2015

Griswold and its Surroundings: The 1963, '64, and '65 Terms

L.A. Powe
University of Texas, spowe@law.utexas.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/aulr

Part of the Courts Commons, and the Legal History Commons

Recommended Citation
Available at: https://digitalcommons.wcl.american.edu/aulr/vol64/iss6/3

This Essay is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
Griswold and its Surroundings: The 1963, '64, and '65 Terms

This essay is available in American University Law Review: https://digitalcommons.wcl.american.edu/aulr/vol64/iss6/3
There were four dominant themes of the mature—post-Frankfurter—Warren Court. First and foremost was ending Jim Crow in the South, a project that began with Brown v. Board of Education.¹ Second was promoting democracy through “one person, one vote.”² The third was the reform of the criminal justice system by requiring it to conform to national best practices. The last theme was expanding freedom of expression by ending McCarthy-era persecutions, liberating the depiction of sex from the Victorian Era ideal, and guaranteeing the right to vigorously criticize government.³ Of course there was considerable overlap among the themes, a point especially clear in the case of race and the criminal justice system. What makes

¹. 347 U.S. 483, 495 (1954) (holding that public educational facilities inherently could not be “separate but equal,” and such schools in fact violated the Fourteenth Amendment’s guarantee of equal protection).
². See Gray v. Sanders, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing—one person, one vote.”); see also Reynolds v. Sims, 377 U.S. 553, 563 (1964) (concluding that to allow one vote to hold greater weight than another is unconstitutional); Baker v. Carr, 369 U.S. 186, 237 (1962) (confirming that the Fourteenth Amendment protects voting rights and that courts can decide the constitutionality of a state’s redistricting when it impacts voting rights).
Griswold v. Connecticut stand out so sharply is that it does not involve any of these themes and that it led to no further Warren Court decisions on the issue. The latter point is not surprising, as only the three New England states where the Catholic Church held undue influence had anti-contraceptive laws, and the Church, holding a losing hand, immediately capitulated. Thereafter, private entities like Planned Parenthood could offer contraception.

So how does Griswold fit in with the Warren Court, if it fits in at all? To explore that question I will look at the 1964 Term (in which the Court decided Griswold) and the Terms immediately before and after. I have limited the data to the Terms on each side of Griswold for a couple of reasons. First, the 1963 Term was the coming together of the liberal five-man majority, confident in America and their own abilities to improve it. Second, the 1965 Term marks the last Term before the constant summer race riots and deepening war in Vietnam soured the liberal mood in the country. As a result, the 1966 mid-term elections produced sweeping Republican victories.

THE 1963 TERM

Anthony Lewis, then the Supreme Court correspondent of the New York Times, called the 1963 Term the "Second American Constitutional Convention." He caught its spirit and actions perfectly. The 1963 Term was a Term of blockbuster decisions, and there are no back-to-back volumes of the U.S. Reports that can match 377 and 378.

4. 381 U.S. 479 (1965) (holding that the Constitution provides married couples a right to contraception).
5. See THE WARREN COURT, supra note 3, at 376 (noting that in 1964, three-quarters of American Catholics were in support of freely available advice about contraceptives).
6. It is well to remember that the Court's Terms were different fifty years ago. The Court routinely decided twice as many cases on the merits as it does today, and one could expect almost twenty important constitutional decisions per Term. Tracey E. George & Chris Guthrie, Remaking the United States Supreme Court in the Courts' of Appeals Image, 58 DUKE L.J. 1439, 1440-41 (2009).
8. See generally THE WARREN COURT, supra note 3, at 209-16 (recognizing that the Warren Court had a liberal majority, "men of action, ready to act," and thus often took on controversial cases).
9. There were race riots in Harlem (1964) and Watts (1965), but they were isolated. In 1966 and 1967, they became widespread.
The biggest case of the Term was *Reynolds v. Sims*, the follow up to the two-year-old *Baker v. Carr*. Alabama had not redistricted in six decades, and all observers of legislative apportionment believed, as Solicitor General Archibald Cox argued, that *Reynolds* was going to hold what was implicit in *Baker*—that at least one house of a bicameral state legislature had to be apportioned on an equal population basis, but that the second house could bear a resemblance to the United States Senate. What was not anticipated was that the Court would reject the Senate analogy and instead hold that both houses had to be apportioned on an equal population basis. Furthermore, to show how serious the Court was, in a companion case out of Colorado, the Court applied its “one person, one vote” rule to a brand new state constitution that had been approved by the voters of every single county in the state (under circumstances where voters could have adopted a different constitution with equal apportionment in both houses). The result of *Reynolds* meant that every state was going to undergo new redistricting in the not-so-distant future. It also took reapportionment off the docket, pending those legislative actions.

A second major case of the Term was *Escobedo v. Illinois*, where the dissenters claimed “the goal which the Court seemingly has in mind [is] to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntary or not.” A 5–4 majority issued an opinion that indeed radiated hostility toward confessions (and the police). The majority announced it had “learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence secured through skillful investigation.” The Court

13. 369 U.S. 186 (1962) (holding that if a state’s redistricting impacts voting rights, then a justiciable constitutional cause of action exists through the Fourteenth Amendment’s Equal Protection Clause).
14. THE WARREN COURT, supra note 3, at 246.
17. Id. at 495.
18. Id. at 490–91 (holding that an individual’s Sixth Amendment rights were violated when he was taken into custody, interrogated, and denied the opportunity to consult with his attorney).
19. Id. at 488–89.
then suggested that police “often” extort confessions “to save law enforcement officials the trouble and effort of obtaining valid independent evidence.” The Court continued its attack on confessions and law enforcement with another “we have learned”:

We have also learned the lesson of history that no system of criminal justice can, or should, survive if it comes to depend on the citizens’ abdication through unawareness of their constitutional rights . . . . If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

_Escobedo_ was not the only major criminal procedure case the Court confronted during the 1963 Term. The Court also ruled that the Fifth Amendment’s privilege against self-incrimination was applicable to the states, and affirmed a preference for search warrants over police discretion. In the latter case, the Court tightened the standards for issuing warrants when police claim to be relying on an unnamed informant.

Another landmark case, instantly beloved by the media, was _New York Times v. Sullivan_, which constitutionalized the law of libel of public officials and declared the long-dead Sedition Act of 1798 to have been a First Amendment infringement. The Court also moved obscenity law from _Roth v. United States_, which was designed to protect all _great_ literature, to _Jacobellis v. Ohio_, which guaranteed that all _serious_ literature would be protected, as a summary 5–4 reversal of an obscenity finding against Henry Miller’s _Tropic of Cancer_ illustrated.

In 1964, the Court commenced its destruction of the federal domestic security program. The Subversive Activities Control Act required

---

20. _Id._ at 490 (quoting Haynes v. Washington, 373 U.S. 503, 519 (1963)).
21. _Id._
24. _See id._ at 113–14 (holding that the search warrant issued was not supported by probable cause because the affidavit contained no allegation that the affiant had personal knowledge of the defendant’s criminal activity and because the magistrate accepted the informant’s “mere conclusion” without question).
registration of the Communist Party and its members with the Subversive Activities Control Board (SACB) (after the SACB found the Party to be a "Communist-action" organization) and created penalties for noncompliance. In *Aptheker v. Secretary of State*, the first case since the Court upheld the decision of the SACB to require registration, the Court held that officers of the Communist Party could not have their passports revoked when the Party refused to disclose its members.

The race cases were all re-runs. *NAACP v. Alabama* was before the Court for the fourth and final time. An exasperated Court informed the Alabama Supreme Court that if it would not accept its final defeat, the Court would enter its own decree *a la Martin v. Hunter's Lessee.* *Griffin v. Prince Edward County* was one of *Brown v. Board of Education*’s companion cases. By 1964, Prince Edward was the sole county remaining in Virginia without public schools (having abolished them as part of "Massive Resistance"). That was an easy equal protection violation. More significantly, the Court authorized the federal district court, if need be, to levy taxes to support the schools that were ordered to open.

*Bell v. Maryland* was the Justices' hardest sit-in case to date because, try as they might, they could not find a state or local law that could be deemed to authorize the segregation that the storeowner practiced. After months of delay and wrangling, Justice Brennan created a majority opinion that reversed the trespass convictions on the basis of a new public accommodations law passed after the convictions had been affirmed, certiorari granted, and the case argued. This was not pretty at all, but as Justice Brennan told his clerks near the end of the *Bell* wrangling (and many subsequent times): "Five votes can do anything

31. Id. at 534.
33. THE WARREN COURT, supra note 3, at 166–67 (noting that the Alabama Supreme Court repeatedly frustrated the United States Supreme Court’s holding, forcing the NAACP to repeatedly return to the Supreme Court for relief).
34. 14 U.S. 304, 351–52 (1816) (affirming the Court's power to override state courts and to enter a final judgment).
37. See id. at 230, 232–33 (noting that the law under which the petitioners were charged was subsequently abolished and "now vindicates their conduct and recognizes it as the exercise of a right, directing the law's prohibition not at them but at the restaurant owner or manager who seeks to deny them service because of their race").
38. Id. at 242.
around here." 39 Justice Brennan and Chief Justice Warren had been worried that any other decision in a sit-in case could adversely affect Congressional action on the Civil Rights Act, which received Senate approval immediately before Bell came down.

**THE 1964 TERM**

Easily the most important case from the 1964 Term was *Heart of Atlanta Motel v. United States*, 40 sustaining the Civil Rights Act less than six months after President Johnson signed it into law. The (now-demolished) motel sat at the intersection of two interstate highways and served an interstate clientele. 41 However, the motel refused to rent rooms to black patrons. Ultimately, the Court held that Congress could use the Commerce Clause to compel private businesses to comply with the Civil Rights Act. 42

Two companion cases stretched the Commerce Clause rationale. One case involved Ollie’s Barbeque in Birmingham, located eleven blocks from the interstate and unlikely to be serving travelers. 43 Solicitor General Cox suggested that the United States had not yet enforced the Civil Rights Act against the owners and that the Court did not have jurisdiction. However, the Justices brushed his argument aside to get to the merits. They ruled that the $69,000 (out of $150,000) worth of meat that came from out of state brought Ollie’s under the Act. 44 The Court wrote that African Americans spent significantly less time in areas with racially segregated restaurants and that, in turn, restricted commerce. Yet, the African Americans turned away by Ollie’s and other establishments would still have to eat, and their food would be equally likely to have come from another state. The message of the case was that, contrary to the statutory language of the Act, the Act covered everyone.

---

41. *Id.* at 243.
42. *Id.* at 261.
44. *Id.* at 296, 304.
Bell v. Maryland was not, in fact, the last sit-in case the Court heard; Hamm v. City of Rock Hill was. A 5–4 majority vacated the convictions and ordered the indictments dismissed under the doctrine of abatement. There were two problems. First, there was not a shred of evidence that Congress intended or even thought that passage of the Civil Rights Act would abate pre-existing criminal convictions of the highest court in a state. Second, how the power to regulate interstate commerce now and in the future is affected by a pre-existing criminal conviction is impossible to explain—and was therefore left unexplained. The answer had to be that the Court was treating the Act as wiping everything clean (whether or not Congress had the power to do so).

In McLaughlin v. Florida, the Court took up an issue it had studiously ducked a decade earlier—criminalizing interracial sex. The majority opinion was interesting because it took the stance of looking for a sufficient justification for the law rather than simply stating, as Justices Stewart and Douglas did, that a criminal law that turns on race is per se unconstitutional. McLaughlin marked the last time the NAACP Legal Defense Fund cited the first Justice John Marshall Harlan’s Plessy v. Ferguson dissent for the proposition that the Constitution was colorblind.

The other important race cases were also First Amendment cases. With the Civil Rights Movement still in full swing, demonstrators advocating equal rights often found themselves in conflict with law enforcement and ordinances regulating assembly. In 1961, the Reverend Elton Cox led some two thousand demonstrators in Baton Rouge, Louisiana from a restaurant they were picketing to the courthouse. None were arrested during the demonstration, but Cox was subsequently convicted of breaching the peace, obstructing public passageways, and picketing at a courthouse. The Court easily reversed the breach of the peace conviction, reasoning that the

48. McLaughlin v. Florida, 379 U.S. 184, 192–93, 196 (1964) (majority opinion); see also id. at 198 (Stewart, J., concurring).
49. 163 U.S. 587 (1896).
demonstration was peaceful. The Court also reversed the second conviction, reasoning that officials administered the statute as a standard-less licensing scheme, something long held unconstitutional. The courthouse picketing statute was unanimously deemed constitutional, but the conviction was also reversed because a majority on de novo review concluded that the police chief had given the demonstrators permission to be there. The Court's position in Cox seemed to somewhat conflict with a decision two years earlier, where the Court had described a demonstration of 150 people at the South Carolina capital as "pristine." In Cox, the Court, even as it reversed the convictions, warned that "liberty itself would be lost in the excess of anarchy."

The Court further cleared the path for the Civil Rights Movement by holding that the First Amendment prohibited the threat of prosecution for certain expressive activity. In Dombrowski v. Pfister, the Supreme Court considered whether Louisiana officials had abused anti-communism laws to chill the Southern Conference Education Fund's civil rights efforts. The Fund claimed that the state was threatening prosecutions for which it had no hope of securing valid convictions, and the threats were bringing the organizations activities to a halt. The chairman of the state's UnAmerican Activities Committee stated that arrests had been for racial agitation. Justice Brennan authorized an injunction against the state because "the chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of success or failure." On its face, Pfister offered a powerful tool to civil rights groups fighting a determined, and all-too-often unlawful, Deep South resistance.

In dissent, Justice Harlan made a federalism argument and asked what if the organization was really "conspiring to stage a forcible coup d'état?" It might have improved the government of Louisiana at the time.

Leaving the South and civil rights, the Court decided two domestic security cases involving two federal statutes, one with a real

52. Id. at 545–46.
53. Id. at 556–58.
54. Id. at 564, 569–70.
56. 379 U.S. at 554, 558.
57. 380 U.S. 479 (1965).
58. Id. at 487–89.
59. Id. at 485–86.
60. Id. at 487 n.4.
61. Id. at 487.
62. Id. at 502 (Harlan, J., dissenting).
communist and the other, a fellow-traveler. *United States v. Brown* \(^63\) concerned the Taft-Hartley Act, which required union leaders to affirm that they were not members of the Communist Party if the union wished to avail itself to the protections of the National Labor Relations Act. Congress had rationalized that Communists were far more likely to engage in political—rather than economic—strikes, which presented an inherent conflict of interest with union leadership. Chief Justice Warren found the requirement to be a bill of attainder because Congress was finding the Communist Party and its members prematurely guilty of a crime. \(^64\) Stripping them of their union positions was, therefore, punishment. The opinion was both novel and unsatisfying because conflict of interest provisions are presumably valid. \(^65\) Chief Justice Warren attempted to finesse the point by stressing the fact that the Communist Party was specifically named in the legislation. \(^66\)

The other case, *Lamont v. Post Master General*, \(^67\) involved Corliss Lamont, an American socialist philosopher and civil liberties advocate, \(^68\) and a recently passed statute that barred the Post Office from delivering “communist political propaganda” via second class mail to an address, unless the addressee had communicated a desire to receive such mail. \(^69\) Justice Douglas’s majority opinion assumed there was a First Amendment right to receive ideas; Justice Brennan in concurrence made that explicit. This was the first “live” federal statute to be declared a violation of the expression clauses.

The final First Amendment case of the Term killed public movie censorship boards by demanding they take on the burden of proof, be responsible for initiating judicial review, and to do so quickly. \(^70\) No boards had either the staff or the money to meet the new procedural requirements, so these staples of Twentieth Century history passed

---

63. 381 U.S. 437 (1965).
64. *Id.* at 449–50.
67. 381 U.S. 301 (1965).
from the scene and were replaced at the end of the decade by a ratings system fashioned by the Motion Picture Association of America. The 1964 Term’s criminal procedure cases were a mixed bag. The previous Term’s decision to incorporate the privilege against self-incrimination bore fruit in *Griffin v. California*, when the Court applied the federal rule to the states that prosecutors cannot comment on the choice of the defendant not to testify. The Court also incorporated the Sixth Amendment’s guarantee of a speedy trial against the states in *Pointer v. Texas*.

In *Estes v. Texas*, the petitioner, Billie Sol Estes—Texas wheeler-dealer and sometime Lyndon B. Johnson business partner—claimed that the state of Texas had violated his Fourteenth Amendment right to due process by allowing live radio and television broadcasts of his pre-trial hearing on swindling charges. Over impassioned dissents, claiming that cameras do not per se deny the right to a fair trial, the Court overturned his convictions, holding that his trial was fundamentally unfair because “there had been a bombardment of the community with the sights and sounds” of the petitioner’s trial.

In light of the Court’s assault on racial discrimination in the South, *Swain v. Alabama* is all but inexplicable. In *Swain*, the state of Alabama had convicted an African-American defendant of raping a white woman and sentenced him to death. On appeal to the Supreme Court, the defendant challenged the state’s peremptory challenges to strike six eligible African-Americans from the jury venire in an area where no living person could remember an African-American ever being on a jury. Since peremptory challenges had a long pedigree and could be used for any or no reason, the Court sided with the prosecution. The Court explained that “[w]ith these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause.”

The Court’s claim that banning peremptory challenges based on race

73. Id. at 615.
74. 380 U.S. 400 (1965).
75. 381 U.S. 532 (1965).
76. Id. at 538.
78. See id. at 222–23.
79. Id. at 221.
would be a "radical change," rang hollow a year after the Court's influential decision in *Reynolds v. Sims,* in which the Court held that legislative districts across states be equal in population.

Finally, in *Linkletter v. Walker,* the Court came to grips with the fact that its criminal procedure revolution could empty American jails of their criminal population because, previously, all constitutional decisions were fully retroactive. But no longer. The majority ruled that its decision to require states to follow the exclusionary rule applied only to cases on direct review where the judgment was not final. Justices Hugo Black and William O. Douglas thought the majority behaved lawlessly.

Then came *Griswold,* which marked the third time the Connecticut birth control statute had been before the Court, but the first time the Court reached the merits. The "third time's the charm," apparently. In 1943, in the wake of the New Deal revolution, the Court held that a group of doctors did not have standing to challenge the law. In 1961, a woman, who gave birth to three babies who died shortly after, filed suit alongside the doctors, and the standing problem was apparently solved. However, Justice Frankfurter convinced a bare majority that state penal statutes cannot be subject to a constitutional challenge "if real threat of enforcement is wanting." He noted that since 1879, the state had only initiated one prosecution, apparently a test case, which was dismissed after the state court decision. Justice Clark, who had voted against noting probable jurisdiction, was happy to join: "Good riddance! Join me up." Justice Brennan provided the fifth vote, reasoning that the statute would only prevent birth control clinics from opening; it would not prevent married couples from obtaining contraceptives by other means. He wrote that the Court would not review the statute until the State made "a definite

---

80. *Id.* at 221–22 (warning that such a holding would leave "each and every [peremptory] challenge open to examination... and a great many uses of the challenge would be banned").
81. 377 U.S. 533, 558 (1964) (requiring every state legislative body to reflect "one person, one vote"); *see supra* notes 12–15 and accompanying text.
83. 381 U.S. 618 (1965).
87. *Id.* at 507.
88. TCC to Felix [Frankfurter], June 6, 1961, Tom Clark Papers, Box A109, Folder 11, Tarlton Law Library, University of Texas School of Law.
and concrete threat to enforce these laws against individual married couples,\(^8^9\) which finally occurred in \textit{Griswold}.

By the time \textit{Griswold} arrived before the Court, the Justices were familiar with the issue. They all voted to note probable jurisdiction and then got on with the opinion writing. In 1961 it took almost three months for the decision; four years later it took barely two months. Justice Douglas had his penumbras and emanations and ended with a praise of marriage—something that he could never find in his private life. Justice Goldberg “found” the Ninth Amendment. Justice Harlan saw in Due Process the evolving standard he could never find in Equal Protection. Justice White rested on the irrationality of Connecticut’s belief that no contraception would limit illicit sex. And, of course, Justices Black and Stewart had their curt, biting dissents.\(^9^0\)

Whether \textit{Griswold} would generate future decisions was unclear. The case was best summarized by its winning counsel, Yale law professor Thomas I. Emerson, with his pithy title “Nine Justices in Search of a Doctrine.”\(^9^1\) Yet, eight years later, its right of privacy was the constitutional basis for \textit{Roe v. Wade}\(^9^2\) and, twenty-two years later, Judge Robert Bork’s opposition to \textit{Griswold} was one factor in the Senate’s rejecting his Supreme Court nomination by President Reagan. Anthony Kennedy’s replacing Bork saved \textit{Roe} and laid the groundwork for the protection of same-sex marriage.

\textbf{The 1965 Term}

\textit{Reynolds v. Sims} and its companions were redistricting, not voting rights cases, and they took redistricting off the docket for several years. The 1965 Term instead featured three voting rights cases, two flowing from and sustaining the recently passed Voting Rights Act. \textit{South Carolina v. Katzenbach}\(^9^3\) dealt with the Act generally: the elimination of literacy tests, the creation of federal registrars, and the requirement that affected states get the approval of the federal government before any state or local changes in voting could go into effect.\(^9^4\) The Court accepted Congress’s findings that many voting requirements were racially discriminatory and all past remedial measures had had been

\(^{8^9}\) \textit{Poe}, 367 U.S. at 509.

\(^{9^0}\) The most complete study is David J. Garrow, \textit{Liberty and Sexuality: The Right to Privacy and the Making of \textit{Roe v. Wade}} (1994). The most recent commentary is Ryan C. Williams, \textit{The Paths to Griswold}, 89 Notre Dame L. Rev. 2155 (2014).


\(^{9^2}\) 410 U.S. 113 (1973).

\(^{9^3}\) 383 U.S. 301 (1966).

\(^{9^4}\) See id. at 312, 315–16, 334–37.
ineffectual. Congress “chose to limit its attention to the geographic areas where immediate action seemed necessary”: Southern states.\textsuperscript{95} Drawing on \textit{McCulloch v. Maryland},\textsuperscript{96} the Court stated that Congress could use “any rational means to effectuate the constitutional prohibition” of discrimination on the basis of race.\textsuperscript{97}

\textit{Katzenbach v. Morgan}\textsuperscript{98} was a companion case that dealt with a provision of the Act that enfranchised non-English speakers who had a sixth grade education in a Puerto Rican school where the instruction was in Spanish. Unlike the Voting Rights Act provisions at issue in \textit{Katzenbach}, there was no voluminous legislative history; there was no legislative history at all. Furthermore, the Court had previously recognized that English literacy could be a rational requirement for voting.\textsuperscript{99} Without overruling \textit{that case}, the Court stated its task was not determining whether New York’s English literacy requirement was constitutional, but instead, determining whether the federal displacement was “appropriate legislation to enforce the Equal Protection Clause.”\textsuperscript{100} The Court then sustained the law as protecting Spanish speakers from discrimination by the state.\textsuperscript{101} But it also went on to apparently give Congress an independent power to interpret the Constitution and prevail over the contrary conclusion of the Court.\textsuperscript{102} Understanding the implications of its conclusion, the Court dropped a footnote, stating that this was a power only to enhance, not restrict, rights.\textsuperscript{103} The Court might have asked the English-speaking New Yorkers how they liked their voting power diluted by the addition of several hundred thousand voters who did not speak English.\textsuperscript{104}

\begin{itemize}
  \item \textsuperscript{95} \textit{Id.} at 328.
  \item \textsuperscript{96} 17 U.S. (4 Wheat.) 316 (1819).
  \item \textsuperscript{97} \textit{Katzenbach}, 383 U.S. at 324.
  \item \textsuperscript{98} 384 U.S. 641 (1966), abrogated in part by \textit{Shelby County v. Holder}, 133 S. Ct. 2612 (2013).
  \item \textsuperscript{100} \textit{Morgan}, 384 U.S. at 650.
  \item \textsuperscript{101} \textit{Id.} at 657-58.
  \item \textsuperscript{102} See \textit{id.} at 648 n.8 (The Due Process Clause “enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment”) (internal citations omitted).
  \item \textsuperscript{103} \textit{Id.} at 651-52 n.10 (“We emphasize that Congress’[s] power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.”).
  \item \textsuperscript{104} The sentence in the text is harsh. But consider a modern analogy: suppose Congress, relying on \textit{Morgan} and \textit{Plyler v. Doe}, 457 U.S. 202 (1982) (states cannot deny undocumented children K-12 public education), decides to enfranchise all adults who have resided in the United States for twelve months. Many affected citizens would believe their votes were being diluted.
\end{itemize}
Another great victory for voting rights came when the Justices took on poll taxes. The Twenty-Fourth Amendment, ratified without a single Southern state, abolished the poll tax in federal elections. The Voting Rights Act directed the Justice Department to challenge the poll tax in state elections; a year later, poll taxes were gone. In *Harper v. Virginia Board of Elections*, the Court declared that voting was a fundamental right and could not be conditioned on paying the annual $1.50 tax. Justice Douglas, writing for the Court, explained that “[w]ealth, like race, creed, or color, is not germane to one’s ability" to cast an intelligent ballot. Thus, “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored," a tradition dating from the day *Harper* came down. Douglas brushed aside both originalism and precedent with a single assertive sentence carrying its own emphasis: “Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.” With these three cases, the Justices demonstrated their commitment to promoting robust democratic participation.

The Court’s protections against Southern discrimination continued in *Evans v. Newton* and *Brown v. Louisiana* (although both cases would be eroded in the future). The former involved a segregated park in Macon created by former Georgia Senator Augustus Bacon in the early years of the century with the city being the trustee. After *Brown v. Board of Education*, the city realized it could no longer operate the park on a segregated basis, and so it petitioned a state court to appoint private trustees instead. The Court thought it still looked like Macon was maintaining the park as before and added that “the service rendered even by a private park of this character is municipal in nature[,]... like a fire department or a police department that traditionally serves the

107. Id. at 666.
108. Id. at 668.
109. Id. (citations omitted).
110. Id. at 669.
community." The Court held that the facial change in the park's administration did not authorize its segregation.

*Brown v. Louisiana* similarly involved segregation in a public domain. The case centered around a small, peaceful protest in a public library where five African Americans entered, asked for a book that the library did not have (which the librarian stated would be ordered), and then just stayed and stood in the building. Shortly thereafter, the sheriff arrived and asked them to leave. When they refused, they were arrested for breach of the peace. A five-man majority was split between overbreadth and asserting that what occurred was an "appropriate" protest.

The Court combated both discrimination based on race and on political affiliation. The Court invalidated further provisions of the Subversive Activities Control Act (SACA) in *Albertson v. Subversive Activities Control Board*. There, the defendant refused to register as a Communist because doing so would open him up to prosecution under the Smith Act. Attorney General Tom Clark had seen this problem when the SACA was first proposed. A unanimous Court upheld Albertson's self-incrimination claim and invalidated the provision requiring Communist Party members to register as such, because it would violate the Fifth Amendment's privilege against self-incrimination.

State efforts to rid themselves of Communists took two basic forms. One was a state version of the House UnAmerican Activities Committee; the other was a loyalty oath that, in some form, disclaimed Communist membership. Both of these practices were before the Court, and in both cases the states lost. In *DeGregory v. New Hampshire*, the state attorney general was a one-man legislative investigating committee into communism in the state and was engaged in his third investigation of the defendant. DeGregory stated in court that he had not been a member of the Communist Party since 1957 and refused, on First Amendment grounds, to answer any questions about the time he had been a party member. Justice Douglas did not

115. *Id.* at 301 (holding that "we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector").
117. 382 U.S. 70, 71–72 (1965) (noting that SACA required each member of every Communist organization to register with the Attorney General and provide a registration statement).
118. 18 U.S.C. § 2385 (1940) (criminalizing any attempt to overthrow state or federal government).
119. *Albertson*, 382 U.S. at 77–78.
find any evidence that DeGregory had committed sedition against the
state during the 1960s, and the state’s interest in his conduct during
the 1950s was “too remote and conjectural to override the guarantee of
the First Amendment that a person can speak or not, as he chooses,
free of all government compulsion.”

The Court further protected group membership by ruling that for
the legislature to pass a law allowing an employer to ban his employees
based on their membership in subversive groups, the law must be
narrowly tailored to effect only active members who intend to assist in
the groups’ unlawful ends. Arizona had a loyalty oath backed by
another statute that made it grounds for discharge for a state employee
to be a member of the Communist Party. Because the law did not
distinguish between members of the Party who subscribe to the Party’s
illegal aims and members who did not, it “threaten[ed] the cherished
freedom of association protected by the First Amendment.” After all, those who joined the Party “but do not share its unlawful purposes
and who do not participate in its unlawful activities surely pose no
threat.” With these cases, the federal domestic security program was
on life support, and the state programs were dead.

Perhaps more significant than the Term’s domestic security cases
were those involving obscenity, two of which, Memoirs v. Massachusetts and Ginzburg v. United States, involved vote swapping
that resulted in blockbuster rulings the Justices did not believe in.
Memoirs, also known as Fanny Hill, the title character in the 1749
novel, was a highly titillating book that pushed the boundaries of
decency. Ginzburg was a sleaze who triggered Attorney General
Robert Kennedy’s puritanical streak, but his supposedly obscene
book and magazine were well within the range of what was generally
available for adult consumption. Outside of the Kennedy Justice
Department and the judges on his case, no serious student of
obscenity thought his conviction could stand. Solicitor General
Thurgood Marshall even directed his assistant, who was arguing the

121. Id. at 830.
123. Id. at 18.
124. Id. at 17.
127. See L.A. Powe, Jr., The Obscenity Bargain: Ralph Ginzburg for Fanny Hill, 35 J. Sup.
literary critics and fine art scholars found Ginzburg’s portrayals tasteful, and on appeal,
111 well-known leaders in arts and literature filed an amicus brief on his behalf).
case, to lose it. But Justice Fortas convinced Justice Brennan to protect *Fanny Hill* in exchange for Justice Fortas voting to affirm Ginzburg's conviction, and that settled the outcome of the two cases. *Fanny Hill* changed obscenity law by requiring that the government prove the materials were utterly without redeeming social value. *Ginzburg* allowed conviction for selling supposedly near-obscene materials if the seller pandered—emphasized the material's sexual content—in the process.

On the criminal procedure front, *Miranda v. Arizona* was the biggest case since *Escobedo*—probably the biggest criminal procedure decision of the Warren years. It lacked *Escobedo*’s hostile rhetoric about confessions and the police, but its four warnings were unmistakable, and the police were absolutely aghast at the decision. They claimed the Court was handcuffing the police and coddling criminals. *Miranda* would have consequences in the 1966 and 1968 elections that no other case could match.

The Court also sought to protect criminal defendants from the sway of media in high-publicity cases. In 1955, Cleveland neurosurgeon Dr. Sam Sheppard was convicted of bludgeoning to death his young, attractive, pregnant wife in their bedroom. It was one of the “trials of the century,” and the local press was everywhere in the courthouse as the judge essentially ceded his functions to the press. Justice Clark's opinion quoted from a judge below: “In this atmosphere of a ‘Roman holiday’ for the news media, Sam Sheppard stood trial for his life.”

128. *Id.* at 170, 173 (noting that Justice Marshall believed that the case was incorrectly decided because the materials, although pornographic, were not out of the mainstream, and, therefore, were entitled to First Amendment protection).

129. *Id.* at 166-68, 170, 172-74 (“Justices... bargain over outcomes,” and the decisions in *Memoirs* and *Ginzburg* are no different. Justice Fortas favored business interests and aimed to affirm Ginzburg’s conviction in order to exonerate G.P. Putnam’s Sons, the publisher of *FANNY HILL*, stating that the “nation was about to turn to another wave of ‘book burning.’” The result perpetuated “a great injustice” by denying Ginzburg “equal justice under [the] law”).

130. *See Memoirs*, 383 U.S. at 418 (establishing a three-part test for obscenity jurisprudence, stating that “three elements must coalesce... (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value”).


Among several other errors, while the jurors were sequestered, they were separated into two groups to pose for photographs, which appeared in the press. Sheppard and Lee Harvey Oswald, who the Warren Commission and many scholars believed would not have received a fair trial for the assassination of President Kennedy, were instrumental in initiating a decade-long debate over the fairness of trials involving substantial press coverage.\footnote{133. After Sheppard’s death, DNA evidence matched that of Sheppard’s handyman who was then serving a life sentence for the murder of another woman. The case became the basis for the television series “The Fugitive” as well as a later movie by the same name.}

A week after \textit{Miranda}, \textit{Schmerber v. California}\footnote{134. 384 U.S. 757 (1966).} reaffirmed a 1957 decision\footnote{135. Breithaupt\textit{ v. Abram}, 352 U.S. 432 (1957).} that a blood sample could be unwillingly taken from a person without violating the Self-Incrimination Clause. To be sure, taking blood was “an incriminating product of compulsion,” but it was not testimonial and, therefore, outside the privilege.\footnote{136. \textit{Schmerber}, 384 U.S. at 765.}

Finally, in \textit{Johnson v. New Jersey},\footnote{137. 384 U.S. 719 (1966).} the Court held that its \textit{Miranda} decision only applied \textit{prospectively} to future state law criminal proceedings.

\section*{WHERE DOES \textit{GRISWOLD} FIT?}

\textit{Griswold}’s surroundings from the year before to the year after fully reflect the themes of the mature Warren Court. \textit{Griswold} fits best in the sense that it was a liberal decision, and so were most of the others. Yet, very clearly, birth control was an issue apart from the central tasks of the Warren Court. While sex is implicit in the use of contraceptives, \textit{Griswold} is not a First Amendment case like those involving obscenity, and it is not a freedom of association case like those involving Communists. Doctrinally, it is either a right to privacy (meaning autonomy), substantive due process, or an unenumerated rights case. Either way, it’s an outlier.

the era was the end to racial discrimination, and yet Alabama—yes, Alabama, which was at war with the Court and the national government over segregation—was given a pass. The decision is more than baffling; it is antithetical to everything else the Court was doing. Justice Brennan provided the fifth vote, yet his biographers do not mention this inexplicable decision.140

There was one further outlier—Ginzburg v. United States. To affirm Ginzburg’s conviction, the majority rewrote the federal obscenity statute to insert a pandering feature, and then had to find Ginzburg guilty of that new crime, even though he was never charged with it, and thus had no occasion to defend against it. One of Chief Justice Warren’s law clerks wrote to his boss: “Speaking frankly, sir, my own feeling is that Ginzburg did get cheated out of a chance to explain. If a southern court did this to a Negro in a criminal case, I have no doubt the Court would jump in, and with good reason.”141 But the bargain between Justices Brennan and Fortas had been made with Chief Justice Warren’s approval, and the petition for rehearing was denied.

Perhaps Griswold is not the outlier I have suggested. Another way of looking at it is that it was near the beginning of an effort to make poverty (or something thereabouts) a suspect classification for purposes of constitutional rights. Before Poe v. Ullman was argued, “a major medical journal, in a story picked up by national newspapers, quoted Connecticut doctors as explaining how the state law affected only those citizens too poor to pay private physicians for diaphragm fittings.”142 As Yale law professor Thomas Emerson, the winning counsel, wrote, “[The law’s] enforcement only against birth control clinics resulted in patent discrimination against persons who were too poor or too uneducated to seek private medical advice.”143 After Griswold, they could become Planned Parenthood patients, and the possibility existed, as Emerson observed, that questions from the Bench about equal protection “carrie[d] a portent for the future.”144

Harper, with its equation of wealth distinctions with racial distinctions, was a further move towards creating Emerson’s portent and what Frank Michelman in his 1969 Harvard Foreword saw as a

142. The Warren Court, supra note 3, at 447.
143. Emerson, supra note 91, at 219.
144. Id. at 221.
constitutional shield for the poor from “the most elemental consequences of poverty: lack of funds to exchange for needed goods, services, or privileges of access.” In my study of the Warren Court, I concluded Miranda as follows:

“Not since Gideon [v. Wainwright] and Douglas [v. California] had a decision been so focused on the differences between the affluent and the poor. If the police stopped a man of means and wished to interrogate him as a suspect, the first thing he would do was demand to speak to his lawyer. By that very demand he would be spared, first, the indignities of the interrogation room and, second, being convicted for having confessed (since his lawyer would ensure that he would not incriminate himself if the police did not have their case). But the poor, equally obviously, did not have their own lawyers and did not know that they had the right to refuse to speak to the police. It just wasn’t fair.”

The Court’s decisions were contemporaneous with President Lyndon B. Johnson’s launching the War on Poverty and the initial Congressional anti-poverty legislation as the Nation seemed poised to improve the lives of the least well-off. In this context, Johnson’s assertion to historian William Leuchtenburg is telling: “[N]ever before have the three independent branches [of the federal government] been so productive.”

*Harper, Miranda, Griswold,* and maybe a couple of other lesser-known cases addressed the advantages of the “haves” over the “have-nots”; yet nothing again as explicit as *Harper.* Perhaps no wonder; this was before the continuous summer race riots and the wonderment that escalation in Vietnam was not having its desired effects. The idea of a constitutional shield from poverty was dying just as Michelman was writing. Richard Nixon bested Hubert Humphrey and was to be blessed with four appointments in his first term (more than any subsequent two term president). With the changed composition of the Court, *United States v. Kras* and *San*
Antonio Independent School District v. Rodriguez put an end to what may or may not have been a new theme for the Court. And Griswold became what it may have always been: a right to privacy case.

CONCLUSION: GRISWOLD, ME, AND THE HARVARD LAW REVIEW

Connecticut's anti-contraception statute at the Court matched my early years. The Court decided Tileston the year I was born; Poe the year I graduated from high school; and Griswold the year I graduated from a small Connecticut college, married my wife, and entered law school. The first law school final I took was in the Legal Process out of Hart and Sachs's mimeographed 1958 tentative edition. The course was taught by the dean, who was incomprehensible even in private conversation. Despite Hart and Sacks eschewing constitutional law, the final exam had Griswold as a question. By a statistically significant margin, I got my lowest grade in law school.

Perhaps if I had been at Harvard I would have known better. In the Supreme Court issue of the Harvard Law Review's Note on Griswold, the writers, in the best footnote ever in Law Review history observed: "Despite the practice of illegal fornication by Americans of all descriptions throughout our history, the United States has never lost a war." Attending a non-elite law school, I would never have thought of that.

America's victory streak in wars would soon be over. But Griswold's right to privacy became central to the battles over abortion, which seemingly have no end. And to the shock of many, the issue of contraception reemerged in the wake of the Supreme Court's validation of President Obama's Affordable Care Act.

151. 411 U.S. 1, 18, 35, 40, 55 (1973) (holding that states are not required to allocate local property tax revenues to benefit all students equally, because the Constitution did not guarantee a right to public education).


153. 'The Legal Process' as a first year course and 'Constitutional Law' reserved for the second year? What rational law school could do that? Not Harvard, where The Legal Process was an upper level course.