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SUPREME COURT HISTORY PROJECT

THE FIRST DECADE OF THE BURGER COURT: CONSERVATIVE DOMINANCE (1969-1979)*

Russell W. Galloway, Jr.**

I. INTRODUCTION

During the October 1968 Term the United States Supreme Court was more liberal than at any other time in its history. The Court was controlled by a five-vote majority of liberal-activist Justices (Douglas, Warren, Brennan, Marshall, and Fortas). In addition, the liberal wing could count on support, in many divided cases, from Black, the Court's long-standing liberal leader, who had moved into a moderate voting posture during the prior three Terms.¹ Moreover, among the remaining three Justices (White, Stewart, and Harlan), only one (Harlan) was really a conservative. The liberal wing had dominated the Court since April 1962 and had pursued a policy of judicial activism based on a philosophy of egalitarianism, libertarianism, and economic liberalism.²

Beginning in 1969, the Court underwent one of the most dramatic alterations in its entire history.³ The liberal wing

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1. As commentators have frequently pointed out, statistical "movement" on the part of a Justice is a relative concept. When a Justice moves toward one bloc and away from another, the explanation may be that the rest of the Court has shifted its position, while the Justice has remained static. Statements in this article concerning the "movement" of Justices should, therefore, not be taken literally.

2. See Galloway, *The Third Period of the Warren Court: Liberal Dominance (1962-1969)* (Supreme Court History Project, Publication No. 3), 20 SANTA CLARA L. REV. 773 (1980).

3. Other candidates for "most drastic short-term personnel change" include the appointment of Taney and Barbour (1837), the loss of Miller and Bradley (1890-92),

was decimated and the conservative wing rejuvenated by five personnel changes. During the first half of 1969, the liberal wing lost two of its members, Earl Warren and Abe Fortas.⁴ To replace them, President Nixon appointed Warren E. Burger and Harry A. Blackmun. In August 1971, Hugo L. Black and John M. Harlan resigned. To replace them, Nixon appointed Lewis F. Powell, Jr. and William H. Rehnquist. Finally, in 1975, William O. Douglas resigned. To replace him, President Ford appointed John P. Stevens.

In the aftermath of these five personnel changes, the liberal wing was a mere shadow of its former self. Gone was the Superchief, Earl Warren. Gone was Douglas, the Court's most liberal member from 1949 to 1975,⁵ and his old partner Black, the "people's lawyer" from Alabama. Gone was Fortas, Douglas' protégé at Yale Law School. Of the liberal bloc that dominated the 1960's, only Brennan and Marshall remained. In contrast, the five personnel changes left the conservative wing in a dominant position. As in the Vinson era, control rested in the hands of a coalition of seven conservatives and moderates led by the conservative four-vote Nixon bloc. This article will examine the voting patterns of the Justices during the first ten years of the Burger era, a period characterized by conservative dominance.

Before turning to the voting data, it may be useful to recall the political climate during the summer of 1969. The 1960's had witnessed the transformation of a reform movement initially based upon principles of love, peace, and justice 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 election. Nixon, a conservative devoted to the annihilation of the New Deal, took office just at the crucial moment when two openings appeared on the Court. Like most Presidents before him, Nixon

the Harding appointments (1921-23), the Roosevelt appointments (1937-43), the deaths of Murphy and Rutledge (1949), and the resignations of Frankfurter and Whittaker (1962).

4. Warren announced his resignation. President Johnson nominated Justice Fortas to succeed Warren as Chief Justice. Opposition mounted, and Fortas unexpectedly resigned. Nixon took office before the two vacancies could be filled.

5. Douglas joined the Court in 1939. During the first decade of his tenure, however, Justices Murphy, Rutledge, and Black had more liberal voting records at times.

consciously sought and found jurists who agreed with his political views.⁶

II. THE VOTING PATTERNS DURING THE OCTOBER 1969 THROUGH 1978 TERMS

A. *The October 1969 Term*

At the start of the Term, the Court had a new Chief Justice, Warren E. Burger, who had taken over on the effective date of Earl Warren's resignation, June 23, 1969. But, as a result of delays in the selection of Fortas' successor,⁷ the Court had only eight Justices throughout the Term.

On the basis of prior voting patterns, a 3-2-3 alignment could be expected. Douglas, Brennan, and Marshall had been liberals during prior Terms. Black and White had been in the middle between the Court's liberal and conservative wings during the immediately prior Terms. Harlan and Stewart had been the Court's two most conservative members since 1962. The new Chief Justice had been associated with the conservative wing of the D.C. Circuit and was selected by Nixon as a conservative.

As expected, Burger aligned himself with the conservatives during his first Term on the Court. He disagreed with the liberals, Douglas (48.8%), Brennan (39.5%), and Marshall (36.4%), more often than with the conservative Harlan (17.6%) and the moderate conservative Stewart (20.0%). In fact, Burger had the most conservative record of any Justice during the Term.⁸ This can be demonstrated by comparing Burger's voting pattern with that of Harlan, previously the Court's most conservative member.

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

7. The Senate rejected Nixon's first two nominees to fill Fortas' seat, Clement F. Haynsworth, Jr. and G. Harrold Carswell, both of whom were conservatives from the South.

8. See appendix A, table 1 *infra*.

TABLE 1
DISAGREEMENT RATES—OCTOBER 1969 TERM

	Harlan	Burger
Douglas	41.2%	48.8%
Brennan	27.6%	39.5%
Marshall	20.8%	36.4%

As Table 1 shows, Burger disagreed with each of the Court's three liberals substantially more than Harlan did. For the first time since the resignation of Frankfurter and Whittaker in April 1962, Harlan was definitively ousted from his position as the Court's most conservative member.⁹

The overall voting data¹⁰ confirm the expected alignment of three liberals, two moderates, and three conservatives during the Term. The liberal wing consisted of a close pair (Brennan and Marshall; 6.4% disagreement rate), with Douglas a more distant third member out on the Court's left extreme. The conservative wing (Burger, Harlan, and Stewart) was a rather loose coalition. Black and White were balanced between the two wings. Disagreement rates among the Justices were relatively low. Only one pair of Justices (Douglas-Burger) had a disagreement rate (48.8%) approaching fifty percent. All other disagreement rates were in the forty percent and below range. Correspondingly, there was very little bloc voting.

The data show a distinct swing to the right from the prior Term.¹¹ The dissent rates of the two most liberal Justices (Douglas and Brennan) jumped, while those of the two most conservative Justices during prior Terms (Harlan and Stewart) plummeted.

9. Stewart was arguably more conservative than Harlan during the October 1968 Term. See Table 2 *infra*.

10. See appendix A, table 1 *infra*.

11. In this article, "right" means conservative, and "left" means liberal. Conservative victories in divided decisions during the Term included: *Williams v. Florida*, 399 U.S. 78 (1970) (5-3; criminal procedure; six-person jury); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (5-2; race relations; state action); *McMann v. Richardson*, 397 U.S. 759 (1970) (5-3; criminal procedure; guilty plea); *Dandridge v. Williams*, 397 U.S. 471 (1970) (5-3; equal protection; welfare maximum grant restrictions); *Evans v. Abney*, 396 U.S. 435 (1970) (5-2; race relations; closing of public park); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969) (4-3; personal injury).

TABLE 2
 DISSENT RATES—OCTOBER 1968 & 1969 TERMS

JUSTICE	OCT. 1968 TERM	OCT. 1969 TERM	CHANGE
LIBERALS			
Douglas	22.2%	27.9%	+ 5.7%
Brennan	2.0%	12.5%	+10.5%
CONSERVATIVES			
Stewart	33.3%	19.5%	-13.8%
Harlan	32.7%	14.9%	-17.8%

Although the expected swing to the right did occur, it did not 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%).¹² Moreover, the Court's three most conservative members dissented more than its three most liberal members.

TABLE 3
 DISSENTS—OCTOBER 1969 TERM

JUSTICE	DISSENTS	DISSENT RATE
LIBERALS		
Douglas	24	27.9%
Brennan	11	10.5%
Marshall	<u>4</u>	5.1%
Total	39	
CONSERVATIVES		
Stewart	17	19.5%
Harlan	13	14.9%
Burger	<u>25</u>	29.1%
Total	55	

In fact, a number of the most famous cases of the Term were liberal victories.¹³

12. See appendix B, table 1 *infra* for complete data on dissent rates during the Term.

13. *E.g.*, *Baldwin v. New York*, 399 U.S. 66 (1970) (5-3; criminal procedure; jury trial); *Coleman v. Alabama*, 399 U.S. 1 (1970) (5-3; criminal procedure; right to counsel); *In re Winship*, 397 U.S. 358 (1970) (5-3; criminal procedure; proof beyond a reasonable doubt); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (5-3; due process; right to hearing before termination of welfare benefits); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970) (8-0; standing); *Sullivan v. Little Hunting*

Black's voting record is worthy of notice. From 1937 to 1966, Black had been a member of the liberal wing. During the October 1966, 1967, and 1968 Terms, however, he and his old mates parted company, and he found himself in a moderate position. During the October 1969 Term, Black was almost exactly in the center between the liberal and conservative wings.

TABLE 4

BLACK'S DISAGREEMENT RATES—OCTOBER 1969 TERM

JUSTICE	DISAGREEMENT RATE WITH BLACK
LIBERALS	
Douglas	35.3%
Brennan	37.9%
CONSERVATIVES	
Harlan	39.5%
Burger	37.6%

As Table 4 shows, Black disagreed with his former colleagues in the liberal wing in more than one-third of the cases.¹⁴

White was also balanced almost exactly in the center between the liberal and conservative wings. This can be confirmed by examining the following table, which shows that White disagreed with the three liberals, in the aggregate, with almost the same frequency as with the three conservatives.

Park, Inc., 396 U.S. 229 (1969) (5-3; race relations; Civil Rights Act of 1866); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (8-0; race relations; school desegregation).

14. In contrast, Black agreed with Douglas in 100% of the cases they both participated in during the October 1938, 1939, and 1940 Terms.

TABLE 5

DATA CONCERNING WHITE'S DISAGREEMENTS—OCTOBER 1969 TERM

JUSTICE	DISAGREEMENTS WITH WHITE	DISAGREEMENT RATE WITH WHITE
LIBERALS		
Douglas	30	35.3%
Brennan	16	18.4%
Marshall	<u>12</u>	15.4%
Total	58	
CONSERVATIVES		
Stewart	21	24.4%
Harlan	17	19.8%
Burger	<u>23</u>	27.1%
Total	61	

In summary, the two personnel changes of 1969 resulted in a substantial shift to the right. The liberal wing was reduced from five to three (Douglas, Brennan, and Marshall), and the dissent rates of the liberal Justices jumped substantially. The conservative wing, in contrast, grew from two to three (Burger, Harlan, and Stewart), while the dissent rates of Harlan and Stewart dropped substantially. Nevertheless, the liberals retained a narrow edge in the won-lost column. Chief Justice Burger, in his first Term, was the most conservative member of the Court and its most frequent dissenter.

B. *The October 1970 Term*

On the first day of the Term, Harry A. Blackmun was seated. Like Burger, Blackmun was chosen by President Nixon with the expectation that he would be a judicial conservative. After the arrival of Blackmun, the Court was once again at full strength, and its personnel remained unchanged for the remainder of the Term. Joining Burger and Blackmun on the right were Harlan, the Court's most conservative member during the 1960's, and Stewart, the Court's second most conservative member during the 1960's. For the first time in years, the conservative wing was larger than the liberal wing, which was now reduced to three (Douglas, Brennan, and Marshall).

Blackmun immediately joined Burger on the Court's far right. Blackmun and Burger 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."¹⁵ Blackmun's voting record during the Term was the most conservative on the entire Court. Overall, he disagreed with the three liberals more frequently than either Burger or Harlan did, as the following table shows.

TABLE 6
DISAGREEMENT RATES—OCTOBER 1970 TERM

	Harlan	Burger	Blackmun
DOUGLAS	46.6%	52.4%	53.9%
BRENNAN	38.3%	42.1%	41.5%
MARSHALL	29.9%	38.7%	40.0%

The swing to the right, which had 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, the conservative Burger dissented less than half as often as during the prior Term.¹⁶ His dissent rate (13.0%) was less than a third of Douglas'. The following table contains data illustrating these trends.

TABLE 7
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 October 1970 Term witnessed a clear

15. Both are from St. Paul, Minnesota.

16. 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.

conservative edge.¹⁷ The dissent rate 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.

TABLE 8
DISSENT RATES—OCTOBER 1970 TERM

JUSTICE	DISSENT RATE
LIBERALS	
Douglas	41.3%
Brennan	29.6%
Marshall	27.1%
CONSERVATIVES	
White	16.8%
Burger	13.0%
Blackmun	16.8%

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 telltale sign of the Court's rightward shift.

17. Important conservative victories during the Term included: *Abate v. Mundt*, 403 U.S. 182 (1971) (7-2; legislative apportionment); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (6-3; legislative apportionment); *Richardson v. Perales*, 402 U.S. 389 (1971) (6-3; due process; social security); *McGautha v. California*, 402 U.S. 183 (1971) (6-3; criminal procedure; death penalty); *Rogers v. Bellei*, 401 U.S. 815 (1971) (5-4; loss of citizenship); *Harris v. New York*, 401 U.S. 222 (1971) (5-4; criminal procedure; *Miranda*); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (5-4; attorney oath); *Younger v. Harris*, 401 U.S. 37 (1971) (8-1; abstention); *Wyman v. James*, 400 U.S. 309 (1971) (5-4; 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; free speech; *Pentagon Papers*); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (5-4; criminal procedure; search and seizure); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (6-3; damage suits for civil rights violations); *Graham v. Richardson*, 403 U.S. 365 (1971) (9-0; welfare rights of nonresident aliens); *Cohen v. California*, 403 U.S. 15 (1971) (5-4; free speech; "Fuck the Draft" jacket); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971) (9-0; school desegregation); *UTU v. State Bar*, 401 U.S. 576 (1971) (5-3; attorney solicitation); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); (8-0; race relations; employment discrimination); *Tate v. Short*, 401 U.S. 395 (1971) (9-0; criminal procedure; equal protection); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (8-1; due process); *Baird v. State Bar*, 401 U.S. 1 (1971) (5-4; admission to practice law; inquiry into Communist affiliations).

TABLE 9
DISAGREEMENT RATES—OCTOBER 1970 TERM

	Stewart	White
LIBERALS		
Douglas	49.5%	46.1%
Brennan	34.6%	31.1%
Marshall	32.1%	34.9%
CONSERVATIVES		
Harlan	23.6%	28.0%
Burger	18.7%	15.1%
Blackmun	19.8%	15.2%

This was the last 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. Black's last Term was marked by a continuation of his swing to the right. He disagreed with the two Nixon appointees *less* than with his former colleagues in the liberal wing.

TABLE 10
DATA CONCERNING BLACK'S DISAGREEMENTS—OCTOBER 1970 TERM

JUSTICE	DISAGREEMENTS WITH BLACK	DISAGREEMENT RATE WITH BLACK
LIBERALS		
Douglas	36	35.0%
Brennan	36	33.6%
Marshall	38	35.8%
CONSERVATIVES		
Burger	27	25.2%
Blackmun	31	29.0%

To summarize, the October 1970 Term saw the balance of power shift to the conservatives. Blackmun, in his first Term, occupied the far right in close partnership with Burger. White moved substantially to the right into the third most conservative position. Harlan and Stewart continued their basically conservative voting patterns. Even Black leaned to the right. This left Douglas, Brennan, and Marshall in minority status on the liberal wing. The dissent rates of the liberals jumped dramatically to levels substantially higher than the conservatives. The conservative dominance that characterized the first

decade of the Burger era had begun.

C. *The October 1971 Term*

When the October 1971 Term opened, there were two vacant seats on the Court. During the recess Hugo L. Black and John M. Harlan had resigned because of illness. The two seats remained open until January 7, 1972. Thus the Court sat for three months with only seven Justices. On the basis of past performance, the expected alignment was three liberals (Douglas, Brennan, and Marshall), one moderate (White), one moderate conservative (Stewart), and two conservatives (Burger and Blackmun).

To replace Black and Harlan, President Nixon appointed Lewis F. Powell, Jr. and William H. Rehnquist. With the seating of Powell and Rehnquist, the "Nixon Court" was completed, and the Court entered a period of nearly four years in which there were no personnel changes. Although the two new Justices did not sit during the first part of the Term, they did participate in roughly half of the decisions, providing sufficient data to allow generalizations concerning their voting patterns.

Like Burger during the October 1969 Term and Blackmun during the October 1970 Term, Rehnquist and Powell promptly lined up on the far right of the Court. Indeed, they both voted at least as conservatively as Burger and Blackmun. This can be deduced from the data in the following table.

TABLE 11
DISAGREEMENT RATES—OCTOBER 1971 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%

In their first Term together on the Court, the four Nixon appointees comprised a solid conservative bloc. The cohesion among the four was quite high, as the following table shows.

TABLE 12
 AGREEMENT RATES—OCTOBER 1971 TERM

	Blackmun	Burger	Powell	Rehnquist
Blackmun	—	89.0%	80.3%	87.5%
Burger		—	92.1%	90.9%
Powell			—	88.3%
Rehnquist				—

The balance of power during the Term rested with the conservatives.¹⁸ The dissent rates of the Court's three liberal Justices were substantially higher than the dissent rates of the four conservatives, as the following table shows.

18. Important conservative victories during the Term included: *Branzburg v. Hayes*, 408 U.S. 665 (1971) (5-4; free press); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (5-3; due process); *Laird v. Tatum*, 408 U.S. 1 (1972) (5-4; domestic surveillance); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (5-4; free speech; access); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (6-3; race relations; private clubs); *Kirby v. Illinois*, 406 U.S. 682 (1972) (5-4; criminal procedure; counsel at lineup); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (5-4; equal protection; intent to discriminate); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (5-4; criminal procedure; jury trial); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (5-4; criminal procedure; jury trial); *Lindsey v. Normet*, 405 U.S. 56 (1972) (5-2; due process; landlord-tenant).

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

TABLE 13

DISSENT RATES—OCTOBER 1971 TERM

JUSTICE	DISSENT RATE
LIBERALS	
Douglas	43.8%
Brennan	31.5%
Marshall	25.6%
CONSERVATIVES	
Blackmun	16.5%
Burger	18.6%
Powell	19.0%
Rehnquist	16.7%

The conservative dominance can be illustrated by examining the behavior of the Court's most liberal member, Douglas. His dissent rate continued its upward climb: 22.2% (October 1968 Term), 27.9% (October 1969 Term), 41.3% (October 1970 Term), 43.8% (October 1971 Term). Douglas' 43.8% dissent rate was the highest of *any* Justice since the start of the Warren era. The extreme distance of Douglas from the mainstream of the Court's decisions is reflected in his extraordinarily high disagreement rates with each of the members of the dominant conservative bloc: 61.5% (Douglas-Rehnquist), 60.9% (Douglas-Burger), 58.1% (Douglas-Powell), 57.9% (Douglas-Blackmun).

An interesting change occurred in the voting patterns of the Court's two remaining members, Stewart and White. Throughout the Warren Court's final period of liberal dominance (1962-1969), Stewart had been a moderate conservative, leaning more toward Harlan's position than toward that of the liberals. During the same period, White was a moderate, often very near the center, frequently a little to the right, and occasionally a little to the left. Stewart's composite voting record was consistently more conservative than White's during this period. But during the October 1971 Term, the two Justices reversed their positions. White's voting record was distinctly more conservative than Stewart's; he disagreed with each of the liberals more frequently and with each of the conservatives less frequently than Stewart did.

TABLE 14
DISAGREEMENT RATES—OCTOBER 1971 TERM

JUSTICE	DISAGREEMENT RATE WITH STEWART	DISAGREEMENT RATE WITH WHITE
LIBERALS		
Douglas	35.7%	46.1%
Brennan	24.8%	29.1%
Marshall	18.9%	31.0%
CONSERVATIVES		
Blackmun	27.2%	15.7%
Burger	29.9%	22.5%
Powell	31.7%	28.6%
Rehnquist	32.3%	24.2%

In spite of their change in relative position, Stewart and White were unquestionably the Court's moderates. Their voting records placed them between the three-vote liberal and four-vote conservative blocs.¹⁹

In summary the October 1971 Term was dominated by a four-vote conservative bloc composed entirely of Nixon appointees. The five remaining survivors of the Warren era were scattered across a moderate to liberal spectrum. The three-vote liberal wing had the highest dissent rates, with Douglas, the Court's most liberal member, disagreeing with each of the four conservatives in roughly six out of every ten cases. Within less than three years, the Court had changed from a 6-2-1 or 5-3-1 liberal majority to a 4-2-3 conservative plurality, marking one of the most dramatic short-term shifts in orientation in the entire history of the Supreme Court.

D. *The October 1972 Term*

This was the first full Term for the "Nixon Court" and the first of three full Terms with stable personnel. The lineup on the Court was the most conservative it had been since at least 1956 and arguably since before the constitutional revolution of 1937. The nation was also in a conservative mood. At the start of the Term, the presidential campaign was in full swing. The 1972 election offered the nation a choice between the conservative incumbent Richard M. Nixon and the liberal

19. See appendix A, table 3 *infra*, which contains complete data on disagreement rates during the October 1971 Term.

challenger George McGovern. The November election produced a landslide for Nixon, whose campaign stressed "law and order," the rights of the "silent majority," and the dismantling of the welfare state.

Voting data for the Term suggest the existence of a five-vote conservative bloc.²⁰ As expected, the four Nixon appointees had conservative voting patterns. Rehnquist occupied the far right, moving Burger into the second most conservative position. Blackmun and Powell were also definitely conservative, although Powell shifted toward a more moderate posture than in the prior Term. Somewhat surprisingly, White moved far to the right into the heart of the conservative bloc, as the following table shows.

TABLE 15

WHITE'S DISAGREEMENT RATES—OCTOBER 1972 TERM

JUSTICE	DISAGREEMENT RATE WITH WHITE
LIBERALS	
Douglas	57.2%
Brennan	42.9%
Marshall	40.6%
CONSERVATIVES	
Powell	20.8%
Blackmun	17.6%
Burger	19.6%
Rehnquist	19.7%

White's swing to the right continued the trend of the prior Term, when he moved to the right of Stewart after a long history as the Court's most centralist member.

In contrast to White, Stewart remained almost exactly in the center between the liberal and conservative wings. As the following table shows, his disagreement rates with the three most conservative Justices were only slightly lower than with the three liberals.

20. See appendix A, table 4 *infra*. Cohesion was not as high among the conservatives as during the prior Term.

TABLE 16

STEWART'S DISAGREEMENT RATES—OCTOBER 1972 TERM

JUSTICE	DISAGREEMENT RATE WITH STEWART
LIBERALS	
Douglas	40.3%
Brennan	36.6%
Marshall	<u>34.9%</u>
Average	37.3%
CONSERVATIVES	
White	38.6%
Burger	33.6%
Rehnquist	<u>38.3%</u>
Average	36.8%

Predictably, the conservative wing dominated the Court and controlled its decisions.²¹ With the exception of Rehnquist, the conservatives' dissent rates were quite low. The dissent rates of Burger, Blackmun, and Powell were substantially lower than during the prior Term. The dissent rates of the three liberals, in contrast, climbed to new highs and reached levels far above those of the conservatives.

21. Important conservative victories during the Term included: *United States v. Ash*, 413 U.S. 300 (1973) (6-3; criminal procedure; counsel at identification procedure); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (5-4; free speech; obscenity); *Miller v. California*, 413 U.S. 15 (1973) (5-4; free speech; obscenity); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (5-4; violation of civil rights); *White v. Regester*, 412 U.S. 755 (1973) (6-3; legislative apportionment); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (6-3; legislative apportionment); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (6-3; criminal procedure; consent searches); *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (5-3; freedom of religion); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (5-4; equal protection; financing of public schools); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (6-3; equal protection; voting rights); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (5-4; equal protection; filing fees); *Mahan v. Howell*, 410 U.S. 315 (1973) (5-3; legislative apportionment); *United States v. Kras*, 409 U.S. 434 (1973) (5-4; equal protection; filing fees); *Couch v. United States*, 409 U.S. 322 (1972) (7-2; criminal procedure; self-incrimination).

TABLE 17
DISSENT RATES—OCTOBER 1971 & 1972 TERMS

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

The dissent rates of all three liberals continued the rapid upward trend of prior Terms. Each of the three achieved a new personal record, and Douglas' dissent rate (50.7%) was the highest since the February 1795 Term.²² The continued 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 18
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 three liberals accounted for nearly 60% of the Court's total dissents during the Term.²³

22. The previous record, also held by Douglas, was 50.0% in the October 1952 Term. This conclusion is based on studies of dissent rates undertaken by the author.

23. Complete data on dissents during the October 1972 Term are set forth in appendix B, table 4 *infra*. There were some important liberal victories during the Term. *E.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (6-3; freedom of religion); *In re Griffiths*, 413 U.S. 717 (1973) (7-2; equal protection; aliens); Sugarman v. Dougall, 413 U.S. 634 (1973) (8-1; equal protection; aliens); USDA v. Moreno, 413 U.S. 528 (1973) (7-2; equal protection; welfare); USDA v. Murry, 413 U.S. 508 (1973) (5-4; equal protection; welfare); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (6-2; race relations; school desegregation); United States v. SCRAP, 412 U.S. 669 (1973) (5-3; standing); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (8-1; equal protection; sex discrimination); *Roe v. Wade*, 410 U.S. 113 (1973) (7-2; abortion); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (9-0; standing).

Polarization between the Court's extremes remained very high. The disagreement rate between Douglas and Rehnquist (66.2%) was a modern Supreme Court record. Seven pairs of Justices had disagreement rates above 50%. Notably, Douglas disagreed with each of the five conservatives in more than 50% of the cases.

TABLE 19
DISAGREEMENT RATES ABOVE 50%—OCTOBER 1972 TERM

	Powell	Blackmun	White	Burger	Rehnquist
Douglas	51.5%	54.3%	57.2%	57.9%	66.2%
Brennan					58.2%
Marshall					55.2%

There was frequent bloc voting. 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 the highest of the Burger Court's first decade and one of the highest in the history of the Court.

In summary, voting data for the October 1972 Term suggest an alignment of five conservatives, one moderate, and three liberals. The conservatives exercised almost complete control and, except for Rehnquist, dissented infrequently. The dissent rates of the three liberals jumped to record levels. It was an extremely strong Term for the conservatives.

E. *The October 1973 Term*²⁴

The 1973 Term was dominated by the same six-vote coalition of conservatives and moderate conservatives that had dominated the prior Term. On the far right, once again, was Rehnquist. He disagreed with each of the three liberals more frequently than any other Justice did. Noteworthy was his 62.7% disagreement rate with Douglas (84 disagreements in 134 cases). As in the prior Term, Burger was the second most conservative Justice. Blackmun and Powell had the third and fourth most conservative voting patterns. The cohesion of this four-vote conservative bloc and its distance from the three liberals are shown in the following table.

24. There were no personnel changes during the Term.

TABLE 20
DISAGREEMENT RATES—OCTOBER 1973 TERM

	Powell	Blackmun	Burger	Rehnquist
LIBERALS				
Douglas	50.4%	51.5%	55.9%	62.7%
Brennan	41.4%	42.8%	41.1%	53.6%
Marshall	40.2%	42.6%	47.1%	51.5%
CONSERVATIVES				
Powell	—	18.8%	14.3%	14.5%
Blackmun		—	10.9%	14.7%
Burger			—	9.4%
Rehnquist				—

Identifiable shifts occurred in the voting patterns of the Court's two moderate conservatives, White and Stewart. After two terms of increasing conservatism, White moved back toward a more moderate voting posture. His disagreement rates with the liberals were substantially lower than those of the four Nixon appointees and also substantially lower than in the prior Term. White did not, however, move all the way back to the center; he remained more closely aligned with the conservatives. Meanwhile Stewart moved substantially to the right. During the prior Term, he had been very near the center. During the October 1973 Term, he resumed his more accustomed place substantially to the right of center. Indeed, he moved to the right of White.

The six-vote conservative coalition controlled the outcome of the vast bulk of cases decided during the Term.²⁵ The

25. 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 (1974) (5-4; race relations; school desegregation); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974) (6-3; standing); *United States v. Richardson*, 418 U.S. 166 (1974) (5-4; standing); *Ross v. Moffitt*, 417 U.S. 600 (1974) (6-3; criminal procedure; equal protection); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (6-3; equal protection; sex discrimination); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (6-3; civil procedure; class actions); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (5-4; due process); *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974) (6-3; privacy; constitutionality of Bank Secrecy Act of 1970); *Edelman v. Jordan*, 415 U.S. 651 (1974) (5-4; retroactive welfare benefits); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) (5-4; race relations; appointment of public officials); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (6-3; race relations; case or controversy); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (6-3; civil procedure; class actions); *United States v. Robinson*, 414 U.S. 218 (1973) (6-3; criminal procedure; search incident to arrest).

dissent rates of Rehnquist and Stewart dropped substantially, while those of the other four conservatives hovered near the low levels of the prior Term.

TABLE 21
DISSENT RATES—OCTOBER 1973 TERM

JUSTICE	RATE	CHANGE FROM PRIOR TERM
White	13.6%	+ 0.6%
Stewart	11.9%	-15.7%
Powell	9.8%	- 0.8%
Blackmun	10.1%	+ 1.4%
Burger	12.1%	- 1.5%
Rehnquist	15.9%	- 8.6%

The liberals, in contrast, dissented frequently. The dissent rates of Brennan and Marshall continued their upward trend to personal record highs. Douglas, the Court's most liberal member, dissented somewhat less frequently than in the prior Term when he set the modern Court record, but he still dissented more than any other Justice. In fact, Douglas dissented more than Stewart, Powell, Blackmun, and Burger combined. The three liberals cast nearly two-thirds of all the dissents during the Term.

TABLE 22
DISSENT RATES—OCTOBER 1972 & 1973 TERMS

JUSTICE	OCT. 1972	OCT. 1973
Douglas	50.7%	45.6%
Brennan	34.8%	37.1%
Marshall	32.6%	35.5%

The liberal wing included the very close Brennan-Marshall pair and Douglas, aligned somewhat by himself on the left extreme.²⁶

26. The liberal wing also won several divided cases during the Term. *E.g.*, *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (5-4; criminal contempt); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (6-3; free speech; defamation); *Florida Power & Light Co. v. IBEW*, 417 U.S. 790 (1974) (5-4; labor); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (5-3; equal pay); *Allee v. Medrano*, 416 U.S. 802 (1974) (5-3; labor); *United States v. Giordano*, 416 U.S. 505 (1974) (5-4; criminal procedure; electronic surveillance); *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115

To summarize, the October 1973 Term was another very strong Term for the conservatives. A six-vote coalition of conservatives and moderate conservatives controlled the Court. The core of the conservative majority was a cohesive four-vote bloc composed of Rehnquist, Burger, Blackmun, and Powell. They were joined in most cases by White and Stewart, whose voting patterns had become quite similar after a shift to the left by White and a shift to the right by Stewart. A three-vote liberal bloc (Douglas, Brennan, and Marshall) dissented frequently. This was the fourth consecutive Term of conservative dominance.

F. *The October 1974 Term*

For the third consecutive Term no changes in personnel occurred. The voting alignment that characterized the prior Term continued. A six-vote coalition of conservatives and moderate conservatives dominated the Court. On the right were the four Nixonians, Rehnquist, Burger, Powell, and Blackmun. Stewart and White were between the extremes and sided with the conservatives more than with the liberals. Douglas, Brennan, and Marshall held down the left wing and dissented more often than the other six Justices combined.

Let us consider, first, the dominant conservative wing. Rehnquist, as usual, had the most conservative voting record. Burger, as usual, lined up near Rehnquist on the right. Powell also had a strongly conservative voting pattern. He was close to Burger; their 12.2% disagreement rate was the second lowest on the Court.

Blackmun had a somewhat more moderate voting pattern. In general he disagreed with the liberals less than the other conservatives did. Blackmun's disagreement record with the liberals was very similar to those of Stewart and White. As a result, it may be valid to consider Blackmun a moderate conservative during the Term rather than a core conservative.

White was also distinctly more moderate than the three core conservatives. This suggests, once again, that his swing to the right during the October 1971 and 1972 Terms was

(1974) (5-4; labor); *Smith v. Goguen*, 415 U.S. 566 (1974) (6-3; free speech); *Hagans v. Lavine*, 415 U.S. 528 (1974) (6-3; equal protection; welfare); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (6-3; free speech); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974) (5-4; maritime personal injury).

temporary.

The dissent rates of the dominant conservative wing remained in the low range that characterized prior Terms. They controlled the Court and had little to complain about.²⁷

TABLE 23
DISSENT RATES—OCTOBER 1974 TERM

JUSTICE	DISSENT RATE
Stewart	17.1%
White	11.4%
Blackmun	8.1%
Powell	11.3%
Burger	13.0%
Rehnquist	18.7%

The only major change in the voting pattern of the Court's relatively isolated three-vote liberal wing was a substantial drop in dissent rates. Douglas' dissent rate edged down for the second straight Term, and both Brennan's and Marshall's dropped by nearly one-third from their personal record highs of the prior Term.

TABLE 24
DISSENT RATES—OCTOBER 1974 TERM

JUSTICE	DISSENT RATE	CHANGE FROM
Douglas	44.9%	- 0.7%
Brennan	28.7%	- 8.4%
Marshall	24.4%	-10.9%

Had the liberals become resigned to the conservative trends of the majority? Were the cases the liberals cared about not getting the four votes needed for review? Whatever the reason,

27. The conservatives prevailed over dissents by the liberals in the following cases: *Weinberger v. Salfi*, 422 U.S. 749 (1975) (6-3; irrebuttable presumptions; Social Security benefits); *Warth v. Seldin*, 422 U.S. 490 (1975) (5-4; standing); *Hicks v. Miranda*, 422 U.S. 332 (1975) (5-4; abstention); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (5-2; attorneys' fees); *Oregon v. Hass*, 420 U.S. 714 (1975) (6-2; criminal procedure; *Miranda*); *Hoffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (6-3; abstention); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (5-4; equal protection; sex discrimination); *Sosna v. Iowa*, 419 U.S. 393 (1975) (6-3; residency requirement); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (6-3; due process; state action); *Schick v. Reed*, 419 U.S. 256 (1974) (6-3; criminal procedure; pardons).

the new pattern reversed a rather long trend toward higher dissent rates in the liberal wing.

TABLE 25
DISSENT RATES—OCTOBER 1968 THROUGH 1974 TERMS

JUSTICE	OCT. 1968	OCT. 1969	OCT. 1970	OCT. 1971	OCT. 1972	OCT. 1973	OCT. 1974
Douglas	18.3%	27.9%	41.3%	43.8%	50.7%	45.6%	44.9%
Brennan	8.7%	12.5%	29.6%	31.5%	34.8%	37.1%	28.7%
Marshall	6.7%	5.1%	27.1%	25.6%	32.6%	35.5%	24.4%

In spite of their reduced dissent rates, the liberals were still far above the conservatives when it came to dissent rates. The combined dissents of the three liberals (113) were more than those of all the remaining six Justices (97).²⁸

This was Douglas' final Term. Although he did not resign until the following Term, he participated in only one decision after the October 1974 Term. Long the champion of the liberal cause, Douglas ended the longest tenure in the history of the Court in his accustomed place on the far left. Dissenter to the last, he disagreed with each of the six members of the conservative wing more than either Brennan or Marshall did. Court watchers have speculated, in light of Douglas' dissent in *DeFunis v. Odigaard*,²⁹ that he, like Black, moved to the right at the end of his career. However, the voting data show that while Douglas' liberalism softened somewhat during his last two Terms, he did not, like Black, move from the Court's extreme left to the center. To the end, Douglas was the Court's "most liberal Justice."

In summary, the October 1974 Term was the fifth consecutive Term of conservative dominance. The Court was controlled by a six-vote conservative wing composed of three core conservatives (Rehnquist, Burger, and Powell) and three mod-

28. Liberal victories in divided cases included: *Herring v. New York*, 422 U.S. 853 (1975) (6-3; criminal procedure; right to closing argument); *Faretta v. California*, 422 U.S. 806 (1975) (6-3; criminal procedure; right to appear *in pro per*); *Wood v. Strickland*, 420 U.S. 308 (1975) (5-4; civil rights; immunity); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) (5-4; antitrust); *North Ga. Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (6-3; due process; debtor-creditor); *Goss v. Lopez*, 419 U.S. 565 (1975) (5-4; due process; students' rights).

29. 416 U.S. 312 (1974).

erate conservatives (Blackmun, White, and Stewart). The three liberals (Douglas, Brennan, and Marshall), as a distinct minority, accounted for more than half of the dissents.

G. *The October 1975 Term*

The Court's personnel underwent another face lift during the Term with the retirement of William O. Douglas. To replace Douglas, President Ford appointed John Paul Stevens. Since Douglas participated in only one decision and Stevens participated in roughly half the decisions, the Court had only eight members in nearly half the cases.

Once again, the Term was totally dominated by the six-vote bloc of conservatives and moderate conservatives. This can be readily deduced from the fact that Brennan and Marshall, the two remaining liberals, cast almost as many dissenting votes (100) as all six members of the conservative wing (105).³⁰ The dissent rates of the conservatives remained at the very low levels that had characterized prior Terms.

30. Important conservative victories over dissents by Brennan and Marshall included: *Stone v. Powell*, 428 U.S. 465 (1976) (6-3; criminal procedure; habeas corpus); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (5-4; criminal procedure; search and seizure); *Gregg v. Georgia*, 428 U.S. 153 (1976) (7-2; criminal procedure; death penalty); *Mathews v. Lucas*, 427 U.S. 495 (1976) (6-3; equal protection; illegitimates); *Andresen v. Maryland*, 427 U.S. 463 (1976) (7-2; criminal procedure; search and seizure); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (6-2; race relations; school desegregation); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (5-4; free speech; zoning); *Aldinger v. Howard*, 427 U.S. 1 (1976) (6-3; pendant jurisdiction); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4; commerce clause; states' rights); *Washington v. Davis*, 426 U.S. 229 (1976) (7-2; race relations; intent to discriminate); *United States v. Miller*, 425 U.S. 435 (1976) (7-2; criminal procedure; search and seizure); *Kelley v. Johnson*, 425 U.S. 238 (1976) (6-2; police hair length regulation); *Greer v. Spock*, 424 U.S. 828 (1976) (6-2; free speech; access); *Paul v. Davis*, 424 U.S. 693 (1976) (5-3; due process); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (6-2; free speech; access); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (5-3; free speech; defamation); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (6-2; due process); *United States v. Watson*, 423 U.S. 411 (1976) (6-2; criminal procedure; search and seizure); *Rizzo v. Goode*, 423 U.S. 362 (1976) (5-3; case or controversy); *Michigan v. Mosley*, 423 U.S. 96 (1976) (6-2; criminal procedure; Miranda).

TABLE 26
DISSENT RATES—OCTOBER 1975 TERM

JUSTICE	DISSENT RATE	CHANGE FROM PRIOR TERM
Blackmun	13.0%	+1.6%
Powell	4.4%	-6.9%
Burger	9.4%	-3.6%
Rehnquist	20.3%	+1.6%

Powell's 4.4% dissent rate was the lowest of any Justice since the October 1968 Term.

The dissent rates of the two liberals, in contrast, turned sharply upward again after their sudden drop during the prior Term.³¹ Brennan's dissent rate (38.4%) was a personal record high.

TABLE 27
DISSENT RATES—OCTOBER 1975 TERM

JUSTICE	DISSENT RATE	CHANGE FROM PRIOR TERM
Brennan	38.4%	+ 9.7%
Marshall	34.8%	+10.4%

The alignment within the conservative wing was similar to that during the prior Term. Rehnquist was on the far right with Burger next to him. Their distance from Brennan and Marshall is shown in the following table.

31. The few liberal victories in divided cases included: *Woodson v. North Carolina*, 428 U.S. 280 (1976) (5-4; criminal procedure; capital punishment); *Singleton v. Wulff*, 428 U.S. 106 (1976) (5-4; standing); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (5-4; right of privacy; abortion); *Elrod v. Burns*, 427 U.S. 347 (1976) (5-3; freedom of association); *Hampton v. Wong*, 426 U.S. 88 (1976) (5-4; due process; aliens); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (5-3; race relations; employment discrimination).

TABLE 28
DISAGREEMENT RATES—OCTOBER 1975 TERM

	Brennan	Marshall	Burger	Rehnquist
LIBERALS				
Brennan	—	5.9%	47.8%	58.7%
Marshall		—	44.4%	55.6%
CONSERVATIVES				
Burger			—	10.9%
Rehnquist				—

The split was not as extreme as during several prior Terms when disagreement rates above 60% were common, but it was still very high.

Blackmun and Powell had basically conservative voting records. Blackmun disagreed with the liberals a little more than Powell did, but he also disagreed with Rehnquist and Burger a little more, so no clear choice can be made as to who was more conservative. Powell was, once again, very closely aligned with Burger.

Stewart and White were aligned somewhat to the left of Blackmun and Powell. Stewart disagreed with both the liberals and the conservatives a little more than White did, so their relative alignment is also quite arbitrary.

TABLE 29
DISAGREEMENT RATES—OCTOBER 1975 TERM

	Stewart	White
LIBERALS		
Brennan	40.9%	37.0%
Marshall	37.3%	34.8%
CONSERVATIVES		
Burger	24.8%	15.2%
Rehnquist	25.5%	23.2%

As Table 29 shows, both White and Stewart leaned definitely to the right rather than to the left.

Stevens, who was seated in December 1975, participated in seventy-two of the one hundred thirty-eight decisions. As the following table shows, he was located quite near the center with a slight inclination to the right.

TABLE 30

STEVENS' DISAGREEMENT RATES—OCTOBER 1975 TERM

JUSTICE	DISAGREEMENT RATE WITH STEVENS
LIBERALS	
Brennan	36.1%
Marshall	38.6%
CONSERVATIVES	
Burger	31.9%
Rehnquist	33.3%

Overall, Stevens' record was the third most liberal on the Court.

To summarize, the Court's alignment during the October 1975 Term was two liberals and six conservatives and moderate conservatives, with the newly seated Stevens near the center between the two extremes. For the sixth consecutive Term, there was clear conservative dominance. The fortunes of the liberals sank to a new low with the loss of the liberal champion, William O. Douglas, at a time when his long time opponent, Gerald Ford, was in a position to select his replacement. It was a vintage year for the conservative Burger Court.

H. *The October 1976 Term*

This was Stevens' first full Term on the Court. Analysis of prior Terms has revealed fairly consistent patterns among the other eight Justices. The right wing had been occupied by the four core conservatives, Rehnquist, Burger, Powell, and Blackmun. Of the four, only Powell and Blackmun had shown even occasional tendencies toward a moderate position. The liberal wing, after the resignation of Douglas, was down to two members, Brennan and Marshall. The remaining two Justices, Stewart and White, had been moderate conservatives with occasional recent deviations to the left by Stewart and to the right by White. The alignments of these eight Justices remained unchanged during the October 1976 Term.

The following table shows the disagreement rates between the Court's liberal and conservative wings.

TABLE 31
DISAGREEMENT RATES—OCTOBER 1976 TERM

	Blackmun	Powell	Burger	Rehnquist
Brennan	40.0%	41.9%	52.0%	58.2%
Marshall	39.8%	41.8%	52.0%	56.5%

Clearly Rehnquist was again on the far right; he disagreed with both the liberals substantially more frequently than his conservative colleagues did. Just as plainly, Burger held the second most conservative position. The relative placement of Powell and Blackmun is less clear, but both were more moderate than Rehnquist and Burger.

White and Stewart, the Court's moderate conservatives, also voted in a manner consistent with prior patterns. Their disagreement rates with the liberals were lower than those of the four core conservatives, but they leaned to the right rather than the left.

TABLE 32
DISAGREEMENT RATES—OCTOBER 1976 TERM

	White	Stewart
LIBERALS		
Brennan	38.1%	40.3%
Marshall	34.7%	36.9%
CONSERVATIVES		
Powell	17.6%	25.2%
Blackmun	20.2%	20.3%
Burger	20.8%	23.6%
Rehnquist	28.2%	21.3%

How did Stevens vote during his first full Term on the Court? The answer can be derived from the following table.

TABLE 33

STEVENS' DISAGREEMENT RATES—OCTOBER 1976 TERM

JUSTICE	DISAGREEMENT RATE WITH STEVENS
LIBERALS	
Brennan	28.5%
Marshall	28.9%
CONSERVATIVES	
Burger	36.1%
Rehnquist	40.2%

Stevens was clearly left of center. He agreed with the liberals more than with the conservatives. He was a moderate liberal, the Court's third most liberal member.

Dissent and disagreement rates were rather high. On the liberal wing, the dissent rates remained at or near record levels for both Brennan and Marshall. Of greater interest, however, is the fact that the dissent rates of the Court's three most conservative members increased. Evidently the conservatives had some new ground for discontent in the trend of Court decisions.³²

32. Important liberal victories in divided cases included: *Coker v. Georgia*, 433 U.S. 584 (1977) (6-3; criminal procedure; capital punishment); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977) (7-2; presidential papers); *Bates v. State Bar*, 433 U.S. 350 (1977) (5-4; free speech; attorney solicitation); *United States v. Chadwick*, 433 U.S. 1 (1977) (7-2; criminal procedure; search and seizure); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (5-4; equal protection; aliens); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (7-2; right of privacy; contraceptives); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (5-4; right of privacy; family living arrangements); *Bounds v. Smith*, 430 U.S. 817 (1977) (6-3; criminal procedure; prisoners' rights); *Wooley v. Maynard*, 430 U.S. 705 (1977) (6-3; free speech; "Live Free or Die" license plates); *Castenada v. Partida*, 430 U.S. 482 (1977) (5-4; criminal procedure; jury discrimination); *Brewer v. Williams*, 430 U.S. 387 (1977) (5-4; criminal procedure; right to counsel); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (5-4; equal protection; sex discrimination); *Craig v. Boren*, 429 U.S. 190 (1976) (7-2; equal protection; sex discrimination).

TABLE 34
 DISSENT RATES—OCTOBER 1975 & 1976 TERMS

JUSTICE	OCT. 1975 TERM	OCT. 1976 TERM	CHANGE
Powell	4.4%	10.5%	+6.1%
Burger	9.4%	16.8%	+7.4%
Rehnquist	20.3%	21.8%	+1.5%

In spite of the higher dissent rate on the right, the Term was characterized by continuing conservative dominance. This is clear when one considers that the two liberals cast more total dissents than all four core conservatives.³³

TABLE 35
 DISSENTS—OCTOBER 1976 TERM

JUSTICE	DISSENTS
LIBERALS	
Brennan	47
Marshall	<u>44</u>
Total	91
CONSERVATIVES	
Powell	13
Blackmun	13
Burger	21
Rehnquist	<u>24</u>
Total	71

To recapitulate, the voting alignment during the October 1976 Term was two liberals, three moderates, and four conservatives. Stevens, in his first full Term, was moderately lib-

33. Important conservative victories over dissents by Brennan and Marshall included: *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (5-4; free press; right of privacy); *Beal v. Doe*, 432 U.S. 438 (1977) (6-3; right of privacy; abortions); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (5-4; abstention); *United Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (7-2; race relations; employment discrimination); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (4-3; contract clause); *Ingraham v. Wright*, 430 U.S. 651 (1977) (5-4; due process; school discipline); *Juidice v. Vail*, 430 U.S. 327 (1977) (6-3; abstention); *Weatherford v. Bursey*, 429 U.S. 545 (1977) (7-2; criminal procedure; right to counsel); *United States v. Donovan*, 429 U.S. 413 (1977) (6-3; criminal procedure; electronic surveillance); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (5-3; equal protection; racial discrimination; intent to discriminate).

eral. White and Stewart, however, leaned to the right, giving the balance of power to the conservative wing. Once again, the liberals (Brennan and Marshall) dissented much more frequently than the conservatives. The Court was highly polarized; dissent rates remained high. It was a Term characterized by conservative dominance, but with a trend toward a more moderate 2-5-2 alignment.

I. *The October 1977 Term*

No changes in personnel occurred during the Term. Yet, a number of interesting changes emerged in the voting patterns of the Justices.³⁴ To set the stage, let us examine the behavior of the pairs of Justices who occupied the Court's right and left extremes. The two most conservative Justices, for the sixth consecutive Term, were Rehnquist and Burger respectively. The two most liberal Justices, for the third consecutive Term, were Brennan and Marshall. Data concerning the alignment of these four Justices are presented in the following table.

TABLE 36
DISAGREEMENT RATES—OCTOBER 1977 TERM

	Brennan	Marshall	Burger	Rehnquist
LIBERALS				
Brennan	—	7.5%	54.6%	58.3%
Marshall		—	45.7%	53.5%
CONSERVATIVES				
Burger			—	21.7%
Rehnquist				—

While these alignments are similar to prior Terms, new developments occurred in the distribution of the remaining five justices between the two extremes.

White moved to the left of center for the first time since the October 1963 Term. Admittedly his inclination to the left was slight, as Table 37 shows, but the movement toward the Brennan-Marshall pole was striking when compared with prior Terms, such as the October 1972 Term, when he was deep in the heart of the conservative wing.

34. Because the voting patterns are different from other Terms, the discussion is a little more detailed.

TABLE 37

WHITE'S DISAGREEMENT RATES—OCTOBER 1972 & 1977 TERMS

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

Overall, White was the third most liberal Justice during the October 1977 Term.

Stewart moved to the left to a position almost exactly in the center between the Court's poles. Table 38 compares Stewart's alignment in the October 1977 Term and the prior Term, when he was closer to the Rehnquist-Burger pole.

TABLE 38

STEWART'S DISAGREEMENT RATES—OCTOBER 1976 & 1977 TERMS

JUSTICE	OCT. 1976 TERM	OCT. 1977 TERM	CHANGE
LIBERALS			
Brennan	40.3%	32.7%	- 7.6%
Marshall	36.9%	29.4%	- 7.5%
CONSERVATIVES			
Burger	23.6%	29.7%	+ 6.1%
Rehnquist	21.3%	34.4%	+13.1%

Most interesting of all, Powell moved substantially away from Rehnquist and Burger and toward Brennan and Marshall. He 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.

TABLE 39

POWELL'S DISAGREEMENT RATES—OCTOBER 1976 & 1977 TERMS

JUSTICE	OCT. 1976 TERM	OCT. 1977 TERM	CHANGE
LIBERALS			
Brennan	41.9%	34.6%	- 7.3%
Marshall	41.8%	34.4%	- 7.4%
CONSERVATIVES			
Burger	16.3%	29.8%	+13.5%
Rehnquist	17.1%	37.1%	+20.0%

Blackmun also moved farther away from Rehnquist and Burger than he had ever been before. Table 40 shows how his disagreement rates with the core conservatives jumped in the mid-seventies.

TABLE 40

BLACKMUN'S DISAGREEMENT RATES—OCTOBER 1973 & 1977 TERMS

JUSTICE	OCT. 1973 TERM	OCT. 1977 TERM	CHANGE
LIBERALS			
Brennan	42.8%	42.2%	- 0.6%
Marshall	42.6%	41.7%	- 0.9%
CONSERVATIVES			
Burger	10.9%	33.9%	+23.0%
Rehnquist	14.7%	41.3%	+26.6%

Blackmun's 33.9% disagreement rate with Burger suggests that the nickname Minnesota Twins had ceased to be appropriate.

In contrast to White, Stewart, Powell, and Blackmun, Stevens moved to the right during the October 1977 Term. After being the third most liberal Justice in the prior two Terms, he moved to the right of White, Stewart, and Powell into the fourth most conservative position, a little to the right of center.

TABLE 41

STEVENS' DISAGREEMENT RATES—OCTOBER 1976 & 1977 TERMS

JUSTICE	OCT. 1976 TERM	OCT. 1977 TERM	CHANGE
LIBERALS			
Brennan	28.5%	35.8%	+7.3%
Marshall	28.9%	32.8%	+3.9%
CONSERVATIVES			
Burger	36.1%	30.7%	-5.4%
Rehnquist	40.2%	34.6%	-5.6%

As a result of all these developments, the alignment on the Court was much different than in prior Terms. There were two conservatives, two liberals, and five Justices in the center. The following table shows the alignment of the Justices during the Term.³⁵

TABLE 42

ALIGNMENT OF JUSTICES—OCTOBER 1977 TERM

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

This pattern suggests that the Burger Court might be entering a new period in which control is passing from the core conservative bloc to the center.³⁶

The balance of power shifted to the left during the Term.³⁷ After seven consecutive Terms in which liberals cast a

35. The arrows indicate the pole toward which the Justice leaned.

36. See WOODWARD & ARMSTRONG, *THE BROTHERS* (1979), which ends with the following sentence: "The center was in control." *Id.* at 444.

37. Liberal victories in divided cases included: *Butz v. Economou*, 438 U.S. 478 (1978) (5-4; violation of civil rights); *Franks v. Delaware*, 438 U.S. 154 (1978) (7-2; criminal procedure; search and seizure); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (6-3; eminent domain); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (7-2; violation of civil rights); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (6-3; procedural due process; cut-off of utilities); *Elkins v. Moreno*, 435 U.S. 647 (1978) (7-2; equal protection; nonresident college tuition); *New York v. Cathedral Academy*, 434 U.S. 125 (1978) (6-3; freedom of religion).

On the other hand, there were many important conservative victories as well during the October 1977 Term. *E.g.*, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)

disproportionate share of the dissents, the distribution of dissents in the October 1977 Term was much more evenly balanced.

TABLE 43
DISSENT RATES—OCTOBER 1976 & 1977 TERMS

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

To summarize, the voting data suggest a general shift to the left during the October 1977 Term. White, Stewart, Powell, and Blackmun moved away from the Rehnquist-Burger pole. Instead of the six conservative-three liberal alignment of prior Terms, the Court shifted toward a 2-5-2 alignment. The conservative wing lost its cohesion, and even the Minnesota Twins, Burger and Blackmun, disagreed in one-third of the cases. Dissents on the left were down, while dissents on the right were up. The overall picture was much more balanced than during prior Terms when the Court was dominated by the four core conservatives.

J. *The October 1978 Term*³⁸

During the final Term of its first decade, the Burger Court shifted back toward the pattern of conservative dominance that had characterized most of its prior Terms.³⁹ The

(5-4; free speech); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (5-3; contract clause); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (5-3; criminal procedure; search and seizure); *Scott v. United States*, 436 U.S. 128 (1978) (7-2; criminal procedure; search and seizure); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (5-4; access to White House tape recordings); *Foley v. Connelie*, 435 U.S. 291 (1978) (6-3; equal protection; aliens); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (6-3; due process; student dismissals).

38. No personnel changes occurred during the Term.

39. Important conservative victories included: *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979) (5-4; criminal procedure; public access to court proceedings); *Califano v. Boles*, 443 U.S. 282 (1979) (5-4; equal protection; sex discrimination); *Mackey v. Montrym*, 443 U.S. 1 (1979) (5-4; due process; suspension of drivers' licenses); *Parham v. J.R.*, 442 U.S. 584 (1979) (6-3; due process; commitment of child); *Person-*

dissent rates of Rehnquist and Burger dropped substantially. In contrast, Marshall's dissent rate increased, and both Brennan and Marshall dissented in more than one-third of the cases they participated in.

TABLE 44

DISSENT RATES—OCTOBER 1978 TERM

JUSTICE	DISSENT RATE	CHANGE
LIBERALS		
Brennan	33.6%	- 0.7%
Marshall	33.8%	+ 5.5%
CONSERVATIVES		
Burger	13.8%	- 8.7%
Rehnquist	19.4%	-10.8%

For the fourth straight Term, Brennan and Marshall occupied one polar extreme, Rehnquist and Burger the other. Rehnquist disagreed with both Brennan and Marshall in more than fifty percent of the cases.

Once again, there was a shuffling of places among the remaining Justices. Powell moved sharply to the right, back into the core of the conservative wing near Burger, as the following table shows.

nel Adm'r v. Feeney, 442 U.S. 256 (1979) (7-2; equal protection; sex discrimination); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979) (5-4; parole of prisoners); Bell v. Wolfish, 441 U.S. 520 (1979) (5-4; free speech; prisoners' rights); Parham v. Hughes, 441 U.S. 347 (1979) (5-4; equal protection; illegitimates); Herbert v. Lando, 441 U.S. 153 (1979) (6-3; free speech; defamation); Ambach v. Norwick, 441 U.S. 68 (1979) (5-4; equal protection; aliens); Scott v. Illinois, 440 U.S. 367 (1979) (5-4; criminal procedure; right to counsel); Rakas v. Illinois, 439 U.S. 128 (1978) (5-4; criminal procedure; "standing" to raise constitutional objections).

There were also several important liberal victories during the Term. *E.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (5-4; race relations; school desegregation); Columbus Bd. of Educ. v. Pennick, 443 U.S. 449 (1979) (7-2; race relations; school desegregation); United Steelworkers v. Weber, 443 U.S. 193 (1979) (5-2; race relations; affirmative action); Califano v. Westcott, 443 U.S. 76 (1979) (5-4; equal protection; sex discrimination); Davis v. Passman, 442 U.S. 228 (1979) (5-4; equal protection; sex discrimination); Caban v. Mohammed, 441 U.S. 380 (1979) (5-4; equal protection; sex discrimination); Hughes v. Oklahoma, 441 U.S. 322 (1979) (7-2; dormant commerce clause); Colautti v. Franklin, 439 U.S. 379 (1979) (6-3; right of privacy; abortions; vagueness).

TABLE 45

POWELL'S DISAGREEMENT RATES—OCTOBER 1977 & 1978 TERMS

JUSTICE	OCT. 1977 TERM	OCT. 1978 TERM	CHANGE
LIBERALS			
Brennan	34.6%	41.1%	+ 6.5%
Marshall	34.4%	41.7%	+ 7.3%
CONSERVATIVES			
Burger	29.8%	13.0%	-16.8%
Rehnquist	37.1%	21.5%	-15.6%

Other Justices moved toward the right as well.⁴⁰ Stewart moved to the right of Blackmun into closer proximity with Rehnquist and Burger. White moved from left to right of center.

Stevens, in contrast, moved to the left. He was the third most liberal Justice, as he had been in his first two Terms.

TABLE 46

STEVENS' DISAGREEMENT RATES—OCTOBER 1977 & 1978 TERMS

JUSTICE	OCT. 1977 TERM	OCT. 1978 TERM	CHANGE
LIBERALS			
Brennan	35.8%	26.6%	-9.2%
Marshall	32.8%	26.2%	-6.6%
CONSERVATIVES			
Burger	30.7%	34.1%	+3.4%
Rehnquist	34.6%	36.8%	+2.2%

Of the five "center" Justices, only Stevens was closer to Brennan and Marshall than to Rehnquist and Burger.

Blackmun, unlike Powell, did not return to the core of the conservative bloc. He occupied a rather moderate position, slightly right of the Court's center. The following table contrasts Blackmun's voting record with those of the other three Nixon appointees.

40. See appendix A, table 10 *infra*.

TABLE 47

DISAGREEMENT RATES—OCTOBER 1978 TERM

	Blackmun	Powell	Burger	Rehnquist
LIBERALS				
Brennan	32.8%	41.1%	46.1%	53.5%
Marshall	30.0%	41.7%	46.2%	53.5%
CONSERVATIVES				
Burger	20.8%	13.0%	—	13.2%
Rehnquist	26.4%	21.5%	—	—

To summarize, the October 1978 Term witnessed a return of the conservative dominance that characterized most of the 1970's. Powell, Stewart, and White moved to the right. Only Stevens moved to the left. Dissent rates on the right dropped, and those on the left remained high. The Burger Court's first decade ended on a strongly conservative note.

III. TRENDS DURING THE FIRST DECADE OF THE BURGER ERA

A. *Voting Patterns*

Conservative dominance was the most salient feature of the Burger Court's first decade. Chief Justice Burger's first Term, the October 1969 Term, saw a sharp turn to the right and a prompt end of the liberal dominance that had characterized the last seven Terms of the Warren era. Conservative dominance was established in Burger's second Term, which saw the arrival of Blackmun. The seating of Powell and Rehnquist during the October 1971 Term made the conservative control even more complete. From that time forward, the Court was largely controlled by a coalition of four core conservatives and two moderate conservatives.

The extent of conservative dominance may be seen by comparing the dissent rates of the Court's liberal and conservative justices.⁴¹ Consider, for example, the dissent rates of the three liberals and four conservatives during the period beginning with the October 1970 Term.

41. See appendix B, tables 1-10 *infra*.

TABLE 48
DATA CONCERNING DISSENTS—OCTOBER 1970-1978 TERMS

	CASES	DISSENTS	DISSENT RATE	AVERAGE
LIBERALS				
Douglas	615	280	45.5%	35.3%
Brennan	1132	386	34.1%	
Marshall	1148	356	31.0%	
CONSERVATIVES				
Blackmun	1133	136	12.0%	14.8%
Powell	934	110	11.8%	
Burger	1162	171	14.7%	
Rehnquist	972	206	21.2%	

Table 48 shows a dramatic imbalance. The average dissent rate of the liberals (35.3%) was nearly two and one-half times as high as that of the core conservatives (14.8%).

Let us examine the composition of the conservative wing that dominated the Court during the first decade of the Burger era. There were four core conservatives, Rehnquist, Burger, Powell, and Blackmun. The two most conservative Justices were William H. Rehnquist and Warren E. Burger. During each Term after the October 1971 Term, Rehnquist was the Court's most conservative member. In fact, during each Term, he disagreed with each of the liberals more than any other Justice did.⁴² Similarly, with the possible exception of the October 1970 and 1971 Terms, Burger was consistently more conservative than any Justice other than Rehnquist. The following table illustrates the tremendous gulf between Rehnquist and Burger and the Court's liberal wing.

42. See appendix A, tables 4-10 *infra*.

TABLE 49

DISAGREEMENT RATES—OCTOBER 1971, 1972, 1973 & 1976 TERMS

OCT. TERM	JUSTICE	DISAGREEMENT RATES			
		Douglas	Brennan	Marshall	Rehnquist
1971	Rehnquist	61.5%	48.5%	53.0%	—
	Burger	60.9%	47.2%	44.2%	9.1%
1972	Rehnquist	66.2%	58.2%	55.2%	—
	Burger	57.9%	48.9%	45.2%	15.8%
1973	Rehnquist	62.7%	53.6%	51.5%	—
	Burger	55.9%	47.1%	47.1%	9.4%
1976	Rehnquist	—	58.2%	56.5%	—
	Burger	—	52.0%	52.0%	10.9%

The disagreement rates between the extremes were exceptionally high.⁴³ When two Justices disagree in six out of every ten cases, there is obviously a profound difference of viewpoint about what the Court should be doing. There have been only three other times in the history of the Court (the 1790's, the Vinson era, and late 1950's) when disagreement rates have approached these levels.

The third core conservative of the 1970's was Lewis F. Powell, Jr. He agreed with Rehnquist and Burger much more than with the liberals.

TABLE 50

POWELL'S DISAGREEMENT RATES—OCTOBER 1971-1978 TERMS

OCT. TERM	LIBERALS			CONSERVATIVES	
	Douglas	Brennan	Marshall	Burger	Rehnquist
1971	58.1%	50.8%	54.0%	7.9%	11.7%
1972	51.5%	42.6%	38.6%	15.9%	19.8%
1973	50.4%	41.4%	40.2%	14.3%	14.5%
1974	53.0%	40.4%	30.4%	12.2%	22.6%
1975		40.7%	38.6%	9.6%	18.5%
1976		41.9%	41.8%	16.3%	17.1%
1977		34.6%	34.4%	29.8%	37.1%
1978		41.1%	41.7%	13.0%	21.5%
Average	52.5%	41.2%	39.1%	15.3%	20.8%

43. The 66.2% disagreement rate between Rehnquist and Douglas during the October 1973 Term was the highest one-Term disagreement rate since 1793. This conclusion is based on studies of disagreement rates undertaken by the author.

As Table 50 shows, Powell sided decisively with the conservatives in all Terms except the October 1977 Term. He was closer to Burger than to any other Justice.⁴⁴ Clearly Powell deserves the overall label of core conservative. The deeply conservative character of the Burger Court is dramatically illustrated by the fact that Powell had the lowest average dissent rate of all the Justices during the 1970's.

The fourth core conservative was Harry A. Blackmun. During his first Term, Blackmun was arguably the Court's most conservative member. Thereafter he and Powell normally held down the third and fourth most conservative positions. Toward the end of the 1970's, Blackmun's ties with the conservatives loosened considerably, and later historians may conclude that he was a moderate conservative rather than a core conservative by the end of this period.

TABLE 51

BLACKMUN'S DISAGREEMENT RATES—OCTOBER 1970-1978 TERMS

OCT. TERM	LIBERALS			CONSERVATIVES	
	Douglas	Brennan	Marshall	Burger	Rehnquist
1970	53.9%	41.5%	38.7%	4.7%	
1971	57.9%	42.4%	39.4%	11.0%	12.5%
1972	54.3%	41.4%	39.1%	10.9%	24.8%
1973	51.5%	42.8%	42.6%	10.9%	14.7%
1974	47.7%	30.3%	30.9%	13.0%	17.9%
1975		41.2%	39.1%	13.2%	21.3%
1976		40.0%	39.8%	16.1%	21.1%
1977		42.2%	41.7%	33.9%	41.3%
1978		32.8%	30.0%	20.8%	26.4%
Average	53.2%	39.3%	38.0%	14.8%	22.8%

The following table charts the voting relationship of the Minnesota Twins, Burger and Blackmun. The two began the 1970's in close alignment. They drifted apart a little during the mid-1970's. Toward the end of the 1970's, their disagreement rate increased substantially, making their old nickname no longer apt.

44. In fact, Powell was closer to Burger than was Blackmun, Burger's Minnesota Twin.

TABLE 52
DISAGREEMENT RATES BETWEEN BURGER & BLACKMUN

TERM	DISAGREEMENT RATE
Oct. 1970	4.7%
Oct. 1971	11.0%
Oct. 1972	10.9%
Oct. 1973	10.9%
Oct. 1974	13.0%
Oct. 1975	13.2%
Oct. 1976	16.1%
Oct. 1977	33.9%
Oct. 1978	20.8%

The dominance of the four Nixonian core conservatives was secured by the support of the Court's two moderate conservatives, Byron R. White and Potter Stewart. White began his career as a moderate and remained pretty much in the center of the Warren Court, despite some tendency toward the right. Soon after the appointment of Burger, White moved sharply to the right. By the October 1972 Term, he was squarely in the center of the conservative bloc to the right of both Blackmun and Powell. Thereafter he moved back toward the center. In the October 1977 Term, he was arguably a little left of center.

TABLE 53
WHITE'S DISAGREEMENT RATES—OCTOBER 1969-1978 TERMS

OCT. TERM	LIBERALS		CONSERVATIVES	
	Douglas	Brennan	Burger	Rehnquist
1969	35.3%	18.4%	27.1%	—
1970	46.1%	31.1%	15.1%	—
1971	46.1%	29.1%	22.5%	24.2%
1972	57.2%	42.9%	19.6%	19.7%
1973	44.9%	30.0%	18.6%	25.4%
1974	46.7%	27.9%	16.3%	22.0%
1975	—	37.0%	15.2%	23.2%
1976	—	38.1%	20.8%	28.2%
1977	—	31.5%	34.9%	40.3%
1978	—	30.7%	24.8%	32.0%
Average	46.4%	32.2%	21.3%	28.0%

White's overall pattern was conservative rather than liberal.

Now let us examine the voting pattern of Stewart, the

Court's second moderate conservative. When he first arrived on the Court in 1958, Stewart joined the coalition of moderates and conservatives who briefly rolled back the liberal activism that had emerged during the 1954-1957 period.⁴⁵ After the decimation of the conservative wing in 1962 and the establishment of the five-vote liberal majority, Stewart became the Court's second most conservative member and remained in that position throughout the 1962-1969 period of liberal dominance. During the first decade of the Burger era, Stewart continued to be a moderate conservative. He was closer to the liberals than the four core conservatives were, but he normally leaned toward the conservative rather than the liberal side.

TABLE 54

STEWART'S DISAGREEMENT RATES—OCTOBER 1969-1978 TERMS

OCT. TERM	LIBERALS		CONSERVATIVES	
	Douglas	Brennan	Burger	Rehnquist
1969	38.8%	27.6%	20.0%	—
1970	49.5%	34.6%	18.7%	—
1971	35.7%	24.8%	29.9%	32.3%
1972	40.3%	36.6%	33.6%	38.3%
1973	46.2%	37.3%	19.4%	21.2%
1974	42.1%	36.1%	22.0%	29.3%
1975	—	40.9%	24.8%	25.5%
1976	—	40.3%	23.6%	21.3%
1977	—	32.7%	29.7%	34.4%
1978	—	38.1%	19.5%	22.0%
Average	42.0%	35.3%	24.4%	27.9%

As the table suggests, Stewart was close to the center in the October 1971, 1972, and 1977 Terms. During the other seven Terms he was substantially right of center.

John Paul Stevens was not on the Court long enough to allow firm conclusions about his voting patterns. During his first two Terms he was the Court's third most liberal member. In his third Term, he moved substantially to the right. In his fourth Term, he once again was the third most liberal Justice.

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

TABLE 55

STEVENS' DISAGREEMENT RATES—OCTOBER 1975-1978 TERMS

OCT. TERM	LIBERALS		CONSERVATIVES	
	Brennan	Marshall	Burger	Rehnquist
1975	36.1%	38.6%	31.9%	33.3%
1976	28.5%	28.9%	36.1%	40.2%
1977	35.8%	32.8%	30.7%	34.6%
1978	26.6%	26.2%	34.1%	36.8%
Average	31.1%	30.8%	33.3%	36.4%

Thus, the preliminary indications suggested that Stevens was a moderate with a slight inclination toward the left.

The Court's liberal wing was reduced to minority status during the 1970's, after being dominant during the 1962-1969 period. The liberals' sudden fall from control and their discontent with the decisions of the Burger Court's dominant conservative wing are illustrated in the following table.

TABLE 56

DISSENT RATES OF THE LIBERALS—OCTOBER 1967-1978 TERMS

OCT. TERM	Douglas	Brennan	Marshall	ERA
1967	15.2%	3.7%	1.6%	Liberal Dominance (1962-69)
1968	18.3%	1.9%	6.7%	
1969	27.9%	12.5%	5.1%	Transition
1970	41.3%	29.6%	27.1%	Conservative Dominance (1970-78)
1971	43.8%	31.5%	25.6%	
1972	50.7%	34.8%	32.6%	
1973	45.6%	37.1%	35.5%	
1974	44.9%	28.7%	24.4%	
1975		38.4%	34.8%	
1976		37.3%	35.5%	
1977		34.3%	28.3%	
1978		33.6%	33.8%	

Douglas' 50.7% dissent rate during the October 1972 Term was the highest since 1793. The dissent rates of Brennan (38.4%; October 1975 Term) and Marshall (35.5%; October 1973 and 1976 Terms) reached record levels for them. Beyond doubt, the liberals were unhappy with the trend of Burger Court decisions.

B. *Substantive Legal Trends*

This article has not analyzed the legal developments that occurred during the Burger Court's first decade of conservative dominance. Nevertheless, the reader is entitled at least to a brief summary of legal trends. In general, the conservative voting patterns that have been described in this article were reflected in conservative substantive and procedural legal developments. Let us examine, first, 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.

During its first decade, the Burger Court 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 clause⁴⁶ prohibits only intentional racial discrimination,⁴⁷ by tightening the state action requirement,⁴⁸ and by restricting the power of federal courts to issue effective remedies.⁴⁹ After an initial period of relative liberalism,⁵⁰ the Court laid to waste the most important civil rights statute, Title VII of the Civil Rights Act of 1964,⁵¹ rolling back major advances by lower federal courts. Having effectively shut the

46. U.S. CONST. amend. XIV, §1.

47. *E.g.*, *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252 (1977) (zoning); *Washington v. Davis*, 426 U.S. 229 (1976) (employment tests); *Milliken v. Bradley* (I), 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).

48. *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).

49. *E.g.*, *Dayton Bd. of Educ. v. Brinkman* (I), 433 U.S. 406 (1977) (school desegregation); *Austin Independent School Dist. v. United States*, 429 U.S. 990 (1976) (same); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (same); *NAACP v. Federal Power Comm'n*, 425 U.S. 662 (1976) (federal licensees); *Milliken v. Bradley* (I), 418 U.S. 717 (1974) (school desegregation); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) (selection of government officials).

50. *E.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (retroactive seniority); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (written tests; back pay); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1972) (written tests).

51. See in chronological order, *International Bhd. 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 and national minorities has slowed to a trickle.

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 decade.⁵² The cumulative effect of the decade's decisions, however, was a grievous weakening of the advance toward racial justice that characterized prior years.

The Burger Court answered the Warren Court's criminal procedure revolution by firmly embracing the "law and order" principles that President Nixon espoused and explicitly sought in his appointees. The Court terminated the Warren Court's equal protection revolution on behalf of indigent criminal defendants.⁵³ It limited the right to counsel.⁵⁴ It undercut *Miranda* in a series of cases.⁵⁵ It restricted the exclusionary rule⁵⁶ and otherwise eroded the fourth amendment.⁵⁷ It eliminated safeguards against mistaken identifications.⁵⁸ It watered down jury trial requirements.⁵⁹ It reinstated capital punishment.⁶⁰ It drastically reduced the availability of habeas

52. *E.g.*, *Dayton Bd. of Educ. v. Brinkman (II)*, 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); *Castenada v. Partida*, 430 U.S. 482 (1977) (jury discrimination); *Runyan 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).

53. *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).

54. *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).

55. *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).

56. *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).

57. *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).

58. *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).

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

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

corpus.⁶¹ 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 libertarian decisions were also issued, the overall trend was undoubtedly conservative.

The Burger Court's record in free speech cases during its first decade was mixed. In several important areas, characteristic conservative retrenchment took place. The Court rolled back the Warren Court's "public defamation revolution."⁶² It restored the ability of government officials to prosecute obscenity effectively.⁶³ It undercut the access of relatively indigent, grass-roots groups to means for expression of their views.⁶⁴ It terminated the Court's role as guardian of public demonstrators.⁶⁵ Most notoriously, it conducted a vendetta against the press, substantially curtailing the immunities and access rights of news media.⁶⁶ On the other hand, the Court held the line against prior restraints⁶⁷ and even engaged in an activist campaign to expand protections for corporate speech⁶⁸ and commercial speech.⁶⁹ Overall, the Court's commitment to the first amendment was spotty at best.

The Burger Court gained something of a reputation for liberal activism in one noteworthy line of cases involving the right of privacy. The Court held, for the first time, that preg-

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

62. *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).

63. *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 Foundation*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

64. *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).

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

66. *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).

67. *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).

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

69. *E.g.*, *Bates v. State Bar*, 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. State Bar*, 436 U.S. 447 (1978).

nant women have a constitutional right to an abortion⁷⁰ and issued a variety of secondary decisions implementing⁷¹ and eroding⁷² that right. The Court confirmed and extended the constitutional right of privacy in cases involving the use of contraceptives,⁷³ the decision to marry,⁷⁴ and the decision of family members to live together.⁷⁵ Beyond that, however, the Court adopted a restrained position concerning the right of privacy⁷⁶ 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"⁷⁷

The legislative reapportionment revolution of which Earl Warren was so proud⁷⁸ held up reasonably well during the first decade of the Burger era.⁷⁹ Yet, the patterns of conservatism and retrenchment characteristic of the Burger Court were present in this area as well. The Court softened the one-person-one-vote rule by allowing minor deviations (up to ten percent) without any justification⁸⁰ and substantial deviations (up to twenty percent) where supported by rational grounds⁸¹ and by stressing deference to state legislative judgments.⁸² The Court shut down challenges against multi-member

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

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

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

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

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

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

76. *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).

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

78. *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).

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

80. *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).

81. *E.g.*, *Mahan v. Howell*, 410 U.S. 315 (1973) (16.4% deviation); *Abate v. Mundt*, 403 U.S. 182 (1971) (12% deviation).

82. *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 re federal voting districts).

electoral districts by formulating an extremely loose test.⁸³ Finally, the Court continued the restrained pattern set by the Warren Court in racial gerrymander cases.⁸⁴ All in all, the Burger Court's decisions in this area "trace a retreat to the safety of judicial noninvolvement."⁸⁵

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 adversely affecting the poor. It undercut the foundations of poverty law by holding that poverty is not a suspect classification⁸⁶ and denying that subsistence benefits are a fundamental right.⁸⁷ It retrenched in the area of equal protection for indigent criminal defendants.⁸⁸ It restricted the procedural due process rights of welfare recipients,⁸⁹ debtors,⁹⁰ and other persons harmed by government action.⁹¹ It set aside the Warren Court's rule that "the government always wins" in antitrust cases.⁹² It dramatically restricted the rights of indigents to free access to judicial proceedings.⁹³ Moreover, a number of cases suggested renewed conservative activism, *i.e.*, a willingness on the part of the Court to intervene actively in

83. *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).

84. *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).

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

86. *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).

87. *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).

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

89. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Richardson v. Perales*, 402 U.S. 339 (1971).

90. *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).

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

92. 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 (1977).

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

order to advance the interests of the rich.⁹⁴ The overall record was deeply conservative.

Perhaps the most widely noted trend in the first decade of the Burger era was the Court's insistence upon "closing the courthouse doors," *i.e.*, restricting access to federal courts and availability of federal remedies.⁹⁵ The Court used traditional threshold doctrines to create formidable obstacles to judicial review. The rules of standing were tightened drastically and constitutionalized.⁹⁶ The "case or controversy"⁹⁷ and justiciability⁹⁸ doctrines were used to dismiss important cases involving alleged abuse of governmental power. The availability of federal habeas corpus was reduced substantially.⁹⁹ The abstention doctrine became a major barrier to federal litigation.¹⁰⁰ 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.¹⁰¹ Rules concerning pendant jurisdiction were tightened.¹⁰² Those litigants who managed to survive the gauntlet of threshold obstacles

94. *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).

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

96. *E.g.*, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *see, e.g.*, Sedler *Standing and the Burger Court*, 30 *RUTGERS L. REV.* 863 (1977).

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

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

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

100. The leading case in this important area was *Younger v. Harris*, 401 U.S. 37 (1971). The progeny of *Younger* included: *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.

101. *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. CINN. L. REV.* 1 (1978) (concluding that private causes of action are an "endangered species").

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

found themselves up against newly imposed procedural obstacles.¹⁰³ Perhaps most important of all, the Court imposed far-reaching restrictions on the ability of lower federal courts to issue effective remedies.¹⁰⁴ 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 the instances of substantive retrenchment mentioned above.

IV. CONCLUSION

The 1969-1972 period saw one of the most decisive short-term revolutions in personnel in the history of the United States Supreme Court. During the October 1968 Term, the liberals exercised total dominance. After a single Term of transition, the conservatives attained dominance in the October 1970 Term and held it throughout the 1970's except during the October 1977 Term. Indeed, the three remaining personnel changes—the arrival of Rehnquist and Powell, and the departure of Douglas—merely made the conservative dominance more complete. A coalition of four core conservatives (Rehnquist, Burger, Powell, and Blackmun) and two moderate conservatives (White and Stewart) controlled the direction of the Court. The liberal minority functioned as a loyal opposition, expressing their losing views in hundreds of dissenting opinions.

103. *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).

104. *E.g.*, *Rizzo v. Goode*, 423 U.S. 362 (1975); *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. CIV. RIGHTS—CIV. LIB. 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).

APPENDIX A

TABLE 1
DISAGREEMENT RATES—OCTOBER 1969 TERM

Douglas	^a _c	22.1 19/86	18.2 14/77	35.3 30/85	35.3 30/85	38.8 33/85	41.2 35/85	48.8 41/84
Brennan	^a #		6.4 5/78	37.9 33/87	18.4 16/87	27.6 24/87	27.6 24/87	39.5 34/86
Marshall	^a #			28.6 22/77	15.4 12/78	24.7 19/77	20.8 16/77	36.4 28/77
Black	^a #				31.4 27/86	36.0 31/86	39.5 34/86	37.6 32/85
White	^a #					24.4 21/86	19.8 17/86	27.1 23/85
Stewart	^a #						19.8 17/86	20.0 17/85
Harlan	^a #							17.6 15/85
Burger	^a #							

a Total number of cases in which justice participated

b Disagreement rate

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

TABLE 2
DISAGREEMENT RATES—OCTOBER 1970 TERM

Douglas	^c #	23.3 24/103	22.5 23/102	35.0 36/103	46.6 48/103	49.5 51/103	46.1 47/102	52.4 54/103	53.9 55/102	
Brennan	^c #	14.2 15/106		33.6 36/107	38.3 41/107	34.6 37/107	31.1 33/106	42.1 45/107	41.5 44/106	
Marshall	^c #	35.8 38/106			29.9 32/107	32.1 34/106	34.9 37/106	38.7 41/106	40.0 42/105	
Black	^c #	37.4 40/107				38.3 41/107	34.0 36/106	25.2 27/107	29.0 31/107	
Harlan	^c #	19.6 21/107					28.0 30/107	21.5 23/107	21.7 23/106	
Stewart	^c #	23.6 25/106						18.7 20/107	19.8 21/106	
White	^c #	15.1 16/106							15.2 16/105	
Burger	^c #	4.7 5/106								
Blackmun	^c #									

- a Total number of cases in which justice participated
- b Disagreement rate
- c Ratio of disagreements to number of cases in which both justices participated

TABLE 3
DISAGREEMENT RATES—OCTOBER 1971 TERM

Douglas	^a ^b # ^c	23.0 29/126	24.2 31/128	35.7 45/126	46.1 59/128	57.9 73/126	60.9 78/128	58.1 36/62	61.5 36/62
Brennan	^a ^b #		18.1 23/127	24.8 31/125	29.1 37/127	42.4 53/125	47.2 60/127	50.8 31/61	48.5 32/66
Marshall	^a ^b #			18.9 24/127	31.0 40/129	39.4 50/127	44.2 57/129	54.0 34/63	53.0 35/66
Stewart	^a ^b #				22.0 28/127	27.2 34/125	29.9 38/127	31.7 20/63	32.3 21/65
White	^a ^b #					15.7 20/127	22.5 29/129	28.6 18/63	24.2 16/66
Blackmun	^a ^b #						11.0 14/127	19.7 12/61	12.5 8/64
Burger	^a ^b #							7.9 5/63	9.1 6/66
Powell	^a ^b #								11.7 7/60
Rehnquist	^a ^b #								

a Total number of cases in which justice participated

b Disagreement rate

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

TABLE 4
DISAGREEMENT RATES—OCTOBER 1972 TERM

Douglas	^c _b #c	27.4 33/135	23.7 32/135	40.3 54/134	51.5 68/132	54.3 75/138	57.2 79/138	57.9 81/140	66.2 92/139
Brennan	^c _b #		12.8 16/125	36.6 48/131	42.6 55/129	41.4 55/133	42.9 57/133	48.9 66/135	58.2 78/134
Marshall	^c _b #			34.9 45/129	38.6 49/127	39.1 52/133	40.6 54/133	45.2 61/135	55.2 74/134
Stewart	^c _b #				26.6 34/128	30.1 40/133	38.6 51/132	33.6 45/134	38.3 51/133
Powell	^c _b #					17.4 23/132	20.8 27/130	15.9 21/132	19.8 26/131
Blackmun	^c _b #						17.6 24/136	10.9 15/138	24.8 34/137
White	^c _b #							19.6 27/138	19.7 27/137
Burger	^c _b #								15.8 22/139
Rehnquist	^c _b #								

a Total number of cases in which justice participated

b Disagreement rate

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

TABLE 5
DISAGREEMENT RATES—OCTOBER 1973 TERM

Douglas	^c / _a #	19.9 27/136	21.6 29/134	44.9 61/136	46.2 60/130	50.4 65/129	51.5 69/134	55.9 76/136	62.7 84/134
Brennan	^c / _a #		7.2 10/138	30.0 42/140	37.3 50/134	41.4 55/133	42.8 59/138	47.1 66/140	53.6 74/138
Marshall	^c / _a #			33.3 46/138	34.8 46/132	40.2 53/132	42.6 58/136	47.1 65/138	51.5 70/136
White	^c / _a #				24.6 33/134	21.8 29/133	19.6 27/138	18.6 26/140	25.4 35/138
Stewart	^c / _a #					14.8 19/128	20.5 27/132	19.4 26/134	21.2 28/132
Powell	^c / _a #						18.8 25/133	14.3 19/133	14.5 19/131
Blackmun	^c / _a #							10.9 15/138	14.7 20/136
Burger	^c / _a #								9.4 13/138
Rehnquist	^c / _a #								

a Total number of cases in which justice participated

b Disagreement rate

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

TABLE 6
DISAGREEMENT RATES—OCTOBER 1974 TERM

Douglas	% #	21.5 23/107	29.0 31/107	42.1 45/107	46.7 50/107	47.7 51/107	53.0 53/100	56.1 60/107	60.7 65/107
Brennan	% #		10.7 13/122	36.1 44/122	27.9 34/122	30.3 37/122	40.4 46/114	41.0 50/122	46.7 57/122
Marshall	% #			26.8 33/123	24.4 30/123	30.9 38/123	30.4 35/115	36.6 45/123	42.3 52/123
Stewart	% #				25.2 31/123	25.2 31/123	15.7 18/115	22.0 27/123	29.3 36/123
White	% #					17.9 22/123	18.3 21/115	16.3 20/123	22.0 27/123
Blackmun	% #						16.5 19/115	13.0 16/123	17.9 22/123
Powell	% #							12.2 14/115	22.6 26/115
Burger	% #								13.8 17/123
Rehnquist	% #								

- a Total number of cases in which justice participated
- b Disagreement rate
- c Ratio of disagreements to number of cases in which both justices participated

TABLE 7
DISAGREEMENT RATES—OCTOBER 1975 TERM

Brennan	% #	5.9 8/135	36.1 26/72	40.9 56/137	37.0 51/138	41.2 56/136	40.7 55/135	47.8 66/138	58.7 81/138
Marshall	% #		38.6 27/70	37.3 50/134	34.8 47/135	39.1 52/133	38.6 51/132	44.4 60/135	55.6 75/135
Stevens	% #			33.3 24/72	33.3 24/72	32.4 23/71	25.7 18/70	31.9 23/72	33.3 24/72
Stewart	% #				29.9 41/137	25.2 34/135	19.3 26/135	24.8 34/137	25.5 35/137
White	% #					16.9 23/136	17.8 24/135	15.2 21/138	23.2 32/138
Blackmun	% #						15.8 21/133	13.2 18/136	21.3 29/136
Powell	% #							9.6 13/135	18.5 25/135
Burger	% #								10.9 15/138
Rehnquist	% #								

a Total number of cases in which justice participated

b Disagreement rate

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

TABLE 8
DISAGREEMENT RATES—OCTOBER 1976 TERM

Brennan	^c / _b # ^c	7.3 9/124	28.5 35/123	38.1 48/126	40.3 50/124	40.0 50/125	41.9 52/124	52.0 65/125	58.2 64/110
Marshall	^c / _b #		28.9 35/121	34.7 43/124	36.9 45/122	39.8 49/123	41.8 51/122	52.0 64/123	56.5 61/108
Stevens	^c / _b #			26.8 33/123	27.3 33/121	31.1 38/122	28.1 34/121	36.1 44/122	40.2 43/107
White	^c / _b #				28.2 35/124	17.6 22/125	20.2 25/124	20.8 26/125	28.2 31/110
Stewart	^c / _b #					25.2 31/123	20.3 25/123	23.6 29/123	21.3 23/108
Blackmun	^c / _b #						19.5 24/123	16.1 20/124	21.1 23/109
Powell	^c / _b #							16.3 20/123	17.1 21/123
Burger	^c / _b #								10.9 12/110
Rehnquist	^c / _b #								

a Total number of cases in which justice participated

b Disagreement rate

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

TABLE 9
DISAGREEMENT RATES—OCTOBER 1977 TERM

Brennan	^c _b # ^c	7.5 8/106	31.5 34/108	32.7 35/107	34.6 36/104	35.8 38/106	42.2 38/90	54.6 59/108	58.3 63/108
Marshall	^c _c #		29.9 38/127	29.4 37/126	34.4 42/122	32.8 41/125	41.7 45/108	45.7 58/127	53.5 68/127
White	^c _c #			31.3 40/128	32.3 40/124	34.6 44/127	28.4 31/109	34.9 45/129	40.3 52/129
Stewart	^c _c #				29.0 36/124	21.4 27/126	29.6 32/108	29.7 38/128	34.4 44/128
Powell	^c _c #					33.9 42/124	23.8 25/105	29.8 37/124	37.1 46/124
Stevens	^c _c #						34.6 37/107	30.7 39/127	34.6 44/127
Blackmun	^c _c #							33.9 37/109	41.3 45/109
Burger	^c _c #								21.7 28/129
Rehnquist	^c _c #								

a Total number of cases in which justice participated

b Disagreement rate

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

TABLE 10
DISAGREEMENT RATES—OCTOBER 1978 TERM

Brennan	^a #	7.0 9/128	26.6 33/124	30.7 39/127	32.8 42/128	38.1 48/126	41.1 44/107	46.1 59/128	53.5 68/127
Marshall	^a #		26.2 33/126	29.5 38/129	30.0 39/130	39.8 51/128	41.7 45/108	46.2 60/130	53.5 69/129
Stevens	^a #			32.8 41/125	31.0 39/126	29.8 37/124	36.2 38/105	34.1 43/126	36.8 46/125
White	^a #				16.3 21/129	32.3 41/127	28.0 30/107	24.8 32/129	32.0 41/128
Blackmun	^a #					29.7 38/128	25.9 28/108	20.8 27/130	26.4 34/129
Stewart	^a #						21.5 23/107	19.5 25/128	22.0 28/127
Powell	^a #							15.0 14/108	21.5 23/107
Burger	^a #								13.2 17/129
Rehnquist	^a #								

a Total number of cases in which justice participated

b Disagreement rate

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

APPENDIX B

TABLE 1

DISSENT RATES—OCTOBER 1969 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	86	24	27.9%	+ 5.7%
Brennan	88	11	12.5%	+10.5%
Marshall	78	4	5.1%	- 1.6%
Black	87	24	27.6%	- 2.7%
White	87	9	10.3%	- 6.0%
Stewart	87	17	19.5%	-13.8%
Harlan	87	13	14.9%	-17.8%
Burger	86	25	29.1%	—%

TABLE 2

DISSENT RATES—OCTOBER 1970 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	104	43	41.3%	+13.4%
Brennan	108	32	29.6%	+17.1%
Marshall	107	29	27.1%	+22.0%
Black	108	27	25.0%	- 2.6%
Harlan	108	19	17.6%	+ 2.7%
Stewart	108	16	14.8%	- 4.7%
White	107	18	16.8%	+ 6.5%
Burger	108	14	13.0%	-16.1%
Blackmun	107	18	16.8%	—%

TABLE 3
 DISSENT RATES—OCTOBER 1971 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	128	56	43.8%	+ 2.5%
Brennan	127	40	31.5%	+ 1.9%
Marshall	129	33	25.6%	- 1.5%
Stewart	127	15	11.8%	- 3.0%
White	129	13	10.1%	- 6.7%
Blackmun	127	21	16.5%	- 0.3%
Burger	129	24	18.6%	- 5.6%
Powell	63	12	19.0%	—%
Rehnquist	66	11	16.7%	—%

TABLE 4
 DISSENT RATES—OCTOBER 1972 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	140	71	50.7%	+ 6.9%
Brennan	135	47	34.8%	+ 3.3%
Marshall	135	44	32.6%	+ 7.0%
Stewart	134	37	27.6%	+15.8%
Powell	132	14	10.6%	- 8.4%
Blackmun	138	12	8.7%	- 7.8%
White	138	18	13.0%	+ 2.9%
Burger	140	19	13.6%	- 5.0%
Rehnquist	139	34	24.5%	+ 7.8%

TABLE 5
DISSENT RATES—OCTOBER 1973 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	136	62	45.6%	- 5.1%
Brennan	140	52	37.1%	+ 2.3%
Marshall	138	49	35.5%	+ 2.9%
White	140	19	13.6%	+ 0.6%
Stewart	134	16	11.9%	-15.7%
Powell	133	13	9.8%	- 0.8%
Blackmun	138	14	10.1%	+ 1.4%
Burger	140	17	12.1%	- 1.5%
Rehnquist	138	22	15.9%	- 8.6%

TABLE 6
DISSENT RATES—OCTOBER 1974 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	107	48	44.9%	- 0.7%
Brennan	122	35	28.7%	- 8.4%
Marshall	123	30	24.4%	-10.9%
Stewart	123	21	17.1%	+ 5.2%
White	123	14	11.4%	- 2.2%
Blackmun	123	10	8.1%	- 2.0%
Powell	115	13	11.3%	+ 1.5%
Burger	123	16	13.0%	+ 0.9%
Rehnquist	123	23	18.7%	+ 2.8%

TABLE 7
 DISSENT RATES—OCTOBER 1975 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Brennan	138	53	38.4%	+ 9.7%
Marshall	135	47	34.8%	+10.4%
Stevens	72	19	26.4%	—%
Stewart	137	25	18.2%	+ 1.1%
White	138	18	13.0%	+ 1.6%
Blackmun	136	15	11.0%	+ 2.9%
Powell	135	6	4.4%	- 6.9%
Burger	138	13	9.4%	- 3.6%
Rehnquist	138	28	20.3%	+ 1.6%

TABLE 8
 DISSENT RATES—OCTOBER 1976 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Brennan	126	47	37.3%	-1.1%
Marshall	124	44	35.5%	+0.7%
Stevens	123	25	20.3%	-6.1%
Stewart	124	22	17.7%	+0.5%
White	126	17	13.5%	+0.5%
Blackmun	125	13	10.4%	-0.6%
Powell	124	13	10.5%	+6.1%
Burger	125	21	16.8%	+7.4%
Rehnquist	110	24	21.8%	+1.5%

TABLE 9
DISSENT RATES—OCTOBER 1977 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Brennan	108	37	34.3%	-3.0%
Marshall	127	36	28.3%	-7.2%
White	129	27	20.9%	+7.4%
Stewart	128	20	15.6%	-2.1%
Powell	124	21	16.9%	+6.4%
Stevens	127	26	20.5%	-0.2%
Blackmun	109	20	18.3%	+7.9%
Burger	129	29	22.5%	+5.7%
Rehnquist	129	39	30.2%	+8.4%

TABLE 10
DISSENT RATES—OCTOBER 1978 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Brennan	128	43	33.6%	- 0.7%
Marshall	130	44	33.8%	+ 5.5%
Stevens	126	32	25.4%	+ 4.9%
White	129	17	13.2%	- 7.7%
Blackmun	130	13	10.0%	- 8.3%
Stewart	128	25	19.5%	+ 3.9%
Powell	108	18	16.7%	- 0.2%
Burger	130	18	13.8%	- 8.7%
Rehnquist	129	25	19.4%	-10.8%