the Chicago National Democratic Convention. In November, Richard Nixon edged Hubert Humphrey for the presidency, marking the formal end of the liberal era that began with John F. Kennedy's New Frontier. The representatives of "law and order" and the "silent majority" took control of the executive branch.

The liberal bloc, however, exercised almost complete control over the Court's decisions during the October 1968 Term, the last of the Warren era.[219] This is reflected in the extremely low liberal dissent rates. Once again, Harlan dissented more than Fortas, Warren, Brennan, and Marshall combined. Surprisingly, Stewart's dissent rate exceeded Harlan's.

TABLE 39

DISSENTS & DISSENT RATES—OCTOBER 1968 TERM

JUSTICE	DISSENTS	DISSENT RATE
LIBERAL		
Douglas	22	22.2%
Fortas	8	13.8%
Warren	9	9.2%
Brennan	2	2.0%
Marshall	6	6.7%
CONSERVATIVE		
Harlan	32	32.7%
Stewart	33	33.3%

219. Characteristic liberal activism was present during the Term in a variety of important areas: (1) race - Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (8-0 decision) (prosecution of civil rights demonstrators); Hunter v. Erickson, 393 U.S. 385 (1969) (8-1 decision) (open housing); (2) criminal procedure - Benton v. Maryland, 395 U.S. 784 (1969) (6-2 decision) (incorporation of double jeopardy clause); Chimel v. California, 395 U.S. 752 (1969) (6-2 decision) (fourth amendment; searches incident to arrest); Johnson v. Avery, 393 U.S. 483 (1969) (7-2 decision) (legal assistance for prisoners); Spinelli v. United States, 393 U.S. 410 (1969) (5-3 decision) (fourth amendment; probable cause); (3) legislative reapportionment - Wells v. Rockefeller, 394 U.S. 542 (1969) (6-3 decision); Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (6-3 decision); (4) free speech - Brandenburg v. Ohio, 395 U.S. 444 (1969) (9-0 decision) (clear and present danger); Stanley v. Georgia, 394 U.S. 557 (1969) (9-0 decision) (possession of obscene literature); and (5) poverty law - Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (7-1 decision) (procedural due process; debt collection); Shapiro v. Thompson, 394 U.S. 618 (1969) (6-3 decision) (right of interstate migration; welfare).

In summary, the final Term of the Warren era was almost completely dominated by the liberal-activists. Both the decisions and the voting data paint a picture of unchallenged liberal control. The last two cases decided by the Warren Court—*Chimel v. California*,[220] the landmark case which restricted the authority of police to search suspects incident to arrest, and *Benton v. Maryland*,[221] the landmark case incorporating the double jeopardy clause—provide a fitting conclusion to the liberal activism that dominated the 1962-69 period.

The following table illustrates the liberal dominance that characterized the Warren Court's third and final period.

TABLE 40

DISSENT RATES—OCTOBER 1961 THROUGH 1968 TERMS

	LIBERAL		CONSERVATIVE
OCT. TERM	Warren	Brennan	Harlan
1961	15.5%	5.9%	30.6%
1962	7.4%	5.4%	40.9%
1963	6.3%	3.6%	37.6%
1964	5.7%	2.2%	22.5%
1965	5.4%	4.1%	34.4%
1966	15.0%	10.2%	35.6%
1967	5.5%	3.7%	26.6%
1968	9.2%	2.0%	32.7%
AVERAGE	8.6%	4.6%	32.9%

By almost universal acclaim,[222] the Warren Court's most important developments occurred in race relations, criminal procedure, reapportionment of voting districts, free speech, privacy, and social welfare law. In all of these areas, the Court took an an activist general demeanor, and pursued its policies aggressively.

In the race relations area, the Court took a number of important steps. Continuing the equal protection revolution begun in *Brown v. Board of Education*,[223] it extended the prohibition against segregation in public services[224] and nullified schemes devised to

220. 395 U.S. 752 (1969) (6-2 decision).

221. 395 U.S. 784 (1969) (6-2 decision).

222. *See, e.g.*, A. BICKEL, POLITICS AND THE WARREN COURT (1973); A. COX, THE WARREN COURT (1968); P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970); H. SPAETH, THE WARREN COURT (1966).

223. 347 U.S. 483 (1954).

224. *E.g.*, Johnson v. Virginia, 373 U.S. 61 (1963) (courtrooms); Turner v. City of

evade the ban.[225] In addition, the Court cast a protective net over civil rights demonstrators.[226] The Court upheld both the Civil Rights Act of 1964[227] and the Voting Rights Act of 1965,[228] and gave new life to the Civil Rights Act of 1866.[229]

The Court accomplished a criminal procedure revolution as well. One by one, it made the fundamental provisions of the Bill of Rights applicable to the States by incorporating them in the due process clause of the fourteenth amendment.[230] The Court further expanded and elaborated these provisions,[231] and at times issued detailed sets of prophylactic rules to insure compliance.[232] By the end of the 1960's the Court had written a lengthy constitutional code of criminal procedure applicable equally to state and federal trials.[233]

The Court required and supervised the reapportionment of legislative districts throughout the nation.[234] It overruled precedent and held the issue of voter apportionment justiciable.[235] The Court formulated a strict one person, one vote rule [236] which was later applied

---

Memphis, 369 U.S. 350 (1962) (airports).

225. *E.g.*, Green v. School Bd., 391 U.S. 430 (1968) (schools; freedom of choice plan); Bradley v. School Bd., 382 U.S. 103 (1965) (schools; delay); Griffin v. School Bd., 377 U.S. 218 (1964) (schools; closing public schools); Goss v. Board of Educ., 373 U.S. 683 (1963) (schools; pupil transfer plan).

226. *E.g.*, Brown v. Louisiana, 383 U.S. 131 (1966); Hamm v. City of Rock Hill, 379 U.S. 306 (1964); Bell v. Maryland, 378 U.S. 226 (1964); Garner v. Louisiana, 368 U.S. 157 (1961) (first in the series); *but see* Adderley v. Florida, 385 U.S. 39 (1966).

227. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

228. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

229. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

230. *E.g.*, Benton v, Maryland, 395 U.S. 784 (1969) (fifth amendment; double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment; jury trial); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment; confrontation); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment; self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment; right to counsel); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment; cruel and unusual punishments).

231. *E.g.*, Chimel v. California, 395 U.S. 752 (1969) (fourth amendment); Katz v. United States, 389 U.S. 347 (1967) (fourth amendment); Mempa v. Rhay, 389 U.S. 128 (1967) (sixth amendment; right to counsel); United States v. Wade, 388 U.S. 218 (1967) (sixth amendment; confrontation); Camara v. Municipal Court, 387 U.S. 523 (1967) (fourth amendment); *In re* Gault, 387 U.S. 1 (1967) (juvenile proceedings); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment; self-incrimination).

232. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

233. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

234. Earl Warren believed this was the most important line of cases during his tenure. E. WARREN, MEMOIRS OF EARL WARREN 306 (1977).

235. Baker v. Carr, 369 U.S. 186 (1962).

236. Gray v. Sanders, 372 U.S. 186 (1963).

to the United States House of Representatives,[237] both houses of state legislatures,[238] and local government units having general governmental power.[239] The Court insisted throughout on precise mathematical equality wherever feasible.[240]

The Court also expanded legal protections for speech and association. It rejected defamation actions against public officials[241] and public figures[242] in the absence of actual malice and imposed tighter limits on obscenity prosecutions.[243] The Court provided greater access to private shopping centers for persons seeking forums for expression.[244]

The Court made new law in an effort to protect the privacy of individuals from the assaults of modern technology and government. It redefined the fourth amendment to include electronic surveillance[245] and invalidated New York's wiretapping law.[246] Furthermore, in *Griswold v. Connecticut* it laid the basis for a new constitutional right of privacy in personal decisionmaking.[247]

The Court conducted an activist campaign on behalf of the poor in a variety of areas. It struck down laws adversely affecting welfare recipients,[248] protected debtors against creditors,[249] and sought to insure equal procedural protection for indigent criminal defendants.[250] The Court held poll taxes unconstitutional[251] and suggested that statutes adversely affecting the poor were subject to strict judicial scrutiny.[252] The Court continued to give broad power to the legislative branch to regulate economic enterprise.[253]

---

237. Wesberry v Sanders, 376 U.S. 1 (1964).

238. Reynolds v. Sims, 377 U.S. 533 (1964).

239. Avery v. Midland County, 390 U.S. 474 (1968).

240. Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

241. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

242. Time, Inc. v. Hill, 385 U.S. 374 (1967).

243. *E.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Memoirs v. Massachusetts, 383 U.S. 413 (1966).

244. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

245. Katz v. United States, 389 U.S. 347 (1967).

246. Berger v. New York, 388 U.S. 41 (1967).

247. Griswold v. Connecticut, 381 U.S. 479 (1965).

248. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968).

249. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

250. *E.g.*,, Douglas v. California, 372 U.S. 353 (1963).

251. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

252. Shapiro v. Thompson, 394 U.S. 618 (1969).

253. *E.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968).

In general, the Court sought to make the federal judiciary "activist" in the pursuit of its preferred values. It eased requirements for access to the courts and created new causes of action. It eliminated procedural hurdles. The Court reached out to resolve important constitutional issues even where the case did not require it. It overruled precedents freely and gave broad remedial powers and responsibilities to lower federal courts. In all, the Warren Court of the 1960's was a liberal, activist Court.

D. *The Burger Court (1969-Present)*

Beginning in 1969, the United States Supreme Court underwent one of the most dramatic changes in its entire history, as the liberal dominance of the late Warren era gave way to the conservative dominance characteristic of the Burger era.[254]

As noteworthy as the personnel changes on the Court were, recall the political climate at the start of the Burger era. The 1960's reform movements that were inspired by principles of love, peace, and justice had transformed into a ruinous state of violence and divisiveness. Shaken by riots, bombings, and threats of violence, a "silent majority" turned to the right and brought Richard M. Nixon into power on a "law and order" platform in the 1968 presidential election. Nixon, a conservative devoted to the annihilation of the New Deal, took office at a crucial moment as two openings appeared on the Court.[255] Like most presidents before him, Nixon consciously sought and found jurists who agreed with his political views.[256]

The October 1969 Term was a period of transition. The loss of Warren and Fortas reduced the liberal wing to three (Douglas, Brennan, and Marshall) and destroyed the liberal majority status. On the first day of the Term, conservative Warren E. Burger,[257] was

---

254. *See* Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891 (1981).

255. Warren announced his resignation in 1968. President Johnson nominated Fortas to succeed Warren as Chief Justice. Opposition mounted, and Fortas resigned in early 1969.

256. In his campaign, Nixon pledged "to nominate to the Supreme Court individuals who shared my judicial philosophy, which is basically a conservative philosophy." R. NIXON, PUBLIC PAPERS OF THE PRESIDENT 1055 (1972).

257. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 23, at 3111-42. Burger had been a corporate lawyer in Minneapolis (1931-53), an assistant attorney general in the Eisenhower Administration (1953-56), and a leader of the conservative wing of the District of Columbia Circuit (1956-69). "Being one of the most articulate of conservative judges, Burger was often their spokesman on issues of constitutional and criminal law . . . . He had written on the bench the same sort of protest to the prevailing judicial activism and liberalism that Mr. Nixon had delivered from the campaign stump . . . . Burger was then, clearly enough, Mr. Nixon's kind of judge." *Id.* at 3113.

sworn in to replace Earl Warren as Chief Justice. This increased the conservative wing back to three: Burger, Harlan, and Stewart. Justices Black and White were aligned in the center between the two wings. Fortas' seat remained vacant throughout the Term.

As expected, Burger aligned himself with the conservatives during his first Term on the Court. In fact, Burger had the most conservative record of any Justice during the Term. He disagreed with Douglas, Brennan and Marshall substantially more than Harlan, who was previously the Court's most conservative member, did. Harlan was ousted from his position as the Court's most conservative member for the first time since the resignation of Frankfurter and Whittaker in April 1962.

Voting data for the October 1969 Term show a distinct swing to the right from the prior Term.[258] The dissent rates of the two most liberal Justices, Douglas and Brennan, jumped, while those of the two most conservative Justices, Harlan and Stewart, plummeted. The swing to the right did not, however, go far enough to establish conservative dominance. On the contrary, the highest dissent rate on the Court belonged to the most conservative Justice (Burger, 29.1%). Moreover, the Court's three most conservative members cast more total dissents than its three most liberal members. In fact, a number of the Term's most famous cases were liberal victories.[259]

Harry A. Blackmun was seated on the first day of the October 1970 term.[260] Blackmun immediately joined Burger on the Court's far right. In Blackmun's first Term, the two disagreed in only 4.7% of the cases (5 out of 106). This was by far the lowest disagreement rate between any two Justices on the Court, and it earned them the nickname "Minnesota Twins."[261] Blackmun's voting record during the Term was the most conservative on the entire Court. Overall, he

---

258. Conservative victories in divided decisions during the Term, included: Williams v. Florida, 399 U.S. 78 (1970) (5-3 decision) (criminal procedure; six-person jury); Dandridge v. Williams, 397 U.S. 471 (1970) (5-3 decision) (equal protection; welfare maximum grant restrictions); Evans v. Abney, 396 U.S. 435 (1970) (5-2 decision) (race; closing of public park).

259. *E.g.*, *In re* Winship, 397 U.S. 358 (1970) (5-3 decision) (criminal procedure; proof beyond a reasonable doubt); Goldberg v. Kelly 397 U.S. 254 (1970) (5-3 decision) (procedural due process; right to hearing before termination of welfare benefits); Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) (8-0 decision) (standing); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (8-0 decision) (race; school desegregation).

260. *See* 5 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT, 3-12 (1978). Blackmun, another former corporation lawyer and conservative federal appellate judge, was chosen because he shared Nixon's and Burger's commitment to law and order and judicial restraint.

261. Both Justices are from St. Paul, Minnesota. In fact, they went to grade school together, and Blackmun was best man at Burger's wedding.

disagreed with the three liberals more frequently than either Burger or Harlan did.

The swing to the right, begun during the prior Term, accelerated. The dissent rates of the three liberal Justices jumped dramatically; Marshall's dissent rate quintupled, Brennan's rate doubled, and Douglas' rate (41.3%) was his highest since the October 1953 Term. In contrast, Burger dissented less than half as often as during the prior Term.[262] His dissent rate (13.0%) was less than a third of Douglas'. The following table contains data illustrating these trends.

TABLE 41

DISSENT RATES—OCTOBER 1968, 1969 & 1970 TERMS

JUSTICE	OCT. 1968 TERM	OCT. 1969 TERM	OCT. 1970 TERM	CHANGE
Douglas	22.2%	27.9%	41.3%	+19.1%
Brennan	2.0%	12.5%	29.6%	+27.6%
Marshall	6.7%	5.1%	27.1%	+20.4%
Burger	—	29.1%	13.0%	−16.1%

In contrast to the prior Term, when the liberals retained a slight advantage, the conservatives had a clear edge during the October 1970 Term.[263] The dissent rates of the three liberals were higher than those of the three conservatives. Not since the October 1953 Term had the liberals performed so poorly in comparison to the conservatives in the won-lost figures. The conservative dominance characteristic of the Burger era had begun.

---

262. The extent of the Court's swing to the right is strikingly apparent from the fact that Burger had the *highest* dissent rate on the Court during the October 1969 Term and the *lowest* dissent rate on the Court during the October 1970 Term.

263. Conservative victories during the Term included: Whitcomb v. Chavis, 403 U.S. 124 (1971) (6-3 decision) (legislative apportionment); McGautha v. California, 402 U.S. 183 (1971) (6-3 decision) (criminal procedure; death penalty); Harris v. New York, 401 U.S. 222 (1971) (5-4 decision) (criminal procedure; *Miranda*); Law Students Civil Rights Research Council, Inc., v. Wadmond, 401 U.S. 154 (1971) (5-4 decision) (attorney oath); Younger v. Harris, 401 U.S. 37 (1971) (8-1 decision) (abstention); Wyman v. James, 400 U.S. 309 (1971) (5-4 decision) (welfare; home visits).

On the other hand, some significant liberal decisions were issued during the October 1970 Term. *E.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (6-3 decision) (free speech); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (6-3 decision) (damage suits for fourth amendment violations); Graham v. Richardson, 403 U.S. 365 (1971) (9-0 decision) (welfare rights of nonresident aliens); Cohen v. California, 403 U.S. 14 (1971) (5-4 decision) (free speech; profanity) Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971) (9-0 decision) (race; school desegregation); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment discrimination); Tate v. Short, 401 U.S. 395 (1971) (9-0 decision) (criminal procedure; equal protection); Boddie v. Connecticut, 401 U.S. 371 (1971) (8-1 decision) (due process); Baird v. State Bar, 401 U.S. 1 (1971) (5-4 decision) (admission to practice law; inquiry into Communist affiliations).

The shift in the balance of power to the conservative side was reflected in the voting patterns of Stewart and White. Both were much closer to the conservatives than to the liberals. Although not as conservative as Blackmun and Burger, Stewart and White were at least as conservative as Harlan. Their low disagreement rates with the Nixon appointees were a signal of the Court's rightward shift.

This was the final Term for two of the Court's giants, Harlan and Black. Harlan, a conservative, maintained his usual high disagreement rate with Douglas (46.6%), but was otherwise surprisingly moderate. During Black's last Term he continued his swing to the right. He disagreed with the two Nixon appointees *less* often than with his former colleagues in the liberal wing, as the following table shows.

TABLE 42

DATA CONCERNING BLACK'S DISAGREEMENTS—OCTOBER 1970 TERM

	DISAGREEMENT RATE WITH BLACK	DISAGREEMENT WITH BLACK
LIBERAL		
Douglas	36	35.0%
Brennan	36	33.6%
Marshall	38	35.8%
CONSERVATIVE		
Burger	27	25.2%
Blackmun	31	29.0%

When the October 1971 Term opened, there were two vacant seats on the Court. During the recess, both Black and Harlan had resigned because of illness. To replace them, President Nixon appointed Lewis F. Powell, Jr.[264] and William H. Rehnquist.[265] With the seating of Powell and Rehnquist on January 7, 1972, the "Nixon Court" was complete, and the Court entered a period of nearly four years without personnel changes.

---

264. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 260, at 63-83. Powell, a conservative corporate attorney from Richmond, Virginia, and a "pillar of the American legal establishment" (*id.* at 64), moved promptly into a close alliance with Burger and has been a core conservative throughout most of his tenure.

265. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 260, at 109-31. "When he took his seat in 1972, his [Rehnquist's] ideology was clear to his supporters and opponents alike - an ideology that President Richard M. Nixon, who appointed him, described somewhat imperfectly as that of a judicial conservative." *Id.* at 109. Rehnquist is probably the most conservative Justice appointed since the constitutional revolution of 1937.

Like Burger during the October 1969 Term and Blackmun during the October 1970 Term, Rehnquist and Powell promptly aligned on the far right of the Court. Indeed, each voted at least as conservatively as Burger and Blackmun, as the following table suggests.

TABLE 43

DISAGREEMENT RATES—OCTOBER 1972 TERM

	BLACKMUN	BURGER	POWELL	REHNQUIST
DOUGLAS	57.9%	60.9%	58.1%	61.5%
BRENNAN	42.4%	47.2%	50.8%	48.5%
MARSHALL	39.4%	44.2%	54.0%	53.0%

The four Nixon appointees formed a cohesive conservative block during their first Term together on the Court. They received strong support from White, who stood distinctly to the right of the center during the Term. Justice Stewart was approximately at the center of the Court. Douglas, Brennan, and Marshall held down the left wing.

The prevailing bloc alignment of the 1972-75 period, after the seating of Powell and Rehnquist, is shown in the following table.

TABLE 44

ALIGNMENT OF JUSTICES — OCTOBER 1972 THROUGH 1974 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Douglas	White →	Rehnquist
Brennan	Stewart →	Burger
Marshall		Powell
		Blackmun

Naturally, the conservative wing prevailed in most of the divided cases. The shift from a 6-3 liberal majority in 1969 to a 6-3 conservative majority in 1972 is one of the most radical short-term changes in the history of the Court.

The pattern of conservative dominance that began in the October 1970 Term continued during the October 1971 Term. The conservative wing, strengthened by the arrival of Powell and Rehnquist, began in earnest to roll back the liberal-activist doctrines of the War-

ren Court. For example, in *Jefferson v. Hackney*[266] the Court held, for the first time, that the equal protection clause bans only "intentional" racial discrimination against ethnic minorities. *Kirby v. Illinois*[267] held that defendants are not entitled to sixth amendment assistance of counsel before the start of formal criminal prosecutions. *Moose Lodge No. 107 v. Irvis*[268] held that racial segregation of private clubs does not violate the equal protection clause. The Court's holding in *Lloyd Corp. v. Tanner*[269] restricted first amendment access rights to private shopping centers. The decision in *Board of Regents v. Roth*[270] destroyed the constitutional underpinnings of the "new property" protected by earlier decisions.[271] And the conservatives had other major victories as well.[272] In all, it was a strongly conservative Term.

At the start of the October 1972 Term, the presidential campaign was in full swing. The 1972 election offered the nation a choice between conservative incumbent Richard M. Nixon and liberal challenger George McGovern. The November election produced a landslide for Nixon and his platform calling for "law and order," the rights of the "silent majority," and the dismantling of the welfare state.

The October 1972 Term, the first full Term for the four Nixonians, was very conservative. As the following table shows, dissent rates on the left were up from the prior Term, and reached levels far above those on the right.

---

266. 406 U.S. 535 (1972) (5-4 decision).

267. 406 U.S. 682 (1972) (5-4 decision).

268. 407 U.S. 163 (1972) (6-3 decision).

269. 407 U.S. 551 (1972) (5-4 decision).

270. 408 U.S. 564 (1972) (5-3 decision).

271. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

272. *E.g.*, Branzburg v. Hayes, 408 U.S. 665 (1971) (5-4 decision) (free press); Laird v. Tatum, 408 U.S. 1 (1972) (5-4 decision) (domestic surveillance); Apodaca v. Oregon, 406 U.S. 404 (1972) (5-4 decision) (criminal procedure; jury trial); Johnson v. Louisiana, 406 U.S. 356 (1972) (5-4 decision) (criminal procedure; jury trial).

There were also some liberal victories during the October 1971 Term. *E.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (5-4 decision) (criminal procedure; death penalty); Gelbard v. United States, 408 U.S. 41 (1972) (5-4 decision) (criminal procedure; grand jury); Wright v. Council of Emporia, 407 U.S. 451 (1972) (5-4 decision) (race; school desegregation); United States v. United States Dist. Court, 407 U.S. 297 (1972) (8-0 decision) (electronic surveillance); Fuentes v. Shevin, 407 U.S. 67 (1972) (4-3 decision) (procedural due process); Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (5-4 decision) (procedural due process); Eisenstadt v. Baird, 405 U.S. 438 (1972) (6-1 decision) (equal protection; contraceptives).

TABLE 45

DISSENT RATES—OCTOBER 1971 & 1972 TERMS

JUSTICE	OCT. 1971 TERM	OCT. 1972 TERM	CHANGE
LIBERAL			
Douglas	43.8%	50.7%	+6.9%
Brennan	31.5%	34.8%	+3.3%
Marshall	25.6%	32.6%	+7.0%
CONSERVATIVE			
Powell	19.0%	10.6%	−8.4%
Blackmun	16.5%	8.7%	−7.8%
Burger	18.6%	13.6%	−5.0%

Each of the three liberals achieved a new personal dissent record, and Douglas' dissent rate (50.7%) was the highest since the February 1793 Term.

The collapse of the liberal bloc can be illustrated in many ways. The following table, for example, compares the liberals' dissent rates during the October 1968 and 1972 Terms.

TABLE 46

DISSENT RATES—OCTOBER 1968 & 1972 TERMS

JUSTICE	OCT. 1968 TERM	OCT. 1972 TERM	CHANGE
Douglas	18.3%	50.7%	+32.4%
Brennan	2.0%	34.8%	+32.8%
Marshall	6.7%	32.6%	+26.9%

The conservative wing took advantage of its dominant position, and inflicted major losses on the liberals in a series of split decisions touching a wide array of issues.[273]

273. *E.g.*, Miller v. California, 413 U.S. 15 (1973) (5-4 decision) (free speech, obscenity); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (6-3 decision) (criminal procedure, consent searches); Lemon v. Kurtzman, 411 U.S. 192 (1973) (5-3 decision) (freedom of religion; three-prong establishment clause test); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (5-4 decision) (equal protection; financing of public schools); Ortwein v. Schwab, 410 U.S. 656 (1973) (5-4 decision) (equal protection; filing fees).

Nonetheless, there were also some important liberal victories during the October 1972 Term. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (6-3 decision) (freedom of religion; establishment clause); *In re* Griffiths, 413 U.S. 717 (1973) (7-2 decision) (equal protection; aliens); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (6-2 decision) (race; school desegregation); Frontiero v. Richardson, 411 U.S. 677 (1973) (8-1 decision) (equal protection; sex discrimination); Roe v. Wade, 410 U.S. 113 (1973) (7-2 decision) (abortion).

Polarization between the Court's extremes remained very high during the October 1972 Term. The disagreement rate between Douglas and Rehnquist of 66.2% was a modern Supreme Court record. Seven pairs of Justices had disagreement rates above fifty percent. Notably, Douglas disagreed with each of the five conservatives in more than fifty percent of the cases. Bloc voting occurred frequently. In thirty-two cases, the entire liberal wing (Douglas, Brennan, and Marshall) dissented. Reflecting the high degree of polarization, the average number of dissents per case (2.16) was both the highest of the Burger Court's first decade and one of the highest in the history of the Court.

The October 1973 and 1974 Terms were dominated by the same six-vote coalition of conservatives and moderate conservatives. Rehnquist and Burger were on the far right during both Terms. Powell and Blackmun swapped the third and fourth most conservative positions. Stewart moved back to the right into the fifth most conservative slot. White was next in order, more moderate than in the prior Terms, but still right of center. Marshall, Brennan, and Douglas completed the line-up from right to left. The flood of conservative victories in divided cases continued.[274] Although the liberals won a few divided cases during this period,[275] overall, the Court

---

274. During the October 1973 Term, important conservative victories involving three or more dissents by the liberals and moderates included the following cases: Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1973) (5-4 decision) (race; school desegregation); Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1974) (6-3 decision) (standing); United States v. Richardson, 418 U.S. 166 (1974) (5-4 decision) (standing); Ross v. Moffitt, 417 U.S. 600 (1974) (6-3 decision) (criminal procedure; equal protection); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (6-3 decision) (civil procedure; class actions); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (5-4 decision) (procedural due process); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (6-3 decision) (privacy; constitutionality of Bank Secrecy Act of 1970); Edelman v. Jordan, 415 U.S. 651 (1974) (5-4 decision) (eleventh amendment; retroactive welfare benefits); O'Shea v. Littleton, 414 U.S. 488 (1974) (6-3 decision) (race; case or controversy); United States v. Robinson, 414 U.S. 218 (1973) (6-3 decision) (criminal procedure; search incident to arrest).

In the October 1974 Term, conservative victories included: Weinberger v. Salfi, 422 U.S. 749 (1975) (6-3 decision) (irrebuttable presumptions; Social Security benefits); Warth v. Seldin, 422 U.S. 490 (1975) (5-4 decision) (standing); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (5-2 decision) (attorneys' fees); Schlesinger v. Ballard, 419 U.S. 498 (1975) (5-4 decision) (equal protection; sex discrimination); Sosna v. Iowa, 419 U.S. 393 (1975) (6-3 decision) (residency requirement); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (6-3 decision) (procedural due process; state action).

275. Liberal victories in divided cases included: Faretta v. California 422 U.S. 806 (1975) (6-3 decision) (criminal procedure; right to appear *in pro per*). North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (6-3 decision) (procedural due process; debtor-creditor); Goss v. Lopez, 419 U.S. 565 (1975) (5-4 decision) (procedural due process; students' rights); National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (6-3 decision) (free speech, defamation).

fully satisfied Nixon's expectations.

The Court's personnel underwent another face lift during the October 1975 Term with the retirement of William O. Douglas. President Ford appointed John Paul Stevens to replace Douglas. [276] Although Stevens is a moderate, he has been one of the more liberal members of the very conservative Burger Court. During his first Term, for example, Stevens had the third most liberal voting record after Brennan and Marshall. The Douglas-Stevens succession marked still another milestone in the Court's journey to the right which began in 1969.

The October 1975 Term was Stevens' first, and it was completely dominated by the conservatives and moderate conservatives.[277] To illustrate, Brennan and Marshall, the two remaining liberals, cast almost as many dissenting votes (100) as all six holdover members of the conservative wing (105). The dissent rates of the conservatives remained at the very low levels that had characterized prior Terms. The following table illustrates the conservative dominance by comparing the dissent rates of the liberal Justices, Brennan and Marshall, and the conservative Justices, Burger and Powell.

---

276. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 260, at 149-62. Stevens is a former Chicago attorney and Seventh Circuit Judge.

277. Important conservative victories over dissents by Brennan and Marshall included the following landmark cases: Stone v. Powell, 428 U.S. 465 (1976) (6-3 decision) (criminal procedure; habeas corpus); Gregg v. Georgia, 428 U.S. 153 (1976) (7-2 decision) (criminal procedure; death penalty); Andresen v. Maryland, 427 U.S. 463 (1976) (7-2 decision) (criminal procedure; search and seizure); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (6-2 decision) (race; school desegregation); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (5-4 decision) (free speech; zoning); National League of Cities v. Usery, 426 U.S. 833 (1976) (5-4 decision) (commerce clause; States's rights); Washington v. Davis, 426 U.S. 229 (1976) (7-2 decision) (race; intent to discriminate); Greer v. Spock, 424 U.S. 828 (1976) (6-2 decision) (free speech; access); Paul v. Davis, 424 U.S. 693 (1976) (5-3 decision) (due process); Hudgens v. NLRB, 424 U.S. 507 (1976) (6-2 decision) (free speech; access); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (5-3 decision) (free speech; defamation); Mathews v. Eldridge, 424 U.S. 319 (1976) (6-2 decision) (procedural due process); Rizzo v. Goode, 423 U.S. 362 (1976) (5-3 decision) (case or controversy).

TABLE 47

DISSENT RATES — OCTOBER 1975 TERM

JUSTICE	DISSENT RATE	CHANGE FROM PRIOR TERM
LIBERAL		
Brennan	38.4%	+ 9.7%
Marshall	34.8%	+10.4%
CONSERVATIVE		
Powell	4.4%	− 6.9%
Burger	9.4%	− 3.6%

Brennan's dissent rate of 38.4% was a personal record. In contrast, Powell's dissent rate of 4.4% was the lowest of any Justice since the October 1968 Term. Polarization between the Justices at the Court's extremes remained at the very high levels characteristic of the modern Court. During the October 1975 Term, Rehnquist disagreed with Brennan in 58.7% of the cases and with Marshall in 55.6% of the cases.

The line-up that emerged after the seating of Stevens, and that tended to prevail until 1981, is shown in the following table.

TABLE 48

ALIGNMENT OF JUSTICES — OCTOBER 1975 THROUGH 1980 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Brennan	White →	Rehnquist
Marshall	Stewart →	Burger
	Stevens	Powell
		Blackmun

Voting patterns during the October 1976 Term were very similar to those of the prior Term. Rehnquist and Burger were aligned on the far right, and Brennan and Marshall on the far left. Powell and Blackmun sided closely with Rehnquist and Burger. White and Stewart were more moderate, but they retained their usual tilt to the right. Stevens, in contrast, leaned slightly to the left, disagreeing with Rehnquist (40.2%) and Burger (36.1%) more than with Brennan (28.5%) and Marshall (28.9%).

Dissent and disagreement rates were rather high during the October 1976 Term. In the liberal wing, the dissent rates remained at or near record levels for both Brennan and Marshall. Notably, the dissent rates of the Court's three most conservative members in-

creased. Evidently the trend of Court decisions gave the conservatives some new ground for discontent.[278] Yet in spite of the higher dissent rates on the right, the Term was characterized by continuing conservative dominance.[279] This is clear when one considers that the two liberals cast more total dissents (91) than all four core conservatives (71).

During the October 1977 Term, a number of interesting changes emerged in the voting patterns of the Justices. The alignment of the Court's extremes remained the same with Rehnquist and Burger on the far right, and Brennan and Marshall on the far left.[280] The other Justices, however, shifted their alignments dramatically. White moved to the left of center for the first time since the October 1963 Term. The following table shows White's substantial shift to the left after his sojourn in the conservative bloc during the early 1970's.

278. Important liberal victories in divided cases included: Coker v. Georgia, 433 U.S. 584 (1977) (6-3 decision) (criminal procedure; capital punishment); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (7-2 decision) (presidential papers); Bates v. State Bar, 433 U.S. 350 (1977) (5-4 decision) (free speech; attorney solicitation); Nyquist v. Mauclet, 432 U.S. 1 (1977) (5-4 decision) (equal protection; aliens); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (7-2 decision) (right of privacy; contraceptives); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (5-4 decision) (right of privacy; family living arrangements); Wooley v. Maynard, 430 U.S. 705 (1977) (6-3 decision) (free speech; "Live Free or Die" license plates); Brewer v. Williams, 430 U.S. 387 (1977) (5-4 decision) (criminal procedure; right to counsel); Craig v. Boren, 429 U.S 190 (1976) (7-2 decision) (equal protection; sex discrimination).

279. Important conservative victories over dissents by Brennan and Marshall during the October 1977 Term included: Beal v. Doe, 432 U.S. 438 (1977) (6-3 decision) (right of privacy; abortions); International Bd. of Teamsters v. United States 431 U.S. 324 (1977) (7-2 decision) (race; employment discrimination); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (4-3 decision) (contract clause); Ingraham v. Wright 430 U.S. 651 (1977) (5-4 decision) (procedural due process; school discipline); United States v. Donovan, 429 U.S. 413 (1977) (6-3 decision) (criminal procedure; electronic surveillance); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (5-3 decision) (equal protection; racial discrimination; intent to discriminate).

280. Disagreement rates between the Court's extremes were once again very high: Rehnquist-Brennan (58.3%), Burger-Brennan (54.6%), and Rehnquist-Marshall (53.5%).

TABLE 49

WHITE'S DISAGREEMENT RATES—OCTOBER 1972 & 1977 TERMS

JUSTICE	OCT. 1972 TERM	OCT. 1977 TERM	CHANGE
LIBERAL			
Brennan	42.9%	31.5%	−11.4%
Marshall	40.6%	29.9%	−10.7%
CONSERVATIVE			
Burger	19.6%	34.9%	+15.3%
Rehnquist	19.7%	40.3%	+20.6%

Stewart also moved sharply away from the Rehnquist-Burger pole toward a position slightly to the left of the Court's center.

Most notably, Justices Powell and Blackmun moved substantially to the left. Powell was almost exactly in the statistical center of the Court during the October 1977 Term, in striking contrast to prior Terms when he voted as a core conservative in close alignment with Burger and Rehnquist. Similarly, Blackmun's disagreement rate with Rehnquist jumped from 14.7% to 41.3%, and his disagreement rate with Burger jumped from 10.9% to 33.9%, suggesting that the "Minnesota Twins" nickname was no longer accurate. Stevens, in contrast, moved to the right into the fourth most conservative position.

As a result of all these developments, the balance of power shifted to the left during the October 1977 Term.[281] Instead of the 6-3 conservative majority of prior Terms, the alignment was 2-5-2. After seven consecutive Terms during which the liberals cast a disproportionate share of dissents, the distribution of dissents was now more balanced.

---

281. Liberal victories in divided cases included: Franks v. Delaware, 438 U.S. 154 (1978) (7-2 decision) (criminal procedure; search and seizure); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1977) (6-3 decision) (eminent domain); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (7-2 decision) (civil rights; suits against municipal corporations); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (6-3 decision) (procedural due process; cutoff of utilities); Elkins v. Moreno, 435 U.S. 647 (1978) (7-2 decision) (equal protection; nonresident college tuition); New York v. Cathedral Academy, 434 U.S. 125 (1978) (6-3 decision) (freedom of religion).

On the other hand, there were many important conservative victories as well during he October 1977 Term. *E.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (5-4 decision) (free speech); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (5-3 decision) (contract clause); Zurcher v. Stanford Daily, 436 U.S 547 (1978) (5-3 decision) (criminal procedure; search and seizure); Scott v. United States, 436 U.S. 128 (1978) (7-2 decision) (criminal procedure; electronic surveillance); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (5-4 decision) (access to White House tape recordings).

TABLE 50

DISSENT RATES—OCTOBER 1976 & 1977 TERMS

JUSTICE	OCT. 1976 TERM	OCT. 1977 TERM	CHANGE
LIBERAL			
Brennan	37.3%	34.3%	−3.0%
Marshall	35.5%	28.3%	−7.2%
CONSERVATIVE			
Burger	16.8%	22.5%	+5.7%
Rehnquist	21.8%	30.2%	+8.4%

In short, voting data for the October 1977 Term suggested that the Burger Court was entering a new period in which control passed from the right wing to the center.[282]

Voting data for the October 1978 through 1980 Terms reveal a strikingly consistent pattern. In each of the three Terms, Rehnquist and Burger aligned on the far right. After his brief stay at the Court's center during the October 1977 Term, Powell moved sharply back to the right and resumed his usual close alliance with Burger. Stewart was definitely right-of-center in his last three Terms on the Court, and posted an overall voting record much like Powell's. White was almost precisely in the statistical center between the Rehnquist-Burger and Marshall-Brennan poles, leaning only slightly to the right. Blackmun also was in the center. Unlike Powell, Blackmun's split with the conservative wing in the October 1977 Term stuck, and he was a statistical moderate throughout the rest of the 1970's. Stevens returned to his accustomed position as third most liberal Justice, lining up slightly left of center during all three Terms. As Marshall and Brennan went their lonely way in the Court's underpopulated liberal wing, the following line-up prevailed.

282. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN, INSIDE THE SUPREME COURT (1979), which ends with the following sentence: "The center was in control." *Id.* at 444.

TABLE 51

ALIGNMENT OF JUSTICES — OCTOBER 1978 THROUGH 1980 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Marshall Brennan	Stewart → White Blackmun Stevens	Rehnquist Burger Powell

The polarization of Justices at the Court's extremes continued at the extremely high levels characteristic of the Burger era. Rehnquist posted exceptionally high disagreement rates with both Marshall (57.7%) and Brennan (56.2%). In fact, he disagreed with both of the liberals in virtually two out of every three cases decided in the October 1979 Term.

The conservatives and moderates dominated the Court from the October 1978 through 1980 Terms. The lowest dissent rates were posted by White (13.4%), Burger (13.8%), Blackmun (15.2%), and Powell (15.7%). Rehnquist dissented more often (24.4%), calling from the far right for more aggressive conservatism by the Court. The Court's three most liberal members posted the highest dissent rates for the three-year period: Marshall (33.9%), Brennan (32.3%), and Stevens (24.8%). Major conservative victories were registered in cases involving criminal procedure,[283] equal protection,[284] privacy,[285]

283. *E.g.*, New York v. Belton, 453 U.S 454 (1981) (6-3 decision) (fourth amendment; searches incident to arrest); Michigan v. Summers, 452 U.S. 692 (1981) (6-3 decision) (fourth amendment; "limited intrusions"); Wood v. Georgia, 450 U.S. 261 (1981) (5-4 decision) (equal protection; right to counsel); Rawlings v. Kentucky, 448 U.S. 98 (1980) (5-4 decision) (fourth amendment; "standing"); United States v. Payner, 447 U.S. 727 (1980) (6-3 decision) (fourth amendment; "standing"; federal supervisory power); Rhode Island v. Innis, 446 U.S. 291 (1980) (6-3 decision) (privilege against self-incrimination; *Miranda*); Rummel v. Estelle, 445 U.S. 263 (1980) (5-4 decision) (cruel and unusual punishment; life sentence for three petty thefts); Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (5-4 decision) (public trial); Dalia v. United States, 441 U.S. 238 (1979) (5-4 decision) (electronic surveillance; surreptitious entry to plant bug); Scott v. Illinois, 440 U.S. 367 (1979) (5-4 decision) (right to counsel); Rakas v. Illinois, 439 U.S. 128 (1978) (5-4 decision) (fourth amendment; "standing").

284. *E.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (6-3 decision) (sex; male only draft registration); City of Memphis v. Green, 451 U.S. 100 (1981) (6-3 decision) (race; traffic barrier between black and white residential area); Michael M. v. Superior Court, 450 U.S. 464 (1981) (5-4 decision) (sex; statutory rape); Schweiker v. Wilson, 450 U.S. 221 (1981) (5-4 decision) (age; Social Security eligibility); Califano v. Boles, 443 U.S. 282 (1979) (5-4 decision) (illegitimates; survivor's benefits); Personnel Administrator v. Feeney, 442 U.S. 256 (1979) (7-2 decision) (sex; veterans' preference); Parham v. Hughes, 441 U.S. 347 (1979) (5-4 decision) (illegitimates; wrongful death suits); Ambach v. Norwick, 441 U.S. 68 (1979) (5-4 decision) (aliens); Lalli v. Lalli, 439 U.S. 259 (1978) (5-4 decision) (illegitimates; intestate succession).

freedom of expression,[286] and other important issues.[287]

At the start of the October 1981 Term, Sandra Day O'Connor was sworn in to replace Potter Stewart. Stewart, a moderately conservative Cincinnati Republican, had been quite conservative in his final years, but O'Connor probably deserves a more conservative label. The Court's first woman Justice, O'Connor was selected by President Reagan from the Goldwater wing of the Arizona Republican Party. Her voting record during her first three Terms suggests that she initially aligned herself with the Court's conservative wing, and sided with her former Stanford classmate and Arizona Bar colleague, Rehnquist, in most divided cases. In short, for the sixth consecutive time, a Republican President placed a Justice on the Court more conservative than the Justice's predecessor, producing the conservative alignment illustrated in the following table.

TABLE 52

ALIGNMENT OF JUSTICES — OCTOBER 1981 TERM

LIBERAL	MODERATE	CONSERVATIVE
Marshall	Blackmun	Rehnquist
Brennan	White	Burger
	Stevens	O'Connor
		Powell

As of this writing, the Court's liberal wing seemingly is on the brink of extinction. Brennan, age seventy-eight, and Marshall, age seventy-five, have had recurrent health problems. It is unlikely they can hold out until 1989, so the Court could soon be without liberals. The conservative dominance characteristic of the Burger era will likely remain for many more years.

---

285. *E.g.*, H.L. v. Matheson, 450 U.S. 398 (1981) (6-3 decision) (abortion); Harris v. McRae, 448 U.S. 297 (1980) (5-4 decision) (abortion).

286. *E.g.*, Haig v. Agee, 453 U.S. 280 (1981) (7-2 decision) (passport revocation); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (5-4 decision) (time, place, and manner regulations); Bell v. Wolfish, 441 U.S. 520 (1979) (5-4 decision) (prisoners' union); Herbert v. Lando, 441 U.S. 153 (1979) (6-3 decision) (defamation; discovery of author's thought processes).

287. *E.g.*, Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (5-4 decision) (no right to counsel in parental status termination proceedings); Ball v. James, 451 U.S. 355 (1981) (5-4 decision) (one person, one vote rule not applicable to water district); Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981) (6-3 decision) (right to treatment); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (5-4 decision) (taking); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (5-4 decision) (freedom of religion; establishment clause); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (6-3 decision) (taking); Parham v. J.R., 442 U.S. (1979) (6-3 decision) (commitment of child).

The Burger Court's conservative voting patterns described in this section reflect conservative substantive and procedural legal developments. The five substantive areas in which the Warren Court's most famous liberal-activist innovations occurred—race relations, criminal procedure, free speech, privacy, and legislative reapportionment—became some of those most affected by the Burger Court's decisions.

The Burger Court has inflicted a series of severe defeats on racial minorities. The Court undercut the Warren Court's equal protection revolution by holding that the equal protection clause[288] prohibits only intentional racial discrimination,[289] by tightening the state action requirement,[290] and by restricting the power of federal courts to issue effective remedies.[291] After an initial period of relative liberalism,[292] the Burger Court limited the most important civil rights statute, Title VII of the Civil Rights Act of 1964, by rolling back major advances made by lower federal courts.[293] Having effectively shut the door on the Warren Court's racial equality revolution, the Court reopened it to some extent in a series of more moderate decisions issued toward the end of the 1970's.[294] The cumulative

---

288. U.S. CONST. amend. XIV, § 1.

289. *E.g.*, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (zoning); Washington v. Davis, 426 U.S. 229 (1976) (employment tests); Milliken v. Bradley, 418 U.S. 717 (1974) (school desegregation); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (school desegregation); Jefferson v. Hackney, 406 U.S. 535 (1972) (welfare benefits).

290. *E.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's lien); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (cut off of electricity to residence); Moose Lodge No. 107 V. Irvis, 407 U.S. 163 (1972) (private clubs).

291. *E.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (school desegregation); Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (school desegregation); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 990 (1976) (school desegregation); NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976) (federal licensees); Milliken v. Bradley, 418 U.S. 717 (1974) (school desegregation); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) (selection of government officials).

292. *E.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (retroactive seniority); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written tests; back pay); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (written tests).

293. *See*, in chronological order, International Bd. of Teamsters v. United States, 431 U.S. 324 (1977); East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); United Air Lines Inc. v. Evans, 431 U.S. 553 (1977). The 1977 trilogy was a clear signal to the lower courts to curtail the liberal activism that had been dominant in Title VII cases throughout the early 1970's. The lower courts responded with a vengeance. As a result, the flood of Title VII class actions on behalf of racial minorities has slowed to a trickle.

294. *E.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (school desegregation); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (school desegregation); United Steelworkers v. Weber, 443 U.S. 193 (1979) (affirmative action); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (special admissions); Castaneda v. Partida, 430 U.S. 482 (1977)

effect of the Burger Court's decisions, however, has been a grievous weakening of the advance toward racial justice that characterized prior years.

The Burger Court responded to the Warren Court's criminal procedure revolution by firmly embracing the "law and order" principles that President Nixon both espoused and explicitly sought in his appointees. The Court terminated the Warren Court's equal protection revolution on behalf of indigent criminal defendants,[295] limited the right to counsel,[296] undercut *Miranda*,[297] restricted the exclusionary rule,[298] and otherwise eroded the fourth amendment.[299] The Court eliminated safeguards against mistaken identifications,[300] watered down jury trial requirements,[301] reinstated capital punishment,[302] and drastically reduced the availability of habeas corpus.[303] Overall, the Court placed a higher value on crime control than on constitutional protections and emphasized the need for eliminating federal interference with local law enforcement policies. Although many liberal decisions were also issued, the overall trend has been undoubtedly conservative.

The Burger Court's record in free speech cases has been mixed. In several important areas, characteristic conservative retrenchment

---

(jury discrimination); Runyon v. McCrary, 427 U.S. 160 (1976) (private schools; Civil Rights Act of 1866); Hills v. Gautreaux, 425 U.S. 284 (1976) (housing); Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (employment; Civil Rights Act of 1866).

295. *E.g.*, United States v. MacCollom, 426 U.S. 317 (1976); Ross v. Moffitt, 417 U.S. 600 (1974); Fuller v. Oregon, 417 U.S. 40 (1974).

296. *E.g.*, Scott v. Illinois, 440 U.S. 367 (1979); Ross v. Moffitt, 417 U.S. 600 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Kirby v. Illinois, 406 U.S. 682 (1972).

297. *E.g.*, Fare v. Michael C., 442 U.S. 707 (1979); Dunaway v. New York, 442 U.S. 200 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Michigan v. Mosley, 423 U.S. 96 (1975); Oregon v. Hass, 420 U.S. 714 (1975).

298. *E.g.*, Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975).

299. *E.g.*, Rakas v. Illinois, 439 U.S. 128 (1978) (standing); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (third-party evidence searches); Scott v. United States, 436 U.S. 128 (1978) (electronic surveillance); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory searches); Andresen v. Maryland, 427 U.S. 463 (1976) (search of attorney's files); United States v. Watson, 423 U.S. 411 (1976) (warrantless arrests); United States v. Robinson, 414 U.S. 218 (1973) (searches incident to arrest); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches); Adams v. Williams, 407 U.S. 143 (1972) (stops and frisks); United States v. White, 401 U.S. 745 (1971) (consent monitoring).

300. *E.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977); United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972).

301. *E.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970).

302. *E.g.*, Gregg v. Georgia, 428 U.S. 153 (1976).

303. *E.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976).

has occurred. The Court rolled back the Warren Court's "public defamation revolution."[304] It restored the ability of government officials to prosecute obscenity effectively,[305] and it undercut the access of grass-roots groups to means for expression of their views.[306] The Court also terminated its own role as guardian of public demonstrators.[307] Most notoriously, it conducted a vendetta against the press, substantially curtailing the immunities and access rights of news media.[308] On the other hand, the Court held the line against prior restraints[309] and even engaged in an activist campaign to expand protections for corporate speech[310] and commercial speech.[311] Overall, however, the Court's commitment to the first amendment has been spotty at best.

The Burger Court earned a reputation for liberal activism in one noteworthy line of cases involving the right of privacy. The Court held, for the first time, that pregnant women have a constitutional right to an abortion[312] and issued a variety of secondary decisions implementing[313] and eroding[314] that right. The Court confirmed and extended the constitutional right of privacy in cases involving the use of contraceptives,[315] the decision to marry,[316] and

---

304. *E.g.*, Wolston v. Readers Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).

305. *E.g.*, Hamling v. United States, 418 U.S. 87 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); *cf.* FCC v. Pacifica Found., 438 U.S. 726 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

306. *E.g.*, Greer v. Spock, 424 U.S. 828 (1976); Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

307. *E.g.*, Laird v. Tatum, 408 U.S. 1 (1972).

308. *E.g.*, Herbert v. Lando, 441 U.S. 153 (1979); Houchins v. KQED, Inc., 438 U.S. 1 (1978); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972).

309. *E.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971).

310. *E.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

311. *E.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975). *But see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

312. Roe v. Wade, 410 U.S. 113 (1973), and its companion case, Doe v. Bolton, 410 U.S. 179 (1973).

313. *E.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

314. *E.g.*, Beal v. Doe, 432 U.S. 438 (1977), and companion cases.

315. *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); *cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972).

316. *E.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978).

the decision of family members to live together.[317] Beyond that, however, the Court adopted a restrained position concerning the right of privacy[318] which led at least one observer to conclude, "[I]t is likely that constitutional privacy will be relegated to the status of a 'limbo' doctrine. . . ."[319]

The legislative reapportionment revolution of which Earl Warren was so proud[320] held up reasonably well during the first decade of the Burger era.[321] Yet, the patterns of conservatism and retrenchment characteristic of the Burger Court are present in this area as well. The Court softened the one-person, one-vote rule by allowing minor deviations between the most and least populous districts without any justification[322] and substantial deviations where supported by rational grounds[323] and by stressing deference to state legislative judgments.[324] The Court rejected challenges to multi-member electoral districts.[325] Finally, the Court continued the restrained pattern set by the Warren Court in racial gerrymandering cases.[326] Generally, the Burger Court's decisions in this area "trace a retreat to the safety of judicial noninvolvement."[327]

---

317. *E.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

318. *E.g.*, Whalen v. Roe, 429 U.S. 589 (1977); Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976); Kelley v. Johnson 425 U.S. 238 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

319. Silver, *The Future of Constitutional Privacy*, 21 ST. LOUIS U.L.J. 211, 215 (1977).

320. *See* Baker v. Carr, 369 U.S. 186 (1962), and its many progeny, including especially Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); and Avery v. Midland County, 390 U.S. 474 (1968).

321. *E.g.*, Chapman v. Meier, 420 U.S. 1 (1975); Connor v. Johnson, 402 U.S. 690 (1971).

322. Typically the Court allowed deviations up to 10%. *E.g.*, White v. Regester, 412 U.S. 755 (1973) (9.9% deviation); Gaffney v. Cummings, 412 U.S. 735 (1973) (7.83% deviation). *But cf.* Chapman v. Meier, 420 U.S. 1 (1975) (stricter standards for court-ordered reapportionment).

323. *E.g.*, Mahan v. Howell, 410 U.S. 315 (1973) (16.4% deviation); Abate v. Mundt, 403 U.S. 182 (1971) (11.9% deviation).

324. *E.g.*, White v. Weiser, 412 U.S. 783 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973). *But cf.* White v. Weiser, 412 U.S. 783 (1973) (no need for deference regarding federal voting districts).

325. Whitcomb v. Chavis, 403 U.S. 124 (1971). *But cf.* Chapman v. Meier, 420 U.S. 1 (1975) (stricter standards for court-ordered reapportionment); White v. Regester, 412 U.S. 755 (1973) (multi-member districts held invidiously discriminatory).

326. *E.g.*, United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (redistricting with adverse effect on Jewish community); Beer v. United States, 425 U.S. 130 (1976) (nonretrogression principle for redistricting under the Voting Rights Act of 1965); City of Richmond v. United States, 422 U.S. 358 (1975) (racially motivated annexation upheld).

327. Comment, *Judicial Deference in the Representation Controversy: A Further Erosion of the Justiciability Doctrine*, 44 BROOKLYN L. REV. 143, 143 (1977).

In cases involving essentially economic interests, the Burger Court terminated the "egalitarian revolution" that had characterized the Warren era. The Court returned to a posture of restraint with regard to government activities that adversely affect the poor. It undercut the foundations of constitutional poverty law by holding that poverty is not a suspect classification[328] and denying that subsistence benefits are a fundamental right.[329] The Court retrenched in the area of equal protection for indigent criminal defendants.[330] It restricted the procedural due process rights of welfare recipients,[331] debtors,[332] and other persons harmed by government action.[333] The Court set aside the Warren Court's rule that "the Government always wins" in antitrust cases,[334] and it dramatically restricted the rights of indigents to free access to judicial proceedings.[335] Moreover, a number of cases suggested renewed conservative activism, including a willingness on the part of the Court to actively intervene in order to advance the interests of the rich.[336]

Perhaps the most widely noted trend during the first decade of the Burger era was the Court's insistence upon "closing the courthouse doors," or, in other words, restricting access to federal courts and availability of federal remedies.[337] The Court used traditional threshold doctrines to create formidable obstacles to judicial review. The rules of standing were tightened drastically and constitutionalized.[338] The case or controversy[339] and justiciability[340] doctrines were

---

328. *E.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

329. *E.g.*, Ortwein v. Schwab, 410 U.S. 656 (1973); Dandridge v. Williams, 397 U.S. 471 (1970); Rosado v. Wyman, 397 U.S. 397 (1970).

330. *E.g.*, Ross v. Moffitt, 417 U.S. 600 (1974).

331. *E.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Richardson v. Perales, 402 U.S. 389 (1971).

332. *E.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). *But see* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

333. *E.g.*, Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

334. For a discussion of cases illustrating this change see Pollock, *Antitrust, the Supreme Court, and the Spirit of '76*, 72 NW. U.L. REV. 631-55 (1978).

335. *E.g.*, Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973).

336. *E.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); National League of Cities v. Usery, 426 U.S. 833 (1976).

337. *See, e.g.*, Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977). The leaders in this development were Rehnquist, Burger, and Powell.

338. *E.g.*, Simon v. Eastern Ky. Welfare Rights Org., 425 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 166 (1974); United States v. Richardson, 418 U.S. 166 (1974); Linda R.S. v. Richard D., 410 U.S.

used to dismiss important cases involving alleged abuse of governmental power. The availability of federal habeas corpus was reduced substantially.[341] The nonintervention doctrine became a major barrier to federal litigation.[342] The Warren Court's presumption in favor of private causes of action to enforce statutory rights was converted into a presumption *against* private causes of action.[343] Rules concerning pendant jurisdiction were tightened.[344] Those litigants who managed to survive the gauntlet of threshold obstacles found themselves up against newly imposed procedural obstacles.[345] Most importantly, the Court imposed far-reaching restrictions on the ability of lower federal courts to issue effective remedies.[346] The Court's recurrent obsession was to reduce the case load of the federal courts, and its message to the federal judges was to dismiss the cases without reaching the merits. In the long run, this position may result in greater detriment to aggrieved citizens than all other instances of substantive retrenchment mentioned above.

III. CONCLUSION

The era of Supreme Court history that began with the constitu-

---

614 (1973); *see e.g.*, Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863 (1977).

339. *E.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

340. *E.g.*, Gilligan v. Morgan, 413 U.S. 1 (1973); Laird v. Tatum, 408 U.S. 1 (1972).

341. *E.g.*, Stone v. Powell, 428 U.S. 465 (1976).

342. The leading case in this important area was Younger v. Harris, 401 U.S. 37 (1971). The progeny of *Younger* include: Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). *See, e.g.*, Comment, *Post-Younger Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, 1976 DUKE L. J. 523.

343. *E.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Cort v. Ash, 422 U.S. 66 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974); *see, e.g.*, Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1 (1978) (concluding that private causes of action are an "endangered species").

344. *E.g.*, Aldinger v. Howard, 427 U.S. 1 (1976).

345. *E.g.*, Weinberger v. Salfi, 422 U.S. 749 (1975) (class actions); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (class actions); Zahn v. International Paper Co., 414 U.S. 291 (1973) (class actions).

346. *E.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Milliken v. Bradley (II), 418 U.S. 717 (1974); Edelman v. Jordan, 415 U.S. 651 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Gilligan v. Morgan, 413 U.S. 1 (1973); Linda R.S. v. Richard D., 410 U.S. 614 (1973); *see, e.g.*, Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978); Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV 841 (1977).

tional revolution of 1937 has had four major periods. First came the relatively liberal Roosevelt Court (1937-46), with its early years of liberal dominance (1937-41) and its later years of polarization and discord (1941-46). Second came the more conservative Vinson Court (1946-53), with its early years of polarization (1946-49), and later years of 7-2 conservative dominance (1949-53). Next came the liberal Warren Court (1953-69), with its early years of emerging liberal activism (1954-58), its middle years of retrenchment and restraint (1958-62), and its later years of aggressive liberal activism (1962-69). Finally, the Burger Court (1969-present) with its nearly unbroken pattern of conservative dominance, exhibits a trend not likely to end soon.