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JUSTICE BRENNAN AND THE HEYDAY OF
WARREN COURT LIBERALISM

Edward V. Heck*

INTRODUCTION

Between 1962 and 1969 the judicial liberalism that had first emerged in Chief Justice Warren's early years on the Supreme Court reached its full flowering. The factionalism that marked the Court's voting patterns between 1958 and 1962 prevented earlier emergence of a near-total liberal dominance. By the beginning of the 1962 Term, however, the liberals were clearly in the saddle. The switch in the Court's voting patterns can be traced quite clearly to the departure from the Court of Justices Whittaker and Frankfurter and the appointment by President Kennedy of Justices White and Goldberg. The years 1962-1969 can be clearly identified as the heyday of Warren Court liberalism. The Chief Justice himself has been tagged, "The Judge Who Changed America."

The influence of Warren in the decisions rendered during these years is too apparent to deny. Often overlooked, however, are the crucial contributions of the Chief Justice's closest collaborator, Justice William J. Brennan, Jr. Close examination of voting patterns and opinions clearly points to the conclusion that it was Justice Brennan, even more than the Chief Justice, who deserves to be remembered as the cutting edge of Warren Court liberalism.

In this article, Justice Brennan's contributions to the jurisprudence of the late Warren Court will be addressed not only through statistical analysis of votes, but also through

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consideration of how his opinions gave shape to the Court’s dominant liberal philosophy.

In keeping with a convention now widely accepted by political scientists studying the Supreme Court, the time frame for analysis is not the annual term of Court, but rather the “natural court.” A natural court has been defined by political scientist John Sprague as a period without a change in the membership of the Court. Division of voting statistics into natural court periods rather than annual terms reflects the recognition that change in the Court does not “occur only during summer recess.” Indeed, changes in the Court’s voting patterns are more often attributable to personnel changes that mark the beginning of a new natural court. So it was with the personnel changes that began with the retirement of Justice Whittaker on April 1, 1962, and culminated with the seating of Justice Arthur J. Goldberg on the opening day of the October 1962 Term six months later. In this short period the Court was transformed from a body in which a conservative majority as often as not carried the day, to a body clearly dominated by a majority liberal bloc. Despite subtle shifts in the size and makeup of voting blocs, the liberals were to dominate the Court until another set of personnel changes in 1969 saw the resignation of Justice Fortas and the retirement of Chief Justice Warren. This chain of events provided President Richard M. Nixon with the opportunity to begin his reconstruction of the Court.

THE VOTING DATA

Classifying voting data by natural courts best reflects the view that presidents seek to change the Court through the appointment process. Their efforts generally do not go unrewarded. While there is no accepted convention as to how natural courts created by these presidential appointments are to

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5. Galloway, supra note 1, at 610 n.7.
be identified, the approach adopted in this article is to give each of the three courts considered an identifying numerical designation. Natural court designations are arrived at by counting a new natural court for each separate personnel change since 1789. Thus, the court created by the substitution of Kennedy appointees White and Goldberg for Justices Whittaker and Frankfurter is Court 77, sometimes referred to as "The Kennedy Court." The seating of Justice White established this Court as an eight-member group on April 16, 1962, and the appointment of Justice Goldberg the following October brought this Court to full strength. The Kennedy Court remained intact for more than three years, ending with the reluctant resignation of Justice Goldberg. The appointment of Justice Abe Fortas in 1965 marked the beginning of Court 78. With Justice Black increasingly likely to desert the liberal bloc as new issues came before the Justices, Court 78 proved to be an interlude between the Kennedy Court and the more activist, liberal court created in the fall of 1967 when Justice Thurgood Marshall took over the seat vacated by retiring Justice Tom Clark. Marshall's appointment, the last of the Warren era, inaugurated Court 79.

The next three sections of this paper will analyze the major decisions of each of these natural courts with emphasis on the role of Justice Brennan in each period. For each natural

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8. This is in contrast to the annual term of Court, which can be readily identified, of course, by the year in which it began.

9. The counts used here are based on the "time chart of the United States Supreme Court" presented in H. CHASE & C. DUCAT, CONSTITUTIONAL INTERPRETATION 1357-60 (1974). These court numbers are analogous to the practice of identifying each new "Congress" by number. The difference is that the life of a "Congress" is set at two years, while a "natural court" may be longer or shorter, depending upon the death or retirement of a Justice. For an earlier use of this numbering system, see Heck, The Socialization of a Freshman Justice: The Early Years of Justice Brennan, 10 PAC. L.J. 707, 710, 727-28 (1979).

10. See Thompson, The Kennedy Court: Left and Right of Center, 26 WEST POL. Q. 263 (1973). Although Justice Frankfurter did not retire officially until Aug. 28, 1962, he did not cast a vote or deliver an opinion in any case decided after Justice White joined the Court.


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<thead>
<tr>
<th>Court Number</th>
<th>Years</th>
<th>New Justice(s)</th>
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<tbody>
<tr>
<td>Court 77</td>
<td>1962-65</td>
<td>White</td>
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<td>Court 78</td>
<td>1965-67</td>
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<td>Court 79</td>
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<td>T. Marshall</td>
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court, the analysis will begin with a statistical overview of bloc voting patterns and majority participation and dissent rates for the period. These statistics clearly show that in each of the three periods it was Justice Brennan’s position that most often coincided with that of the Court as a whole. Seeking a more fully-rounded understanding of the nature of the Justice’s influence on the jurisprudence of the late Warren Court, Justice Brennan’s opinions in major constitutional cases will be scrutinized in each of the three natural courts being considered.

BRENNAN AND THE KENNEDY COURT

The presidential election of 1960 was in no sense a referendum on future directions for the Supreme Court. Despite inflated rhetoric, the differences between John F. Kennedy and Richard M. Nixon on issues of general import were minimal. The narrow victory of Kennedy and the Democrats was hardly a “mandate” for anything. Putting aside questions of style, the most significant differences between the two candidates were their respective party affiliations and the men they would choose for high executive and judicial office, including the Supreme Court of the United States.

12. Analysis of voting blocs is based on tables that show for each pair of Justices on the Court the percentage of cases in which they voted together (whether with the majority or in dissent). I have adopted the convention that a group of Justices form a cohesive bloc if the interagreement scores for each pair exceed 80%.

The selection of cases to be included in the analysis is a problem faced by any analyst of Supreme Court voting behavior, and has been resolved in different ways by different scholars. The nature of the case selection problem has been best stated by political scientists David Rohde and Harold Spaeth, who note: “Although there is no inherent superiority in counting cases and votes one way rather than another, the matter of method is sufficiently important to require specification.” D. ROHDE & H. SPAETH, supra note 7, at 134.

In this paper all cases decided with full opinion (unanimous as well as non-unanimous), plus those per curiam decisions evoking dissent on the merits, are included. When several cases are decided with a single opinion, each case has been counted separately. Thus, the results here differ slightly from those reported by analysts who consider only non-unanimous decisions or only cases decided with signed opinion. My rule for counting cases is substantially the same as that adopted by Rohde and Spaeth. Id. at 135-37.

13. Majority participation rates and dissent rates are obviously two sides of the same coin, but in my tables I report both scores. Cases included in the analysis are the same as for the interagreement tables, supra note 12.

14. For vacancies on the courts of appeals the Kennedy team at the Justice Department did not require a “litmus test” of liberalism, but did seek assurances that southern appointees were not hostile to civil rights. Goldman, Judicial Appointments
The Court was tailor-made for a President seeking to influence judicial policy in a liberal direction. Between 1958 and 1962, (Court 76), the Court had been highly factionalized. Although a liberal majority on questions of economic power had been in place for half a dozen years, on key issues of civil liberties, the liberal “bloc” of Douglas, Black, Warren, and Brennan frequently had been unable to win over a crucial fifth vote.\textsuperscript{16} A single presidential appointment, therefore, could tip the balance in a substantial number of cases.

The influence of the Kennedy Administration on the Supreme Court was not immediately felt. President Kennedy had been in office more than a year before the first vacancy occurred on the Court. In due time, however, Administration influences were brought to bear as President Kennedy’s appointees helped reshape Supreme Court voting patterns and policy outputs.

It was, of course, Kennedy’s appointment of Arthur Goldberg, rather than that of White, that opened the way for an outpouring of innovative liberal decisions. Although one commentator has suggested that President Kennedy might have “raised an eyebrow or two” at White’s “fairly prompt turn-to-the-right on the bench,”\textsuperscript{15} it must be remembered that White often supported “liberal” positions on such crucial issues as civil rights, reapportionment, and economic regulation. Still, it was Goldberg who became firmly entrenched in the mainstream of the then-dominant liberal majority. A table of interagreement rates for all Justices in Court 77 reveals a cohesive liberal bloc of Douglas, Warren, Brennan, and Goldberg with an average interagreement rate of 86.5\%.\textsuperscript{17} Although Justice Black was beginning his movement toward a sometimes conservative voting position in this period, he remained closely affiliated with this bloc, recording interagreement rates above 80\% with both Warren and Brennan. Moreover, the once-cohesive conservative bloc was utterly

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17. Complete data on bloc voting patterns during Court 77 are set forth in appendix A, table 1 infra.
shattered, with Harlan becoming increasingly isolated from his colleagues. Justices Clark and Stewart were as likely to agree with centrist members of the liberal bloc as with each other. Justice White frequently voted with both Brennan (84.8%) and Warren (80.8%).

The power of the Douglas-Warren-Brennan-Goldberg bloc and the dominance of Justice Brennan within this bloc is even more clearly demonstrated by individual dissent rates for the nine Justices who sat on the Court from 1962 to 1965. In this natural court, Justice Brennan clearly established himself as the Supreme Court's "center of gravity." In the three and one-half years of Court 76, Brennan had dissented sixty-six times, more than either Clark or Stewart. In more than three terms of Court 77, however, he recorded only fifteen dissents, voting with the majority in 97.1% of all cases. Closest to Brennan was the Chief Justice, with thirty dissents and a 94.1% majority participation rate. At the other extreme, Justice Harlan was with the majority in only 56.3% of the cases, filing an incredible total of 222 dissents.

If only cases raising civil liberties issues are considered, the power of the new liberal majority appears even more impressive. Black joined Douglas, Goldberg, Warren, and Brennan to form a cohesive five-member bloc. In these cases, Brennan's vote was almost invariably the vote of the Court, as the Justice from New Jersey recorded only six dissents in civil liberties cases in the entire period.

Given the voting power of the new liberal majority, it is hardly surprising that Court 77 (1962-1965) is remembered for a remarkable number of far-reaching innovations in judicial policy making. A partial listing of landmark cases would have to include *Gideon v. Wainwright* and *Malloy v. Hogan* on

18. Complete data on majority participation and dissent rates during Court 77 are set forth in appendix B, table 1 infra.
19. "Center of gravity" here means simply the justice with the highest majority participation rate, or "maximal participation in the majority." G. Shubert, Quantitative Analysis of Judicial Behavior 120 (1959).
21. Civil liberties issues are defined broadly to include those cases in which the Court's decision turns on a personal claim of right involving the Bill of Rights or the fourteenth amendment, plus cases turning on analogous claims under federal statutes. But see G. Shubert, The Judicial Mind 102 (1965).
the issue of incorporation, the major reapportionment cases of *Wesberry v. Sanders* and *Reynolds v. Sims*, *School Prayer Cases*, *New York Times Co. v. Sullivan*, and *Griswold v. Connecticut*. Because of these cases and others expanding the rights of individuals and the power of the economically disadvantaged, this natural court is deservedly remembered as an activist judicial body, promoting the tenets of modern liberalism across a broad spectrum of issues.

Less visible than the liberal and activist nature of this Court, is the extent to which its characteristic policy outputs were shaped by the attitudes, goals, and role orientation of Justice Brennan. Chief Justice Warren, of course, is generally regarded as the architect of many of these policies, with Justice Goldberg correctly given much of the credit. Yet, Brennan, with less fanfare, not only occupied the center of gravity in voting, but also shaped many of the policies of this Court through his opinions.

Most of the doctrinal innovations of this period clearly bear Brennan's stamp. Although he wrote no major reapportionment opinions in *this* natural court, Brennan fully accepted the "one-man, one-vote" doctrine spelled out by Justice Black in *Wesberry v. Sanders* and the Chief Justice in *Reynolds v. Sims*.

Brennan's mark is perhaps most apparent in the cases incorporating provisions of the Bill of Rights into the fourteenth amendment. In *Gideon v. Wainwright*, the Chief Justice gave Justice Black the honor of writing the opinion overruling the *Betts v. Brady* decision Black had opposed for twenty-one years. Rather than relying on his own pet doctrine of

30. Brennan either approved of Justice Black's historical argument that the framers of article I, section 2 of the Constitution intended to require approximately equal per capita representation in congressional districts—despite the availability of fourteenth amendment grounds for the decision—or felt the point was not worth pressing given agreement on the result.
33. 316 U.S. 455 (1942).
“total incorporation.” Black based the decision on the “selective incorporation” position Brennan had worked out in earlier dissenting opinions. This limited rationale proved acceptable to seven of the Justices. The right to counsel was incorporated because it was “fundamental and essential to a fair trial, and so, to due process of law,” not because the entire Bill of Rights was applicable to the states.

A year later when the Court made the fifth amendment privilege against self-incrimination applicable to the states in Malloy v. Hogan, Justice Brennan forthrightly spelled out his own views on this hotly debated subject in an opinion that won the support of all five members of the liberal bloc. Referring to the privilege as the “essential mainstay” of the adversary system in criminal proceedings, Brennan wrote:

The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence.

The same standards were to apply in both federal and state courts, Brennan wrote, because the Supreme Court had rejected the notion that the fourteenth amendment guarantees only a “watered-down, subjective version of the Bill of Rights.” Ignoring the claims of federalism, Brennan continued, “it would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on

36. Although all nine justices agreed with the result, only seven of the nine endorsed Justice Black’s opinion. This case, thus, provides an excellent example of the important distinction between what political scientist David Rohde calls the “majority voting coalition” (all nine justices) and the “majority opinion coalition” (only seven justices in this case). Rohde, Policy Goals and Opinion Coalitions in the Supreme Court, 16 MIDWEST J. POL. SCI. 208, 214 (1972).
37. 372 U.S. at 342.
38. Id. at 340-45.
40. Id. at 7.
41. Id. at 8.
42. Id. at 10-11 (quoting Ohio ex. rel. Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).
whether the claim was asserted in state or federal court."

The rights incorporated into the Bill of Rights were to be fully absorbed.

These were strong words, particularly in light of the fact that the self-incrimination clause has long been one of the least popular provisions of the Bill of Rights. Brennan's opinion provoked dissents from four of his colleagues, led by Justice Harlan, who labelled Brennan's constitutional doctrine "incorporation in snatches." Vehemently rejecting the idea that identical standards were to apply at federal and state levels, Harlan said:

It is apparent that Mr. Justice Cardozo's metaphor of "absorption" was not intended to suggest the transplantation of case law surrounding the first eight Amendments to the very different soil of the Fourteenth Amendment's due process clause.

Justice White, joined by Stewart, dissented on the pragmatic point that the Court's decision implied that mere invocation of the privilege would oust the judge from his traditional role of deciding on the validity of a claim of privilege, a position Brennan himself had once endorsed.

Given that Malloy could have been decided favorably to the constitutional claim on narrower grounds, one may ask why Brennan, the skillful coalition builder of 1956-1962, did not attempt to answer these dissents and perhaps win over additional votes. The answer, it would appear, is to be found in the new voting patterns of Court 77 (1962-1965). With the addition of Goldberg to the Court, five Justices were in agreement that at least most of the provisions of the Bill of Rights should be applied to the states in their entirety. The time had come when Brennan's long and strongly held views on in-

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43. Id. at 11.
45. 378 U.S. at 27 (Harlan, J., dissenting).
47. 378 U.S. at 33.
48. For Brennan's views as a state court judge, see In re Pillo, 11 N.J. 8, 93 A.2d 176 (1952).
corporation enjoyed majority support. In *Malloy v. Hogan*, therefore, he was able to set out a strong and uncompromising defense of selective incorporation, the very position he had earlier spelled out in dissent. A change in judicial personnel had converted an appeal to the future into "fundamental law."

Brennan was also influential in shaping the Court's consensus in the landmark first amendment cases involving school prayer and libel. In the *School Prayer Cases* his concurring opinion, which filled in many of the gaps in Justice Clark's cryptic majority opinion, has been treated as the *de facto* opinion of the Court. In *New York Times Co. v. Sullivan* he wrote a majority opinion that broke new ground in protecting the press from the threat of ruinous libel judgments and provoked fresh debate about the "central meaning of the First Amendment."

In the *School Prayer Cases*, eight of the nine Justices agreed that prayer and Bible reading in the public schools offended the first amendment's establishment clause. Justice Clark, in an opinion that avoided controversial issues that might have split his eight-member majority, emphasized common ground. Relying heavily on excerpts from the writings of Jefferson and Madison and vague quotations from earlier Supreme Court decisions on religion, Clark concluded that the establishment and free exercise clauses together commanded governmental neutrality toward religion. If the primary purpose of the statute is to advance or hinder religion, it is unconstitutional. Once state laws requiring prayer or Bible reading were found to be religious in character, it followed that the statutes must fall. The thrust of this opinion was to make the decision appear to be dictated by inescapable constitutional commands. Indeed, Clark went so far as to assert that the judicially created rule of neutrality was clearly and

52. See C. Hughes, *The Supreme Court of the United States* 68 (1928).
54. For a commentary that treats Brennan's concurring opinion as a gloss on the opinion of the Court, see R. McCloskey, * supra* note 29, at 290-321.
58. *Id.* at 223.
JUSTICE BRENNAN concisely stated in the words of the first amendment.59

In practice, of course, the issue was not so simple. Even Justices Douglas and Black had long recognized that absolutism would not answer nagging questions about possible conflicts between the establishment and free exercise clauses. Delicate interpretation was required to explicate the boundaries between permissible and prohibited governmental activity of a religious or quasi-religious nature. These problems could be dealt with in a majority opinion only at the risk of driving one or more Justices from the majority coalition. Thus, this delicate balancing was left to the authors of concurring opinions, particularly Justice Brennan.

Brennan’s motivations for writing a seventy-four page concurring opinion remain shrouded in mystery, though it may well be that he felt some obligation as occupant of the Court's “Roman Catholic seat” to speak his mind on a question going to the heart of the relationship between church and state. More sensitive than some of his colleagues to attacks from outside the Court at this time,60 he may also have felt the need to deflate, in advance, the anticipated charges that the Court was anti-religious and determined to stamp out all vestiges of public support for religion.61 School prayer, like other civil liberties issues, presented a genuine conflict between the individual and society. On the side of the individual, Justice Brennan went beyond the majority opinion on two major points. First, he emphasized that religious exercises in the school were, in fact, deeply offensive to many students and their parents.62 Second, he stressed the subtle peer group pressures to conform that made it difficult for children and adolescents to exercise their privilege of being excused.63

For Brennan, the considerations noted above clearly pointed to the decision that, on balance, school prayer and Bible reading violated the first amendment. Thus, he joined

59. Id. at 226.
61. 374 U.S. at 231-32 (Brennan, J., concurring).
62. “[O]ur religious composition makes us a vastly more diverse people than were our forefathers,” wrote the Court’s only Roman Catholic justice. “[P]ractices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and nonbelievers alike.” Id. at 240-41.
63. Id. at 290.
fully in the majority opinion, but cautioned that the decision did not imply that the Court “must declare unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government.” Bringing back into the picture some of the societal considerations that he felt must yield to individual claims in the unique circumstances of school prayer, Brennan then ventured far outside the boundaries of the case before the Court in search of the line between permissible and unconstitutional governmental support of religion. Religious exercises in legislative bodies, for example, might be constitutional because legislators were presumed to be mature adults. Sunday-closing laws, the motto “In God We Trust,” and the words “under God” in the pledge of allegiance all might be upheld as “activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning.” Nondevotional use of the Bible and teaching about religion were clearly permissible, as Clark had noted in the majority opinion. Tax exemptions for religious groups could be justified as “generally available to educational, charitable, and eleemosynary groups.” Many other practices, for example the provision of military and prison chaplains, draft exemptions for ministers and divinity students, excusal of children from schools on religious holidays, and use of public buildings by religious groups on a temporary basis, could all be justified by the proposition that such seeming infringements of the establishment clause were outweighed by competing values under the free exercise clause.

Such detailed consideration of hypothetical policy issues would be inappropriate if not impossible in an opinion of the Court. But in a concurring opinion, Brennan was free to propose possible constitutional justifications for generally accepted governmental activities in support of religion. To the Court’s critics, Brennan’s opinion proclaimed that the Justices were not requiring governmental hostility toward religion. Moreover, according to Robert McCloskey, the concurring opinion provided “the blending of coherence and flexibility

64. Id. at 294.
65. Id. at 299-300.
66. Id. at 303-04.
67. Id. at 301 (footnote omitted).
68. Id. at 296-99.
requisite for a viable judicial standard,\textsuperscript{69} a standard that could be applied by lower court judges when other church-state issues were raised.

The opinion is perhaps as significant for what it reveals about Brennan's approach to constitutional adjudication as for the standards it sets out. As in other first amendment cases, Brennan firmly rejected the search for absolutes, as well as the attempt to base decisions on history and the specific intent of the framers. Invoking the doctrines delineated in both \textit{McCulloch v. Maryland}\textsuperscript{70} and \textit{West Virginia Board of Education v. Barnette},\textsuperscript{71} Brennan declared that the Court's task was to apply the fundamental principles of an eighteenth century Constitution to the realities of a twentieth century nation.\textsuperscript{72} Such a task, he admitted, was seldom easy or automatic, but that it was no excuse for ducking tough issues where both sides might claim some support from fundamental values. On such issues, balancing is inevitable, and Supreme Court Justices are likely to differ on how the scale should tip. Here, as in other cases requiring a weighing of competing values, Brennan favored the individual. At the same time, he sought to preserve as much of society's legitimate claim as could be squared with a generous interpretation of individual freedom.

The balancing of individual and societal values implicit in the concurring opinion in \textit{School Prayer Cases} is explicit in Brennan's majority opinion in \textit{New York Times Co. v. Sullivan}.\textsuperscript{73} This landmark case can be approached on three distinct levels: First, the Justices, as supporters of racial equality, were inclined to quash Alabama's attempt to punish the New York Times financially in retaliation for the paper's support of the civil rights movement. Second, the case presented an opportunity to apply first amendment principles to insulate the press from libel judgments. Finally, as Harry Kalven has pointed out, Brennan's opinion contains the seeds of a doctrine emphasizing the "central meaning" of the first amendment.\textsuperscript{74}

\begin{itemize}
    \item \textsuperscript{69} R. McCloskey, \textit{supra} note 29, at 303.
    \item \textsuperscript{70} 17 U.S. (4 Wheat.) 316 (1819).
    \item \textsuperscript{71} 319 U.S. 624 (1943).
    \item \textsuperscript{72} 374 U.S. at 230-37.
    \item \textsuperscript{73} 376 U.S. 254 (1964).
    \item \textsuperscript{74} Kalven, \textit{supra} note 56, at 191.
\end{itemize}
Allegedly defamed by a Times advertisement placed by civil rights leaders in an effort to arouse opinion against police brutality in Montgomery, Police Commissioner L.B. Sullivan had won a $500,000 libel judgment against the newspaper. Given that the reality of the defamation was at best an open question, the Justices unanimously agreed that the jury verdict must be reversed. In justifying their decision to reverse, six Justices endorsed an opinion by Justice Brennan.

Brennan's opinion, said Kalven, "may prove to be the best and most important [the Court] has ever produced in the realm of freedom of speech." The Court's duty according to Brennan was to determine whether Alabama's libel law, as applied to an action "brought by a public official against critics of his official conduct," abridges the freedom of speech and of the press that is guaranteed by the first and fourteenth amendments. Not only Sullivan, but all public officials, were forclosed from recovery for a defamatory falsehood relating to their official conduct unless they could show "actual malice," Brennan concluded. In practice such a rule would mean that only rarely could a public official win a libel judgment against a critical press.

The implications of the decision went much further. The underlying value that the Justices sought to protect was what Brennan called "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." If nothing else, it would seem, the first amendment allows criticism of government. According to Kalven, this case marks the beginning of a new proposition that "analysis of free speech issues should hereafter begin with the significant issue of seditious libel and defamation of government by its critics rather than with the sterile example of a man falsely yelling fire in a crowded theater." Brennan did not go quite so far in his majority opinion. Yet, he did go out of his way to announce that the unconstitutionality of the Sedition Act of 1798 had carried the

75. Id. at 193-94.
76. 376 U.S. at 256.
77. Id. at 280.
78. Id. at 270.
79. Kalven, supra note 56, at 205.
day in the court of history, and to cite dicta from his opinion in *Roth v. United States* emphasizing the importance of protecting expression on public issues. If this is indeed the central meaning of the first amendment, surely criticism of public officials, which helps keep open the channels for peaceful political change, is entitled to greater constitutional protection than obscenity.

Nonetheless, Brennan again rejected first amendment absolutism. Despite the importance of keeping the public forum open, the "actual malice" test recognizes a competing interest in protecting the reputation of a public official maliciously attacked. Thus, recovery would be permitted if it could be shown that a defamatory falsehood was published "with knowledge that it was false or with reckless disregard of whether it was false or not." A carry over from the common law of slander, this test was rejected by Justices Black, Douglas, and Goldberg, who asserted that the first amendment prohibited all libel judgments for public officials. It was Brennan, however, the pragmatic libertarian, rather than Black, the absolutist, who carried the Court. Brennan's approach resulted in a unanimous decision expanding the meaning of freedom of the press. Moreover, the "actual malice" test itself is representative of Brennan's constitutional jurisprudence in a number of respects. It clearly involves balancing, strongly supporting a free press, yet it recognized that social order required some means of punishing outrageously scurrilous attacks. Derived in part from the opinions of lower courts, it was a test that could be used in charging juries. Like the *Roth* test, to be sure, it is a standard lacking in certainty in application. But such uncertainty, Brennan recognized, is inevitable in the search for a balance between the competing values of freedom and order.

Preference for libertarian claims, balancing, and tests to be applied by lower courts all characterized Brennan's opinions in the landmark civil liberties cases of Court 77 (1962-
Because of his close alignment with Chief Justice Warren, Brennan was frequently chosen to write the opinion of the Court in major cases and, thus, exercised disproportionate influence over the shape of the Warren Court's jurisprudence. Other path-breaking civil liberties opinions by Brennan in this natural court include *Fay v. Noia*,88 *NAACP v. Button*,86 and *Dombrowski v. Pfister*.87

In *Fay v. Noia*, the Court expanded the scope of federal habeas corpus,88 thus building the foundation that would give the criminal justice decisions of the liberal majority real meaning for those already imprisoned as well as those accused of crimes in the future.

Like *New York Times Co. v. Sullivan*, Brennan's other major first amendment opinions reflect an expansive view of the meaning of the amendment, particularly the freedom of association, while at the same time conceding the legitimacy of traditional state regulatory powers. In *NAACP v. Button*, he recognized a state's power to regulate the legal profession, but concluded that the NAACP's litigation activities were protected by the first amendment.89 Not only was "abstract discussion" within the scope of the amendment's coverage, but "vigorous advocacy" as well.90

While the impact of *NAACP v. Button* was merely the legitimazation of the NAACP's existing litigation strategy, Brennan's opinion in *Dombrowski* armed free speech proponents with a new weapon—the injunction. Under traditional notions of federalism, a plaintiff who felt harassed by state officials was barred from the federal courthouse under the abstention doctrine, the rule that federal courts should refuse to intervene in state matters, particularly criminal prosecutions.91 In *Dombrowski*, however, Brennan concluded that federal court abstention was not required when a vague state statute might produce a "chilling effect"92 on speech. Under these circumstances, federal judges might intervene to enjoin

87. 380 U.S. 479 (1965).
88. 372 U.S. at 399-427.
89. 371 U.S. at 439-45.
90. Id. at 429.
91. 380 U.S. at 484.
92. Id. at 487.
threatened state prosecutions. While Brennan conceded the importance of federalism, free speech again outweighed competing values.

Brennan's influence in this natural court was felt not only in these innovative decisions, but in opinions supporting liberal results in the relatively mundane cases that dominate the Court's docket as well. In United States v. Wong Sun, Brennan raised the banner of self-restraint to avoid unnecessary constitutional issues, writing a narrow opinion invalidating a narcotics arrest on factual grounds. Similarly, in Bell v. Maryland, he found the middle ground that justified reversal of the convictions of civil rights sit-in demonstrators without finding in the fourteenth amendment itself a right of equal access to places of public accommodation.

Brennan's influence was not limited to opinions in those cases falling under the rubric of civil liberties. Support for the economic underdog generally marked his opinions in cases involving claims of injured workers, antitrust prosecutions, and labor-management disputes. In promoting this aspect of liberalism, Brennan sought in his opinions to uncover the overall thrust of congressional policy, even at the expense of literal reading of statutory language.

The Court of 1962-1965, then, was liberal and activist in the economic sphere as well as in civil liberties cases. This activism, as Robert McCloskey has noted, was reflected "not only in a handful of great, landmark decisions but in the cumulative effect of many others in which the justices chipped away at the doctrinal roadblocks to a judicially-defined good society." The activism of the period was not, however, an attempt to foist upon the nation a coherent liberal ideology endorsed by a unified court. Despite some tendency of Douglas, Goldberg, Warren, Brennan, and Black to vote as a bloc,

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93. Id. at 492.
96. See G. Schubert, supra note 21, at 127-28.
there were differences among them. Douglas' extremism on civil liberties issues is well known and Black's allegedly erratic voting tendencies have been well documented, though less than satisfactorily explained.

Thus, the decisions of the Court between 1962 and 1965 most often reflected the views of Warren and Brennan, backed by newcomer Goldberg. The pragmatic liberalism that the Chief Justice and Brennan had endorsed in previous years emerged as the dominant force shaping the Court's decisions. The dominance of Brennan and Warren is reflected not only in their voting records, but also in their opinions. Rarely has a single Justice written as many path-breaking constitutional opinions in so short a time as Brennan produced between 1962 and 1965. With the liberal Justices in the saddle, Brennan had become the most effective spokesman for their point of view. No longer were battles to be fought over the basic doctrines of incorporation and reapportionment. In the future, the Court would be free to deal with new issues and application of the principles adopted between 1962 and 1965 in different factual settings.

OLD ISSUES, NEW ISSUES, AND A CONSTITUTIONAL INTERLUDE: 1965-1967

Justice Goldberg, the closest ally of Brennan and Warren in the path-breaking years, 1962-1965, had hardly begun to feel at home in the Supreme Court when President Johnson persuaded him to leave the Court to serve as Ambassador to the United Nations.102 To replace Goldberg, Johnson selected Abe Fortas of the Washington law firm of Arnold, Fortas, & Porter.

Though hardly a carbon copy of Goldberg, Fortas generally shared his predecessor's position on the major issues before the Supreme Court. While the personnel change that created Court 78 (1965-1967) did not produce major shifts in doctrine, voting blocs became more fluid. In contrast to the cohesive four-man bloc of the previous years, Douglas-Fortas-Brennan and Brennan-Fortas-Warren now formed interlock-

102. Goldberg wrote to his colleagues: "As you must know, only the most compelling call to duty could bring me to leave this Court and your dedicated and joyous company. But that call did come, and I could not refuse." 382 U.S. ix (1965).
 Confirming the fluidity of bloc structure in this court was the central position of Justice Black. In Court 77 (1962-1965), he had remained marginally attached to the dominant liberal bloc centered around Warren and Brennan. But between 1965 and 1967, he moved to a nonaligned position. The simple fact is that he did not consistently agree with any other Justice; his highest rate of inter-agreement was a modest 73.6% with Justice Brennan. Far more than Fortas, it was Justice Black whose votes made Court 78 (1965-1967) different from the Kennedy Court.

Brennan and Warren did not dominate the Court as completely as in the previous period. With twenty-three dissents in two terms, Brennan's majority participation score fell from an extraordinary 97.1% to a more modest 92.2%. Warren's thirty-three dissents gave him a majority participation rate of 88.7%, still high, but noticeably below the 94.1% of 1962-1965. While Black's dissent rate approached the 20% mark, Justice Douglas' exceeded it.\textsuperscript{104} The changes in interagreement rates may be traced in part to the changing shape of the issues presented on the Court's civil liberties docket. While Black continued to support civil liberties claims in cases involving citizenship,\textsuperscript{105} the fifth amendment,\textsuperscript{106} and a range of first amendment issues,\textsuperscript{107} he frequently voted against civil liberties claims when the cases involved fourth amendment claims,\textsuperscript{108} civil rights demonstrations,\textsuperscript{109} the removal of state prosecutions to federal courts,\textsuperscript{110} and vague due process claims in criminal cases.\textsuperscript{111} In short, Black favored traditional civil liberties claims of the

\textsuperscript{103} Complete data on bloc voting patterns during Court 78 are set forth in appendix A, table 2 infra.
\textsuperscript{104} Complete data on majority participation and dissent rates are set forth in appendix B, table 2 infra.
\textsuperscript{105} Afroyim v. Rusk, 387 U.S. 253 (1967).
\textsuperscript{108} Cooper v. California, 386 U.S. 58 (1967).
type that concerned the Court prior to 1964 (except in fourth amendment cases), but resolutely opposed extension of libertarian principles to new issues coming to the Court in the wake of the civil rights movement.

Justice Brennan, on the other hand, was much more likely to join with Douglas, Warren, and Fortas in applying libertarian principles to novel legal issues. Because of Black's frequent desertion from the liberal "bloc," Brennan's views were sometimes expressed in dissent, though only rarely in opinions authored by Brennan.\textsuperscript{118} Nonetheless, Brennan, even more than Warren, retained his position as the Court's "center of gravity." Moreover, Brennan continued to speak for the Court in a number of leading constitutional decisions, most notably in opinions dealing with congressional power to legislate against racial discrimination, freedom of the press, the rights of criminal defendants, and obscenity. While some of these opinions expanded on the libertarian principles established in the preceding years, others delineated the limits of Brennan's brand of judicial liberalism.

\textit{Congressional Power and Racial Discrimination}

Reflecting on recent developments in the Supreme Court after his resignation as solicitor general, Archibald Cox asserted that the development of constitutional doctrine allowing Congress to assume responsibility for the civil rights revolution was the most significant achievement of the Supreme Court between 1965 and 1967.\textsuperscript{119} In the early phases of the civil rights movement, the Court had acted alone with very little support from Congress or the President. The passage of the Civil Rights Act of 1964 initiated a fundamental change, indicating that the legislative and executive branches had finally accepted the challenge to join with the Court in the battle to secure legal equality for black Americans. Clearly, it was with a feeling of relief and vindication that the Justices embraced the opportunity to place a quick stamp of legitimacy on the act in \textit{Heart of Atlanta Motel v. United


\textsuperscript{113} Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966).
States and Katzenbach v. McClung.114 Similarly, in South Carolina v. Katzenbach116 the Court approved the Voting Rights Act of 1965 under an expansive interpretation of the enforcement clause of the fifteenth amendment. Feeling that they had stood alone on the civil rights question long enough, the Justices were eager to endorse congressional efforts to lift the burden from their shoulders.118 Among the most far-reaching expressions of this view is Justice Brennan's majority opinion in Katzenbach v. Morgan.117

In an opinion that indicates how far a majority of the Justices were willing to go to achieve their goal, Justice Brennan wrote that the section of the Voting Rights Act that forbade the use of state English literacy tests to disfranchise potential voters who had completed sixth grade in Puerto Rican schools was constitutional under section five of the fourteenth amendment. Like section two of the fifteenth amendment, the enforcement clause of the fourteenth amendment was a positive grant of power to Congress. In a radical departure from past decisions, Brennan asserted that unconstitutional state action is not required to activate this section.118 The only question for the Court was whether the chosen congressional action was an "appropriate" means of enforcing the equal protection clause.119 Citing McCulloch v. Maryland,120 Brennan argued that the standard of appropriateness was identical to the standards for action under the "necessary and proper" clause.121 In what former Solicitor General Cox has labelled "a strikingly novel form of judicial deference to congressional power,"122 Justice Brennan wrote that the Court could inquire only whether there was a rational basis for the determination

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114. 379 U.S. 241 (1964); 379 U.S. 294 (1964) respectively. The notion that legitimating path-breaking acts of Congress is one of the most important functions of the Court has been propounded by Charles L. Black. See C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 64 (1960).
118. Id. at 648-49.
119. Id. at 649-50.
120. 17 U.S. (4 Wheat.) 316 (1819).
121. 384 U.S. at 650-51.
122. Cox, supra note 113, at 106.
that the legislation in question was "necessary and proper" to implement the fourteenth amendment. Congress, not the Court, he concluded, has discretion to determine the scope of legislative power under the fourteenth amendment.\textsuperscript{128}

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cence, this may be. Yet, it should not be taken to mean that the liberal Justices had at least seen the wisdom of extreme deference to the legislature. When Congress promoted policy goals favored by a majority of the Justices, the Court endorsed congressional efforts. In other cases, these same Justices would not hesitate to strike down congressional action.\textsuperscript{124} Judicial self-restraint cannot be separated from the substance of the policies under consideration.

But as long as Congress and the Court shared similar policy goals, Congress would be granted great freedom of action. As Cox pointed out, the logic of Brennan's position in \textit{Katzenbach v. Morgan} is that Congress may pass any legislation to correct any condition that tends to deny equality.\textsuperscript{125} That this was Brennan's position is clear from an earlier opinion in \textit{United States v. Guest},\textsuperscript{126} in which the Court had reversed a district court decision dismissing conspiracy indictments under the Civil Rights Act. Going beyond Justice Stewart's majority opinion, Brennan argued that Congress could outlaw even private conspiracies under section five of the fourteenth amendment. According to Brennan, congressional power to \textit{promote} civil rights was limited only by a need to tread lightly on the constitutional guarantees of those accused of a crime.\textsuperscript{127}

\textit{Brennan and Development of the New York Times Rule}

With Congress both willing and able to take over leadership in extending the rights of black citizens, the Justices of the Warren Court were free to develop and elaborate liberal doctrines in other fields. One set of unanswered questions centered around the breadth of the protection afforded the press under the \textit{New York Times} rule. Like most rules that attempt to balance competing interests, the "actual malice" test of

\\textsuperscript{123} 384 U.S. at 653-56.
\textsuperscript{125} Cox, \textit{supra} note 113, at 107.
\textsuperscript{126} 383 U.S. 745 (1966).
\textsuperscript{127} \textit{Id.} at 777-82 (Brennan, J., concurring).
New York Times Co. v. Sullivan was far from self-executing. As author of the majority opinion in that case, Brennan became a central figure as the Justices wrestled with the application of the principles of New York Times to new facts.

The first case involving application of the test was relatively easy, with the Justices reaching a consensus on the extension of the New York Times rule to criminal libel cases. Moreover, in Rosenblatt v. Baer, Brennan won a bare majority for an opinion extending the protection afforded the press by the New York Times rule to criticism of those “who have, or appear to the public to have substantial responsibility for or control over the conduct of governmental affairs.” Nonetheless, four separate opinions revealed that the Justices were badly split over the proper standards for striking the balance between first amendment values and state power to punish defamatory publications.

The Court’s consensus over the extension of New York Times evaporated entirely in the years between 1965 and 1967. The differences among the Justices first came to a head in Time, Inc. v. Hill, decided in January 1967, after two rounds of oral argument. Because the case involved a tort action against Life Magazine under a New York privacy statute rather than a libel judgment, it was not clear that the New York Times rule was applicable. Complicating the issue was the presence of another libertarian value, the right to privacy, a competing value of constitutional dimensions recognized by all sitting Justices except Black and Stewart. Although the New York Times precedent could not be applied mechanically in such a different setting, Brennan was among those Justices who recognized that similar first amendment values were at stake. Brennan’s narrow majority opinion resolved the

131. Id. at 85.
133. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1105 (10th ed. 1980).
free press-privacy conflict in favor of first amendment values. The holding was simple and straightforward:

We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.\(^\text{138}\)

In *Time, Inc.*, Brennan set out his view that the “actual malice” test could be extended from the area of libel to invasion of privacy, and from criticism of public officials to discussion of matters of “public interest” by application of the underlying principles of *New York Times*. Chief among those principles, Brennan wrote, was the function of the press in a free society. Because guarantees of a free press “are not for the benefit of the press so much as for the benefit of all of us,”\(^\text{138}\) erroneous statements about matters of public interest must be tolerated. Calculated falsehood, on the other hand, fell outside first amendment protection.\(^\text{137}\) In order to insure that juries would allow adequate breathing room for protected material, they could be allowed to return tort judgments against publishers only for knowing or reckless falsity.\(^\text{138}\) The “knowing and reckless falsity” test would protect the press in privacy as well as libel cases, while at the same time recognizing that the competing value of privacy might occasionally require vindication in the courts.

Parting company with Brennan were the Chief Justice and Justices Fortas and Clark, who struck the balance on the side of the privacy interests,\(^\text{139}\) and Justice Harlan, who labelled Brennan’s opinion a “sweeping extension”\(^\text{140}\) of the *New York Times* rule. While joining the majority opinion, Black and Douglas also noted their continued preference for first amendment absolutism.\(^\text{141}\) This four-way split indicated that the majority that had supported the *New York Times* rule when libel of public officials was involved was divided

\(^{135}\) 385 U.S. at 387-88.
\(^{136}\) Id. at 389.
\(^{137}\) Id. at 389-90.
\(^{138}\) Id. at 390.
\(^{139}\) Id. at 411-20 (Fortas, J., dissenting).
\(^{140}\) Id. at 405 (Harlan, J., concurring and dissenting).
\(^{141}\) Id. at 398 (Black, J., concurring).
over its application to new situations. When the question of whether the *New York Times* rule should apply to "public figures" as well as public officials came before the Court in *Curtis Publishing Company v. Butts*, Brennan's call for further extension of *New York Times* fell on deaf ears. Although there was no majority opinion, four Justices adopted Harlan's proposal calling for a rule allowing public figures to recover "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Despite the disagreement between Brennan and Harlan over the degree of protection to be afforded the press against suits by public figures, both Justices started from the premise that false communications had no social value, and therefore, were outside first amendment protection. The difference between them was not one of approach, as it was between absolutists Black and Douglas and the rest of the Court. Rather, Brennan and Harlan agreed that balancing was necessary, but they differed on how to strike that balance. Harlan, stressing the plight of those injured by the news media, would confine the *New York Times* rule to cases very close to the seditious libel situation of the original case. Brennan, on the other hand, focused on the need to promote a free press and would have extended the rule on a case-by-case basis as new situations arose. Because of the greater weight he gave to the first amendment, Brennan's approach was clearly libertarian. Yet it was also pragmatic, holding open the possibility of recovery for those the Justices believed truly wronged.

**Rights of Defendants**

Justice Brennan's opinions in cases dealing with the rights of those accused of crime recognized and accommodated competing values, stressing the need to expand the constitutional rights of defendants without undermining police efforts to control crime. Between 1965 and 1967, the Supreme Court was frequently called upon to decide cases testing the limits of the Justices' commitment to the rights of criminal

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142. 388 U.S. 130 (1967).
143. *Id.* at 155.
144. *Id.* at 173 (Brennan, J., concurring and dissenting).
defendants. Detailed Supreme Court supervision of state
criminal justice processes was largely a by-product of the
Warren Court’s application of specific Bill of Rights guaran-
tees to the states, a movement that continued in the two
Terms of Court 78 (1965-1967). Once these rights were ex-
tended to state defendants, the Justices next had to wrestle
with what these guarantees would mean in practice. With the
5-4 decisions in Escobedo v. Illinois in 1964, and Miranda
v. Arizona in 1966, the Warren Court’s liberal majority (in-
cluding Justice Black) took up the task of spelling out explicit
guidelines for police conduct at the state and local levels. Be-
cause failure to adhere to these rules could result in the revers-
al of convictions and on occasion the release of those con-
victed, law enforcement spokesmen charged that the Justices
were soft on crime, pro-criminal, and anti-police.

Many of these decisions, notably Miranda, did reflect a
basic mistrust of the police and required modifications of the
standard operating procedures of law enforcement agencies. Yet Miranda and other cases decided in favor of the defen-
dant by no means constituted the entire story of Warren
Court decision making in criminal justice cases. Those who as-
sert that the Court in this period was “soft on crime” overlook
the willingness of most of the Justices to balance the needs of
the police as protectors of the social order against the consti-
tutional claims of individual defendants. During the “consti-
tutional interlude” of 1965 to 1967, the task of striking this
balance frequently fell to Justice Brennan.

The Justice’s position in this balancing process is perhaps
best illustrated by his majority opinions in the Wade tril-
ogy, the source of the Wade-Gilbert rule requiring the pres-
ence of counsel at post-indictment lineups. Like the Miranda
rules, this requirement imposed limitations on widely-used
police procedures. For most of those in the law enforcement
community, the decisions in these cases provided additional

U.S. 14 (1967).
148. See, e.g., V. Leonard, The Police, The Judiciary and the Criminal 166-
82 (2d ed. 1975).
evidence that the Warren Court was anti-police. In reality, though, these decisions were by no means one-sided, for in Brennan's opinions the Court also ruled that neither the lineup itself, the taking of handwriting exemplars, nor forcing the accused to repeat specified phrases, violated the fifth amendment's self-incrimination clause. Moreover, in *Stovall v. Denno*, the Justices decided that the *Wade-Gilbert* rule should have prospective application only, because retroactivity would disrupt administration of criminal laws. As author of the opinion of the Court in each of these three cases, Brennan formulated a rule calculated to protect defendants against serious police abuses. At the same time, he carefully limited the sweep of the new rules in recognition of legitimate law enforcement needs.

Similar expressions of support for the needs of law enforcement may be found in Brennan's majority opinion in *Warden v. Hayden*. Joined by the Court's four conservatives, Brennan declared that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." While these opinions reflect the Justice's willingness to concede the legitimate needs of the police, it is his majority opinion in *Schmerber v. California* that perhaps best illustrates Brennan's overall approach to the process of balancing competing societal and individual interests when resolving constitutional claims of those accused of a crime. Convicted of driving while intoxicated on the basis of a blood test requested by police officers, Schmerber sought reversal on self-incrimination, right to counsel, search and seizure, and general due process grounds. Justices Black, Warren, Douglas, and Fortas agreed that the conviction should be reversed. Brennan, however, disagreed, joining the Court's four conservatives in rejecting each of Schmerber's constitutional claims. Although "[t]he integrity of an individual's person is a cherished value of our society," Brennan concluded that a blood

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152. 387 U.S. 294 (1967).
153. Id. at 298-99.
155. Id. at 772.
test was a reasonable search under the fourth amendment. Moreover, the evidence was admissible because it was not of a "testimonial or communicative nature."\footnote{Id. at 761.} Dissenting on the fifth amendment point, Justice Black condemned "[t]he refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination. . . ."\footnote{Id. at 778 (Black, J., dissenting).}

Rarely has a dissent more accurately characterized a majority opinion. Convinced that society's interest in protection from drunken drivers required limited restrictions on individual liberty, Brennan did indeed engage in a "refined, subtle reasoning and balancing process." Indeed, such balancing was at the heart of his approach to constitutional interpretation in this period. As in first amendment cases, he more often than not favored the person asserting constitutional rights. On the other hand, when he concluded, as he did in Schmerber and other criminal justice cases, that the needs of society outweighed the needs of the individual in a particular set of circumstances, he could part ways with his liberal colleagues and cast the deciding vote against a civil liberties claim. In the years 1965-1967, then, it was Brennan whose individual opinions best illustrate the collective position of the Court as a body responsive to the constitutional claims of criminal defendants, yet unwilling to "handcuff" the police.

\textit{Obscenity}

In addition to his opinions in the areas of civil rights, freedom of the press, and criminal justice, Justice Brennan was in the forefront of the Court's efforts to define obscenity and establish standards for its regulation by federal and state governments during the years of Court 78 (1965-1967). In that period, Brennan became "the Court's leading expert on that vexatious line between freedom of artistic expression and proscribable obscenity."\footnote{H. ABRAHAM, JUSTICES AND PRESIDENTS 246-47 (1974).} His opinions in three obscenity cases decided in 1966\footnote{Memoirs v. Massachusetts, 383 U.S. 413 (1966); Ginzburg v. United States, 383 U.S. 469 (1966); Mishkin v. New York, 383 U.S. 502 (1966).} represent the final stage in the gradual development of the approach to obscenity and the first
amendment sketched out nearly ten years earlier in Roth v. United States.\textsuperscript{160}

As in many of his civil liberties opinions, Brennan's strategy in Roth was to seek a balance between competing interests—in this instance, community interests in proscribing smut and the first amendment claims of individuals seeking to sell or obtain sexually-oriented reading and viewing materials. In striking this balance, Brennan had rejected the absolutist position that all such materials were entitled to first amendment protection, adopting instead the position that obscenity was worthless and thus outside the scope of first amendment protections. Under this approach, determination of the "factual" question of obscenity is dispositive of the constitutional question: if a book or movie is held to be "obscene," it may be banned; if its is not obscene, it is entitled to full first amendment protection. Thus, the "test" of obscenity was crucial. The original Roth test, "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest,"\textsuperscript{161} apparently reflected the desire of a majority of the Justices to loosen the hold of the censor on the availability of reading material.

Yet, lower courts had not been generous in their reading of Roth. As a result, the Justices attempted, in subsequent cases,\textsuperscript{162} to spell out more precisely the requirements of a test of obscenity that would safeguard first amendment values without affording constitutional protection to all forms of pornography. By 1966, the groundwork had been laid for the three-fold test of obscenity elaborated by Justice Brennan in a plurality opinion in Memoirs v. Massachusetts.\textsuperscript{163} Reaffirming the Roth test as the appropriate standard for separating the obscene from the constitutionally protected, Brennan declared that three elements must coalesce to support a finding of obscenity. It was necessary to establish that:

(1) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is

\textsuperscript{160} 354 U.S. 476 (1957). Brennan, of course, later repudiated his efforts to develop a workable test of obscenity. See text accompanying note 174 infra.

\textsuperscript{161} 354 U.S. at 489. See Heck, supra note 9, at 720.


\textsuperscript{163} 383 U.S. 413 (1966).
patently offensive because it affronts contemporary community standards relating to the depiction or representation of sexual matters; and (c), the material is utterly without redeeming social value.\footnote{164}

Because a book had to fail all three of these tests before it could be characterized as obscene, the \textit{Memoirs} standard made it extremely difficult to uphold obscenity convictions. While \textit{Memoirs} may not be entirely consistent with the letter of \textit{Roth}, it is certainly in keeping with its spirit. The \textit{Memoirs} test represented an effort to balance "the interest in being protected from offensive or shocking sights"\footnote{165} against the interest in free expression. Without a doubt, Brennan expected free expression to prevail in most cases, but not when particularly offensive materials were under review.

Brennan's approach to obscenity in this period, then, was generally consistent with his civil liberties jurisprudence. His efforts to widen the scope of material accorded constitutional protection are evident in the requirement that the material under review must be "utterly without redeeming social value"\footnote{166} to be denied constitutional protection. Moreover, Brennan insisted that the "community standards" to be applied must be national standards, not local ones.\footnote{167} Yet, any suspicions that the new test might prove an absolute bar to obscenity prosecutions in practice were removed when the Court, with Brennan writing the majority opinions, affirmed convictions in the two companion cases, \textit{Mishkin v. New York},\footnote{168} and \textit{Ginzburg v. United States}.\footnote{169}

Brennan's efforts to define obscenity, however, never enjoyed majority support after his initial writing in \textit{Roth}. The 1966 obscenity cases produced a total of eleven concurring and dissenting opinions in which the Justices generally reiterated personal positions staked out in earlier cases.\footnote{170} Even Justices like Warren, who agreed with Brennan's basic ap-

\footnotesize{164. \textit{Id.} at 418.}
\footnotesize{166. \textit{383 U.S.} at 419.}
\footnotesize{167. \textit{Jacobellis v. Ohio}, 378 U.S. 184, 192-95 (1964).}
\footnotesize{168. \textit{383 U.S.} 502 (1966).}
\footnotesize{169. \textit{383 U.S.} 463 (1966).}
\footnotesize{170. \textit{See, e.g.,} Justice Stewart's memorable attempt to define hard-core pornography in \textit{Jacobellis}—"I know it when I see it." 378 U.S. 184, 197 (1964) (Stewart, J., concurring).}
proach to these cases, parted company over specific applications of the rule.\textsuperscript{171} The splits among the Justices opened the floodgates for a torrent of criticism over the \textit{Memoirs} opinion.\textsuperscript{172} A year later, frankly admitting their divergent views on obscenity, the Justices threw in the towel, temporarily abandoning the effort to define obscenity in favor of a policy of summary judgment following perusal by the Justices of the allegedly obscene materials.\textsuperscript{173} Only with the arrival of the Burger Court did the Justices again attempt to work out a coherent policy on obscenity. Although Chief Justice Burger's opinions in the 1973 obscenity cases are largely consistent with the main thrust of Brennan's efforts to define obscenity in \textit{Roth} and \textit{Memoirs}, Brennan had by that time concluded that the search for the line between the obscene and the protected was futile.\textsuperscript{174} However, these views had not yet surfaced by the end of 1967. While the lines between obscene and protected materials were in a state of flux, Brennan's approach to the resolution of obscenity cases had a major impact on the jurisprudence of Court 78 (1965-1967).

Just as Court 78 differed from its predecessor, so the character of Justice Brennan's opinions differed from those he had delivered in the preceding three and one-half years. When new issues such as congressional power to legislate against racial discrimination came before the Court, Brennan was among the leaders defending congressional legislative power. More frequently, his task was to apply the principles established earlier in different factual settings. Through all these efforts runs a common theme—the need to balance a devotion to individual liberty against broader societal needs. The years 1965-1967, then, may be characterized as a "constitutional interlude," a period in which the Justices paused to reinforce the foundations established earlier. While Brennan's dominant position within the Court eroded slightly in this period, he remained the "center of gravity." In the fall of 1967, the

\textsuperscript{171} Id. at 200 (Warren, C.J., dissenting).
\textsuperscript{172} See, e.g., Magrath, \textit{The Obscenity Cases: Grapes of Roth}, 1966 Sup. Ct. Rev. 7 (1966).
appointment of Justice Thurgood Marshall brought to the Court a new ally for Justice Brennan. In short order he was to regain the dominant position he had occupied between 1962 and 1965 as the revitalized liberal majority further expanded the frontiers of civil liberties in the final days of the Warren Court.

BRENNAN AND THE FINAL DAYS OF THE WARREN COURT

The appointment of Justice Marshall was apparently more of an effort to secure President Johnson's place in history as a champion of civil rights than an attempt to influence the Court's decisions via the appointment process. Nonetheless, the substitution of Marshall for Clark produced significant changes in the Court's voting patterns. The newest Justice moved immediately into the dominant liberal bloc of Court 79 (1967-1969).

Agreeing with Fortas, Warren, and Brennan in more than 90% of all cases, Marshall became the fourth member of the most cohesive bloc in modern Court history, with a joint interagreement rate of 92.5%. Brennan and Marshall quickly became the most closely knit pair of Justices within this bloc, voting together in more than 95% of the cases decided during this two-year period. Although Justice Douglas, because of his propensity for the lone dissents, was outside the dominant bloc in this Court, Justice Stewart was marginally affiliated with it, recording interagreement scores with Brennan and Fortas in excess of 80%. Continuing his movement to an idiosyncratic voting position, Justice Black found himself in disagreement with all the Brethren, attaining his highest interagreement rate, a meager 67.3%, with Justice Brennan.175

Dissent rates and majority participation scores demonstrate even more clearly the impact of Justice Marshall's appointment on the decisions of Court 79 (1967-1969). Only Justice Brennan, with six dissents and a 98.4% majority participation score, was closer to the Court's center of gravity than Marshall, who dissented in only nine cases. Chief Justice Warren filed twenty-two dissents and Fortas twenty-five before being forced off the court near the end of the 1968

175. Complete data on bloc voting patterns during Court 79 are set forth in appendix A, table 3 infra.
Bloc voting patterns tell only part of the story of the liberal Justices in the final two years of the Warren Court. The five most liberal Justices were frequently able to gain the support of one or more of their more conservative colleagues. An overwhelming majority of civil liberties cases were resolved in favor of the claimant, often with votes to spare.

One commentator has noted that the Warren Court’s final campaign for civil liberties involved two major operations. On the one hand, there was a great deal of “mopping up” as the Justices attempted to deal with new twists on issues of racial discrimination, reapportionment, and criminal justice. On the other hand, the dominant majority, on occasion, engaged in withdrawing from too-advanced positions, much as in the 1965-1967 interlude. This two-fold campaign summarizes much of Court 79’s civil liberties decision making. Yet, it tends to overlook the cases in which the Justices struck out in new directions, particularly in poverty law. Moreover, the mopping up operation involved the formulation of new, sometimes absolutist, approaches to constitutional interpretation. Thus, a full account of the decision-making trends in this natural court would include: 1) mopping up, or consolidation, including the formulation of new, hard-line approaches in such areas as racial discrimination and reapportionment; 2) movement into new constitutional fields; and, 3) retreat or withdrawal from too-advanced positions. Not surprisingly, Brennan, as the central figure in the dominant coalition, had a hand in all three of these developments.

Mopping Up, And Then Some

Given the number and significance of innovative decisions handed down between 1962 and 1967, it is hardly surprising that the final two years of the Warren Court involved a great deal of mopping up. This occurred primarily in the three major areas of Warren Court policy making: criminal justice, racial discrimination, and reapportionment.

In a number of criminal justice decisions the majority worked out the details of rules and doctrines announced ear-

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176. Complete data on majority participation and dissent rates during Court 79 are set forth in appendix B, table 3 infra.
lier. In *Duncan v. Louisiana*\(^{178}\) and *Benton v. Maryland*,\(^{179}\) the majority largely completed the process of selective incorporation, holding that the right to a jury trial and freedom from double jeopardy were binding on the states. Although Justice Brennan did not write an opinion in either of these cases, Justices White and Marshall, in majority opinions, specifically adopted Brennan's selective incorporation approach requiring identical standards in federal and state courts.

In three school desegregation cases,\(^{180}\) the Justices at last called for dismantling of the dual school systems still in existence thirteen years after *Brown v. Board of Education*.\(^{181}\) In *Green v. County School Bd. of New Kent County*, the Justices, faced with a classic example of a dual system in a rural county with no residential segregation, concluded that a freedom of choice plan had by no means succeeded in replacing identifiable white and black schools with "just schools."\(^{182}\) Emphasizing past delays, Brennan declared for a unanimous Court that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."\(^{183}\)

In form, *Green* was simply another step in the process of working out the details of *Brown I*. The Justices had talked tough in previous school desegregation cases, asserting that the time for mere "deliberate speed" had run out, while at the same time approving token compliance.\(^{184}\) *Green* marked the beginning of a qualitatively different approach to school desegregation cases. Token desegregation, once considered a victory, was no longer enough. Real desegregation in the South had been accomplished more in response to congressional and administrative action than to any court decision. But once the Justices found that Congress and the Department of Health, Education and Welfare were on their side, they were ready to re-enter the school desegregation field with a new hard-line approach. Within two years, *de jure* segregation of the classic

\(^{178}\) 391 U.S. 145 (1968).
\(^{181}\) 349 U.S. 294 (1955). This was the second *Brown v. Board of Education*.
\(^{182}\) 391 U.S. 430, 442 (1968).
\(^{183}\) *Id.* at 439 (emphasis in original).
Southern variety was dead. New and more difficult problems of racial isolation in urban areas, however, loomed on the horizon.

The tendency to adopt a hard-line approach while “mopping up” old problems was not limited to school desegregation cases. Nowhere was this more apparent than in Justice Brennan’s opinions in the 1969 reapportionment cases. Most significant of these cases was\textit{Kirkpatrick v. Preisler},\textsuperscript{185} in which the majority struck down a congressional apportionment scheme in which the population of no district deviated from the ideal figure of 431,981 by more than 14,000 persons. Noting in passing that the Missouri Legislature had rejected plans with a smaller deviation from absolute equality, Brennan announced the astonishing doctrine that the “as nearly as practicable standard” of\textit{Wesberry v. Sanders}\textsuperscript{186} required a state to make “a good-faith effort to achieve \textit{precise mathematical equality}.”\textsuperscript{187} Under this new “precise mathematical equality” standard, the Justices then struck down a New York apportionment scheme as well.\textsuperscript{188}

Four other Justices, Warren, Black, Douglas, and Marshall, joined Brennan’s opinion. The remainder of the Court insisted that the majority had gone too far. It has been noted that “many knowledgeable and loyal partisans of ‘one man-one vote’ are puzzled, if not dismayed, by the inflexible and doctrinaire quality of Mr. Justice Brennan’s opinion for the Court.”\textsuperscript{189} Among those most dismayed by the “absolute and uncompromising” standard of\textit{Kirkpatrick} were Justices Harlan, Stewart, Fortas, and White. For Harlan, whose worst fears seemed vindicated,\textit{Kirkpatrick} was an easy target for a sarcastic dissent:

Marching to the nonexistent “command of Article I, § 2” of the Constitution, the Court now transforms a political slogan into a constitutional absolute. Strait indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions,

\begin{itemize}
\item \textsuperscript{185} 394 U.S. 526 (1969).
\item \textsuperscript{186} 376 U.S. 1 (1964).
\item \textsuperscript{187} 394 U.S. at 530-33 (emphasis added).
\item \textsuperscript{188} Wells v. Rockefeller, 394 U.S. 542, 546 (1969).
\end{itemize}
politics, history, and economics, so as to achieve the magic formula: one man, one vote.\textsuperscript{190}

Harlan's opposition was to be expected. More difficult to ignore were the equally strong objections raised by White and Fortas. White, who had joined pro-reapportionment opinions in the past, labelled the decisions "unduly rigid and unwarranted."\textsuperscript{191} Justice Fortas, while concurring with the result in both cases, disagreed with Brennan's opinion as strenuously as the dissenters, suggesting that the majority had lost touch with reality.\textsuperscript{192} Because Fortas demonstrated the absurdity, both logically and pragmatically, of the majority Justices' position, even on their own terms, his attack on Kirkpatrick was particularly devastating. Critics outside the Court were even more vehement, arguing that the Justices had fallen victim to an insidious "guardian ethic"\textsuperscript{193} or had fallaciously equated "equal population districts" with the inherently unattainable goal of "equal representation."\textsuperscript{194}

Why, then, did Justice Brennan ignore the arguments of White and Fortas and write an uncharacteristically absolutist opinion? To begin with, there was no reason to compromise if five Justices were prepared to insist on precise mathematical equality. Such an explanation leaves unanswered, however, the more fundamental question of why five Justices favored an uncompromising stand in the first place. More specifically, why did Brennan abandon his customary middle-ground approach in favor of an absolutism more commonly associated with Black and Douglas? Had Brennan, by 1969, become so caught up in the "heavenly city of the Twentieth Century Justices"\textsuperscript{195} that he could no longer make the fine distinctions necessary for a Justice who recognizes that in constitutional cases there is usually merit on both sides of an issue?

Certainly there are signs of rigidity in Brennan's opinions in this final period of the Warren Court. Yet, it may be that Brennan's changing position was more the result of experience than of a fundamental shift in his approach to constitutional adjudication. One possible explanation of Brennan's uncom-

\textsuperscript{190} 394 U.S. at 549-50 (Harlan, J., dissenting) (footnote omitted).
\textsuperscript{191} Id. at 553 (White, J., dissenting).
\textsuperscript{192} Id. at 538-39 (Fortas, J., concurring).
\textsuperscript{193} W. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY 9-13 (1974).
\textsuperscript{194} Dixon, supra note 189, at 227-28.
promising opinion in *Kirkpatrick* is that he hoped an inflexible standard would relieve the federal courts of the need to formulate reapportionment plans. Or possibly, the absolutist, hard-line approach adopted by Brennan in cases like *Green* and *Kirkpatrick* can be explained as a "function of impatience with continuing noncompliance."\^196

In earlier years, Brennan's approach to constitutional cases was based on the premise that if the Supreme Court took the lead and announced fundamental principles, other branches of government could work out the details of constitutional rights and balance competing claims. Many of his opinions suggested that the Supreme Court's most important function was the promulgation of standards that would confine trial judges, juries, and state legislators within constitutional bounds without stripping them of all discretion. In obscenity and libel cases, tests like *Roth* and *New York Times* reflected a belief that lower courts would make a genuine effort to live up to the libertarian spirit of the Supreme Court's decisions. In apportionment cases, the hope that state legislatures would put their own houses in order was reflected in standards like "as nearly as practicable." Even *Brown II* was based on the perhaps naive assumption that southern school boards would make a good-faith effort to implement the Court's desegregation decision.\^197

Over the years, however, evidence mounted that other branches of government could not always be counted on to give meaning to the Supreme Court's decisions. Impatience with the slow pace of school desegregation under the Court's earlier tolerant approach was close to the surface in *Green*. In *Kirkpatrick*, Brennan's "all-pervasive distrust of the legislative process"\^198 was quite explicit. Rejecting the suggestion that the Missouri apportionment was close enough to the ideal to survive judicial scrutiny, Brennan wrote, "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable."\^199

Even in mopping up operations, then, the decisions of

\^197. 349 U.S. at 299.
\^198. 394 U.S. at 550 (Harlan, J., dissenting).
\^199. *Id.* at 531.
Court 79 (1967-1969) had an activist cast. According to the increasingly stable liberal majority associated with Warren and Brennan, much remained to be done to protect constitutional rights. Even in the well-plowed fields of racial discrimination, reapportionment, and criminal justice, this court continued to break new ground.

New Fields

At the same time, the Justices of Court 79 were also moving cautiously into new constitutional fields. In major decisions relaxing rules of standing for those seeking change and expanding the scope of judicial supervisory power over Congress, Brennan was a silent partner, while in the rapidly growing field of poverty law Brennan took the lead. His opinion in the landmark case of *Shapiro v. Thompson* not only signalled that the Court was receptive to cases asserting the constitutional and statutory rights of the poor, but also established a framework for future consideration of cases in such fields as sex discrimination, abortion, and state school financing.

Brennan's rationale for Supreme Court involvement in poverty cases had been gradually outlined in a series of speeches culminating in his 1969 Notre Dame Convocation Address. In 1968, he stated, "[s]ociety's overriding concern today is with providing freedom and equality of rights and opportunities in a realistic and not merely formal sense, to all the people of this nation." In earlier crises, he argued, lawyers had shirked their responsibilities, but now, he asserted, they should face up to their social obligation and play a creative role. More specifically, Brennan felt that lawyers were needed to help the underprivileged segments of society penetrate the web of statutes and regulations in such fields as civil rights, urban renewal, poverty, and social security. In the era of the "Positive State," Brennan told Notre Dame Law School

graduates in one of his last off-bench addresses, law and lawyers could not avoid a "role in perfecting the use of government as a social instrument." Law, he maintained, must no longer be used as a tool for oppression of the disadvantaged, but should instead be used as a weapon in the fight for equality and justice, as a motor, not a brake, in movements for change. From this, it followed that the Supreme Court's duty was to formulate rules to right social ills.

Brennan's campaign for recognition of the rights of the poor came to fruition in *Shapiro v. Thompson* when the Court, on a 5-3 vote, ruled unconstitutional state and District of Columbia one-year residency requirements for recipients of welfare benefits. Appropriately, Brennan was the author of the majority opinion. The effect of the durational residency requirement, he began, was to create two classes of needy residents—those who had lived in the state a year or more, and similarly needy residents who had lived there less than a year. This classification was significant, he continued, because it was the basis for denying assistance "upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."

While this passage suggests that Brennan himself may well have favored the view that subsistence was a fundamental right that the state was duty-bound to assure, he was careful not to rest the Court's holding on that ground. Rather, he emphasized that the residency requirement interfered with the fundamental right to travel. Because a fundamental right was involved, the discriminatory classification was to be subjected to strict scrutiny; the government could not meet the test of "compelling state interest[s]," so the residency requirement was held to violate the equal protection clause of the fourteenth amendment.

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205. Brennan, Convocation Address, 44 Notre Dame Law. 1029, 1030 (1969) (citing Miller, Toward a Concept of Constitutional Duty, 1968 Sup. Ct. Rev. 199, 201). In his address, Brennan not only indicated agreement with Miller's argument that the Court had begun to develop a notion of constitutional duty, but went on to announce his own view that the Court should perform this function. For further development of the theme, see Brennan, The Law School of Tomorrow, 9 N.H. Bar J. 6 (1966).


207. Id. at 627.

208. Id. at 629-31.

209. Id. at 638 (emphasis in original).
Basing the decision on a right to travel rather than a "right to welfare" made the opinion acceptable to a wider range of Justices and may have been necessary to hold together a majority with somewhat divergent views. Of course, the effort to accommodate diverse opinions may leave the author open to a charge of lack of clarity. Such was the case with Shapiro. Indeed, Brennan was careful to downplay the implications of the opinion.

It remained for Justice Harlan, in a powerful dissent, to spell out the implications of Shapiro more precisely. Despite Brennan's efforts to trace the compelling state interest doctrine to earlier cases, it is virtually impossible to refute Justice Harlan's charge that the "compelling state interest" test was a relative newcomer to equal protection litigation. Moreover, Harlan was correct in pointing out that there were two branches of this test. Under the new approach outlined in Brennan's opinion, the state must show a compelling governmental interest if either a suspect classification or a fundamental right is involved. Although Harlan was willing to accept the strict scrutiny test in racial classification cases, he strenuously protested the fundamental right trigger of this doctrine "because it creates an exception which threatens to swallow the standard equal protection rule." In fact, Harlan suspected that a fundamental right to welfare lurked in Brennan's dictum about the necessities of life. And even the Court's actual holding went too far for Harlan, since he concluded that state interests in the fiscal integrity of public assistance programs outweighed any incidental interference with the right to travel. In closing, Harlan attacked the majority's opinion as another manifestation of the belief that only the federal judiciary had the wisdom to solve social problems.

Despite a bit of the hyperbole that is the prerogative of the dissenter, Justice Harlan was not far off the mark in his critique of the decisions in which the majority Justices, led by Brennan, formulated new approaches to old problems or moved into new constitutional fields. Still, the majority in Court 79 (1967-1969) was not invariably liberal and activist. A

210. Id. at 634.
211. Id. at 658 (Harlan, J., dissenting).
212. Id. at 658-61 (Harlan, J., dissenting).
213. Id. at 661 (Harlan, J., dissenting).
214. Id. at 661, 675, 677 (Harlan, J., dissenting).
substantial number of decisions involved what may be called a retreat from too-advanced positions.

Retreat

The cases illustrating retreat correspond with those in which Justice Brennan voted to reject a civil liberties claim. Despite signs of increasing constitutional absolutism, Brennan did join a number of such decisions, particularly in the criminal justice field. Most notable of these decisions was Terry v. Ohio,\(^\text{216}\) which ultimately rested upon the conclusion, of eight Justices, that policemen needed power to “stop and frisk” suspicious persons if law and order were to be preserved. Chief Justice Warren’s opinion, which explicitly recognized society’s interest in effective law enforcement, was the heir of Brennan’s earlier opinions in cases like Schmerber v. California and Warden v. Hayden.\(^\text{216}\) Likewise, Brennan continued to join the majority in decisions refusing to apply libertarian rulings retroactively.\(^\text{217}\)

Brennan spoke for the Court in two decisions rejecting civil liberties claims. In Cameron v. Johnson,\(^\text{218}\) he wrote that Dombrowski did not require federal court intervention whenever the words “chilling effects” were invoked, and upheld Mississippi’s Anti-Picketing Law in the face of a demand for injunctive relief. And in Ginsberg v. New York,\(^\text{219}\) he once again adopted a pragmatic position in an obscenity case, writing over the dissents of Douglas, Fortas, and Black that a state could restrict dissemination to minors of sexually-oriented material that was not obscene under the Memoirs test.

Whatever his vote, then, Brennan’s decision was almost invariably that of the Court in civil liberties cases between 1967 and 1969. When Brennan supported a constitutional claim, the Court ruled in favor of the claimant; when he was opposed, the Court ruled against the claim. More so than in the years between 1962 and 1965, Brennan was in the saddle.

\(^{215}\) 392 U.S. 1 (1968).

\(^{216}\) See notes 152-56 supra and accompanying text.


\(^{218}\) 390 U.S. 611 (1968).

\(^{219}\) 390 U.S. 629 (1968).
Whether leaning toward absolutism\textsuperscript{220} or developing new doctrines,\textsuperscript{221} he was spokesman for the Court in an extraordinary number of leading opinions.

\textbf{CONCLUSION}

In the most general fashion, developments in Supreme Court policy between 1962 and 1969 illustrate how the Supreme Court follows the election returns. Given a divided Court, a President can shift the balance of voting power with a single appointment. Naturally, most presidents select Justices who broadly reflect their own views. It was in precisely this manner that President Kennedy's appointments of White and Goldberg helped convert the Warren Court from an essentially conservative body before 1962 to a dynamic force for social and legal change for the next seven years. President Johnson's selection of Fortas and Marshall assured continuation of this trend through 1969. As the Court became increasingly involved throughout these seven years with issues on the frontiers of American society and politics, Brennan became more and more the spokesman for the majority Justices.

Only rarely after 1962, was Brennan on the losing side in a civil liberties case. Overall, he dissented only forty-four times between 1962 and 1969, and his majority participation rate was 96.8\%. Not even Chief Justice Warren, with eighty-five dissents and 92.7\% majority participation, could equal these marks. Between 1962 and 1969, Brennan was a member of a cohesive bloc of four to five Justices strongly committed to civil liberties. Only in rare cases did he file dissenting or concurring opinions, on the average, less than two of each per year. Not unexpectedly, he wrote some of the major opinions of the period—\textit{New York Times v. Sullivan},\textsuperscript{222} \textit{Shapiro v. Thompson},\textsuperscript{223} \textit{Malloy v. Hogan},\textsuperscript{224} \textit{Dombrowski v. Pfister},\textsuperscript{225} \textit{Katzenbach v. Morgan},\textsuperscript{226} and \textit{Fay v. Noia},\textsuperscript{227} to list only the most innovative. In these opinions he continued to propound

\textsuperscript{220} See text accompanying notes 185-96 supra.
\textsuperscript{221} See text accompanying notes 202-15 supra.
\textsuperscript{222} 376 U.S. 254 (1964).
\textsuperscript{223} 394 U.S. 618 (1969).
\textsuperscript{224} 378 U.S. 1 (1964).
\textsuperscript{225} 380 U.S. 479 (1965).
\textsuperscript{226} 384 U.S. 641 (1966).
\textsuperscript{227} 372 U.S. 391 (1963).
the same philosophy of pragmatic liberalism he had supported in his first five and one-half years on the Court. But after 1962, he wrote not in dissent, but for the Court. When necessary, he could write narrow, technical opinions holding a majority for a result favorable to a civil liberties claimant. More often, the goal of his opinions was to spell out and justify standards that lower courts could apply in implementing the spirit of the Warren Court’s decisions. Brennan’s devotion to individual freedom is clear in these opinions.

Yet, even with a strong majority in favor of a libertarian interpretation of a variety of constitutional guarantees, Brennan also remained a pragmatist. Like Chief Justice Warren, he realized that order and liberty go hand-in-hand. Though he does not seem to have been directly affected by increasingly vociferous spokesmen for law and order, even more than the Chief Justice, Brennan recognized the need for effective, yet humane, law enforcement practices. Likewise, he frequently stressed the legitimacy of community interests in religious observances and in limiting the distribution of pornography, regardless of the fact that these decisions sometimes infringed upon individual freedoms. Brennan favored the individual, but conceded that on occasion the needs of the community should prevail. A number of his major opinions, therefore, were antilibertarian in their immediate outcome. Because Brennan generally saw both sides of an issue, the guidelines emerging from his opinions were not always clear. The dominant theme, though, was greater freedom for the individual vis-à-vis government.

On issues of economic regulation, Brennan was part of an overwhelming liberal bloc that became gradually stronger through the years. In opinions based on statutory construction, Brennan generally emphasized the overall goals underlying a legislative policy, often at the expense of the literal language of a statute. Because this policy-oriented approach to statutory construction is value-laden, Brennan and his Brethren were able to guide judicial policy along liberal lines. The overall trend of these decisions was clearly favorable to the government and small business plaintiffs in antitrust cases, to unions, and to individual workers. In the new field of poverty law, Brennan was the Court’s leader, both in off-the-bench speeches and in his opinion for the Court in Shapiro v.
The years 1962-1969 will be remembered as the zenith of the era of Chief Justice Earl Warren. It is impossible to deny the significance of Warren's path-breaking opinions such as *Reynolds v. Sims*[^228] and *Miranda v. Arizona*.[^230] Other Justices who served through only part of this era—Goldberg, Fortas, and Marshall—left their marks in major opinions and crucial votes. Black and Douglas, though drawing farther apart and often outside the mainstream, saw many of their earlier dissents vindicated. White, Stewart, Clark, and even Harlan sometimes provided crucial votes and wrote major opinions. More than any of his colleagues, though, Brennan shared Warren's philosophy throughout this seven-and-one-half-year period, voting with the Chief Justice in more than 95% of the Court's decisions. And on the rare occasions when they disagreed, it was usually Brennan, not the Chief Justice, who prevailed. Thus, Brennan deserves credit for shaping the direction of the Court during the 1962-1969 heyday of Warren Court liberalism.

### APPENDIX A

#### TABLE 1
**Bloc Voting Patterns**
**Court 77 (1962-65)**

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<th></th>
<th>Douglas</th>
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<th>Brennan</th>
<th>Goldberg</th>
<th>Black</th>
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*a Each entry is percentage agreement between a pair of justices.*

#### TABLE 2
**Bloc Voting Patterns**
**Court 78 (1965-67)**

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*a Each entry is percentage agreement between a pair of justices.*
### TABLE 3
### Bloc Voting Patterns

*Court 79 (1967-69)*

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*a Each entry is percentage agreement between a pair of justices.*
APPENDIX B

TABLE 1
MAJORITY PARTICIPATION AND DISSENT RATES
COURT 77 (1962-65)

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<th>Justice</th>
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<th>Dissents</th>
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TABLE 3
MAJORITY PARTICIPATION AND DISSENT RATES
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