1970

The Warren Court: Completion of a Constitutional Revolution

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VANDERBILT LAW REVIEW

VOLUME 23 MARCH, 1970 NUMBER 2

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With the retirement of Chief Justice Earl Warren from the United States Supreme Court, the time comes for the critics to step away in favor of the historians. In this article, Professor Swindler brings the finished era into historical perspective with analysis of the personalities, the issues, and the decisions of the Warren Court. He sees the Court not only as the innovative and provocative organ to which popular opinion has been directed, but also as a culmination of a long-term cycle of constitutional development.

I. A THIRTY-YEAR CYCLE

In the final weeks of its sixteen year history, the subject matter of the Warren Court's opinions ranged over most of the major constitutional issues with which it had concerned itself since 1953, and out of which it developed the seminal decisions for which it will be remembered. For example, it upheld an Alabama desegregation plan which provided for proportional racial representation on public school faculties,[1] and found a snack bar in a privately owned recreational facility to be within the "public accomodations" definition of the Civil Rights Act of 1964.[2] It rejected a North Carolina county's request to reinstate a literacy test for voter registration on the ground that the county had not met its burden of proving that for the past five years, under the Voting Rights Act of 1965, such a test had not been used for voter disfranchisement on a racial basis.[3] It applied the confrontation clause of the sixth amendment to state criminal

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1. United States v. Board of Educ., 395 U.S. 225 (1969).
2. Daniel v. Paul, 395 U.S. 298 (1969).
3. Gaston County v. United States, 395 U.S. 285 (1969).

procedure,[4] upheld, under the first amendment an "equal time" provision in an order of the Federal Communications Commission,[5] and, in the process of invalidating the Ohio Criminal Syndicalism Act, overruled the 42-year-old case of *Whitney v. California*.[6] The Chief Justice himself, speaking for the Court, invalidated a New York freeholder voting law under the equal protection clause of the fourteenth amendment,[7] and in a landmark opinion declared that in determining upon the seating of duly elected representatives, Congress was limited to the specific qualifications set out in the Constitution.[8] In two California cases, the Court reiterated the rule that search of person and premises, with or without warrant, was limited to the immediate area of apprehension,[9] while in cases from Maryland and North Carolina, the Court set out applicable criteria for determination of double jeopardy.[10]

The many decisions of the Warren Court may be categorized as a jurisprudence of individual integrity within the increasing constrictions of a corporate society: the constitutional guarantee of equality of opportunity between races, between voters, and between criminal defendants. In addressing itself to this theme, the Warren Court rounded out a cycle of constitutional change which has ranged over three decades and completed a revolution in national history which began in the crises of the New Deal and moved forward logically and inexorably to the present.[11]

The second century of the Constitution of the United States and of the Supreme Court of the United States is distinguishable from the first and is divisible into two broad periods with fairly definite dates to mark their beginning and end. The first era, *laizzez-faire* dominance in constitutional thought, was introduced by the Court's acceptance in

4. Harrington v. California, 395 U.S. 250 (1969).

5. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

6. Brandenburg v. Ohio, 395 U.S. 444 (1969), *overruling* Whitney v. California, 274 U.S. 357 (1927).

7. Kramer v. Union Free School Dist., 393 U.S. 818 (1969).

8. Powell v. McCormack, 395 U.S. 486 (1969).

9. Chimel v. California, 395 U.S. 752 (1969); Shipley v. California, 395 U.S. 818 (1969).

10. Benton v. Maryland, 395 U.S. 784 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937); North Carolina v. Pearce, 395 U.S. 711 (1969).

11. *See generally* B. SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 1-25 (1957); W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY, 1932-1968 (1970); Miller, *Toward a Concept of Constitutional Duty*, 1968 S. CT. REV. 199; *cf.* W. SWINDLER, THE OLD LEGALITY, 1889-1932, at 18-79 (1969); *cf.* Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696 (1946); Corwin, *Our Constitutional Revolution and How to Round It Out*, 19 PA. B.A.Q. 261 (1948); *cf.* B. SCHWARTZ, *supra* at 26-61, 140-88, 342-72.

1885 of Senator Roscoe Conkling's argument that the "person" in amendment XIV, section 1 was understood to be a legal person as well as an individual.[12] It lasted until 1937 when the knell sounded in *West Coast Hotel Co. v. Parrish*,[13] and the present era was ushered in immediately thereafter in *NLRB v. Jones & Laughlin Steel Corp.*[14]

In the half-century from the mid-eighties to the mid-thirties, the dominant theme of constitutional decision had been the narrow scope of permissible legislative action—whether it was the experimental state Granger laws which, in the face of judicial hostility, laid the foundations for the administrative regulatory agency, or the initial congressional statutory efforts at antitrust legislation and the control of interstate railroad activity in the form of the original Sherman Act and the Interstate Commerce Commission Act. At the state and national level alike, lawmakers struggled to cope with the exploding big business economy only to be rebuffed by a Court which at times seemed obsessed with a zeal to leave the interstate corporation totally beyond the reach of government.

The result of these years of narrow constitutional construction was the development of a body of decisional law unequivocally supporting a limited power of government in the area of economic affairs. When the depression of the 1930's revealed the bankruptcy of the *laissez-faire* concept of the economy, it followed that the constitutional rationale committed to the validity of that concept would inevitably be found to be bankrupt as well. As an ideological Armageddon approached, the apostles of narrow construction found that they had cut off their own avenues of retreat by their sweeping and gratuitous declarations of the limited nature of constitutional power; the end came in the spring of 1937 with the Pyrrhic victory over the New Deal "court packing" proposal, the cracking of the monolith of reaction on the Court itself, and the beginning of a rebuilding of constitutional law during the latter years of the Hughes Chief Justiceship.

The systematic broadening of the concept of legislative power which characterized the decade following 1937—first under Hughes and then under his successor as Chief Justice, Harlan F. Stone—was attended by a necessary overturning of a long series of precedents which, in the half-century of *laissez-faire*, had undergirded the narrow

12. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886); *cf.* San Mateo County v. Southern Pac. R.R., 116 U.S. 138 (1885).

13. 300 U.S. 379 (1937) (police power of state extends to regulation of maximum hours and minimum wages).

14. 301 U.S. 1 (1937) (upholding constitutionality of NLRB).

legislative concept. Stone's administration of the Court, indeed, is remembered today (as it was at the time) for the intellectual tumult created by this uprooting of long-established landmarks and the trial and error approach which seemed characteristic of constitutional decision in the aftermath of the New Deal revolution.[15]

By the end of the Stone Chief Justiceship, new dimensions of constitutional law were clearly discernible: Federal labor law, virtually *sui generis* when *Jones & Laughlin Steel* was announced in 1937, had become a many-faceted jurisprudence in its own right (and was about to be fundamentally reoriented with the Taft-Hartley Act).[16] Social welfare legislation—old age security and unemployment compensation in particular—had come to be validated by the judiciary as a matter of course.[17] The subject of civil liberties, annealed and hammered on an anvil of war loyalty issues unknown to the now almost classical "clear and present danger" tests evolved in the First World War, had already introduced the related subjects of racial justice and the inviolability of personal privacy.[18] A reexamination of societal and individual rights in the context of criminal justice was about to begin.[19]

The seven years under Chief Justice Vinson have been described, perhaps somewhat wishfully, as a period in which the volatility of the constitutional decisions of the later Roosevelt era was dampened down.[20] In the retrospect now provided by the succeeding era of the Warren Court, the full consequences of the revolution of 1937-46 can be better understood, and the Vinson interlude can be better described as a seedtime for the constitutional propositions which were boldly advanced, and bitterly debated, in the years from 1953 to the spring of 1969.

In the perspective afforded by the end of the 30-year, counter-*laissez-faire* jurisprudential development, the period covered by the

15. *See generally* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 547-627 (1956).

16. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938); NLRB v. Mackay Radio, 304 U.S. 333 (1938); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); Hague v. CIO, 307 U.S. 496 (1939); United States v. Darby, 312 U.S. 100 (1941).

17. *Cf.* Stewart Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

18. *Cf.* Morgan v. Virginia, 328 U.S. 373 (1946); Screws v. United States, 325 U.S. 91 (1945); Smith v. Allwright, 321 U.S. 649 (1944); Smith v. Texas, 311 U.S. 128 (1940).

19. *Cf.* Ashcraft v. Tennessee, 322 U.S. 143 (1944); McNabb v. United States, 318 U.S. 332 (1943); Glasser v. United States, 315 U.S. 60 (1942); Betts v. Brady, 316 U.S. 455 (1942).

20. *Cf.* Allen, *Chief Justice Vinson and the Theory of Constitutional Government: A Tentative Appraisal*, 49 NW. U.L. REV. 3 (1954); Frank, *Fred Vinson and the Chief Justiceship*, 21 U. CHI. L. REV. 212 (1954).

Hughes-Stone judicial administration is now seen as a conservative movement. That is to say, the half-century of dominance of the concept of narrow legislative power could readily be counterbalanced by an alternative concept of broad legislative power; if this did not mean a simple return to a pre-1885 state of affairs, this could be explained by the fact that political and economic circumstances had changed in the meantime. But the essential fact was that a broad construction of constitutional powers was readily to be found within American political tradition; it was not a novel proposition of first impression.[21]

What the period of the Vinson Court revealed, however, was that there *were* novel propositions of first impression which were spontaneously generating from the economic and political stresses of the depression decade of the thirties and the hot and cold war years of the forties. In one sense, the constitutional pronouncements of the period 1937-46 were simply an epitaph for the age of *laissez-faire*, now forever dead. To coin a cliche, an era had ended with the release of atomic energy at the end of World War II, and with it the release of many pent-up political energies as well; underprivilege and underdevelopment of all types and in all parts of the world were now to demand prompt and drastic relief in favor of a rule of universal and uniform equality.

Many of the issues of the Warren Court were anticipated in the Vinson period, which from one viewpoint was a transitional era. For example, the procedural rules for arrest and arraignment which came to full flower in *Mallory v. United States*[22] had their predecessor opinions in the previous decade.[23] In education, the summary rationale represented in *Engel v. Vitale*,[24] was prepared by the pre-Warren decisions on religion and the public schools.[25] Similarly, the "state action" doctrine evolved from a barrier to integration into an instrument for accelerating integration,[26] while the wheel of fate ground inexorably toward *Brown v. Board of Education*.[27] Indeed, most

21. *Cf.* Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961.

22. 354 U.S. 449 (1957).

23. Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943).

24. 370 U.S. 421 (1962).

25. *See* Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 330 U.S. 203 (1948); Everson v. Board of Educ. 330 U.S. 1 (1947).

26. *Compare* Barrows v. Jackson, 346 U.S. 249 (1953), *and* Shelley v. Kraemer, 334 U.S. 1 (1943), *with* Evans v. Newton, 382 U.S. 296 (1968), *and* Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

27. 347 U.S. 483 (1954); *cf.* McLaurin v. Regents, 339 U.S. 637 (1950); Sweat v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

striking of all is the fact that *Brown* was originally argued and set for reargument within the time span of the Vinson Court.[28] In another respect, there has been a characteristic continuity in the constitutional jurisprudence of the past three decades. Dissents, or non-unanimous[29] opinions, have been the rule rather than the exception. Moreover, a conscious use of the dissent—or, more especially, the concurring opinion—has become more general; it might be argued, in fact, that it has become almost an indispensable element in the development of the Court's institutional position. While disparity of argument may sometimes be a symptom of intellectual disintegration, as in the melee of the Stone Court when dissents occasionally dissented from other dissents,[30] the spectrum of conceptualization, which more often has been covered by the several opinions in the same case, may contribute greatly to intellectual strength.

The statistics of disagreement or at least non-unanimity have been shown for the Hughes-Stones period on the Court (1930-46) to have increased from 11 percent of the opinions in the earlier year to 64 percent in the last year.[31] In the "quiescent" period of the Vinson Court the percentage accelerated to a remarkabble 81 in the final year of the Chief Justiceship.[32] While the statistics for the Warren Court as projected in the tables in the present study are not comparable—being collected only for constitutional cases—those in Table 1 suggest a percentage for the non-unanimous/dissenting cases seldom less than 50 and on one or two occasions exceeding 80. From this consistently high level of divergency of views it could be hypothesized that the nature of the constitutional revolution which began in 1937 has been to provoke a continuing process of reexamination of judicial positions on virtually every issue which presents itself.

Part V of the present study considers the manner in which the non-conforming rationales of the leading members of the Warren Court have contributed to post-New Deal constitutionalism. For the history of the Warren Court has not merely been one of continuity of the Frankfurter-Jackson position in the alignment of Justices Harlan, Stewart and White on the one hand, and the ascendancy of the Black-Douglas position through the joinder of Justices Brennan, Goldberg-

28. *Cf.* Brown v. Board of Educ., 344 U.S. 1, 141 (1952); 345 U.S. 972 (1953).

29. "Non-unanimous" is used as a modern equivalent to the now lesser known *nemine contra dicende* (N.C.D.) to indicate a divided opinion without dissent.

30. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 672 (1944); *cf.* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 619 (1944).

31. C. PRITCHETT, THE ROOSEVELT COURT, Table I, at 25 (1948).

32. C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT, Table I, at 21 (1954).

Fortas, Marshall and the Chief Justice on the other. It has been, as suggested by Parts II-IV which follow, a vigorous, sometimes virulent, dialogue over the premises and consequences involved in the vast new propositions of constitutional law which have emerged in these sixteen years.

TABLE I

VOTING RECORD ON CASES INVOLVING CONSTITUTIONAL ISSUES 1953-1968

Term	*Cases with Const'l Issues*	*Unanimous Opinions*	*Non-Unanimous* Opinions*	*Opinions with Dissents*
1953	21	4	4	13
1954	31	12	6	13
1955	65	23	8	34
1956	31	5	1	25
1957	72	16	1	55
1958	55	23	6	26
1959	40	19	8	13
1960	43	4	6	33
1961	35	13	4	19
1962	59	22	9	28
1963	49	12	3	34
1964	37	8	10	19
1965	40	13	9	18
1966	47	12	5	30
1967	72	16	15	41
1968	46	21	2	23

*Cases in which there were concurring opinions, but no dissents.

II. THE SHAPING OF THE WARREN COURT

As the October 1953 term of the Court opened, the Eisenhower administration was completing its first nine months in office, an armistice had been announced for the Korean War, and on Capitol Hill Senator Joseph McCarthy's obsession with subversion in government service was reaching a climax in paranoia which would result in his formal censure the following year. The nuclear age had bred a hyperconsciousness of the problem of security and national survival; within four more years, Sputnik 1 would inaugurate the space age and—with its stunning demonstration of the well advanced state of Soviet technology—would have a dual impact upon the American mind. On the one hand, Russian successes in space provoked demands

VOTING RECORD ON CONSTITUTIONAL CASES BY INDIVIDUAL JUSTICES 1953-1968

Justice	1953			1954			1955			1956			1957			1958			1959			1960		
	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D
Warren	16		4	28	1	2	64		1	24	1	4	63	2	7	50		5	37		3	39	1	3
Black	8	2	11	26		5	59	3	3	21	1	5	59	2	9	44	2	9	31	2	7	30	3	10
Reed	16	2	2	26		5	57	1	7	4														
Frankfurter	17	1	3	23	3	5	53	7	5	19	5	6	55	2	15	45	3	7	34	4	2	31	8	3
Douglas	8	2	10	24		7	57	1	7	22		8	45	3	24	46	2	7	27	2	11	19	5	19
Jackson	17	1	2																					
Burton	20		1	25	2	4	59		6	25	2	4	68		4									
Clark	16	1	2	29	2		64		1	23		4	64		8	50	2	2	34		6	39	3	1
Minton	19		2	25	1	5	61		4															
Harlan				11	1	4	60	1	4	23	5	2	59	3	10	43	6	6	30	4	6	32	7	4
Brennan										22	1	3	64	2	5	49	4	2	33		7	33	2	8
Stewart																51	1	1	39	1		37	2	4
Whittaker										23			65		7	50	3	2	35	1	4	37	3	3

Justice	1961			1962			1963			1964			1965			1966			1967			1968		
	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D	O	C	D
Warren	31	2	2	58		1	46	2	1	32	1	2	37	1	2	44		3	69		3	43		3
Black	27	3	5	54	3	2	38	4	7	21	8	7	31	1	8	37	2	8	49	12	11	25	12	9
Frankfurter	23	1	1																					
Douglas	22	7	6	47	9	3	35	9	5	27	6	4	32	4	4	33	5	9	48	13	11	39	1	
Clark	28	3	4	35	7	17	36	5	8	33	1	3	34	2	4	40	1	6						
Harlan	24	6	5	29	7	23	28	5	16	21	9	7	27	3	10	30	3	14	36	15	21	23	6	7
Brennan	32	3		53	5	1	48		1	35	1	1	38	1	1	44	1	2	66	6		44	2	
Whittaker	11																							
Stewart	29	3	3	37	3	19	39	2	8	27	3	6	36	3	1	38	5	4	56	8	8	35	6	5
White	16		1	47	1	11	42	2	5	31	1	5	35	1	3	41	2	4	50	7	15	39	3	4
Goldberg				50	5	4	40	4	5	28	6	3												
Fortas													35	2	3	37	3	7	58	8	6	31		4
Marshall																			64	5	3	42		1

for a matching emphasis on scientific training in the United States; on the other, they heightened the insistence upon security and conformity.

For the mid-fifties represented the critical stage in the cold war on the domestic front, and to a degree compromised the constitutional argumentation of the Court at the same time that it toughened its intellectural fibre. With Congress, which tended to view the unconventional with suspicion if not hostility, the breaking of new ground by the judicial branch of government was bound to raise alarms. *Brown* shook the foundations of a framework which had existed comfortably since 1896;[33] amid the welter of desegregation cases which followed *Brown*, to which were added the series of "Fifth Amendment" opinions curbing the excesses of the security hysteria of the past decade, Congress and the Court were quickly maneuvered into a confrontation.

The Court itself changed composition rather swiftly in this period; President Eisenhower's five appointments replaced four of Truman's and one of Franklin Roosevelt's, and were all made within a space of four years. (See Chart). Justices Black, Frankfurter, Douglas, and Clark embodied the constitutional revolution of the New Deal years; Chief Justice Warren and Justices Harlan, Brennan and Stewart—and the fifth Eisenhower appointee, Justice Whittaker—represented the post-World War II national mind. If the newcomers did not represent a substantial ideological shift (and, indeed, three of the five were Frankfurter-type post-New Deal moderates or conservatives), the fundamental point was that they *were* new, and hence would deal with the issues before them on their own terms.

For the remainder of the fifties, then, the Warren Court would operate in the context of a national political atmosphere charged with cold war tensions, while seeking its own answers to the judicial questions it had inherited from the Vinson Court. Among the latter were two major groups of issues—racial segregation, represented in *Brown*, a literal holdover from the last Vinson term; and the balancing of national security interests and individual liberties, the latter being subdivided into questions of federal law[34] and state law.[35] Within these formative years, the Warren Court would offer its answers to these several questions.[36]

33. Plessy v. Ferguson, 163 U.S. 537 (1896).

34. Dennis v. United States, 341 U.S. 494 (1951).

35. Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Supervisors, 341 U.S. 716 (1951); Gerende v. Board of Pub. Works, 341 U.S. 56 (1951).

36. Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instr., 368 U.S. 278

The specific outcome of the *Brown* case was hardly a shock to the Congressional mind; the remarkably detailed questions on which the Court had invited argument from counsel[37] had rather clearly forecast the probable holding. It was, rather, the dynamic and evolutionary definition of the nature of the Constitution itself, implicit in the opinion in the case, which left conservatives in trauma. "In approaching this problem," the Court had said, "we cannot turn the clock back to 1868 when the Fourteenth Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the nation."[38] With grim clairvoyance, the conservative mind filled in the implications: if the Court was prepared to read all wordage of the Constitution in terms of contemporary issues rather than in terms of what strict constructionists insisted upon calling "original meaning," there would be no issue in American life which could not be brought within the scope of constitutional adjudication.[39]

Yet this was no novel proposition advanced by the new Chief Justice—Vinson had said substantially the same thing in *Dennis*. "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature."[40] If Vinson's words seemed to advert to "original meaning," the *Dennis* case itself had made clear that as circumstances changed the applicability of the constitutional standard changed; and in 1951 it had been the liberal mind which had quailed at the proposition.[41] But whether or not there were any absolutes, it had always been evident that absolutes were never more than a circumscribed area within a broader area of relativism; even Justice Holmes had regarded questions under the first amendment as questions of "proximity and degree,"[42] and Justice Cardozo had sought to resolve the question of incorporation of Bill of Rights guarantees into the fourteenth amendment by singling out for incorporation those

(1961); Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Educ., 357 U.S. 399 (1958); *cf.* Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

37. 345 U.S. 972 (1953).

38. Brown v. Board of Educ., 347 U.S. 483, 492 (1954).

39. *Cf.* W. MURPHY, CONGRESS AND THE COURT, chs. 4, 5 (1962).

40. Dennis v. United States, 341 U.S. 494, 508 (1951).

41. *Cf.* Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952).

42. Schenck v. United States, 249 U.S. 47, 52 (1919), *cited in* Dennis v. United States, 341 U.S. 494, 537 (1951) (dissenting opinion).

"specific pledges . . . implicit in the concept of ordered liberty . . . ."[43]

Of course, *Brown* was devastating to the conservatives in more elemental respects as well; like *Marbury v. Madison*,[44] it enunciated a constitutional first principle on which all succeeding questions in related subject areas would turn. It was predictable that *Cooper v. Aaron*,[45] holding that no evasive scheme to avoid desegregation would be tolerated, would follow upon the heels of the two *Brown* cases and with an even greater manifestation of unanimity. In a desperate last stand, the conservatives resurrected the rationalization of "interposition" only to have it summarily disposed of as preposterous by a United States district court in New Orleans.[46] There was ultimately no escape from the proposition flowing from this type of adjudication: If racial equality was now recognized as part of that liberty which, in Cardozo's phrase, had been "withdrawn by the Fourteenth Amendment from encroachment by the states," and subsequently had been "enlarged by latter-day judgments"—then it was indeed the supreme law of the land. (See Table III).

In the face of this harsh reality, the Southern conservatives in Congress were politically impotent, while Northern conservatives simply found it impolitic to decry the rule of equality set out in the segregation cases. A calculated attack upon the new constitutional liberalism, to have a practical prospect of success, would have to be launched on a collateral issue. That issue was to be provided by the Court decisions on the loyalty/subversion, or "fifth amendment," cases.

In the fall of 1955, in *Toth v. Quarles*[47] the Warren Court began developing the proposition that ex-servicemen were entitled to civil trial even for service-connected crimes, and followed with the *Reid v. Covert*[48] rule (in which the Court reversed itself within a twelve-month period) on civil trial guarantees to servicemen's dependents. This shaking of the military establishment sent tremors onto Capital Hill; they proved to be the first rumblings of a shattering series of opinions in the area of civilian rights generally.

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43. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

44. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

45. 358 U.S. 1 (1958).

46. Bush v. School Bd., 188 F. Supp. 916 (1960), *motion for stay of injunction denied per curiam*, 364 U.S. 500 (1960); *cf.* Morris, *The Segregation Cases: An End or A Beginning?* 28 OHIO B.J. 187 (1955).

47. 350 U.S. 11 (1955).

48. 351 U.S. 487 (1956); 354 U.S. 1 (1957).

While the Court in the "second round" of *Reid v. Covert*[49] could not but have pleased conservatives when it deelared that "the United United States is entirely a creature of the Constitution" and that "no agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution,"[50] the conclusion derived in this instance—that the rights conferred by the Constitution follow the citizen of the United States wherever he is under the jurisdiction of the United States, at home or abroad—was calculated to stir certain doubts. There were doubts in the conservative mind that were confirmed in *Slochower v. Board of Higher Education*[51] when the majority decried "the practice of imputing a sinister meaning to the exercise of a person's constitutional right."[52] This observation, reiterated with increasing frequeney, was seen as an articulate challenge to the sweeping inquiries being asserted by congressional and state legislative committees into matters of loyalty and subversion.

The challenge to investigative authority offered by the fundamental guarantees of the Constitution was most bluntly expressed in *Watkins v. United States*,[53] where the Chief Justice speaking for the Court declared that "there is no congressional power to expose for the sake of exposure." He added: "No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." There were two distinctions which the legislative branch was compelled to recognize as limitations upon its own funetions, said the opinion. One was the distinction between the public's right to be adequately informed on subjects for which legislation was contemplated, and the individual's right to privacy of personal conviction. The other was the distinction between the finding of facts by legislative inquiry and the trying of facts in a judicial setting which properly safeguarded the individual's privileges.

Watkins was one of a cluster of cases in June 1957. A second of these demanded that there be explicitly defined authority for and objectives of investigatory proceedings in state as in congressional committees.[54] Another directed administrative agencies of the federal government to be bound by the findings of their own investigative procedures and not override them upon the separate initiative of the

49. 354 U.S. 1 (1957).
50. *Id.* at 6, 16.
51. 350 U.S. 551 (1956).
52. *Id.* at 557.
53. 354 U.S. 178, 187, 200 (1957).
54. Sweezey v. New Hampshire, 354 U.S. 234 (1957).

executive.[55] A fourth set aside a conviction based upon undisclosed reports of an investigation by the F.B.I.[56] Most alarming of all, for an alarmist-oriented Congress, was the holding in *Yates v. United States*[57] that advocacy of violent overthrow of government had to be shown beyond reasonable doubt to be an active rather than an abstract advocacy. Since this nullified the convictions in the original *Dennis* case, it was readily accepted by Court critics as a calculated weakening of the security procedure set out in the original Smith Act.[58]

In all of the cases, the Warren Court had stressed the basic principle which would—except in periods when Frankfurter's doctrine of judicial restraint was ascendant—characterize the major constitutional decisions of the 1953-69 years. If it was not an unequivocal declaration of the absolutism of fifth amendment rights in the "cold war" fifties (for the Court sought to avoid a collision with Congress by repeatedly stating that the legislature would not be understood to have intended to extend its inquiries beyond the scope of its constitutional powers), it was a logical point of departure for such a declaration by the latter years of the sixties.

Thus the Court, within the first five years of the Warren Chief Justiceship, came generally to be recognized as an innovative Court. One critic dourly observed that "judicial statesmanship," which was the only dignified term he could apply to the new body of law, was too often just another name for opportunism and like "judicial legislation" should at best "be held to a minimum."[59] But another observer, a few years later, discounted the popular and political outcries against the "fifth amendment" cases and found that they were consistent with the established principles of Bill of Rights interpretation.[60] In each instance, the writer accepted as his starting premise a fresh dynamism in the Court's adjudication.

Other evidence of the Court's crystallizing position upon Bill of Rights guarantees—absolutes or pledges "implicit in the concept of ordered liberty"—were manifest in these years. In 1954, the Court seemed on the verge of an extension of the fourth amendment rule on search and seizure. In *Irvine v. California*,[61] four Justices were in favor

55. Service v. Dulles, 354 U.S. 363 (1957).
56. Jencks v. United States, 353 U.S. 657 (1957).
57. Yates v. United States, 354 U.S. 298 (1957).
58. *Cf.* W. MURPHY, *supra* note 39, chs. 6, 7.
59. Braucher, *Foreword* to *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 121 (1955).
60. Sutherland, *Foreword: The Citizen's Immunities and Public Opinion*, 71 HARV. L. REV. 85 (1957).
61. 347 U.S. 128 (1954).

of such a step and four who spoke the "opinion" of the Court were unprepared to take the step, and the fortuitous concurrence of the ninth Justice tipped the balance against extension. But two years later, in *Griffin v. Illinois*,[62] a similar majority of four plus a concurrence spoke more boldly in a related area: in state criminal proceedings "a state can no more discriminate on account of poverty than on account of religion, race, or color," and accordingly if it provides at all for appellate review it had to do so regardless of appellants' ability to pay costs. Near the end of the decade—and at the height of the congressional furor over the Court—a seven-to-two majority rejected coerced confessions in state trials as a violation of the Bill of Rights privileges secured to all defendants.[63]

The constitutional rationale which was expressed by Congress in the great Court debate of 1957-58 is significant in its contrast to the jurisprudence taking shape on the Court itself in this same period. (See Part III). While the Court itself, in subsequent "Fifth Amendment" cases, narrowed the application of its 1958 opinions,[64] it remained firmly committed to the basic premise that the Bill of Rights in particular, and in the Constitution in general, represented the limits to congressional action. This, of course, might have been the same language as found in opinions of the pre-1937 Court of *laissez-faire* days. There was, however, a fundamental distinction; the old Court had read the Constitution as a limitation upon legislative action to meet developing social and economic issues in order to preserve the private interests of ever so small a group of entrepreneurs, while the post-New Deal Court read the legislative article—specifically, article I, § 8—as broad enough for any reasonable public need, limited only by enumerated prohibitions in Article I, § 9 and the "concept of ordered liberty" as suggested in the Bill of Rights. It could be expressed in another way: where the older constitutionalism had emphasized limited governmental power, the new constitutionalism emphasized the obligation of government to exercise power for the common benefit. Moreover, in the face of governmental inaction, the Court would be disposed to treat the explicit provisions of the Constitution as self-executing in effect. This was certainly the basic premise of the "Fifth Amendment" cases; it was even more evident in the desegregation cases where the Court, by its concept of the dynamics of the equal protection

62. 351 U.S. 12 (1956).

63. Payne v. Arkansas, 356 U.S. 560 (1958).

64. *E.g.*, Uphaus v. Wymann, 360 U.S. 72 (1959); Barenblatt v. United States, 360 U.S. 109 (1959).

clause of the fourteenth amendment, galvanized legislative machinery everywhere into a sputtering and coughing start after long inaction. Where state legislation proved ineffective, congressional machinery was started up; after three quarters of a century, a succession of civil rights measures were added to the federal statutes—and, as a result, the United States became the guarantor of certain rights of individuals as against the states themselves.

Thus the fundamental proposition of the *Brown* cases may plausibly be advanced as the basic ingredient in the constitutional theory of the Warren Court. In the succession of desegregation civil rights cases from 1954 through 1969, the language of concurrence and dissent rather clearly demonstrates that the members of the Court themselves recognized this fact. The non-unanimity of the Court in these cases (Table III) was not over the immediate constitutional question of racial equality,[65] but over the logical ultimate dimensions of the theory.

Burton v. Parking Authority[66] in 1961 indicated the Court's gathering momentum in the broadening of the desegregation principle. In extending the "state action" doctrine as the Vinson Court had begun to do in *Shelley* and *Barrows*, Justice Tom Clark declared that "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[67] Justice Harlan's dissent at once discerned that "far-reaching constitutional questions . . . may, or may not, be lurking in this judgment," and suggested that the particular issue be remanded to the state courts for consideration of their potentialities.[68] The reiteration of the dynamics of equal protection might have sounded more certainly in the 1964 sit-in cases[69] had not the Court majority in the principal case been so divided; nevertheless, Justice Douglas in a concurring opinion joined by Justice Goldberg declared: "We would reverse the modern trend were we to hold that property voluntarily serving the public can receive state protection when the owner refuses to serve some solely because they were colored.

"We should make that body of law the common law of the Thirteenth and Fourteenth Amendments so to speak."[70]

65. The firm unanimity in *Brown, Cooper v. Aaron*, and *Lassiter v. Board of Educ.* makes this clear.

66. Burton v. Wilmington Pkg. Auth., 365 U.S. 715 (1961).

67. *Id.* at 725.

68. *Id.* at 729.

69. *E.g.*, Bell v. Maryland, 378 U.S. 226 (1964).

70. *Id.* at 253-55.

By the year of this case, congressional machinery galvanized by the earlier civil rights/desegregation cases had produced the successive Civil Rights Acts of 1957, 1960, and 1964.[71] The sit-in cases were companions to the two major actions testing the constitutionality of the last of these enactments, and in the *Heart of Atlanta Motel*[72] and *McClung*[73] cases the Court majority was able to enlarge upon its rationale in terms of explicit statutory provisions rather than upon abstract constitutional language—a matter of objection by Justice Black in the sit-in cases.[74] Since Congress had elected to rest its "public accommodations" provisions on the commerce clause rather than the equal protection clause, the Court encountered no dissenting argument although it did not achieve unanimity. In both cases, Clark's opinion for the Court simply confirmed the post-New Deal rule that the commerce power was virtually plenary legislative power for anything Congress itself rationally conceived to be a proper subject of legislation: "That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid."[75]

The principal concurrences in the two "public accommodations" decisions represented a divergence within the activists' bloc which would develop more dramatically in later cases. Justice Black uttered the *caveat* that "every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what effects the national interest and is therefore subject to control by the federal laws."[76] While acquiescing in the congressional reliance on the commerce clause in this instance and for this subject-matter, Black urged that a more appropriate constitutional base might have been the "necessary and proper" clause. Justice Douglas' concurrence, on the other hand, found the Court opinion too narrow and urged that "the right of people to be free of state action that discriminates against them because of race . . . 'occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines,'" and accordingly called for judicial validation on the basis of the equal protection clause.[77]

71. Act of September 9, 1957, PUB. L. No. 85-315, 71 Stat. 634; Act of May 6, 1960, Pub. L. No. 86-449, 74 Stat. 86; Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241.

72. Bell v. Maryland, 378 U.S. 226, 318 (1964).

73. Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964).

74. Katzenbach v. McClung, 379 U.S. 294 (1964).

75. Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 257 (1964).

76. *Id.* at 275.

77. *Id.* at 279.

The crystallizing of the Black viewpoint within the dichotomized activism of the sixties was finally demonstrated in the "stand-in" cases following the "public accommodations" decisions. To Justice Arthur Goldberg's opinion for the Court in *Cox v. Louisiana (I)*,[78] invalidating as unconstitutionally vague a state law on breaches of the peace where "the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not,"[79] Justice Black argued that the holding should not be understood to deny local governments a reasonable authority to control unruly street demonstrations.[80]

As though anticipating the near-anarchy of many protest activities at the end of the sixties, Black's dissent in *Brown v. Louisiana*[81] became more explicit: Where the majority had reversed convictions in a "stand-in" in a public library, the dissent warned that

> the principle espoused has a far greater meaning. It means that the Constitution (the First and Fourteenth Amendments) requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage "sit-ins" or "stand-ups" to dramatize their particular views on particular issues. And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do so for causes which, while wholly legal, may not be so appealing to this Court. The States are thus paralyzed with reference to control of their libraries for library purposes, and I suppose that inevitably the next step will be to paralyze the schools.[82]

In 1966, Justice Black's argument became the Court's opinion, affirming a conviction of protesters obstructing normal access and activity in a public jail. He found "no merit to the petitioners' argument that they had a constitutional right to stay on the property over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate . . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected . . . ."[83]

Justice Douglas spoke the view of four dissenters (including Justices Brennan and Fortas and the Chief Justice) in decrying the use

78. 379 U.S. 356 (1965); *see* Cox v. Louisiana (II), 379 U.S. 559 (1965).
79. 379 U.S. at 557.
80. *Id.* at 575.
81. 383 U.S. 131 (1966).
82. *Id.* at 165.
83. Adderly v. Florida, 385 U.S. 39, 47-48 (1966).

of a trespass statute to nullify a constitutional right of peaceful petition. Obstruction—so long as it is peaceable—may be an incident of bringing a lawful petition to public attention, said the dissent, but unless the public places "are so clearly committed to other purposes that their use for the airing of grievances is anomalous," the lawful protest may be most effective only in the public place (in this instance, the jail) where the wrong is being perpetrated.[84]

Thus, as the sixties (and the Warren Court) came to their terminal point, the logical extremes of constitutional liberty suggested in questions raised in the first desegregation cases were being reached. With the departure of Chief Justice Warren and Justice Fortas from the bench, and with the limits to first amendment rights of assembly and petition being argued by Justice Black, a terminal point in this particular constitutional subject had also become discernible. But, what is more important, the shaping of the Warren Court had taken place in the early Eisenhower years. The four Kennedy-Johnson appointments, after all, affected only three positions on the Court, and of the two of these appointees who remained, one (Justice White) adhered to the non-activist wing. The desegregation decisions of the fifties set the stage for the major constitutional argument of the sixties (see Part IV), while the "Communist" or "Fifth Amendment" cases of the fifties precipitated the great debate in Congress (see Part III) which sharpened the judicial wits for the great issues which emerged in the following decade.

III. The Clash With Congresss

Congress's role in the development of American constitutional thought has been too little studied. There is, of course, the primary fact that constitutional amendment by congressional initiative has to date been the sole means of change in the text; and the fact that of several thousand proposals for amendment only thirty have actually been submitted and only twenty-five of these ratified[85] attests to the function of Congress in dissipating the effect of emotionally surcharged plans to reverse judicial decisions. Whether initiating in Congress or among constitutents, the loud demands to "put God back in the Constitution" after the school prayer decisions, to repeal or amend the fifth amendment after the provocative opinions of the fifties, to do something about the states' rights after the broadening of the equal

84. *Id.* at 54.

85. Statistics on proposed constitutional amendments in App. B of each volume of W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY (1964).

TABLE III
DESEGREGATION AND CIVIL RIGHTS
VOTING RECORD IN EIGHTEEN SELECTED CASES

Date and Name of Cases	Warren	Black	Reed	Frankfurter	Douglas	Jackson	Burton	Clark	Minton	Harlan	Brennan	Stewart	Whittaker	White	Goldberg	Fortas	Marshall
Brown v. Bd. of Ed., 347 U.S. 483 (1954)	0	o	o	o	o	o	o	o	o								
Cooper v. Aaron, 358 U.S. 1 (1958)	0	o	o	o	o		o	o		o	o						
Lassiter v. Bd. of Elec., 360 U.S. 45 (1959)	o	o	o	o	0			o		o	o	o					
Burton v. Pkg. Auth., 365 U.S. 715 (1961)	o	o		D[2]	o			0		D[1]	o	C	d[1]				
Garner v. Louisiana, 368 U.S. 157 (1961)	0	o		C[2]	C[1]			o		C[3]	o	o	o				
McLaughlin v. Florida, 379 U.S. 184 (1964)	o	o		o	c[2]			o		C[1]	o	C[2]		0			
Bell v. Maryland, 378 U.S. 226 (1964)	c[2]	D			C[1]			o		d	0	o		d	C[2]		
Heart of Atl. Mot. v. U.S., 379 U.S. 241 (1964)	o	C			c			0		o	o	o		o	c		
Katzenbach v. McClung, 379 U.S. 294 (1964)	o	C[1]			C[2]			0		o	o	o		o	C[3]		
Cox v. Louisiana, 379 U.S. 536 (1965)	o	C/D			o			c/d		c/d	o	o		c/d	0		
Brown v. Louisiana, 383 U.S. 131 (1966)	o	D			o			d		d	C[1]	d		C[2]		0	

Adderly v. Florida, 385 U.S. 39 (1966)	d	0	D	o	o	d	o	o	d	
Evans v. Newton, 382 U.S. 96 (1966)	o	D[1]	0	o	D[2]	d[2]	o	C	o	
S. Carolina v. Katzenbach, 383 U.S. 301 (1966)	0	C/D	o	o	o	o	o	o	o	
Reitman v. Mulkey, 387 U.S. 369 (1967)	o	d	C	d	D	o	d	0	o	
Loving v. Virginia, 388 U.S. 1 (1967)	0	o	o	o	o	o	C	o	o	
Jones v. Alf. Mayer Co., 392 U.S. 429 (1968)	o	o	C		D	o	0	d	o	o
Gaston County v. U.S., 395 U.S. 285 (1969)	o	D	o		0	o	o			o

0 - writer of opinion of the Court
o - joining in opinion of the Court
C - writer of concurring opinion
c - joining in concurring opinion

numbers indicate separate concurring or dissenting opinions

D - writer of dissenting opinion
d - joining in dissenting opinion
C/P - concurring in part
D/P - dissenting in part
C/D - concurring in part, dissenting in part

protection clause in the civil rights and reapportionment cases—all of these have amounted to "letting off steam" without serious prospect of a proposed amendment actually getting out of Congress. The potentially mischievous proposal of the late Senator Everett M. Dirksen, to call a twentieth-century constitutional convention to override the "one man, one vote" doctrine, seems likely to have died with its most ardent advocate.

Constitutional amendments, of course, have overridden specific judicial decisions.[86] Yet the proposed twentieth amendment to abolish child labor simply became moot when *United States v. Darby*[87] was handed down in 1941. The fact is that a constitutional amendment is a relatively specific and expeditious means of changing constitutional meaning; but judicial interpretation, whether the Court is a broad or narrow constructionist at any given period, also eventually recognizes changes effected by what Justice Felix Frankfurter called the "erosion of time."

Congress is also, quite properly, its own judge of the constitutional limits within which the legislative power may be wielded, and occasionally (and, indeed, all too infrequently) its own understanding of the constitutionality of its actions is expressed in committee reports or floor debates on projected bills. Congressional convictions on constitutional issues may be occasionally discerned in amendatory legislation, as when part of an original enactment is judicially invalidated. On rare occasions, these convictions may be expressed in acerbic terms, as when Congress moved to deal with the "portal-to-portal" issue in wage-hour cases of the forties.[88]

In legislative enactments on the judiciary itself, Congress has a fundamental role to play and, over the national history, has discharged it responsibility if somewhat belatedly in terms of reforms to promote efficiency. Thus William Howard Taft, one of the leaders in statutory modernization of the judicial process, had to begin the work during his Presidency (1909-13) and continue it during his Chief Justiceship (1921-30), and even then the completion of his program—the legislative

86. *E.g.*, the eleventh amendment specifically "reversed" Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); the thirteenth nullified Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1854); and the sixteenth nullified Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

87. United States v. Darby, 312 U.S. 100 (1941). If it be asked whether the Court in *Darby* was enacting a judicial amendment to the Constitution, the answer would be another question, whether the Court had originally enacted a judicial amendment in Hammer v. Dagenhart, 247 U.S. 251 (1918).

88. Thus, the legislature rebutted United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944), in Act of March 9, 1945, ch. 20, § 1, 59 Stat. 33.

ratification of the uniform rules of federal procedure—did not get through Congress until the decade after his death.[89] The temptation to play politics in this manifestly sensitive area of separation of powers has been ever-present, but only on four occasions—in the Jeffersonian hostility to the Marshall Court in the first years of the nineteenth century, in the Reconstruction era, in the "Court-packing" effort of 1937, and in the anti-Court bills of 1957-58—has political hostility threatened to override the separation principle.[90]

Thus the uproar on Capitol Hill in the waning period of the loyalty hysteria of the mid-fifties, precipitated by the "Fifth Amendment" cases presented the Warren Court with a critical prospect of a direct collision with Congress. There were after-tremors, as in the undercover attempt to enact "states' rights" amendments after *Baker v. Carr*,[91] and in its recurrent form of the so-called Dirksen amendments and Dirksen's campaign to invoke the convention provision of Article V. But the epicenter of political disturbance was quite manifestly the anti-Court proposals for 1957-58. When the Court rode out that crisis, partly as a result of a reduction of conservative strength in Congress in the fall elections of 1958, and partly as a result of a qualifying of some of its own "Fifth Amendment" doctrines,[92] the way was cleared for the affirmative pronouncement of the key doctrines of the Warren Court in the sixties.

The two sessions of the 85th Congress found conservative political strength at its highest point since the elections of 1928 and this fact coincided with a high degree of conservative discontent with current constitutional decisions. Racial integration was a basic factor in this discontent, but only Southern Congressmen, Senators, and state legislators said much about it. The "Southern Manifesto" was proclaimed,[93] followed by statutes and resolutions of "interposition;"[94] but whatever sympathy there might be among Northern conservatives was tacit rather than overt. Security and loyalty, and the allegation that Supreme Court opinions were undermining them, were the most effective rallying points.

A California Congressman declared in the summer of 1957,

89. *See* A. MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 119-20 (1965); W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY 271-76 (1969).

90. M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 1-49 (1964).

91. 369 U.S. 186 (1962). *See generally* Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1 (1963).

92. *See* note 64 *supra*.

93. "Declaration of Constitutional Principles," in 102 CONG. REC. 4460 (1956).

94. *E.g.*, 1 RACE REL. L. REP. 437, 443, 445 (1955).

commenting on the Court's holding[95] that the government was required to open its files for documentary proof of the evidence it offered in prosecution of subversives, "Conspiracy to burn down a house for the insurance is a criminal offense, but conspiracy to destroy a constitutional government by force and violence remains in the same legal category as running through a red light." The speaker went on to demand whether "the safety of the American people and their right to be secure against treason in their midst, is more important than possible injury to a few known and proven Communists . . . ."[96]

The commentary—not particularly relevant for much of the time—ranged over scores of pages in the *Congressional Record.* But as judicial confusion and concern mounted in the aftermath of the major "Fifth Amendment" decisions of 1957, a succession of specific legislative proposals were drafted and reported out by the House and Senate Judiciary Committees.[97] The most drastic of these was the so-called "anti-*Jencks* bill" introduced by Senator Jenner of Indiana, even though somewhat moderated by an amendment by the bill's co-sponsor, Senator Butler of Maryland. The bill, which sought to limit Supreme Court jurisdiction over legislative and administrative investigatory procedure, both state and national, failed to rally all-out conservative support for an anti-Court drive in 1957 when the main conservative effort was being concentrated on opposing the Civil Rights Act of that year. But the support came in the spring and summer of 1958.

By the early summer, several bills had passed the House of Representatives and had come to the Senate: Each of these aimed specifically at a Supreme Court decision which had become anathema to the conservatives, and the fact that a "shotgun" approach had been employed suggested that one or more, at least, would get through both houses. There was strong likelihood that if the first one or two were successful of passage, the momentum thus generated would carry the rest as well. None of the bills was high on the agenda of the Senate leadership, but in terms of the organized force of hard-core conservatives in opposing the judicial branch of the government they were virtually without precedent—and thus represented a dangerous precedent in themselves.

One of these—S. 1411, a measure which had originated in the Senate and then been amended in the House—aimed at reversing the

95. Jencks v. United States, 353 U.S. 657 (1957).
96. 103 CONG. REC. 10526, 10534 (1957) (remarks of Representative Jackson (R-Cal.)).
97. *Id.* at 10534.

majority holding in *Cole v. Young*,[98] a case from the 1955 term limiting the effect of the Summary Suspension Act of 1950. Although the Act had purported to authorize discharge of any government employees considered to be security risks, the six-to-three majority had held that the statute could not be read to abrogate the dismissal procedures under the civil service laws where the government employee was in a "non-sensitive" position. S. 1411, as amended by the House Post Office (and civil service) Committee, now provided that the 1950 statute was in fact to apply to all federal employees. Otherwise, said the committee report, 80 percent of these employees would be outside the scope of the act (in itself a commentary on the magnitude of the "sensitive" areas with which security legislation was presumably concerned).

The anti-*Cole* bill was one of four which were fated to be tested in the Senate; another was a bill aimed at the alleged effect of the majority holding in *Yates* which one Congressman declared had "made a shambles of the Smith Act."[99] A third dealt with another subject galling to the states' rightists—the opinion in *Pennsylvania v. Nelson*[100] (ironically, affirming a state supreme court holding) giving a broad construction to the doctrine of federal preemption of certain legislative subject areas. But in many respects the most inflammatory of all, in terms of its lingering irritation for Congress and for some segments of the organized bar, was the rule set out in *Mallory* and the congressional effort to override it.

In *Cole*, the Court had avoided a direct confrontation with Congress by limiting the extent of the statute; likewise, in *Yates*, the Court had focused upon particular details of the Smith Act rather than suggesting that the entire statute was an infringement upon constitutional rights. And in *Jencks*, while the Court had found the statute as a whole too broad, and hence invalid, it had left Congress the option of making the statute less broad and thus preserving its general objective. The problem of confrontation was thus shifted back to Congress; if it correctly read the judicial interpretation of the statutes, a constructive amendment could be drafted—but if the cases were tossed about Capitol Hill in an ideological free-for-all, any emerging amendment would be likely to aggravate rather than allay the danger of confrontation.

Thus it may be said, with the wisdom of hindsight, that the only

98. 351 U.S. 536 (1956).
99. 104 CONG. REC. 17169 (1958) (remarks of Senator Keating (R-N.Y.)).
100. 350 U.S. 497 (1956).

bill to pass both houses of Congress in the 1957-58 conservative uprising was a bill which accommodated rather than "overruled" the judicial holding. The anti-*Jencks* measure which was passed in the summer of 1957 thus avoided a Court-Congress confrontation: Where the Court in its original opinion had held that a defendant could not be convicted on the basis of testimony based upon undisclosed records of the prosecution, Congress had met the Justice Department's protest against opening its files to wide-ranging "fishing expeditions" by providing for subpoena of specific documents by defense counsel under explicit conditions.[101] If the congressional action was in any real sense a rebuke to the Court, it was less bellicose in its language than had been the amendatory statutes reacting to the "portal-to-portal" and interstate insurance cases of the previous decade.[102]

The anti-*Cole* bill would have been a direct challenge to the Court opinion if it had passed both houses; where the Court in its holding had found that the 1950 statute could be construed narrowly so as to avoid conflict with civil service procedures, the advocated amendment would have precipitated such conflict. Even more serious was the invitation to confrontation in the anti-*Yates* bills; where the Court had sought to avoid handing down a rule that the Smith Act was *ex post facto* in certain of its provisions, the congressional attempt to insist upon a full retrospective effect of these provisions might well have forced the issue. Both bills, thanks to frenzied parliamentary maneuvering in the closing days of the 85th Congress, failed of final passage. The Court itself, in the companion 1961 cases of *Scales v. United States*[103] and *Noto v. United States*,[104] made its own modification of the membership provisions of the Smith Act.

The anti-*Nelson* and anti-*Mallory* bills were of a somewhat different stripe: In the *Nelson* case, the Supreme Court had accepted the Pennsylvania court's finding that Congress had indeed intended to preempt the field of seditious conspiracy under this clause of the Smith Act.[105] The conservatives in Congress thus found themselves in an anomalous position; the effect of the holding was to confirm the scope of the Smith Act in this subject-area—but at the same time it limited the power of the individual states to impose separate (and usually more

101. Act of September 2, 1957, Pub. L. No. 85-269, 71 Stat. 595 (codified at 18 U.S.C. § 3500 (1964)).

102. *See* note 100 *supra.*

103. 367 U.S. 203 (1961).

104. 367 U.S. 290 (1961).

105. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

sweeping) regulations of the same activities. Thus the congressional debates sought to preserve the cake and eat it, so far as states' rightists were concerned; and the question soon departed from the main point (the amending of the Smith Act to disclaim legislative intent to pre-empt) and became a long dissertation on federal-state relations in general.

Mallory was the most long-lasting in its congressional effects; it would raise issues repeatedly over the next decade as "law and order" became the catch-phrase of political dialogue. In its original holding that under Rule 5(a) of the Federal Rules of Criminal Procedure a confession obtained before expeditious arraignment was inadmissible,[106] the Court essentially reiterated and expanded upon its earlier holding in *McNabb*. The vociferous demands for a "clarification" of the *Mallory* holding and/or of Rule 5(a) quickly became, like the discussions of the *Nelson* issue, a general conservative attack upon the "coddling" of criminal accused by the high Court.

The 85th Congress's specific attack upon five specific judicial decisions—*Jencks, Cole, Yates, Nelson* and *Mallory*—was unprecedented in the history of the judiciary; the New Deal complaints of the mid-thirties had been against the tenor of judicial philosophy as much as against specific decisions, and had never been brought into focus until the inept effort of the "Court-packing" proposal of 1937. The experience of 1957-58 was to have lasting effects upon the Warren Court and upon the issues which were emerging in the decade of the sixties. In point of time, the clash with Congress came when the loyalty issue was entering its last throes, and when the issues of desegregation were proliferating. The political lessons taught by the fight on Capital Hill were fairly clear: Racial equality was a constitutional issue which conservatives could fight only obliquely, and almost certainly without suceess—witness the adoption, in this very Congress, of the first civil rights statute since Reconstruction. As for Bill of Rights limitations upon government action, the issue was already changing from "cold war" threats to security to the rights of individuals generally as against government encroachment.

The shift in political climate after 1958 was also a factor in the opportunities to be seized by the Warren Court in the following years; several of the most aggressive Court foes in Congress were defeated in their bids for reelection that fall, and by 1961 an activist, neo-New Deal administration would take over. The clash with Congress had

106. Mallory v. United States, 354 U.S. 449 (1957).

pointed up the ultimate constitutional proposition which had been taking shape ever since 1937, as the ultimate extreme of the revolution begun with the New Deal. If the national government was increasingly to address itself to social and economic subjects which before the depression decade had been the sole concern of the states, the individual American would of necessity enter into a new and larger relationship with the national government. His rights, as set out in the Bill of Rights as against the national government, would tend to become more explicit and affirmative—and would also tend to be asserted as against the states.

Thus the Court of the sixties, surviving the political outburst of the late fifties, would be emboldened to break new ground on a number of fronts. Equality of the races in social and economic areas, already an accepted judicial theory in the fifties, would be augmented by propositions of equality of the electorate in the reapportionment questions, and by equality of all defendants before the criminal law in a substantial extension of the principles challenged but maintained in the "Fifth Amendment" cases of the fifties. And as an essential ingredient in this emerging jurisprudence, the incorporation of all the essential provisions of the Bill of Rights—the concepts synonymous with "ordered liberty"—would finally be analogized with, if not incorporated into, the basic provisions of the fourteenth amendment.

IV. ACTIVISM ASCENDANT

The constitutional egalitarianism of the Warren Court developed swiftly in the Kennedy years. In 1961 came *Mapp v. Ohio*,[107] followed by *Gideon v. Wainwright*[108] in 1963. The basic doctrines of reapportionment were spelled out in the brief space of twenty months from 1961 to 1963.[109] *Engel v. Vitale*[110] in 1962 completed the rationale on the religious establishment clause of the first amendment, begun in

107. 367 U.S. 643 (1961) (evidence obtained in violation of 4th amendment right of privacy is inadmissible in state court).

108. 372 U.S. 335 (1963) (indigent defendant has right to appointed counsel under due process clause of the 14th amendment).

109. Baker v. Carr, 369 U.S. 186 (1962) (disproportionate representation in voting districts violates equal protection clause of 14th amendment); Gray v. Sanders, 372 U.S. 368 (1963) (county unit system which results in disproportionate vote weighting violates equal protection clause of 14th amendment); Wesberry v. Sanders, 376 U.S. 1 (1964) (equal protection clause of 14th amendment requires that congressional districts be apportioned as equally as possible to population); Reynolds v. Sims, 377 U.S. 533 (1964) (equal protection clause of the 14th amendment requires that representation in both houses of the state legislature be based as equally as possible on population).

110. 370 U.S. 421 (1962) (recital of prayer in public schools violates establishment clause of 1st amendment).

TABLE IV

"INCORPORATION" OF BILL OF RIGHTS
VOTING RECORD IN THIRTY-FIVE SELECTED CASES

Date and Name of Cases	Warren	Black	Reed	Frankfurter	Douglas	Jackson	Burton	Clark	Minton	Harlan	Brennan	Stewart	Whittaker	White	Goldberg	Fortas	Marshall
1st Amend.																	
Slochower v. Board of Ed., 350 U.S. 551 (1956)	o	C	D[1]	o	c		d[1]	0	d[1]	D[2]							
Lerner v. Casey, 357 U.S. 468 (1958)	o	o	o	o	o			o	o	0	o						
Engel v. Vitale, 370 U.S. 421 (1962)	o	0		§	C			o		o	o	D		§			
Gibson v. Florida Comm., 372 U.S. 539 (1963)	o	C[1]			C[2]			d		D	o	d		d	0		
New York Times v. Sullivan, 376 U.S. 254 (1964)	o	C[1]			c			o		o	0	o		o	C[2]		
Jacobellis v. Ohio, 378 U.S. 184 (1964)	D[1]	C[2]			c[2]			d[1]		D[2]	0	C[1]		C[3]	o		
DeGregory v. Attorney Gen., 383 U.S. 825 (1966)	o	o			0			o		D	o	d		d		o	
Elfbrandt v. Russell, 384 U.S. 11 (1966)	o	o			0			d		d	o	d		D		o	
Rosenblatt v. Baer, 383 U.S. 75 (1966)	o	D[1]			C/D			C[1]		C/D	0	C		o		D[2]	
Bond v. Floyd, 385 U.S. 116 (1966)	0	o			o			o		o	o	o		o		o	
Memoirs v. Attorney Gen., 383 U.S. 413 (1966)	o	C[1]			C[2]			D[1]		D[2]	0	c[1]		D[3]		o	

Mishkin v. New York, 383 U.S. 502 (1966)	o	D			d			o		C	0	d		o			o							
Ginsberg v. New York, 390 U.S. 629 (1968)	o	d[1]			D[1]			o		C/D	0	C		o			D[2]							
Stanley v. Georgia, 394 U.S. 557 (1969)	o	C[1]			o					o	c[2]	C[2]		c[2]				0						
Street v. New York, 394 U.S. 576 (1969)	D[1]	D[2]			o					0	o	o		D[3]			D[4]	o						
Brandeburg v. Ohio, 395 U.S. 444 (1969)	PC†	C[1]			C[2]					pc	pc	pc		pc				pc						
4th Amend.																								
Irvine v. California, 347 U.S. 128 (1954)	o	D[2]	o	D[1]	d[2]	0	d[1]	C	o															
Ker v. California, 374 U.S. 23 (1963)	C/P	o			C/P			0		C	C/P	o		o	C/P									
Aguilar v. Texas, 378 U.S. 108 (1964)	o	d			o			D		o	o	d		o	0									
Berger v. New York, 388 U.S. 41 (1967)	o	D[3]			C[1]			0		D[2]	o	C[2]		D[1]			o							
Terry v. Ohio, 392 U.S. 1 (1968)	0	C[3]			D			o		C[1]	o	o		C[2]			o							
*5th Amend.**																								
Payne v. Arkansas, 356 U.S. 560 (1958)	o	o			o		D[1]	D[2]		C	o	o	0											
Bartkus v. Illinois, 359 U.S. 121 (1959)	d[1]	D[1]		0	d[1]		o			o	D[2]	o	o											
Jackson v. Denno, 378 U.S. 368 (1964)	o	D[1]			o			D[3]		D[2]	o	d[2]		0	o									
Malloy v. Hogan, 378 U.S. 1 (1964)	o	o			o			d[1]		D[1]	0	d[2]		D[2]	o									
Murphy v. Waterfront Comm., 378 U.S. 52 (1964)	o	o			o			c[2]		C[2]	o	c[1]		C[1]	0									

*6th Amend.**												
Pointer v. Texas, 380 U.S. 400 (1965)	o	0	o	o	C[1]	o	C[2]	o	C[3]			
Estes v. Texas, 381 U.S. 532 (1965)	o	d	o	0	C	d	d	D	o			
Sheppard v. Maxwell, 384 U.S. 333 (1966)	o	D	o	0	o	o	o	o		o		
Klopfer v. North Carolina, 386 U.S. 213 (1967)	0	o	o	o	C[1]	o	C[2]	o		o		
Washington v. Texas, 388 U.S. 14 (1967)	0	o	o	o	C	o	o	o		o		
Duncan v. Louisiana, 391 U.S. 145 (1968)	o	C	c	o	D	o	d	0		o		
8th Amend.												
Powell v. Texas, 392 U.S. 514 (1968)	o	o	d		o	d	d	C		D	0	
Boykin v. Alabama, 395 U.S. 238 (1969)	o	d	0		D	o	o	o			o	
9th Amend.												
Griswold v. Connecticut, 381 U.S. 479 (1965)	c[2]	D[2]	0	o	C[1]	c[2]	D[1]	C[3]	C[2]			

*See also Tables II and V.
§ - not participating
+ - PC = per curiam opinion

TABLE V

REAPPORTIONMENT CASES
VOTING RECORD IN ELEVEN SELECTED CASES

Date and Name of Case	Warren	Black	Frankfurter	Douglas	Clark	Harlan	Brennan	Stewart	Whittaker	White	Goldberg	Fortas	Marshall
Baker v. Carr, 369 U.S. 186 (1962)	o	o	D[2]	C[1]	C[2]	D[2]	0	C[3]	*				
Gray v. Sanders, 372 U.S. 368 (1963)	o	o		0	c	D	o	C		o	o		
Wesberry v. Sanders, 376 U.S. 1 (1964)	o	0		o	C	D	o	o		o	o		
Reynolds v. Sims, 377 U.S. 533 (1964)	0	o		o	d	D[1]	o	D[2]		o	o		
WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964)	0	o		o	d[2]	D[1]	o	D[2]		o	o		
Maryland Comm. v. Tawes, 377 U.S. 656 (1964)	0	o		o	C	D	o	+		o	o		
Roman v. Sincock, 377 U.S. 695 (1964)	0	o		o	C[1]	D	o	C[2]		o	o		
Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964)	0	o		o	D[2]	D[1]	o	D[3]		o	o		
Avery v. Midland County, 390 U.S. 474 (1968)	o	o		o	o	D[1]	o	D[3]		0		D[2]	
United States v. Montgomery Co. Bd. of Educ. 395 U.S. 225 (1969)	o	0		o		o	o	o		o			o

*not participating

the Vinson Court. By the Johnson years of the mid-sixties the incorporation of major propositions of the Bill of Rights had attained full momentum. In 1964 were swept back the outer limits of first amendment freedoms of expression,[111] as well as certain fourth amendment provisions.[112] (See Tables IV-VI).

In large part, this acceleration of broad construction was aided by an important change in Court personnel brought about by the retirement of Justice Frankfurter in 1962. The architect of the concept of judicial restraint—essentially, a doctrine that the legislative branch, having been freed from judicial inhibitions in 1937, had the primary constitutional responsibility to break new ground—had been the nucleus of a conservative (or at least non-activist) bloc comprised of Justices Harlan, Stewart, and Whittaker, with the occasional concurrence of Clark. The departure of Frankfurter was more than the departure of a single jurist; the circumspect constitutional doctrine which he developed in the post-1937 Court had, by the time of the Vinson Chief Justiceship, brought some appearance of order out of the disparate holdings of the Stone Court.[113] The hegemony which he had assumed by the early fifties continued for virtually a decade, until his retirement.

It was Frankfurter who kept the reapportionment question in check for nearly fifteen years;[114] his dissents and concurrences on a host of constitutional issues during the last four years of his tenure (see Table II) sowed seeds of warning for the divisions on the Court in the years immediately following. During the latter fifties, he was frequently joined by Justice Harlan, and less frequently by Justice Clark; so that when he did in fact depart from the bench, there was a significant diminution in eloquence for the case for judicial restraint.

With the appointment of Justice Goldberg in Frankfurter's place, the balance for activism shifted quickly: Warren, Black, Brennan, Douglas, and Goldberg represented a consistent commitment of a

111. New York Times v. Sullivan, 376 U.S. 254 (1964) (1st and 14th amendments require that a public official prove actual malice to recover in a libel action); Jacobellis v. Ohio, 378 U.S. 184 (1964) (under 1st and 14th amendments, the test for obscenity must employ a national standard).

112. Aguilar v. Texas, 378 U.S. 108 (1964) (4th and 14th amendments require that the issuance of a search warrant be based on affidavits establisbing probable cause); Ker v. California, 374 U.S. 23 (1963) (the standard for obtaining a search warrant is the same under the 4th and 14th amendments and federal standards of reasonableness must apply).

113. *See* Allen, *supra* note 20.

114. *Compare* Colgrove v. Green, 328 U.S. 549 (1946) *with* Baker v. Carr, 369 U.S. 186, 266 (1962).

majority.[115] The result was a recognizable acceleration of new constitutional doctrine: The progression was as predictable in the area of defendants' rights[116] as the progression from the first reapportionment case to *Avery v. Midland County*[117] in 1968, while the extension of the Bill of Rights to the fourteenth amendment led logically to Douglas's comment that "specific guarantees in the Bill of Rights have penumbras."[118]

The full consequences of the ideological shift of the Court in the late thirties thus were realized in the Court of the sixties. From the *laissez-faire* insistence upon a tightly limited power of government action to a renaissance of the concept of latent power to meet any reasonable public need, the constitutional rationale ultimately reached its logical extreme in the concept of government *obligation* to take affirmative and implementary action on specific principles.

As Joseph Story had been the transitional medium for the jurisprudence of the Marshall Court to that of Chief Justice Taney,[119] Frankfurter had been the transitional medium for the jurisprudence of the late New Deal to the Warren Court. The full story of Frankfurter's constitutional doctrine cannot be told here,[120] but the frequency of his concurrences and dissents is of some significance (see Table 11). In his concurrence in the 1956 case of *Railway Employees v. Hanson*,[121] Frankfurter quoted Holmes with approval: " 'Where there is, or generally is believed to be, an important ground of public policy for restraint [*i.e.*, of private action] the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued.' "[122] Where the case manifestly required a major position to be assumed by the judiciary, Frankfurter did not shrink from action if the facts of the case provided enough substance to ensure intelligent decision: Thus in the first *Reid v. Covert*[123] case he "reserved" his opinion; but after arguments developed on rehearing, he concurred with the majority and

115. Not that the remaining Justices represented the monolith or the type of conservatism of the pre-New Deal Court; Clark, Harlan and even Stewart—although less frequently, White—might be found with the majority on specific issues, or some of them at least found it possible to concur rather than to dissent.

116. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

117. 390 U.S. 474 (1968).

118. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

119. *See* W. MURPHY, *supra* note 39, at 5-65.

120. *See, e.g., Symposium—Justice Felix Frankfurter*, 76 HARV. L. REV. 1 (1962).

121. 351 U.S. 225 (1956).

122. *Id.* at 241.

123. 351 U.S. 487, 492 (1956).

concluded that the fifth and sixth amendments placed a limitation upon the administration of military justice.[124]

The reapportionment cases most dramatically demonstrated the passing of the Frankfurter influence. From 1946, when he had delivered the opinion of a seven-man Court in a four-to-three division and had warned against the "political thicket" which lay across the course of activism,[125] until *Baker v. Carr*[126] sixteen years later, the issue had been postponed. Frankfurter's dissent in *Baker* was to be his intellectual legacy on the matter of judicial restraint: "In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason."[127] To claim that the equal protection clause required equal weight or even proportional weight for every vote was to ask the Court to find "a political conception legally enforceable in the broad and unspecific guarantee of equal protection," and in his view was simply a rewriting of the Constitution.[128]

These words aptly stated the doctrine of restraint; per contra, the doctrine of activism was the obligation of the judiciary to identify the specific rights to be guaranteed within the "broad and unspecific guarantee" which Frankfurter decried. Not to do so, in the conviction of the Court in the sixties, was to leave identifiable constitutional rights without possibility of enforcement in the wake of government inaction. Hence the Warren Court tended increasingly to place its emphasis upon the "equal protection of the laws;" it did not hesitate to inquire, *what* laws—for it had already come to its conclusion on that question. The laws might be explicit statutory instruments, but they might very well be, in the alternative, any principle (not merely Cardozo's "specific pledges") "implicit in the concept of ordered liberty." From this starting point began the march of "incorporation" of Bill of Rights guarantees into the fourteenth amendment (see Table IV).

In 1956, Frakfurter spoke for the majority in *Ullmann v. United States*,[129] denying defendants' arguments that the fifth amendment per se provided a guarantee against self-incrimination without congressional implementation. In 1961, Frankfurter dissenting, the Court was reviving an older judicial comment that the fourth and fifth amendments run "almost into each other," and rejecting the "ignoble

124. Reid v. Covert, 354 U.S. 1 (1957).
125. Colgrove v. Green, 328 U.S. 549 (1946).
126. 369 U.S. 186 (1962).
127. *Id.* at 300 (Frankfurter, J., dissenting).
128. *Id.*
129. 350 U.S. 422 (1956).

shortcut to conviction" provided by the Court's having declined, in 1949, to extend to the states the Bill of Rights prohibition against evidence obtained by unlawful search and seizure.[130] Two years later, a non-dissenting though non-unanimous Court in *Gideon v. Wainwright*[131] had similarly broadened the reach of the sixth amendment to the states in right-to-counsel questions in felony cases, and by 1966 in *Miranda v. Arizona*[132] had virtually made the fifth and sixth amendments "run into each other."

The double jeopardy prohibition of the fifth amendment was extended to the states in 1969,[133] overruling the 1937 case of *Palko v. Connecticut*;[134] the fourth amendment search and seizure clause has been subject to considerable judicial vacillation[135] but has tended toward the end of the Warren Court to favor a construction favorable to rights of privacy.[136] The first amendment right of association has been unequivocally broadened since the days of the loyalty hysteria of the fifties.[137] Wiretap evidence was ruled inadmissible in state criminal trials in late 1967,[138] on the heels of divided opinions invalidating state statutes on the subject of wiretapping earlier in the year.[139] The jury trial guarantee of the sixth amendment was extended to the states in 1968,[140] corroborating the "speedy trial" provision and its extension in a 1967 case,[141] and the same amendment's provision for compulsory process to secure witnesses, applied to the states in another 1967 case.[142]

The "cruel and unusual punishment" prohibition of the eighth amendment had been under consideration by the Court since *Robinson v. California*[143] in 1962. Although a badly divided Court in 1968 failed to broaden the *Robinson* doctrine,[144] it seemed on the verge of doing

130. See Harlan's dissent in which Frankfurter joined, in Mapp v. Ohio, 367 U.S. 643, 672 (1961).

131. 372 U.S. 335 (1963).

132. 384 U.S. 436 (1966).

133. Benton v. Maryland, 395 U.S. 784 (1969).

134. 302 U.S. 319 (1937).

135. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968); Redrup v. New York, 386 U.S. 767 (1967); Mishkin v. New York, 383 U.S. 502, 512 (1966).

136. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969).

137. *See, e.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966); DeGregory v. Attorney Gen'l, 383 U.S. 825 (1966); Gibson v. Florida Legis. Invest. Comm., 372 U.S. 539 (1963).

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

139. *See, e.g.*, Berger v. New York, 388 U.S. 41 (1967); *cf.*, Katz v. United States, 389 U.S. 347, 359, 360, 362, 364 (1967) (dissenting and concurring opinions).

140. Duncan v. Louisiana, 391 U.S. 145 (1968).

141. Klopfer v. North Carolina, 386 U.S. 213 (1967).

142. Washington v. Texas, 388 U.S. 14 (1967).

143. 370 U.S. 660 (1962).

144. Powell v. Texas, 392 U.S. 514 (1968).

so (*vis-a-vis* the death penalty) in 1969.[145] Thus, in a space of five years the Warren Court brought the incorporation of most of the "specific guarantees" of the Bill of Rights into the restraints upon the states set out in the fourteenth amendment.[146] The ultimate commitment of the Warren Court was probably best stated by Justice Douglas in 1965: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[147] But, he continued, since the mid-twenties with its cases on the first amendment rights of expression and association, the Court has recognized not only that a right set out in the Constitution was protected from legislative infringement, but that the protection extended also to unexpressed rights. Douglas then concluded:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . . The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clauses enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'[148]

While it may be argued that Douglas's opinion did not amount to an activation of the ninth amendment, the tenor of Bill of Rights adjudication in the last five years of the Warren Court certainly pointed in this direction. If, as in *Griswold*, the case recognized a right of privacy in constitutional law (however clouded the subject remains in tort law)[149] and in the process made much of the fact that it was an "emanation" from the specific pledge which was essential to give the pledge "life and substance," it would seem to be a very short step to finding in the ninth amendment a parallel to "emanations" in the rule against *expressio unius*.[150]

With the inference of activation of the ninth amendment, the activism of the Warren Court reached its zenith. The remarkable

145. Boykin v. Alabama, 395 U.S. 238 (1969).

146. *See also* Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

147. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

148. *Id.* at 484.

149. *See* A. WESTIN, PRIVACY AND FREEDOM 330-64 (1967).

150. *See* B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

division of the Court in *Griswold* found only Clark joining with Douglas in the "opinion" of the Court, with five other Justices joining in three separate concurrences. Yet the basic holdings in the numerous other Bill of Rights cases in these years logically pointed to the question of unenumerated rights protected by the ninth amendment and the circumstances under which the Court could enumerate or activate them. The outcome of this constitutional trend in the years following the Warren Court would depend upon the lingering persuasiveness of the arguments in these Bill of Rights cases, as well as upon the applicability of the arguments to changing issues.

V. The Full Circle

The heritage of the Warren Court in 1953 had been the hard questions presented by the cold war as well as the logical extension of the principle of broad constitutional powers established by the Hughes and Stone Courts. The legacy of the Warren Court can best be stated in the language of its leading members during these years.

As has been suggested above, the retirement of Justice Frankfurter in 1962, coinciding with the abating of the cold war issues in Congress and the renewed pressure of issues of racial equality and voter equality, marked the era of ascendant activism which reached its climax in the last half of the sixties. The leading figures on the Court in this period, in terms of constitutional argument, may thus be identified as the Chief Justice, Associate Justices Black, Brennan, Douglas, and Frankfurter's two successors, Goldberg and Fortas—five men representing the activist bloc. Justice Harlan is rather clearly recognized as the successor to the Frankfurter advocacy of judicial restraint, paired frequently with Justices Stewart and White and, until his retirement in 1967, rather often with Justice Clark. Justice Marshall in succeeding Clark was generally assumed to be a substitution of another activist for an old-line New Dealer, but his tenure on the Warren Court has been too brief to warrant consideration here.

Such classifications are all too apt to be invidious, and certainly are not to be intended to suggest that men like Justice Harlan—who has emerged as a jurist in the Holmes tradition—are hidebound conservatives even remotely comparable to the conservatives of the *laissez-faire* era. Rather, what is suggested here as the lasting contribution of the Warren Court is the probing eloquence of the dialogue in which the activist and non-activist engaged in this period, which has enriched the constitutional theory to be used as a frame of reference for the coming judicial generation.

TABLE VI

DEFENDANTS' RIGHTS CASES
VOTING RECORD IN THIRTEEN SELECTED CASES

Date and Name of Cases	Warren	Black	Reed	Frankfurter	Douglas	Burton	Clark	Minton	Harlan	Brennan	Stewart	Whittaker	White	Goldberg	Fortas	Marshall
Griffin v. Illinois, 351 U.S. 12 (1956)	o	0	d	C	o	D	o	d	d							
Mapp v. Ohio, 367 U.S. 643 (1961)	o	C[1]		d	C[2]		0		D	o	C[3]	d				
Douglas v. California, 372 U.S. 353 (1963)	o	o			0		D[1]		D[2]	o	d[2]		o	o		
Gideon v. Wainwright, 372 U.S. 335 (1963)	o	0			C[1]		C[2]		C[3]	o	o		o	o		
Escobedo v. Illinois, 378 U.S. 478 (1964)	o	o			o		d[3]		D[1]	o	D[2]		D[3]	0		
Massiah v. United States, 377 U.S. 201 (1964)	o	o			o		d		d	o	0		D	o		
Linkletter v. Walker, 381 U.S. 618 (1965)	o	D			d		0		o	o	o		o	o		
Miranda v. Arizona, 384 U.S. 436 (1966)	0	o			o		D[1]		D[2]	o	d[2]		d[2]		o	
Johnson v. New Jersey, 384 U.S. 719 (1966)	0	o			o		C[1]		C[2]	o	c[2]		c[2]		o	
Schmerber v. California, 384 U.S. 757 (1966)	D	d			d		o		o	0	o		o		o	

Stovall v. Denno, 388 U.S. 293 (1967)	o	D[2]	D[1]	o	c	0	c	C	*	
In re Gault, 387 U.S. 1 (1967)	o	C	o		0	o	o	o	o	
Benton v. Maryland, 89 S.Ct. 2056 (1969)	o	o	o		D	o	d	o		0
Chimel v. California, 89 S.Ct. 2034 (1969)	o	d	o		o	o	0	D		o

*proposed reversal and remand

TABLE VII

RECAPITULATION OF VOTING RECORD
IN SELECTED CONSTITUTIONAL CASES

Subject of Cases	Total Cases	Unanimous Opinions	Non-unan. Opinions	Opinions w/Dissents
Table III				
Desegregation/Civil Rts.	18	3	5	10
Table IV				
"Incorporation"	35	2	10	23
Table V				
Reapportionment	11	1		10
Table VI				
Defendants' Rights	13		2	11

As the senior member of the Court—and, indeed, having been appointed to the bench in the vortex of the constitutional revolution of 1937—Hugo L. Black has come to epitomize the broad construction, all-inclusive definition of the Bill of Rights pledges to be incorporated into the fourteenth amendment.[151] His concept of the "absolutes" in the Bill has become professionally a household phrase: "I believe 'that the First Amendment grants an absolute right to believe in any governmental system, [to] discuss all governmental affairs, and [to] argue for desired changes in the existing order,' " he firmly declared in a concurring opinion in *Speiser v. Randall*[152] in 1958. He added: "I also adhere to the proposition that the 'First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.' "[153]

In the *Cox* cases and in *Brown v. Louisiana* in the next decade, Black made an accommodation of, although he did not retreat from, this 1958 view.[154] In 1959, in *Smith v. California*,[155] he still was

151. *See* Cahn, *Justice Black and First Amendment Absolutes*, 37 N.Y.U.L. REV. 549 (1962).

152. 357 U.S. 513, 531 (1958), *quoting* Carlson v. Landon, 342 U.S. 534, 555-56 (1952) (dissenting opinion).

153. *Id.* at 532, *quoting* Yates v. United States, 354 U.S. 298, 344 (separate opinion).

154. Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion); Cox v. Louisiana (11), 379 U.S. 559, 575 (1965) (concurring opinion); Cox v. Louisiana (1), 379 U.S. 536 (1965).

155. 361 U.S. 147, 159 (1959) (concurring opinion).

vigorously advancing it—possibly to hasten the demise of the security-conscious conformity of the decade then ending: "The First Amendment, which is the supreme law of the land, has fixed its own value on freedom of speech and press by putting these freedoms wholly 'beyond the reach' of *federal* power to abridge," and he pointed to the long line of cases which had made the same provision applicable to the states. In 1961, Black protested that the constitutional language made it incumbent upon the judiciary "to guard those liberties the Constitution defined, not those that may be defined from case to case on the basis of this Court's judgment as to the relative importance of individual liberty and government power."[156]

In Black's view, a right set out in the Constitution concurrently vested in Congress a power "to enforce by appropriate criminal sanction" the untrammeled enjoyment of such right.[157] In *Aptheker v. Secretary of State*,[158] virtually a *coup de grace* to the ultra-security era, he found viable rights of individuals in the first, fourth, fifth and sixth amendments, and he was among the earliest jurists to revive the constitutional prohibition of bills of attainder as a modern protective device for the individual.[159] His concurring opinion in *Mapp* declared: "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands," but this was only to say that he did indeed consider that the search and seizure clause of the fourth amendment and the self-incrimination prohibition of the fifth amendment "ran into each other."[160]

Black was not prepared to state that the search and seizure clause was self-executing, the burden of his dissent in *Berger v. New York*,[161] but he was convinced that self-incrimination was a process wholly barred to government prosecutors.[162] In *Pointer v. Texas*[163] he spoke the opinion of the Court in asserting the guarantee of the confrontation clause of the sixth amendment, but in *Powell v. Texas*[164] he hesitated to give a blanket extension of the eighth amendment's clause on cruel

156. Braden v. United States, 356 U.S. 431, 444 (1961) (dissenting opinion).
157. *See* South Carolina v. Katzenbach, 383 U.S. 301, 355 (1966) (concurring in part).
158. 378 U.S. 500 (1964) (concurring opinion).
159. Flemming v. Nestor, 363 U.S. 603, 621 (1960) (dissenting opinion).
160. Mapp v. Ohio, 367 U.S. 643, 661 (1961).
161. 388 U.S. 41, 70 (1967).
162. *See* United States v. Wade, 388 U.S. 218, 243 (1967) (dissenting in part).
163. 380 U.S. 400, 403 (1965).
164. 392 U.S. 514 (1968).

and unusual punishment. Thus the Justice has avoided the charge of a doctrinaire advocacy of total incorporation of the Bill of Rights, although in the process he has inevitably invited the counter-charge that he either has been inconsistent or has "turned conservative."[165]

This is merely to reiterate an oft-overlooked truism, that to seek to categorize any Justice on the basis of specific statements in his opinions is to ignore the peculiar facts in the cases from which the opinions have been exerpted. What is more, or equally, important is the fact that the opinion of any Justice, however influential he may be personally, is only one vote on a nine-man bench. Finally, this is to say that in assessing the constitutional trend of the Warren Court it is necessary to have a composite rather than a mosaic of individual Justices' opinions.

With this *caveat*, one may consider the views of the second in seniority of the bench. Like Black, Justice Douglas has unhesitatingly asserted the absolute guarantees of the freedoms of the first amendment,[166] and has ardently advanced the idea that privacy of belief is a concomitant of these freedoms.[167] His insistence on the church-state "wall of separation" has been adamant.[168] He suggested, in his dissent in *Terry v. Ohio*,[169] that there should be some objective criteria for distinguishing "reasonable" searches and seizures from the "unreasonable" ones prohibited by the fourth amendment. On the other hand, he was prepared, in *Schneider v. Rusk*,[170] to read the equal protection clause of the fourteenth amendment back into the fifth in order to avoid the temptation of law enforcement authorities to make assumptions prejudicial to certain classes of citizens.

The basic absolute in the Constitution, in Douglas's view, is the equality guaranteed to all citizens. Where the law creates a right in one group (e.g., children injured by parent's wrongful death), he argued that it could not invidiously discriminate against some children because they happened to be illegitimate.[171] Where there was a basic qualification for the right to vote, he said in an early reapportionment

165. *But cf.* Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 1030 (1967).

166. *See* Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 698 (1959) (concurring opinion).

167. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963) (concurring opinion).

168. *See* School Dist. v. Schempp, 374 U.S. 203 (1963) (concurring opinion).

169. 392 U.S. 1, 35 (1968).

170. 377 U.S. 163, 168 (1964).

171. Levy v. Louisiana, 391 U.S. 68 (1968).

case, there could be no classification of voters or voting districts that amounted to discrimination in the effectiveness of individuals' votes.[172]

Like Black, and in contradistinction from Douglas, Justice Brennan has sought to determine from the facts of each case whether the defendant qualifies for the enjoyment of an absolute privilege set out in the Bill of Rights. Thus, in the flurry of obscenity cases beginning in 1966, he suggested that only when all condemnatory elements had "coalesced"—dominant "prurient interest" theme, offense to contemporary national tastes, absence of any redeeming social value—could a conviction be justified.[173] Thereupon, he found "coalescence" absent in the "Fanny Hill" case, but present in *Ginzburg v. United States*[174]—to the satisfaction of few critics on or off the Court.

The reasonableness of search and seizure as to the person, as in police-administered blood tests for alcoholism when time was of the essence, was upheld by Justice Brennan in *Schmerber v. California*.[175] In the same term of the Court, he suggested that, where a defendant had knowingly waived his immunity from unlawful entry into his property, the search and seizure prohibition did not apply.[176] However, he reemphasized in *Henry v. Mississippi*,[177] the primary consideration is whether the individual "understandingly and knowingly" waives a right preserved for him under the Constitution. "Presuming waiver from a silent record is impermissible."[178] Security from unlawful invasions from the state was meaningless, in his view, if a waiver could be gratuitously attributed to a defendant, or a suspect could be placed under electronic surveillance.[179]

These three Justices, in their libertarian declarations, expressed the Warren Court's ultimate extreme in protecting the individual in modern society from the continual prospect of encroachment by government apparatus. While the Court, almost to a man, has acquiesced in this function of the Constitution, the less activist members have tended to rely on established rules of due process while the Black-Douglas-Brennan sector has shown a greater readiness to develop new rules within the generalities of the equal protection clause.

172. Gray v. Sanders, 372 U.S. 368 (1963).
173. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).
174. 383 U.S. 463 (1966).
175. 384 U.S. 757 (1966).
176. Lewis v. United States, 385 U.S. 206 (1966).
177. 379 U.S. 443 (1965).
178. Carnley v. Cochran, 369 U.S. 506 (1962).
179. Lopez v. United States, 373 U.S. 427, 446 (1963) (dissenting opinion).

Equal protection, Brennan observed in *Sherbert v. Verner*,[180] begins with the individual's right which is brought into question by the operation of the law; this may be a different (perhaps opposite) thing from saying that the law should operate equally on all individuals (a first premise of due process).

In the view of Justice Harlan, and to a large degree of Justice Stewart, the fundamental problem of equal protection jurisprudence is its tendency to encourage a succession of judicial definitions of rights to be enjoyed under the fourteenth amendment. In concurring in *Griswold*, Harlan warned that "the 'incorporation' doctrine may be used to *restrict* the reach of Fourteenth Amendment Due Process," an interpretative presumption which he found "as unacceptable constitutional doctrine as is the use of 'incorporation' to *impose* upon the states" Bill of Rights restraints.[181] In the same case, Justice Stewart took vigorous exception to Douglas's majority opinion in its suggestion of "penumbras" in the Bill of Rights latent in the ninth amendment[182]—and Black joined him in this instance: "If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be 'the collective conscience of our people' is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court."[183]

The swift broadening of Bill of Rights concepts which climaxed in Douglas's opinion in *Griswold* has stimulated the Harlan-Stewart-White sector of the Court to emphasize again the specific nature of these rights as a requisite for extending them through the fourteenth amendment to the states. The alternative, and the danger, in the view of this sector, is to extinguish the "incongruity" between national and state standards of procedure which is the first principle of a federal system.[184] While Harlan occasionally has been provoked into gratuitous denigration of "the onward march of the long-since discredited 'incorporation' doctrine,"[185] his greater service has been in his tightly reasoned opinions on the limits to inevitable incorporation of guarantees "implicit in the concept of ordered liberty."[186]

180. 374 U.S. 398 (1963).
181. Griswold v. Connecticut, 381 U.S. 479, 499 (1965).
182. *Id.* at 527.
183. *Id.* at 507.
184. *Cf.* Malloy v. Hogan, 378 U.S. 1, 28 (1964) (Harlan, J., dissenting).
185. *Cf.* Pointer v. Texas, 380 U.S. 400, 408 (1965) (Harlan, J., concurring).
186. *See* Griswold v. Connecticut, 381 U.S. 500 (1965).

Like Frankfurter, Harlan has consistently argued that where there are alternatives for state procedure the Court should avoid a holding which extends a constitutional rule beyond the specific flaws in the procedure then under review.[187] Among the great issues of the period 1953-69—racial equality, reapportionment and defendants' rights—the Harlan-led dissents have been primarily directed at the latter two. In *Baker v. Carr*,[188] Harlan was emphatically in agreement with Frankfurter: If voter equality is read into equal protection, this presupposes a definition of the relationship between the voter and the government which has authority over the electoral process—and, as he suggested in his companion dissent, this could only mean a federally guaranteed voter right which was not to be found in the fourteenth amendment. This, he warned in his dissent in *Reynolds v. Sims*,[189] in turn could only lead to "a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary" which would police the relationship. "Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable."

In 1969, Harlan was still protesting that the broadening of equal protection concepts was "an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective." The alternative, as he saw it, was a disposition of the Court to inquire whether the criteria for the legitimate objective were themselves "suspect," or whether the governmental objective was such a "compelling governmental interest" as to meet the primary right of the individual to be free from the governmental action.[190] Three years earlier he had pointed out that the "suspect" action impairing the exercise of constitutional rights might well be private rather than governmental, and that there was "a difference in power between states and private groups so great that analogies between the two tend to be misleading."[191] The fundamental threat in the defendants' rights cases, Harlan warned, was to place this Court in the position of making criminal law under the name of constitutional interpretation,[192] and

187. *Cf.* Benton v. Maryland, 395 U.S. 784, 806 (1969) (Harlan, J., dissenting); Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., dissenting in part).

188. 369 U.S. 186, 330 (1962).

189. 377 U.S. 533, 624 (1964).

190. Shapiro v. Thompson, 394 U.S. 618, 655 (1969).

191. United States v. Guest, 383 U.S. 745, 771 (1966) (Harlan, J., dissenting in part).

192. *Id.* at 774; *cf.* Duncan v. Louisiana, 391 U.S. 145, 175-76 (1968) (Harlan, J., dissenting).

thus to undermine the legislative responsibility in this subject at both the federal and state levels.

Throughout this line of opinions there is a fundamental acceptance of the ultimate validity of government action provided, first, that the separation of powers (*i.e.*, federal and state) assumed by the Constitution is adhered to, and, second, that the proper power (*i.e.*, legislative rather than executive or judicial) is employed.[193] Thus the consensus of the Warren Court—while it was punctuated and qualified by fundamentally divergent views on occasion—has been the validity of the concept of broad governmental power which was established in 1937 by *West Coast Hotel Co.* and *Jones & Laughlin Steel.*

Given this fact, the great principles established in the sixties—the universality of racial equality, the equitable balancing of individual electors, the extension of specific pledges of the Bill of Rights if not their "penumbras"—may reasonably be expected to remain as the enduring features of the Warren Court. The unsettled business left over from the great dialogue between the activists and the non-activists, which will be the business of the Burger Court, includes the definition of ultimate limits to the application of these principles and—perhaps of most importance in the constitutional history of the rest of this century—the integration of all of the judicial criteria, from Article I through Amendment XXV, into a consistent *corpus* of modern constitutional law.

193. *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting).