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SUPREME COURT HISTORY PROJECT: THE WARREN COURT 1962-1969

THE THIRD PERIOD OF THE WARREN COURT: LIBERAL DOMINANCE (1962-1969)*

Russell W. Galloway, Jr.**

INTRODUCTION

This article discusses voting patterns on the United States Supreme Court during the October 1961 through 1968 Terms, a period in which liberal activists exercised almost complete control over the Court's decisions. This is the last in a series of three articles which examine Supreme Court voting patterns during the entire Warren era (1953-1969). The first article discussed the "early years" of the Warren era (the October 1953, 1954, 1955, and 1956 Terms), that witnessed an "emergence of judicial liberalism."¹ The second article discussed the "middle years" of the Warren era (the October 1957, 1958, 1959, and 1960 Terms), that witnessed an "abatement in the liberal trend."² This article discusses the period of liberal dominance that began in the October 1961 Term and continued to the end of the Warren era in the summer of 1969.

The political mood in the nation at large during the early 1960's provided a favorable context for the Court's liberal activism. A swing toward reform began as early as November 1958, when the Democratic Party swept the off-year elections. The trend accelerated during 1960 when John F. Kennedy

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1. Galloway, *The Early Years of the Warren Court: Emergence of Judicial Liberalism (1953-1957)*, 18 SANTA CLARA L. REV. 609 (1978). The introduction to the first article explains the statistical method used in the three articles.

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

was elected President and the civil rights movement gave rise to sit-ins throughout the South. In the political arena, the liberal trend continued for a number of years, achieving its most noteworthy victories in 1964 with the landslide election of President Lyndon B. Johnson and the enactment of far-reaching reform legislation such as the Civil Rights Act of 1964³ and the Economic Development Act of 1964.⁴ Toward the end of the period covered by this article, the mood in the nation moved back to the right in response to accelerating social unrest.

In early 1961, at the end of the period covered by the second article in this series, a coalition of moderates and conservatives held a narrow 5-4 margin over the Court's liberals.⁵ The conservative wing had three members, John Marshall Harlan, Felix Frankfurter, and Charles E. Whittaker. At the other end of the spectrum were four liberals, William O. Douglas, Hugo L. Black, Earl Warren, and William J. Brennan, Jr. Between the two wings were Tom C. Clark and Potter Stewart, two moderate conservatives, who held the deciding votes in all cases involving straight liberal-conservative bloc voting. The October 1957 through 1960 Terms had witnessed a resurgence of judicial conservatism, but the conservative edge was extremely precarious: in order to prevail over the liberals, the three-vote conservative bloc had to capture both moderate conservatives. Moreover, any personnel change involving the replacement of either a conservative or a moderate by a liberal would swing the Court's balance of power to the liberals.

The attempt to understand the "victory" of judicial liberalism during the early 1960's must begin with a discussion of two personnel changes that occurred in 1962. In April 1962, the Court's three-vote conservative bloc was decimated by Whittaker's retirement (April 1, 1962) and the onset of Frankfurter's final illness (April 30, 1962). Suddenly the conservative forces were reduced from three to one.⁶ On April 16, 1962, Whittaker was replaced by Byron R. White, a moderate conservative with some liberal tendencies, particularly in the race

3. 42 U.S.C. §§ 2000a - 2000h (1976 & Supp. II 1978).

4. 42 U.S.C. §§ 2701 - 2994 (1976).

5. Galloway, *supra* note 2, at 972.

6. By way of contrast, it is interesting to note that just before the start of the Warren era, seven of the nine justices were moderate to conservative (Vinson, Burton, Minton, Clark, Reed, Frankfurter, and Jackson). Galloway, *supra* note 1, at 611.

discrimination area. The White appointment, however, did not secure a liberal majority, since a potential five-vote coalition of moderates and conservatives was still present (Clark, White, Stewart, Harlan and Frankfurter).

The second personnel change of 1962 was one of the most important in the history of the United States Supreme Court. After being absent from the Court since April 30, Frankfurter, the leader of the conservative wing, resigned on August 28, 1962. To fill the vacancy, President Kennedy appointed Arthur J. Goldberg, a liberal. With the seating of Goldberg on the first day of the October 1962 Term, the liberal wing attained a five-vote majority (Douglas, Black, Warren, Brennan, and Goldberg).⁷ No longer would the liberals have to tailor their decisions to pick up at least one vote from the conservative side. Henceforth, the contours of the Court's decisions lay entirely within the control of the liberals.⁸

In the ensuing pages, this article will examine the voting patterns on the Court during the liberal period that began in the October 1961 Term and ended with the resignation of Chief Justice Warren in June 1969.

7. It is probably safe to say that at no time in its previous history had the United States Supreme Court had so liberal a panel of justices. The "Roosevelt Court" during the 1940's had only a four-vote liberal bloc (Black, Douglas, Murphy, and Rutledge). The Court of the Progressive Era managed to muster a four-vote liberal bloc on several occasions (Harlan, Holmes, Moody, and McKenna in 1906; Harlan, Holmes, Hughes, and McKenna in 1910; Holmes, Brandeis, Clarke, and McKenna from 1916 through 1921). The Waite Court's liberal wing peaked at four (Davis, Miller, Waite, and Bradley). It is necessary to go back to the age of Andrew Jackson to find a Supreme Court with a liberal majority, and the liberal wing of the 1830's was by no means as activist as the liberals of the 1960's.

8. In order to gain an overview of the balance of power between the liberals and conservatives during the 1960's, the reader should perhaps think in terms of the Goldberg/Fortas seat on the Court. Goldberg remained on the Court for only three Terms before giving up his seat to become ambassador to the United Nations. After Goldberg's resignation, President Johnson appointed Abe Fortas to fill the vacancy. Fortas was also a liberal, so the Goldberg-Fortas succession did not change the liberal-conservative balance of power on the Court. The other four liberals, (Douglas, Black, Warren, and Brennan), remained on the Court up to Warren's resignation in the summer of 1969. The only other personnel change during this period was the replacement of the moderate conservative Clark by the liberal Thurgood Marshall in 1967. Thus, the liberals held a dominant position throughout the final seven terms covered by this article.

THE VOTING PATTERNS DURING THE THIRD PERIOD OF THE WARREN COURT

The October 1961 Term

Voting statistics indicate that the balance of power on the Court moved to the left during the October 1961 Term, reversing the general trend that characterized the preceding period of conservative resurgence.⁹ The shift to the left can be deduced from data concerning the dissent rates of the Court's liberal and conservative justices.

TABLE 1
DISSENT RATES—OCTOBER 1960 & 1961 TERMS

JUSTICE	Oct. 1960 TERM	Oct. 1961 TERM	CHANGE
LIBERALS			
Douglas	40.5%	24.7%	-15.8%
Black	26.1%	21.4%	- 4.7%
Warren	18.9%	15.5%	- 3.4%
Brennan	18.9%	5.9%	-13.0%
CONSERVATIVE			
Harlan	19.4%	30.6%	+11.2%

The dissent rates of the liberal Justices were down from the levels of the prior Term. In contrast, the dissent rate of Harlan, the lone conservative, was up 50% from the prior Term and was now the highest on the Court.¹⁰ The movement

9. The liberal trend was reflected in the most famous cases decided during the Term: *Robinson v. California*, 370 U.S. 660 (1962)(6-2; criminal law); *Engel v. Vitale*, 370 U.S. 421 (1962)(6-1; freedom of religion); and *Baker v. Carr*, 369 U.S. 186 (1962)(6-2; legislative reapportionment). Other liberal victories in bloc-voting cases included *In re McConnell*, 370 U.S. 230 (1962)(5-2; criminal contempt); *Gallegos v. Colorado*, 370 U.S. 49 (1962)(4-3; criminal procedure); *Rusk v. Cort*, 369 U.S. 367 (1962)(5-3; citizenship); *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962)(5-4; antitrust); *FTC v. Henry Broch & Co.*, 368 U.S. 360 (1962)(6-3; trade regulation); *ICC v. J-T Transp. Co.*, 368 U.S. 81 (1962)(6-3; common carriers). The continuing power of the conservative wing was particularly evident in a series of conservative victories in closely-divided criminal procedure cases: *Beck v. Washington*, 369 U.S. 541 (1962)(4-3; grand jury bias); *Oyler v. Boles*, 368 U.S. 448 (1962)(5-4; notice); *Hill v. United States*, 368 U.S. 424 (1962)(5-4; collateral attack); *Killian v. United States*, 368 U.S. 231 (1961)(5-4; disclosure of documentary evidence).

10. Table 1 shows only Harlan in the conservative wing. Since Whittaker and

to the left is not surprising when one considers that Whittaker and Frankfurter participated in only 38.8% and 44.7% respectively of the decisions during the Term.¹¹ In more than 40% of the decisions the liberals held a 4-2-1 working majority.

The shift to the left was closely related to the departure of Whittaker and Frankfurter. The first part of the Term, up to Whittaker's resignation, was a continuation of the Warren Court's second period of conservative resurgence. Douglas and Black, for example, dissented substantially more than Harlan. Thereafter, dissent rates on the left fell and dissent rates on the right rose. Harlan's dissents leaped to a level almost twice as high as Douglas' and Black's.

TABLE 2
DISSENT RATES—OCTOBER 1961 TERM

JUSTICE	BEFORE APRIL 1	AFTER APRIL 1	CHANGE
LIBERALS			
Douglas	30.3%	21.2%	- 9.1%
Black	30.3%	15.7%	-14.6%
Warren	21.2%	11.8%	- 9.4%
Brennan	12.1%	1.9%	-10.2%
MODERATES & CONSERVATIVES			
Clark	6.1%	19.2%	+13.1%
Stewart	9.4%	19.2%	+ 9.8%
Harlan	21.2%	36.5%	+15.3%

These data indicate that the Warren Court's relatively conservative middle period ended promptly with the exit of Whittaker and Frankfurter in April 1962.

The alignment of the Justices was generally consistent with prior Terms. Let us look first at the behavior of the four

Frankfurter participated in fewer than half the decisions, they were not included in the table.

11. As explained in the introduction, Whittaker left the Court on April 1, 1962 and Frankfurter on April 30, 1962.

most liberal Justices, on the one hand, and the two most conservative Justices, on the other.

TABLE 3
DISAGREEMENT RATES—OCTOBER 1961 TERM

	LIBERALS				CONSERVATIVES	
	Douglas	Black	Warren	Brennan	Frankfurter	Harlan
Douglas	—	19.0%	9.5%	18.8%	52.6%	49.4%
Black		—	13.3%	17.9%	42.1%	47.6%
Warren			—	11.9%	44.7%	45.2%
Brennan				—	34.2%	33.3%

Table 3 confirms the existence of a relatively cohesive four-vote liberal bloc, whose members agreed with each other in more than 80% of the cases. In contrast, the three most liberal Justices agreed with the conservative Justices in less than 60% of the cases.

Data on disagreement rates also show that Clark and Stewart, as expected, occupied a position in the center.¹² Clark, after being closely aligned with the conservative bloc during the October 1960 Term,¹³ returned to a more moderate position. Stewart leaned more to the right than Clark, but he maintained enough distance from Harlan to be characterized as a moderate conservative.

Several additional points are worth mentioning. Whittaker had a strongly conservative record in his final Term. White participated in only twelve decisions during the Term, an inadequate number to allow any meaningful conclusions about his voting pattern. General levels of disagreement and dissent were down from the prior Term.¹⁴ Average dissents per case dropped from 2.11 in the October 1960 Term to 1.67 in the October 1961 Term. Only one pair of Justices, Douglas and Frankfurter, disagreed in over 50% of the cases.

In summary, the October 1961 Term was a transition Term. The Court's conservative wing was reduced from three

12. See appendix A, table 1 *infra* for complete data on disagreement rates during the October 1961 Term.

13. See Galloway, *supra* note 2, at 968.

14. See appendix A, table 1 *infra* and appendix B, table 1 *infra*.

to one by the loss of Whittaker and Frankfurter. In over 40% of the cases, the liberals had a working 4-2-1 majority. As a result, there was a definite shift to the left; the period of conservative resurgence was over. The liberals stood on the brink of consolidating their control over the Court.

The October 1962 Term

The liberals attained a majority on October 1, 1962, when Goldberg was sworn in to succeed Frankfurter. Voting data suggest that the liberal majority wasted little time in making its presence felt.¹⁵ The swing to the left that began during the prior Term accelerated during the October 1962 Term and reached a point that might be characterized as liberal dominance.

The Court's increased liberalism can be deduced from data concerning the Justices' dissent rates.

15. The Term witnessed a burst of major cases, including in chronological order: *Sherbert v. Verner*, 374 U.S. 398 (1963)(8-1; freedom of religion); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963)(8-1; freedom of religion); *Yellin v. United States*, 374 U.S. 109 (1963)(5-4; national security investigation); *Goss v. Board of Educ.*, 373 U.S. 683 (1963)(9-0; school desegregation); *Arizona v. California*, 373 U.S. 546 (1963)(5-3; water rights); *Watson v. City of Memphis*, 373 U.S. 526 (1963)(9-0; desegregation of public parks); *Lopez v. United States*, 373 U.S. 427 (1963)(6-3; criminal procedure; electronic surveillance); *Peterson v. City of Greenville*, 373 U.S. 244 (1963)(8-1; prosecution of civil rights demonstrators), and its companion cases; *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539 (1963)(5-4; national security investigation); *Fay v. Noia*, 372 U.S. 391 (1963)(6-3; criminal procedure; habeas corpus); *Gray v. Sanders*, 372 U.S. 368 (1963)(8-1; legislative reapportionment); *Douglas v. California*, 372 U.S. 353 (1963)(6-3; criminal procedure; equal protection); *Gideon v. Wainwright*, 372 U.S. 335 (1963)(9-0; criminal procedure; assistance of counsel); *Townsend v. Sain*, 372 U.S. 293 (1963)(5-4; criminal procedure; habeas corpus); *Wong Sun v. United States*, 371 U.S. 471 (1963)(5-4; criminal procedure; search and seizure); *NAACP v. Button*, 371 U.S. 415 (1963)(5-4; first amendment; attorney solicitation).

TABLE 4

DISSENT RATES—OCTOBER 1960, 1961 & 1962 TERMS

JUSTICE	OCT. 1960 TERM	OCT. 1961 TERM	OCT. 1962 TERM	CHANGE
LIBERALS				
Douglas	40.5%	24.7%	18.0%	-22.5%
Black	26.1%	21.4%	16.2%	-9.9%
Warren	18.9%	15.5%	7.4%	-11.5%
Brennan	<u>18.9%</u>	<u>5.9%</u>	<u>5.4%</u>	-13.5%
Average	26.1%	16.9%	11.8%	
MODERATES & CONSERVATIVES				
Clark	18.3%	14.1%	22.7%	+4.4%
Stewart	18.3%	15.5%	29.7%	+11.4%
Harlan	<u>19.4%</u>	<u>30.6%</u>	<u>40.9%</u>	+21.5%
Average	18.7%	20.1%	31.0%	

The three most conservative Justices dissented, on the average, nearly three times as frequently as the Court's four traditional liberals.¹⁶ The liberals averaged thirteen dissents per Justice during the Term; Clark, Stewart, and Harlan averaged thirty-four dissents per Justice. Both Douglas and Warren had their lowest dissent rates since the start of the Warren era. The dissent rates of Warren (7.4%) and Brennan (5.4%) were especially low. On the opposite extreme, Harlan, the Court's sole remaining conservative, had the highest one-Term dissent rate (40.9%) of any conservative Justice in the entire Warren era.¹⁷

As Table 5 shows, Goldberg leaned toward the liberals during his first Term.

16. See appendix B, table 2 *infra*.

17. The previous high had been Frankfurter's 35.1% dissent rate during the October 1959 Term. See Galloway, *supra* note 2, at 962-966.

TABLE 5
GOLDBERG'S DISAGREEMENT RATES—OCTOBER 1962 TERM

JUSTICE	DISAGREEMENTS WITH GOLDBERG	
	NUMBER	RATE
LIBERALS		
Douglas	22	21.2%
Black	24	23.1%
Warren	18	17.8%
Brennan	14	13.5%
MODERATES & CONSERVATIVES		
Clark	33	32.4%
Stewart	27	26.0%
Harlan	41	39.8%

The complete data on disagreement rates suggest that Goldberg was on the moderate edge of the liberal bloc, just to the right of Warren and Brennan and definitely to the left of White.¹⁸ Like Warren and Brennan, Goldberg had a very low (9.6%) dissent rate. On the whole, the data suggest that Goldberg was a member of the liberal bloc during his first Term on the Court.

The October 1962 Term also provided the first meaningful data on White's voting pattern. During the Term, White was a moderate. He disagreed with the Justices on the Court's far left and right in roughly the same percentage of cases. White disagreed with Douglas (31.8%) and Black (29.4%) slightly more than he disagreed with Harlan (27.4%). The overall voting statistics suggest that White occupied the position to the right of Goldberg and to the left of Clark, near the center of the Court.

The remaining three Justices were right of center. Like White, Clark was near the center with only a slight inclination to the right. Stewart was distinctly inclined to the right: for example, he disagreed with the conservative Harlan in 20.0%

18. See appendix A, table 2 *infra*.

of the cases and with the liberals Douglas and Black in 42.3% and 44.1% of the cases respectively. Harlan held down the right wing. His disagreement rates with the liberals were consistently higher than Stewart's and Clark's.

TABLE 6
DISAGREEMENT RATES—OCTOBER 1962 TERM

	Clark	Stewart	Harlan
Douglas	34.9%	42.3%	53.6%
Black	29.4%	44.1%	53.6%
Warren	24.5%	38.0%	48.1%
Brennan	25.7%	35.1%	45.5%

In summary, the October 1962 Term was a strong Term for the liberals. Goldberg, in his first Term, joined the liberal bloc, giving the liberals a five-vote majority. The liberal group was sufficiently cohesive to allow almost complete control over the Court's decisions. As a result, the liberals had their lowest dissent rates of the entire period since Warren took office. Harlan, who was now isolated on the right, registered the highest one-Term dissent rate of any conservative in the Warren era. The remaining three Justices were arrayed between the liberal bloc and Harlan. White and Clark were near the center. Stewart leaned distinctly to the right. Thus, the Court's alignment during the Term was 5-3-1 or 5-2-2, depending on whether Stewart is counted as a moderate or a conservative.

The October 1963 Term

No personnel changes occurred during the October 1963 Term, and voting patterns were quite similar to those of the prior Term. The five liberals voted cohesively, as the following table shows.

TABLE 7
 AGREEMENT RATES WITHIN THE LIBERAL BLOC—
 OCTOBER 1963 TERM

	Black	Douglas	Goldberg	Warren	Brennan
Black	—	85.2%	82.2%	82.9%	81.7%
Douglas		—	86.5%	87.0%	85.8%
Goldberg			—	87.9%	92.4%
Warren				—	93.6%
Brennan					—

Goldberg, Warren, and Brennan were particularly close. Brennan, for example, disagreed with Warren in only 6.4% of the cases and with Goldberg in only 7.6% of the cases.

Goldberg, during his second Term, moved to the left of Warren and Brennan. This can be deduced from data showing that Clark, Stewart, and Harlan disagreed with Goldberg more than with Warren and Brennan.

TABLE 8
 DISAGREEMENT RATES—OCTOBER 1963 TERM

	Clark	Stewart	Harlan
Goldberg	31.8%	25.5%	48.6%
Warren	21.6%	25.5%	43.1%
Brennan	22.0%	18.5%	40.2%

In fact, Goldberg was arguably located even to the left of Black and Douglas during the Term.

The other four Justices were, once again, scattered over the remainder of the spectrum.¹⁹ White was balanced almost perfectly between the Black-Douglas and Stewart-Harlan wings. Clark and Stewart leaned slightly to the right. Harlan was out on the far right wing by himself. He disagreed with each of the liberals substantially more than either Stewart or Clark did.

19. See appendix A, table 3 *infra*.

TABLE 9
DISAGREEMENT RATES—OCTOBER 1963 TERM

	Clark	Stewart	Harlan
Black	29.7%	33.6%	46.8%
Douglas	29.6%	30.8%	47.2%
Goldberg	31.8%	25.5%	48.6%
Warren	21.6%	25.5%	43.1%
Brennan	22.0%	18.5%	40.2%

The liberals continued to dominate the Court's decisions.²⁰ Harlan's dissent rate, for example, was three times as high as the average rate of the five liberals. He cast more dissenting votes than Douglas, Goldberg, Warren, and Brennan combined.

20. Noteworthy liberal victories included: *Aptheker v. Secretary of State*, 378 U.S. 500 (1964)(6-3; denial of passport); *Escobedo v. Illinois*, 378 U.S. 478 (1964)(5-4; criminal procedure; police interrogation); *Bell v. Maryland*, 378 U.S. 226 (1964)(6-3; prosecution of civil rights demonstrators); *Jacobellis v. Ohio*, 378 U.S. 184 (1964)(6-3; free speech; obscenity); *Malloy v. Hogan*, 378 U.S. 1 (1964)(5-4; criminal procedure; self-incrimination); *Reynolds v. Sims*, 377 U.S. 533 (1964)(8-1; legislative reapportionment); *Baggett v. Bullitt*, 377 U.S. 360 (1964)(7-2; loyalty oath); *NAACP v. Alabama*, 377 U.S. 288 (1964)(9-0; freedom of association); *Griffin v. School Bd.*, 377 U.S. 218 (1964)(7-2; school desegregation); *Massiah v. United States*, 377 U.S. 201 (1964)(6-3; criminal procedure; electronic bugging); *Schneider v. Rusk*, 377 U.S. 163 (1964) (5-3; denaturalization); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964)(6-2; attorney solicitation); *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964)(9-0; free speech; public defamation); *Wesberry v. Sanders*, 376 U.S. 1 (1964)(6-3; legislative reapportionment).

TABLE 10
DISSENT RATES—OCTOBER 1963 TERM

JUSTICE	DISSENTS	DISSENT RATE
LIBERALS		
Black	20	18.0%
Douglas	15	13.9%
Goldberg	14	13.1%
Warren	7	6.3%
Brennan	<u>4</u>	<u>3.6%</u>
Average	12	11.0%
CONSERVATIVE		
Harlan	41	37.6%

On the other hand, the shift toward more liberal voting patterns that characterized the prior two Terms abated during the October 1963 Term. The dissent rates of Harlan, Stewart, Clark, and White were lower than in the October 1962 Term; the dissent rates of Black and Goldberg were higher.

Still, the general pattern was liberal dominance. The extent of this dominance became quite apparent at the very end of the Term when a striking outburst of judicial activism occurred. Harlan, for example, dissented in twenty-one of the last thirty-one cases. Interestingly, Black showed signs of faltering from his characteristic liberalism during this stretch, dissenting in four of the liberal victories.

In conclusion, the October 1963 Term was controlled by the liberals. A cohesive five-vote liberal bloc dominated the Court. Harlan, the Court's most conservative Justice, dissented more than Douglas, Goldberg, Warren, and Brennan combined.

The October 1964 Term

When the Term opened, the nation was preparing for a presidential election. The Republicans had nominated Barry Goldwater, a conservative. The Democrats had nominated incumbent President Lyndon B. Johnson, a liberal in areas dear to the Court such as race relations and aid for the poor. The

election resulted in a landslide for Johnson. The nation decisively rejected the conservative alternative in favor of another four years of Kennedy-Johnson policies. The liberal mood permeated Congress as well. For example, 1964 saw the enactment of the Civil Rights Act of 1964, and the Economic Development Act of 1964 that announced the "war on poverty."

The Court's personnel remained stable through the October 1964 Term. Voting statistics show a continuation of liberal dominance.²¹ For example, Warren and Brennan, the core of the liberal bloc, had dissent rates of only 5.7% and 2.2% respectively. Brennan's dissent rate was the lowest of any Justice since the start of the Warren era and the second lowest one Justice/one Term dissent rate during Warren's sixteen Terms on the Court.

The voting patterns, however, were quite different from prior Terms. There was almost no bloc voting. Patterns of agreement and disagreement were nebulous. For example, the second highest agreement rate was between two Justices who had not previously even been members of the same wing of the Court (Brennan and White, 93.3% agreement rate). Rather than dividing along the expected 5-3-1 lines, the Court tended toward a 2-5-2 voting pattern. In the center was a five-vote cluster comprised of Warren, Brennan, Goldberg, White, and Clark. To the left were Douglas and Black. To the right were Harlan and Stewart.

One way to illustrate this new voting alignment is to show how Warren, Brennan, and Goldberg shifted out of their close alignment with Douglas and Black and into a position closer to the Harlan-Stewart pole. Table 11 shows that Brennan, Warren, and Goldberg disagreed with Douglas and Black *more* than they disagreed with Harlan and Stewart. This was quite different from prior Terms when they were far to the left of center.

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

TABLE 11

DISAGREEMENTS—OCTOBER 1963 & 1964 TERMS

JUSTICE	Warren		Brennan		Goldberg	
	OCT. 1963 TERM	OCT. 1964 TERM	OCT. 1963 TERM	OCT. 1964 TERM	OCT. 1963 TERM	OCT. 1964 TERM
LIBERALS						
Douglas	14	25	15	25	14	28
Black	<u>19</u>	<u>23</u>	<u>20</u>	<u>23</u>	<u>19</u>	<u>30</u>
Total	33	48	35	48	33	58
CONSERVATIVES						
Stewart	28	22	20	17	27	18
Harlan	<u>47</u>	<u>23</u>	<u>43</u>	<u>22</u>	<u>51</u>	<u>23</u>
Total	75	45	63	39	78	41

Warren, Brennan, and Goldberg disagreed with Douglas and Black, their erstwhile colleagues of the liberal bloc, substantially more frequently than with the moderate conservatives, White and Clark.

TABLE 12

DISAGREEMENT RATES—OCTOBER 1964 TERM

	LIBERALS		MODERATES	
	Douglas	Black	White	Clark
Warren	24.4%	30.2%	12.9%	15.1%
Brennan	27.8%	25.6%	6.7%	11.1%
Goldberg	32.2%	34.5%	24.4%	24.1%

These data confirm the disappearance of the five-vote liberal bloc and the emergence of a new five-vote centrist coalition of liberals and moderates.²²

22. Overall, the voting statistics suggest that the October 1964 Term witnessed a breaking of the ranks among the previously cohesive liberal forces. The last time this phenomenon occurred in the Court's left wing was in the 1940's. During the period prior to FDR's appointments, the liberals voted as a bloc, frequently in dissent. During the period immediately after the constitutional revolution of 1937, the liberals

Voting data suggest that the October 1964 Term witnessed a shift toward more conservative patterns.²³ We have already discussed the movement of Warren, Brennan, and Goldberg to the right, away from Douglas and Black. Consider further the dissent rates of the Justices who occupied the Court's left and right wings.

TABLE 13
DISSENT RATES—OCTOBER 1963 & 1964 TERMS

JUSTICE	OCT. 1963 TERM	OCT. 1964 TERM	CHANGE
LIBERALS			
Douglas	13.9%	25.6%	+11.7%
Black	18.0%	27.8%	+ 9.8%
MODERATES & CONSERVATIVES			
Clark	18.9%	8.9%	-10.0%
Stewart	19.1%	19.3%	+ 0.2%
Harlan	37.6%	22.5%	-15.1%

As the table shows, dissent rates on the left were up; those on the right were down. Douglas and Black actually dissented more than Harlan and Stewart.²⁴ Thus, the Court apparently

also voted as a tight bloc; they had to remain cohesive in order to muster a majority. Once FDR's appointees arrived on the Court, however, the liberal majority was assured, and there was no need for the members of the liberal bloc to vote together. As a result, they broke ranks and began to move toward a new position that split the former bloc members into new alignments. A similar process seems to have been at work during the October 1964 Term. The liberals, having finally achieved a clear majority on the Court, broke ranks. The Court then moved toward a new consensus substantially to the left of the position that had been dominant during the late 1950's when the liberals had to compromise to pick up extra votes from outside their ranks.

23. Significant cases which drew dissents from two or more liberals included: *Linkletter v. Walker*, 381 U.S. 618 (1965)(7-2; criminal procedure; search and seizure); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965)(5-2; antitrust); *Jaben v. United States*, 381 U.S. 214 (1965)(6-3; criminal procedure; probable cause); *United States v. California*, 381 U.S. 139 (1965)(5-2; coastal lands); *Zemel v. Rusk*, 381 U.S. 1 (1965)(6-3; passports); *Commissioner v. Brown*, 380 U.S. 563 (1965)(6-3; tax); *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965)(7-2; federalism); *Swain v. Alabama*, 380 U.S. 202 (1965)(6-3; criminal procedure; exclusion of blacks from jury); and *United States v. Ventresca*, 380 U.S. 102 (1965)(7-2; criminal procedure; search and seizure).

24. See appendix B, table 4 *infra*.

moved in a direction more compatible with the views of Harlan than those of Douglas and Black.²⁵

The following points are also worth noting with regard to the October 1964 Term. Warren and Brennan continued their close alignment; they disagreed in only 5.7% of the cases in which they both participated (five out of eighty-seven). Goldberg, after being very near the Court's left edge during the prior Term, returned to the center and, in fact, leaned more toward Stewart and Harlan than toward Douglas and Black. The average number of dissents cast per case was 1.36, lowest since the start of the Warren era and second lowest in the sixteen Terms that Warren was on the Court. Disagreement rates between the various pairs of Justices were similarly very low: the highest disagreement rate was 45.5% (Douglas-Harlan), and only four other pairs of Justices had disagreement rates above 35%.²⁶

In summary, having achieved full control over the Court, the liberals broke ranks during the October 1964 Term and new alignments emerged. Warren, Brennan, and Goldberg moved to the right into a five-vote centrist coalition with White and Clark. Douglas and Black remained substantially to the left—Stewart and Harlan substantially to the right. Dissent rates were up on the left and down on the right, indicating a pause in the trend toward more liberal voting.

The October 1965 Term

Goldberg resigned during the recess to become ambassador to the United Nations after only three Terms on the Court. His importance, however, far exceeded the duration of his tenure as a Justice. Goldberg's arrival on the first day of October 1962 Term gave the liberals an absolute majority after many years of minority status. During his three Terms, Goldberg usually sided with the liberals (particularly with Warren and Brennan), thereby assuring liberal control over the Court's decisions. Obviously, the loss of Goldberg created

25. The lower dissent rates of Stewart and Harlan may be somewhat misleading. It is possible that Harlan, for example, continued to disagree substantially with the Court's decisions, but that he did not dissent in many cases because he felt bound by the precedent that had accumulated during the prior liberal Terms. Harlan, unlike Douglas, did not believe that continued dissent was appropriate with regard to settled law.

26. See appendix A, table 4 *infra*.

a major hole in the liberal forces.

President Johnson appointed Abe Fortas to replace Goldberg. After Fortas's seating the Court's personnel remained stable throughout the Term. Fortas, therefore, bears close watching for the student of High Court statistics. The other Justices are now familiar to the reader.

In the nation at large, important events were taking place. The economic news was bad with the Dow Jones falling 11% within one and one half months. The civil rights movement produced a violent backlash as exemplified by events in Selma, Alabama during the spring of 1965. In August of that year, the failure of the Great Society to keep pace with the rising expectations of the poor led to the Watts riot, first in a series of riots that extended over the next few years. The Vietnam war emerged as a major political issue and there were street demonstrations and protests against the war. President Johnson was suffering from the so-called credibility gap.

Despite the loss of Goldberg and the turmoil in the nation, the Court shifted toward more liberal voting patterns during the October 1965 Term.²⁷ The dissent rates of Harlan, Stewart, and White went up in comparison to the prior Term; those of Douglas and Black went down.²⁸ During the October 1964 Term, Douglas and Black had more total dissents than Stewart and Harlan; one year later the position was again reversed, although by a smaller margin than during the October

27. Moreover, the flow of major activist cases did not slow appreciably. During the October 1965 Term, noteworthy decisions were issued in several important legal fields. Criminal procedure cases included: *Miranda v. Arizona*, 384 U.S. 436 (1966)(5-4; police interrogation); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966)(8-1; trial publicity). Race relations cases included: *Katzenbach v. Morgan*, 384 U.S. 641 (1966)(7-2; Voting Rights Act of 1965); *United States v. Price*, 383 U.S. 787 (1966)(9-0; Civil Rights Acts of 1866 and 1870); *United States v. Guest*, 383 U.S. 745 (1966)(5-4; Civil Rights Act of 1870); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)(8-1; Voting Rights Act of 1965); *Brown v. Louisiana*, 383 U.S. 131 (1966)(5-4; prosecution of civil rights demonstrators); and *Evans v. Newton*, 382 U.S. 296 (1966)(6-3; segregated public parks). First amendment cases included: *Elfbrandt v. Russell*, 384 U.S. 11 (1966)(5-4; loyalty oath); *Mishkin v. New York*, 383 U.S. 502 (1966)(6-3; obscenity); *Ginzburg v. United States*, 383 U.S. 463 (1966)(5-4; obscenity); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)(6-3; obscenity); *Rosenblatt v. Baer*, 383 U.S. 75 (1966)(5-4; defamation of public official); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)(5-4; defamation in labor disputes); and *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965)(8-0; Communist registration). Voting rights cases included *Harper v. Board of Elec.*, 383 U.S. 663 (1966)(6-3; poll tax), in addition to *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*.

28. See appendix B, table 5 *infra*.

1962 and 1963 Terms.

TABLE 14
DISSENTS—OCTOBER 1964 & 1965 TERMS

JUSTICE	OCT. 1964 TERM	OCT. 1965 TERM
LIBERALS		
Douglas	23	23
Black	<u>25</u>	<u>24</u>
Total	48	47
CONSERVATIVES		
Stewart	17	21
Harlan	<u>20</u>	<u>33</u>
Total	37	54

During his first Term, Fortas occupied a position in the center of the Court with a slight inclination to the left. His voting pattern was most like Brennan's (*i.e.*, a little to the right of Douglas, Black, and Warren, and a little to the left of Clark and White).²⁹ As Table 15 shows, Fortas agreed most closely with Warren and Brennan.

29. See appendix A, table 5 *infra*.

TABLE 15
FORTAS' DISAGREEMENT RATES—OCTOBER 1965 TERM

JUSTICE	DISAGREEMENTS	DISAGREEMENT RATE
LIBERALS		
Douglas	17	19.8%
Black	25	30.1%
Warren	7	8.1%
Brennan	<u>10</u>	11.6%
Total	59	
MODERATES & CONSERVATIVES		
Clark	16	18.3%
White	15	18.6%
Stewart	24	28.2%
Harlan	<u>31</u>	36.0%
Total	86	

The fact that Fortas leaned to the left rather than the right is suggested by his much lower disagreement rate with the liberal Douglas (19.8%) than with the conservative Harlan (36.0%).³⁰

The 2-5-2 voting pattern that emerged during the preceding Term continued. The center was occupied by Warren, Brennan, Fortas, White, and Clark. Warren, Brennan, and Fortas leaned to the left; White and Clark to the right. On the left wing were Douglas and Black.³¹ On the right were Harlan

30. Fortas provided the decisive fifth vote for the liberals in the following five-to-four cases: *Miranda v. Arizona*, 384 U.S. 436 (1966)(criminal procedure); *Elfbrandt v. Russell*, 384 U.S. 11 (1966)(loyalty oath); *Kent v. United States*, 383 U.S. 541 (1966)(juveniles); *Brown v. Louisiana*, 383 U.S. 131 (1966)(race relations); and *Harris v. United States*, 382 U.S. 162 (1965)(criminal procedure).

31. Black's position on the Court was rather complex. Overall he was still a liberal. He was closest to Douglas and farthest from Harlan, Stewart, and White. Yet he also had substantial disagreement rates with Warren (26.7%), Brennan (29.8%), and Fortas (30.1%), and he crossed over to the conservative side in several important cases during the October 1965 Term. See *United States v. Standard Oil*, 384 U.S. 224 (1966)(*Rivers & Harbors Act*); *Harper v. Virginia Bd. of Elec.*, 383 U.S. 663 (1966)(poll tax); *Kent v. United States*, 383 U.S. 541 (1966)(juveniles); *Brown v. Loui-*

and Stewart.³² Table 16 shows the disagreement rates of the most liberal and conservative pairs of Justices.

TABLE 16
DISAGREEMENT RATES—OCTOBER 1965 TERM

	LIBERALS		CONSERVATIVES	
	Douglas	Black	Stewart	Harlan
Douglas		21.3%	40.6%	49.0%
Black			32.3%	44.1%
Stewart				13.7%
Harlan				

All five members of the center group had low dissent rates: Warren (5.4%), Brennan (4.1%), Fortas (9.3%), Clark (8.2%), and White (14.0%).

Perhaps reflecting the increasing unrest in the nation, the Justices' disagreement rates increased somewhat in comparison to the low disagreement rates of the prior Term.³³ The average dissent rate, for example, increased from 1.36 per case to 1.47 per case. Yet disagreement rates remained relatively low in comparison to the 1957-1961 period when the Court had been polarized into highly divided blocs of three and four Justices. Only three pairs of Justices disagreed in more than 40% of the cases (Douglas-Harlan, 49.0%; Black-Harlan,

siana, 383 U.S. 131 (1966)(race relations); *Evans v. Newton*, 382 U.S. 296 (1966)(race relations).

32. Harlan and Stewart dissented by themselves in several cases: *Katzenbach v. Morgan*, 384 U.S. 641 (1966)(race relations); *United States v. Von's Grocery*, 384 U.S. 270 (1966)(antitrust); *SEC v. New England Elec. Sys.*, 384 U.S. 176 (1966)(securities); *Amell v. United States*, 384 U.S. 158 (1966)(maritime); *FTC v. Borden Co.*, 383 U.S. 637 (1966)(trade regulation); *United States v. O'Malley*, 383 U.S. 627 (1966)(tax); and *Stevens v. Marks*, 383 U.S. 234 (1966)(criminal procedure).

33. Some bloc voting was present during the October 1965 Term. Liberal victories in bloc voting cases included: *Miranda v. Arizona*, 384 U.S. 436 (1966) (5-4; criminal procedure); *Elfbrandt v. Russell*, 384 U.S. 11 (1966)(5-4; loyalty oath); *DeGregory v. Attorney General*, 383 U.S. 825 (1966)(6-3; legislative investigations of subversive activity); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)(6-3; obscenity); and *Harris v. United States*, 382 U.S. 162 (1965)(5-4; criminal procedure). Conservative victories in bloc voting cases included: *City of Greenwood v. Peacock*, 384 U.S. 808 (1966)(5-4; race relations); *Schmerber v. California*, 384 U.S. 757 (1966)(5-4; criminal procedure); *United States v. Johnson*, 383 U.S. 169 (1966)(4-3; criminal procedure); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)(5-4; free speech).

44.1%; Douglas-Stewart, 40.6%).

In short, a 2-5-2 voting pattern was present during the October 1965 Term. Fortas leaned toward the liberal side, thus assuring continued control by the liberal wing. In fact, a slight shift to the left occurred during the Term.

*The October 1966 Term*³⁴

The national political scene was characterized by increased conflict and polarization. Demands for reform intensified. Widespread riots occurred in cities such as Chicago, Cleveland, and St. Louis, and in reaction, the conservative backlash continued to grow. Symbolically, the Civil Rights Act of 1966 died in the Senate. An economic downturn complicated matters: during the 1966 bear market, the Dow Jones average dropped 25% in eight months. The Court, of course, was not insulated from these pressures.

The October 1966 Term witnessed some major shifts in voting patterns on the Court. Generally, there was a trend toward a polarized 4-1-4 voting alignment instead of the 2-5-2 alignment of the prior two Terms.³⁵ The statistics show four Justices who leaned definitely to the left (Douglas, Fortas, Warren, and Brennan), one Justice in the middle (Black), and four Justices who leaned to the right—two slightly (White and Clark) and two decisively (Stewart and Harlan). The following table shows the split between the Court's two most liberal and two most conservative Justices.

34. No personnel changes occurred until Clark resigned on the last day of the term. His resignation had no effect on voting patterns. This was the fifth consecutive full term since the liberals attained their five-vote majority.

35. Liberal victories in bloc-voting cases included: *Reitman v. Mulkey*, 388 U.S. 369 (1967)(5-4; race relations; California's open housing proposition); *Afroyim v. Rusk*, 387 U.S. 253 (1967)(5-4; citizenship); *Giles v. Maryland*, 386 U.S. 66 (1967)(5-4; criminal procedure; disclosure of evidence); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)(5-4; free speech; loyalty oath); *Spevak v. Klein*, 385 U.S. 511 (1967)(5-4; criminal procedure; self-incrimination); and *Garrity v. New Jersey*, 385 U.S. 493 (1967)(5-4; criminal procedure; self-incrimination). Conservative victories in bloc-voting cases included: *Waller v. City of Birmingham*, 388 U.S. 307 (1967)(5-4; prosecution of civil rights demonstrators); *McCray v. Illinois*, 386 U.S. 300 (1967)(5-4; criminal procedure; informer's privilege); *Cooper v. California*, 386 U.S. 58 (1967)(5-4; criminal procedure; search and seizure); *Spencer v. Texas*, 385 U.S. 554 (1967)(5-4; criminal law; recidivist statutes); *Fortson v. Morris*, 385 U.S. 231 (1966)(5-4; legislative reapportionment); and *Adderley v. Florida*, 385 U.S. 39 (1966)(5-4; prosecution of civil rights demonstrators).

TABLE 17
DISAGREEMENT RATES—OCTOBER 1966 TERM

	LIBERALS		CONSERVATIVES	
	Douglas	Fortas	Stewart	Harlan
Douglas	—	20.0%	50.0%	56.4%
Fortas		—	50.5%	50.5%
Stewart			—	13.0%
Harlan				—

Warren and Brennan moved away from their “centrist” position of the prior two Terms and back toward an identifiably liberal voting pattern.

TABLE 18
DISAGREEMENT RATES—OCTOBER 1965 & 1966 TERMS

	Stewart		Harlan	
	OCT. 1965 TERM	OCT. 1966 TERM	OCT. 1965 TERM	OCT. 1966 TERM
Warren	28.3%	45.5%	40.2%	46.0%
Brennan	26.0%	42.3%	37.5%	44.9%

As Table 18 shows, Warren and Brennan disagreed with the Court's two most conservative members substantially more during this Term than during the prior Term. Moreover, their disagreement rates with Harlan and Stewart were much higher than with Douglas. For these reasons, it is appropriate to speak of a four-vote liberal wing during the October 1966 Term with Fortas, Warren, and Brennan particularly close to one another.³⁶

White and Clark, in contrast, leaned to the right. Their disagreement rates with Douglas and Fortas on the left were higher than with Harlan and Stewart on the right.³⁷ During prior Terms, White and Clark had been much nearer the

36. See appendix A, table 6 *infra*.

37. *Id.*

center.³⁸

Black's voting pattern underwent a noteworthy shift during the October 1966 Term.³⁹ Throughout his long career on the Court, Black had normally occupied a position at or near the Court's left edge. To put the point another way, Black had always disagreed with the conservatives and even the moderates much more than with liberals such as Douglas and Warren. During the October 1966 Term, however, Black moved into a position very close to the center of the Court. This is shown in the following table.

TABLE 19

BLACK'S DISAGREEMENT RATES—OCTOBER 1966 TERM

LIBERALS	
Douglas	28.7%
Fortas	33.7%
Warren	34.0%
Brennan	<u>30.6%</u>
Average	31.7%
MODERATES & CONSERVATIVES	
White	30.2%
Clark	28.9%
Stewart	33.0%
Harlan	<u>39.6%</u>
Average	33.0%

The full extent of Black's shift away from his colleagues in the liberal wing can be seen by comparing his disagreement rates with the right-wing and left-wing justices during the October 1966 Term and prior Terms. Table 20 compares the data for the October 1962 and October 1966 Terms. It shows Black's substantially increased disagreement with the liberals and substantially decreased disagreement with the

38. See, e.g., tables 7, 11 & 12 *supra*.

39. This shift had been foreshadowed during prior Terms when, for brief stretches, Black had broken away from the liberals and dissented in company with the moderates and conservatives.

conservatives.⁴⁰

TABLE 20

BLACK'S DISAGREEMENT RATES—OCTOBER 1962 & 1966 TERMS

JUSTICE	OCT. 1962 TERM	OCT. 1966 TERM	CHANGE
LIBERALS			
Douglas	18.0%	28.7%	+10.7%
Warren	11.1%	34.0%	+22.9%
Brennan	14.4%	30.6%	+16.2%
CONSERVATIVES			
Stewart	44.1%	33.0%	-11.1%
Harlan	53.6%	39.6%	-14.0%

During his second Term on the Court, Fortas moved strongly to the left. His voting record was the second most liberal on the Court, to the left even of Warren and Brennan. His disagreement rates with Douglas (20.0%), Brennan (18.5%), and Warren (11.7%) were slight compared to his disagreement rates with Stewart (50.5%) and Harlan (50.5%).

Polarization on the Court rose substantially from prior Terms. On the average, there were 1.99 dissents per case, up from 1.36 during the October 1964 Term and 1.47 during the October 1965 Term.⁴¹ In fact, the average dissent rate was higher than in any other Term in the 1960's.

40. In twenty-five cases, the Court split 5-4 or 6-3 along liberal-conservative lines. In thirteen of these cases, Black sided with the conservatives. For examples, see the conservative victories cited in note 35 *supra*.

41. For a listing of each Justice's dissent rate, see appendix B, table 6 *infra*.

TABLE 21
AVERAGE DISSENTS PER CASE

Oct. 1961	1.67
Oct. 1962	1.66
Oct. 1963	1.44
Oct. 1964	1.36
Oct. 1965	1.47
Oct. 1966	1.99
Oct. 1967	1.26
Oct. 1968	1.70

Similarly, the top disagreement rates among Justices were above the 50% level for the first time since the October 1962 Term. Douglas and Harlan disagreed in 56.4% of the cases, and Fortas disagreed with both Harlan and Stewart more than 50% of the time.⁴²

Dissent rates were up in both the left and rights wings. The liberals, however, retained an edge, and the Court's most conservative members continued to have the highest dissent rates.

42. See appendix A, table 6 *infra*.

TABLE 22

DISSENT RATES—OCTOBER 1965 & 1966 TERMS

JUSTICE	OCT. 1965 TERM	OCT. 1966 TERM	CHANGE
LIBERALS			
Douglas	23.7%	30.7%	+10.0%
Fortas	9.3%	24.2%	+14.9%
Warren	5.4%	15.0%	+ 9.6%
Brennan	4.1%	10.2%	+ 6.1%
CONSERVATIVES			
Stewart	21.9%	33.0%	+11.1%
Harlan	34.4%	35.6%	+ 1.2%

In summary, the most salient development during the Term was Black's desertion from the liberal wing. Suddenly the liberal majority was in doubt, and it was once again possible for the moderates and conservatives to muster a five-vote coalition consisting of Black, White, Clark, Stewart, and Harlan. The Court moved into a 4-1-4 voting pattern. White and Clark moved to the right; Fortas, on the contrary, moved strongly to the left. Stewart abandoned his relatively passive posture of prior Terms and began to disagree strongly with the liberals. Disagreement rates jumped to the highest point since the October 1960 Term. The data suggest that the Court's moderate and conservative Justices, encouraged by the defection of Black and the growing backlash within the nation, began to make a more serious effort to contest the dominance of the liberal wing. Despite this challenge, the liberal wing continued to prevail.

The October 1967 Term

On the opening day of the October 1967 Term, Thurgood Marshall was seated to replace the moderate conservative Clark. Clark had resigned on the last day of the prior Term. The Clark-Marshall succession strengthened the already powerful liberal wing. In a way, Marshall arrived just in time to preserve the strength of the liberal wing. During the prior

Term, Black's departure from the liberal ranks had reduced the liberal bloc to four and created a potential five-vote moderate and conservative coalition. The Marshall appointment gave the liberal wing the fifth vote needed to retain dominance.

During the October 1967 Term, the Court reached perhaps the most liberal posture in its entire history. There were five liberal activists (Douglas, Fortas, Warren, Brennan, and Marshall). Although Black had moved distinctly to the right and was no longer the unbridled liberal of the 1930's and 1940's, he was still generally inclined to the left. Thus, it may be argued that the liberal wing had grown to six. White had been quite moderate since his arrival on the Court in 1962 and had even leaned slightly to the left during the October 1963 Term. Stewart had been a moderate conservative throughout his tenure. Even Harlan, the Court's only true judicial conservative, was far less conservative than many earlier Justices. Thus, the confluence of six liberals, two moderates, and one conservative created the most liberal bench in the Supreme Court's history.

The analysis of voting statistics may appropriately begin with Marshall's behavior during his first Term. Data on disagreement rates show that Marshall moved into an extremely close relationship with Warren and Brennan.⁴³ He disagreed with each in less than 7% of the cases. In contrast, he disagreed with Harlan in 30% of the cases. In short, Marshall, voted with the Court's liberals during the October 1967 Term, thus reinstating the liberal majority.

The liberal bloc was unusually cohesive. Fortas was slightly to the left of the Warren-Brennan-Marshall group, but he agreed with them in nearly 90% of the cases. Douglas occupied his traditional spot on the Court's extreme left.

43. See appendix A, table 7 *infra*.

TABLE 23

AGREEMENT RATES WITHIN LIBERAL WING—OCTOBER 1967 TERM

	Douglas	Fortas	Warren	Brennan	Marshall
Douglas	—	83.5%	80.6%	82.7%	81.4%
Fortas		—	86.8%	90.7%	89.8%
Warren			—	96.3%	93.3%
Brennan				—	93.2%
Marshall					—

Given the cohesive five-vote liberal bloc, liberal dominance was assured. The extent of the dominance becomes clear when one considers the dissent rates of the five liberals.

TABLE 24

DISSENT RATES—OCTOBER 1967 TERM

DOUGLAS	16.1%
Fortas	9.3%
Warren	5.5%
Brennan	3.7%
Marshall	1.7%

Harlan dissented more times than Fortas, Warren, Brennan, and Marshall combined. Obviously the liberals were quite content with the Court's decisions during the October 1967 Term.

After its short-lived peak during the October 1966 Term, the dissent and disagreement rates fell drastically. There were 1.26 average dissents per case, lowest in the entire sixteen Terms that Warren sat on the Court. Six of the Justices had substantially lower dissent rates than during the October 1966 Term.⁴⁴ Similarly, the top disagreement rates on the Court were unusually low: Douglas and Harlan disagreed in 43.8% of the cases; the next highest disagreement rate was 35.3% (between Douglas and White).

44. See appendix B, table 7 *infra*.

Why were the dissent and disagreement rates on the Court so low, particularly in comparison to the rather high rates of the prior Term? Two possible explanations come to mind. First, it may be that the arrival of Marshall on the Court gave the liberals such complete control that the conservatives simply decided to give up the fight and go along with the majority. Second, it may be that despite the liberal majority, the Court pulled back somewhat toward the center and issued fewer decisions with which the moderates and conservatives disagreed.⁴⁵ Certainly the low level of conflict on the Court was not the result of harmony in the nation at large. 1967 was the year of the long, hot summer and the Detroit riot. United States involvement in Vietnam increased, and the nation continued to move toward polarization.

Black did not return to his traditional close alignment with the liberal wing. Instead he remained in a balanced position between the liberals and the three more conservative Justices. He did, however, lean slightly to the left.

The Court's more conservative members were surprisingly moderate, particularly in view of the relatively high dissent rates during the prior Term. White, for example, was very close to being balanced between the Justices on the extreme left and right.

TABLE 25

WHITE'S DISAGREEMENT RATES—OCTOBER 1967 TERM

LIBERALS	
Douglas	34.3%
Fortas	26.9%
CONSERVATIVES	
Stewart	30.3%
Harlan	25.7%

Similarly, Stewart was much less conservative than in prior Terms. He disagreed with the moderate White (30.3%) almost

45. In fact, major cases were less numerous than in other terms during the 1960's. Noteworthy decisions included: *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)(7-2; race relations; Civil Rights Act of 1866); *Flast v. Cohen*, 392 U.S. 83 (1968)(8-1; taxpayer standing); *Terry v. Ohio*, 392 U.S. 1 (1968)(8-1; criminal procedure; stop and frisk); *Green v. County School Bd.*, 391 U.S. 430 (1968)(9-0; school desegregation); and *Katz v. United States*, 389 U.S. 347 (1967)(7-1; criminal procedure; electronic eavesdropping).

as much as with the liberal Douglas (31.7%). Moreover, he disagreed with the other liberals far less than during prior Terms.

TABLE 26

STEWART'S DISAGREEMENT RATES—OCTOBER 1966 & 1967 TERMS

JUSTICE	OCT. 1966 TERM	OCT. 1967 TERM
Douglas	50.5%	31.7%
Warren	45.5%	24.3%
Brennan	42.3%	20.4%

Harlan also disagreed with the liberals much less than in most other years. Clearly the conservatives were either more content with or more resigned to the course of decisions during the October 1967 Term than in other years.

In summary, the October 1967 Term was characterized by liberal dominance. The seating of Marshall on the first day of the Term re-established the five-vote liberal majority that had been threatened by the loss of Black during the prior Term. Disagreement and dissent rates fell to their lowest level in the entire Warren era. The Court's three most conservative members (White, Stewart, and Harlan) dissented less than before despite their minority position on the Court. Black was in the center with a slight inclination to the left.

The October 1968 Term

With one exception, the Court's personnel remained unchanged from the prior Term. On April 14, 1969, after participating in eighty-eight of the one hundred and four cases decided during the Term, Fortas resigned under pressure. At the end of the Term, Warren resigned but his resignation had no effect on voting during the Term.

Although the Supreme Court had more liberals than ever before, the mood of the nation was swinging away from liberalism. A mood of anger and frustration prevailed, especially after the assassinations of Martin Luther King and Robert Kennedy during the spring of 1968. On the Fourth of July, martial law was declared in Berkeley to quell disturbances arising in response to the French general strike. The stock market was gripped by the first stage of the bear market of 1968-1970 and there was violence in the streets at the Chicago

National Democratic Convention. In November, Richard Nixon edged Hubert Humphrey marking the formal end of the liberal era that began with JFK's New Frontier. The representatives of "law and order" and the "silent majority" had taken control of the Executive branch.

The liberal bloc, however, exercised almost complete control over the Court's decisions.⁴⁶ This is reflected in the liberals' extremely low dissent rates. Once again, Harlan dissented more than Fortas, Warren, Brennan, and Marshall combined. Surprisingly, Stewart's dissent rate exceeded Harlan's.

TABLE 27
DISSENTS & DISSENT RATES—OCTOBER 1968 TERM

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

The five liberals dissented only forty-seven times, whereas the

46. Characteristic liberal activism was present during the Term in a variety of important areas: (1) race relations - *Powell v. McCormack*, 395 U.S. 486 (1969)(7-1; seating of Congressman Adam Clayton Powell), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969)(8-0; prosecution of civil rights demonstrators), *Hunter v. Erickson*, 393 U.S. 385 (1969)(8-1; open housing); (2) criminal procedure - *Benton v. Maryland*, 395 U.S. 784 (1969)(6-2; double jeopardy), *Chimel v. California*, 395 U.S. 752 (1969)(6-2; search and seizure), *Leary v. United States*, 395 U.S. 6 (1969)(8-0; self-incrimination), *Johnson v. Avery*, 393 U.S. 483 (1969)(7-2; legal assistance for prisoners), *Spinelli v. United States*, 393 U.S. 410 (1969)(5-3; search and seizure), *Smith v. Hooey*, 393 U.S. 374 (1969)(9-0; speedy trial); (3) legislative reapportionment - *Wells v. Rockefeller*, 394 U.S. 542 (1969)(6-3); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969)(6-3); (4) free speech - *Bradenburg v. Ohio*, 395 U.S. 444 (1969)(9-0; subversion); *Stanley v. Georgia*, 394 U.S. 557 (1969)(9-0; possession of obscene literature); and, (5) poverty law - *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969)(7-1; debt collection); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (6-3; welfare).

four more conservative Justices dissented 111 times.⁴⁷

The liberal wing was composed of a cohesive four-vote bloc (Fortas, Warren, Brennan, and Marshall) with Douglas somewhat further to the left. Table 28 shows the cohesiveness of the four-vote bloc and its distance from Stewart and Harlan on the right.

TABLE 28
DISAGREEMENT RATES—OCTOBER 1968 TERM

	Fortas	Warren	Brennan	Marshall
LIBERALS				
Fortas	—	17.9%	15.5%	16.3%
Warren		—	9.2%	12.4%
Brennan			—	6.7%
Marshall				—
CONSERVATIVES				
Harlan	35.1%	38.5%	34.7%	32.2%
Stewart	40.0%	38.1%	33.3%	33.0%

The Court's dissent rate took an upward turn after its fifteen-year low during the prior Term. There were 1.70 dissents per case on the average, up from 1.26 during the October 1967 Term. The increase, however, was mostly attributable to the Court's right wing. Stewart's dissent rate, for example, jumped from 18.3% during the prior Term to 33.3%. The increased dissent rates on the right confirm the fact that the final Term of the Warren era was controlled by the liberals.

Black continued to remain somewhat distant from his former colleagues on the left. His disagreement rates with the members of the liberal bloc were high: Douglas, 32.7%; Fortas, 31.6%; Brennan, 31.3%; Marshall, 28.4%; and Warren, 27.8%. On the other hand, Black disagreed with the Court's right wing Justices even more: Stewart, 44.9%; Harlan, 39.2%. Therefore, he must be classified as a moderate with an inclination to the left.

Fortas, during his final Term, had the second most liberal

47. See appendix B, table 8 *infra*.

voting record on the Court. He disagreed with the core liberals Warren and Brennan much less than with the conservatives.

TABLE 29

FORTAS' DISAGREEMENT RATES—OCTOBER 1968 TERM

LIBERALS	
Warren	17.9%
Brennan	15.5%
CONSERVATIVES	
Harlan	35.1%
Stewart	40.0%

Several interesting patterns occurred in the Court's right wing. Harlan was somewhat more moderate than usual and Stewart somewhat more conservative. Stewart was on the far right, ousting Harlan from that spot for the first time since Frankfurter left the Court. White was very close to the exact center.

TABLE 30

WHITE'S DISAGREEMENT RATES—OCTOBER 1968 TERM

JUSTICE	NUMBER	RATE
LIBERALS		
Douglas	38	39.2%
Black	<u>21</u>	21.9%
Total	59	
CONSERVATIVES		
Harlan	33	34.4%
Stewart	<u>24</u>	24.7%
Total	57	

In summary, the final Term of the Warren era was almost completely dominated by the liberals. The five liberals (Douglas, Fortas, Warren, Brennan, and Marshall) dissented only forty-seven times. In contrast, Stewart and Harlan dissented

sixty-five times. Disagreement rates were up a little but still far below the peaks reached in the late 1950's. The statistics paint a picture of unchallenged liberal control.

TRENDS DURING THE THIRD PERIOD OF THE WARREN COURT

Voting Patterns

The clearest pattern during the final eight Terms of the Warren era was liberal dominance. This can perhaps best be seen by comparing the dissent rates of the liberal pair, Warren and Brennan, with those of the Court's most conservative member, Harlan.

TABLE 31
DISSENT RATES—OCTOBER 1961 THROUGH 1968 TERMS

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

A five-vote liberal majority was present throughout the period, with the possible exception of the October 1966 Term. The conservative wing was reduced to one (Harlan) by the loss of Frankfurter and Whittaker in April 1962. The liberal majority emerged with the seating of Goldberg on the first day of the October 1962 Term. At that time, the liberal bloc included Douglas, Black, Warren, Brennan, and Goldberg. On the first day of the October 1965 Term, Goldberg was replaced by Fortas; the liberal majority remained intact. During the October 1966 Term, Black moved out of the liberal wing and

into a moderate position, thus threatening the existence of the liberal majority. The seating of Marshall on the first day of the October 1967 Term, replacing Clark, reinstated the liberal majority that then included Douglas, Fortas, Warren, Brennan, and Marshall.

Voting data show an initial swing to the left during the October 1961 Term, when the liberals had a working 4-2-1 majority in over 40% of the cases. This swing turned into a rout in the October 1962 and 1963 Terms, when the five liberals voted cohesively and dissent rates on the right jumped to their highest point of the entire Warren era.

During the October 1964 and 1965 Terms, the liberals broke ranks and new coalitions emerged. The general alignment during this period was 2-5-2, with the traditional liberals, Warren and Brennan, lining up more or less in the middle between Douglas and Black on the left and Stewart and Harlan on the right. During the October 1966 Term, Black, White, and Clark moved to the right, creating a 4-1-4 alignment and briefly challenging the liberal dominance. During the October 1967 and 1968 Terms, after the seating of Marshall, the liberals resumed almost complete control over the Court's decisions, thus completing the most liberal period in the history of the United States Supreme Court.

The positions on the Court's extreme left and right were held by Douglas and Harlan through most of the period covered by this article.⁴⁸ With only a few exceptions, Douglas and Harlan had the highest disagreement rates of all the pairs of justices.⁴⁹

Douglas, normally a frequent dissenter, was unusually content during the 1960's. After dissenting, on the average, in 28.1% of the cases during the 1953-57 period and 34.6% of the cases during 1957-61 period, his dissent rate dropped to a 20.3% average in the 1961-69 period.

48. An argument can be made that Black or Goldberg was the most liberal in the October 1963 Term, but the case would be close. Stewart was the most conservative in the October 1968 Term. During the other terms, Douglas and Harlan held the extreme positions.

49. See appendix A, tables 1-8 *infra*.

TABLE 32
DOUGLAS' DISSENT RATES

OCT. TERM	DISSENT RATE
1953	41.1%
1960	40.5%
1961	24.7%
1962	18.0%
1963	13.9%
1964	25.6%
1965	23.7%
1966	30.7%
1967	16.1%
1968	22.2%
1972	50.7%
1973	45.6%

Douglas agreed most frequently with Warren, Brennan, Fortas, Marshall, and, during the early 1960's, Black. He disagreed most frequently with Harlan and Stewart.

At the core of the liberal bloc were three closely aligned votes: Warren, Brennan, and Goldberg/Fortas. When Marshall arrived, he joined this group.

Goldberg was most closely aligned with Brennan and Warren during his three Terms on the Court (October 1962, 1963, and 1964 Terms). During his first two Terms, he was much closer to Douglas on the far left than Harlan on the far right; during his final Term he was balanced between the two.

TABLE 33
GOLDBERG'S DISAGREEMENT RATES

OCT. TERM	LIBERALS			CONSERVATIVE
	Douglas	Warren	Brennan	Harlan
1962	21.2%	17.8%	13.5%	39.8%
1963	13.5%	12.1%	7.6%	48.6%
1964	32.2%	14.2%	17.0%	26.7%

On the basis of data such as these, Goldberg deserves his reputation as a member of the liberal wing. Reflecting the liberal dominance, Goldberg had consistently low dissent rates: October 1962 Term, 9.6%; October 1963 Term, 12.1%; October 1964 Term, 14.0%.

Fortas, Goldberg's successor, also aligned himself much more closely with the liberals than with the conservative, Harlan. He agreed most often with Warren, Brennan, and Marshall, and he consistently leaned more toward Douglas on the left than Harlan on the right.

TABLE 34
FORTAS' DISAGREEMENT RATES

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

With the exception of the October 1966 Term, Fortas' dissent rates were low: October 1965 Term, 10.3%; October 1967 Term, 9.3%; October 1968 Term, 10.3%. On the basis of voting data, it seems accurate to treat the Goldberg/Fortas seat as a liberal vote throughout the 1962-1969 period.

Marshall was only on the Court during the October 1967 and 1968 Terms, but he moved immediately into a tight alignment with the liberals. He agreed with Warren and Brennan

in more than 90% of the cases, and he leaned more toward Douglas than toward Harlan.

TABLE 35
MARSHALL'S DISAGREEMENT RATES

OCT. TERM	LIBERALS				CONSERVATIVE
	Douglas	Fortas	Warren	Brennan	Harlan
1967	18.6%	10.2%	6.7%	6.8%	30.0%
1968	21.6%	16.3%	12.4%	6.7%	33.0%

Marshall provided the fifth vote for the liberal majority after Black moved to the right in the 1966-1969 period.

Perhaps the most varied voting pattern on the Court during the 1960's was Black's. During the first two periods of the Warren era, Black had agreed with Douglas and Warren in a very high percentage of cases. During the early 1960's the alignment of Douglas, Black, and Warren continued, although their disagreement rates increased. By 1966, however, Black had moved away from the liberal wing and actually agreed with Stewart and Harlan almost as much as with Douglas and Warren.

TABLE 36
BLACK'S DISAGREEMENT RATES

OCT. TERM	LIBERALS		CONSERVATIVES	
	Douglas	Warren	Stewart	Harlan
1955	4.3%	3.3%	—	43.6%
1962	18.0%	11.1%	44.1%	53.6%
1965	21.3%	26.7%	32.3%	44.1%
1966	28.7%	34.0%	33.0%	39.6%
1967	28.6%	25.0%	31.2%	33.9%

The extent of Black's shift to the right should not, however, be exaggerated. Even during his most conservative Term (the October 1966 Term), he was slightly to the left of center.⁵⁰

50. Black moved to the right of center only in his final Term, the October 1970

White's voting pattern was moderate throughout the 1960's. He agreed most often with Brennan and Clark. Usually, he was near the center between Douglas and Harlan.

TABLE 37

WHITE'S DISAGREEMENT RATES

OCT. TERM	Douglas	Harlan
1962	31.8%	27.4%
1963	24.3%	27.8%
1964	35.2%	21.8%
1965	30.1%	32.6%
1966	36.5%	25.0%
1967	34.3%	25.7%
1968	<u>39.2%</u>	<u>34.4%</u>
Average	32.9%	27.8%

White's shift to the right during the brief challenge to liberal dominance in the October 1966 Term suggested that he might become more conservative if the Court as a whole moved to the right at some later time.

Stewart was a moderate conservative during the period covered by this article. He disagreed with Douglas and even Warren significantly more often than with Harlan.

TABLE 38
STEWART'S DISAGREEMENT RATES

OCT. TERM	LIBERALS		CONSERVATIVE
	Douglas	Warren	Harlan
1961	36.9%	27.7%	27.4%
1962	42.3%	38.0%	20.0%
1963	30.8%	25.5%	24.1%
1964	43.7%	26.2%	20.9%
1965	40.6%	28.3%	13.7%
1966	50.0%	45.5%	13.0%
1967	31.7%	24.3%	19.4%
1968	<u>45.9%</u>	<u>38.1%</u>	<u>23.7%</u>
Average	40.5%	31.8%	20.2%

Stewart was the second most conservative Justice during the 1960's. He agreed with the conservative Harlan more than any other Justice did and he disagreed with Douglas more than any Justice except Harlan.

Harlan was the most conservative Justice. Except in the October 1968 Term, he disagreed with the liberals substantially more than any other Justice. Table 39 illustrates this by comparing Harlan's and Stewart's disagreement rates with Douglas.

TABLE 39
DOUGLAS' DISAGREEMENT RATES

OCT. TERM	Stewart	Harlan
1961	36.9%	49.4%
1962	42.3%	53.6%
1963	30.8%	47.2%
1964	43.7%	45.5%
1965	40.6%	49.0%
1966	50.0%	56.4%
1967	31.7%	43.8%

Substantive Legal Trends

This article will not discuss, in any detail, the substance of the law written by the liberal activists during their period of dominance in the 1960's. What follows, however, is a brief sketch of the most significant legal trends. By almost universal acclaim,⁵¹ the developments that occurred in the following substantive areas were among the most important: 1) race relations, 2) criminal procedure, 3) reapportionment of voting districts, 4) free speech, 5) privacy, and 6) social welfare law. In all these areas, the Court's general demeanor was activist; it pursued its policies aggressively.

In the race relations area, the Court took a number of important steps. It carried on the equal protection revolution begun in *Brown v. Board of Education*.⁵² It extended the prohibition against segregation in public services⁵³ and nullified schemes devised to evade it.⁵⁴ It cast a protective net over

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

52. 347 U.S. 483 (1953).

53. E.g., *Johnson v. Virginia*, 373 U.S. 61 (1963)(courtrooms); *Turner v. City of Memphis*, 369 U.S. 350 (1962)(airports).

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

civil rights demonstrators.⁵⁵ It upheld both the Civil Rights Act of 1964⁵⁶ and the Voting Rights Act of 1965⁵⁷ and resuscitated the Civil Rights Act of 1866.⁵⁸

The Court carried out a criminal procedure revolution. One by one, it made the fundamental provisions of the Bill of Rights applicable to the states by incorporating them in the due process clause of the fourteenth amendment.⁵⁹ One by one, the Court expanded and elaborated those provisions,⁶⁰ at times issuing detailed sets of prophylactic rules to insure compliance.⁶¹ By the end of the 1960's, the Court had written a lengthy constitutional code of criminal procedure equally applicable in state and federal trials.⁶²

The Court required and supervised the reapportionment of legislative districts throughout the nation.⁶³ It overruled precedent and held the issue of voter apportionment justiciable.⁶⁴ The Court formulated a strict one person, one vote rule,⁶⁵ and applied it to the United States House of Representatives,⁶⁶ both houses of state legislatures,⁶⁷ and local gov-

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

56. *Katzenbach v. McClung*, 379 U.S. 295 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

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

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

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

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

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

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

63. Earl Warren believed this was the most important line of cases during his tenure. J. CASPER, *THE POLITICS OF CIVIL LIBERTIES* 213 (1972).

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

65. *Gray v. Sanders*, 372 U.S. 368 (1963).

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

67. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

ernment units having general governmental power.⁶⁸ Right up to the end, it insisted on precise mathematical equality where feasible.⁶⁹

The Court expanded legal protections for speech and association. It rejected defamation actions against public officials⁷⁰ and public figures⁷¹ in the absence of actual malice. It imposed tighter limits on obscenity prosecutions⁷² and expanded access to private shopping centers on the part of persons seeking forums for expression.⁷³

The Court made new law in an effort to protect the privacy of individuals from the assaults of modern technology and government. It redefined the fourth amendment to cover electronic surveillance⁷⁴ and invalidated New York's wiretapping law.⁷⁵ Furthermore, it laid the basis for a new constitutional right of privacy in personal decisions.⁷⁶

The Court conducted an activist campaign on behalf of the poor in a variety of areas. It struck down laws adversely affecting welfare recipients,⁷⁷ protected debtors against creditors,⁷⁸ and sought to insure equal procedural protection for indigent criminal defendants.⁷⁹ It held poll taxes unconstitutional⁸⁰ and it suggested that statutes adversely affecting the poor were subject to strict judicial scrutiny.⁸¹ The Court continued to give broad power to the legislative branch to regulate economic enterprises.⁸²

In general, the Court sought to make the federal judiciary "activist" in the pursuit of its preferred values. It eased requirements for access to the courts and created new causes of

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

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

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

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

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

73. *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

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

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

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

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

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

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

80. *Harper v. Virginia Bd. of Elect.*, 383 U.S. 663 (1966).

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

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

action. It eliminated procedural hurdles. It reached out to resolve important constitutional issues even where the case did not require it. It overruled precedents freely and gave broad remedial powers and responsibilities to lower federal courts. In all, the Warren Court of the 1960's was a liberal, activist Court.

CONCLUSION

The final period of the Warren era (the October 1961 through 1968 Terms) was dominated by the liberal Justices. On the left was William O. Douglas. Next to Douglas was his long-time liberal partner, Hugo L. Black, until the 1960's or old age moved him to the right. Next came the liberal pair, Earl Warren and William J. Brennan, Jr., usually agreeing in more than 90% of the cases. With these four were Arthur Goldberg, and his successor, Abe Fortas, always in the liberal bloc, sometimes to the left and sometimes to the right. Finally, when Black defected, on came Thurgood Marshall to provide the fifth vote.

The liberals exercised their dominance with a great deal of judicial activism. They continued to lead the movement toward racial equality and conducted a constitutional revolution in criminal procedure and legislative districting. They formulated new laws protecting first amendment and privacy rights and pursued a policy of economic egalitarianism in a variety of contexts. The federal judiciary became a more active forum for the redress of legal grievances.

But times would soon change.

APPENDIX A

TABLE 1

DISAGREEMENT RATES—OCTOBER 1961 TERM

		Douglas (85) ^a	Black (84)	Warren (84)	Brennan (85)	Clark (85)	Stewart (84)	Whittaker d (33)	Frankfurter (38)	Harlan (85)
Douglas	% ^b		19.0	9.5	18.8	32.9	36.9	45.5	52.6	49.4
	# ^c		16/84	8/84	16/85	28/85	31/84	15/33	20/38	42/85
Black	%			13.3	17.9	30.0	32.5	39.4	42.1	47.6
	#			11/83	15/84	25/84	27/83	13/33	16/38	40/84
Warren	%				11.9	26.2	27.7	36.4	44.7	45.2
	#				10/84	22/84	23/83	12/33	17/38	38/84
Brennan	%					21.2	21.4	27.3	34.2	33.3
	#					16/85	18/84	9/33	13/38	28/84
Clark	%						25.0	18.2	23.7	28.2
	#						21/84	6/33	9/38	24/85
Stewart	%							15.6	21.6	27.4
	#							5/32	8/37	23/84
Whittaker	%								15.2	12.1
	#								5/33	4/33
Frankfurter	%									7.7
	#									3/39
Harlan	%									
	#									

a Total number of cases in which justice participated

b Disagreement rate

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

d Data for White, Whittaker's successor, not included

TABLE 2
DISAGREEMENT RATES—OCTOBER 1962 TERM

		Douglas (111)a	Black (111)	Warren (108)	Brennan (111)	Goldberg (104)	White (107)	Clark (109)	Stewart (111)	Harlan (110)
Douglas	%b		18.0	20.4	18.0	21.2	31.8	34.9	42.3	53.6
	#c		20/111	22/108	20/111	22/104	34/107	38/109	47/111	59/110
Black	%			11.11	14.4	23.1	29.0	29.4	44.1	53.6
	#			12/108	16/111	24/104	31/107	32/109	49/111	59/110
Warren	%				3.6	17.8	25.0	24.5	38.0	48.1
	#				4/111	18/101	26/104	41/106	41/108	52/108
Brennan	%					13.5	20.6	25.7	35.1	45.5
	#					14/104	22/107	28/109	39/111	50/110
Goldberg	%						25.0	32.4	26.0	39.8
	#						25/100	33/102	27/104	41/103
White	%							15.2	21.5	27.4
	#							16/105	23/107	29/106
Clark	%								27.5	32.4
	#								30/109	35/108
Stewart	%									20.0
	#									22/110
Harlan	%									
	#									

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 1963 TERM

		Black (111) ^a	Douglas (108)	Goldberg (107)	Warren (111)	Brennan (109)	White (110)	Clark (111)	Stewart (110)	Harlan (109)
Black	% ^b		14.8	17.8	17.1	18.3	24.5	29.7	33.6	46.8
	# ^c		16/108	19/107	19/111	20/109	27/110	33/111	37/110	51/109
Douglas	%			13.5	13.0	14.2	24.3	29.6	30.8	47.2
	#			14/104	14/108	15/106	26/107	32/108	33/107	50/106
Goldberg	%				12.1	7.6	23.6	31.8	25.5	48.6
	#				13/107	8/105	25/106	34/107	27/106	51/105
Warren	%					6.4	20.0	21.6	25.5	43.1
	#					7/109	22/110	24/111	28/110	47/109
Brennan	%						15.7	22.0	18.5	40.2
	#						17/108	24/109	20/108	43/107
White	%							21.8	20.2	27.8
	#							24/110	22/109	30/108
Clark	%								20.9	26.6
	#								23/110	29/109
Stewart	%									24.1
	#									26/108
Harlan	%									
	#									

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 1964 TERM

		Douglas (90)a	Black (90)	Warren (87)	Brennan (91)	Goldberg (88)	White (89)	Clark (90)	Stewart (88)	Harlan (89)
Douglas	%b		22.5	24.4	27.8	32.2	35.2	29.2	43.7	45.5
	#c		27/89	21/86	25/90	28/87	31/88	26/89	38/87	40/88
Black	%			30.2	25.6	34.5	28.4	24.7	36.4	38.6
	#			26/86	23/90	30/87	25/88	22/89	32/88	34/88
Warren	%				5.7	14.2	12.9	15.1	26.2	27.1
	#				5/87	12/84	11/85	13/86	22/84	23/85
Brennan	%					17.0	6.7	11.1	19.3	24.7
	#					15/88	6/89	10/90	17/88	22/89
Goldberg	%						24.4	24.1	21.2	26.7
	#						21/86	21/87	18/85	23/86
White	%							13.6	19.8	21.8
	#							12/88	17/86	19/87
Clark	%								23.0	17.0
	#								20/87	15/88
Stewart	%									20.9
	#									18/86
Harlan	%									
	#									

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 1965 TERM

		Douglas (97) ^a	Black (94)	Warren (93)	Brennan (97)	Fortas (86)	Clark (97)	White (93)	Stewart (96)	Harlan (96)
Douglas	% ^b		21.3	18.3	19.6	19.8	29.9	30.1	40.6	49.0
	# ^c		20/94	17/93	19/97	17/86	29/97	28/93	39/96	47/96
Black	%			26.7	29.8	30.1	27.7	34.4	32.3	44.1
	#			24/90	28/94	25/83	26/94	31/90	30/93	41/93
Warren	%				3.2	8.1	14.0	19.1	28.3	40.2
	#				3/93	7/86	13/93	17/89	26/92	37/92
Brennan	%					11.6	12.4	15.1	26.0	37.5
	#					10/86	12/97	14/93	25/96	36/96
Fortas	%						18.6	18.3	28.2	36.0
	#						16/86	15/82	24/85	31/86
Clark	%							11.8	21.9	30.2
	#							11/93	21/96	29/96
White	%								23.9	32.6
	#								22/92	30/92
Stewart	%									13.7
	#									13/95
Harlan	%									
	#									

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 1966 TERM

		Douglas (101)a	Fortas (95)	Warren (100)	Brennan (98)	Black (101)	White (96)	Clark (97)	Stewart (100)	Harlan (101)
Douglas	%b		20.0	26.0	22.4	28.7	36.5	42.3	50.0	56.4
	#c		19/95	26/100	22/98	29/101	35/96	41/97	50/100	57/101
Fortas	%			11.7	18.5	33.7	34.0	34.1	50.5	50.5
	#			11/94	17/92	32/95	32/94	31/91	48/95	48/95
Warren	%				9.3	34.0	26.3	24.0	45.5	46.0
	#				9/97	34/100	25/95	23/96	45/99	46/100
Brennan	%					30.6	20.4	24.5	42.3	44.9
	#					30/98	19/93	23/94	41/97	44/98
Black	%						30.2	28.9	33.0	39.6
	#						29/96	28/97	33/100	40/101
White	%							19.8	25.3	25.0
	#							19/96	24/95	24/96
Clark	%								27.1	28.9
	#								26/96	28/97
Stewart	%									13.0
	#									13/100
Harlan	%									
	#									

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 1967 TERM

		Douglas (105)a	Fortas (108)	Warren (108)	Brennan (110)	Marshall (60)	Black (110)	White (110)	Stewart (109)	Harlan (109)
Douglas	%b		16.5	19.4	17.3	18.6	28.6	34.3	31.7	43.8
	#c		17/103	20/103	18/104	11/59	30/105	36/105	33/104	46/105
Fortas	%			13.2	9.3	10.2	25.9	26.9	20.6	30.8
	#			14/106	10/107	6/59	28/108	29/108	22/107	33/107
Warren	%				3.7	6.7	25.0	20.4	24.3	31.8
	#				4/107	4/60	27/108	22/108	26/107	34/107
Brennan	%					6.8	23.9	19.3	20.4	30.6
	#					4/59	26/109	21/109	22/108	33/108
Marshall	%						30.0	20.0	16.9	30.0
	#						18/60	12/60	10/59	18/60
Black	%							22.8	31.2	33.9
	#							23/110	34/109	37/109
White	%								30.3	25.7
	#								33/109	28/109
Stewart	%									19.4
	#									21/108
Harlan	%									
	#									

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 1968 TERM

		Douglas (99)a	Fortas (58)	Warren (98)	Brennan (100)	Marshall (89)	Black (99)	White (98)	Harlan (98)	Stewart (99)
Douglas	%b		22.4	24.7	24.2	21.6	32.7	39.2	40.2	45.9
	#c		13/58	24/97	24/99	19/88	32/98	38/97	39/97	45/98
Fortas	%			17.9	15.5	16.3	31.6	26.3	35.1	40.0
	#			10/56	9/58	8/49	18/57	15/57	20/57	23/58
Warren	%				9.2	12.4	27.8	21.9	38.5	38.1
	#				9/98	11/89	27/97	21/96	37/96	37/97
Brennan	%					6.7	31.3	16.3	34.7	33.3
	#					6/89	31/99	16/98	34/98	33/99
Marshall	%						28.4	25.0	32.2	33.0
	#						25/88	22/88	28/87	29/88
Black	%							36.1	39.2	44.9
	#							35/97	38/97	44/98
White	%								34.4	24.7
	#								33/96	24/97
Harlan	%									23.7
	#									23/97
Stewart	%									
	#									

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 1961 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	85	21	24.7%	-15.8%
Black	84	18	21.4%	- 4.7%
Warren	84	13	15.5%	- 3.4%
Brennan	85	5	5.9%	-13.0%
Clark	85	12	14.1%	- 4.2%
Stewart	84	13	15.5%	- 2.8%
White	12	1	8.3%	—
Whittaker	33	6	18.2%	-11.5%
Frankfurter	38	10	26.3%	+ 6.5%
Harlan	85	26	30.6%	+11.2%

TABLE 2

DISSENT RATES—OCTOBER 1962 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	111	20	18.0%	- 6.7%
Black	111	18	16.2%	- 5.2%
Warren	108	8	7.4%	- 8.1%
Brennan	111	6	5.4%	- 0.5%
Goldberg	104	10	9.6%	—
White	107	16	15.0%	+ 6.7%
Clark	109	25	22.9%	+ 8.8%
Stewart	111	33	29.7%	+14.3%
Harlan	110	45	40.9%	+10.6%

TABLE 3

DISSENT RATES—OCTOBER 1963 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Black	111	20	18.0%	+ 1.8%
Douglas	108	15	13.9%	- 4.1%
Goldberg	107	14	13.1%	+ 3.5%
Warren	111	7	6.3%	- 1.1%
Brennan	109	4	3.6%	- 1.9%
White	110	15	13.6%	- 1.4%
Clark	111	21	18.9%	- 4.0%
Stewart	110	21	19.1%	-10.6%
Harlan	109	41	37.6%	- 3.3%

TABLE 4

DISSENT RATES—OCTOBER 1964 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	90	23	25.6%	+11.7%
Black	90	25	27.8%	+ 9.8%
Warren	87	5	5.7%	- 0.6%
Brennan	91	2	2.2%	- 1.4%
Goldberg	88	13	14.8%	+ 1.7%
White	89	8	9.0%	- 4.6%
Clark	90	8	8.9%	-10.0%
Stewart	88	17	19.3%	+ 0.2%
Harlan	89	20	22.5%	-15.1%

TABLE 5
DISSENT RATES—OCTOBER 1965 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	97	23	23.7%	- 1.9%
Black	95	24	25.5%	- 2.7%
Warren	93	5	5.4%	- 0.3%
Brennan	97	4	4.1%	+ 1.9%
Fortas	86	8	9.3%	—
Clark	97	8	8.2%	- 0.7%
White	93	13	14.0%	+ 5.0%
Stewart	96	21	21.9%	+ 2.6%
Harlan	96	33	34.4%	+11.9%

TABLE 6
DISSENT RATES—OCTOBER 1966 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	101	31	30.7%	+ 7.0%
Fortas	95	23	24.2%	+14.9%
Warren	100	15	15.0%	+ 9.6%
Brennan	98	10	10.2%	+ 6.1%
Black	101	22	21.8%	- 4.3%
White	96	13	13.5%	- 0.5%
Clark	97	14	14.4%	+ 6.2%
Stewart	100	33	33.0%	+11.1%
Harlan	101	36	35.6%	+ 1.2%

TABLE 7

DISSENT RATES—OCTOBER 1967 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	105	17	16.1%	-14.6%
Fortas	108	10	9.3%	-14.9%
Warren	108	6	5.5%	- 9.5%
Brennan	109	4	3.7%	- 6.5%
Marshall	60	1	1.7%	—
Black	110	24	21.8%	0.0%
White	110	19	17.3%	+ 3.8%
Stewart	109	20	18.3%	-14.7%
Harlan	109	29	26.6%	- 9.0%

TABLE 8

DISSENT RATES—OCTOBER 1968 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Douglas	99	22	22.2%	+ 6.1%
Fortas	58	8	13.8%	+ 4.5%
Warren	98	9	9.2%	+ 3.7%
Brennan	100	2	2.0%	- 1.7%
Marshall	89	6	6.7%	+ 5.0%
Black	99	30	30.3%	+ 8.5%
White	98	16	16.3%	+ 1.0%
Harlan	98	32	32.7%	+ 6.1%
Stewart	99	33	33.3%	+15.0%

