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MARSHALING MAPP:

JUSTICE TOM CLARK’S ROLE IN MAPP V. OHIO’S EXTENSION OF THE EXCLUSIONARY RULE TO STATE SEARCHES AND SEIZURES

Dennis D. Dorin†

INTRODUCTION

Over a decade after Mapp v. Ohio, its author reflected upon Gideon v. Wainwright. Epochal holdings like Gideon, Justice Tom Clark observed:

do not come out of a blue sky like individual thunderbolts, but resemble more closely a cyclone dipping to earth from time to time to lift aloft in its cone many man-made objects until it is filled to the brim; then it casually releases its whole burden, which falls to the earth in bizarre fashion, often leaving never-forgotten landmarks. Gideon is such a landmark.

† This article is derived from Dennis D. Dorin, Seize the Time: Justice Tom Clark’s Role in Mapp v. Ohio, in LAW AND THE LEGAL PROCESS 21-72 (V. Swigert ed. 1982). A preliminary word about some of the sources referred to in this article is necessary. The seminars and interviews with Justices Clark and Potter Stewart drawn upon so heavily at its beginning were, unfortunately, not tape-recorded. Allusions are also frequently made to Justice Clark’s private Supreme Court papers. Clark gave me full access to them during the summers of 1974-75, when they were in a raw form in file cabinets in his U.S. Supreme Court Building storerooms. The great bulk of the Justice’s records was transferred to the University of Texas’s Tarlton Law Library after his death. My strong guess is that all, if not a great deal, of these materials are now duly available to researchers at Tarlton. I know, for example, that Justice Clark told me, in the mid-1970s, a few years before his death, that that was his intention. However, there is no guarantee that every scrap of material from them did in fact reach this destination.

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And so is Clark's *Mapp* holding. Few Supreme Court decisions have been as far-reaching, or as controversial, as *Mapp*'s declaration that "[a]ll evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible" in state criminal trials.\(^5\) The intellectual process that attended *Mapp*'s creation, moreover, was very much the ragged and chaotic—the "cyclonic"—one that Clark had seen in *Gideon*'s origins.

*Gideon* and *Mapp* shared another parallel. Each seemed to embody the very heart of what its author believed were the imperatives of the judicial function. Few cases could have surpassed *Gideon* in symbolizing Hugo Black's jurisprudence.\(^6\) Similarly, *Mapp*'s search and seizure ruling was a direct product of Clark's extraordinary actions—ones that, in turn, were substantially structured and channeled by a conception of a justice's role to which Clark, perhaps uniquely, adhered. Seldom in the Court's history had one of its members so "seized the time"\(^7\) to change the very issues of the case before him in order to marshal\(^8\) the Court into a fundamental doctrinal change. Yet, in so doing, Clark still followed the rules that he, at least, considered substantial limitations upon his discretion.

In critical ways, *Mapp* also involved collaboration between Clark and Black, who became the pivotal justice in Clark's strategy to transform Dollree Mapp's relatively simple obscenity case into one of the most important search and seizure cases ever decided.\(^9\)

\(^5\) *Mapp*, 367 U.S. at 643.

\(^6\) See, for example, ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964), which explores a case with which Justice Black scholars tend very closely to identify him.

\(^7\) See Dorin, supra note 1, at 21 (arguing that Clark's commitment to the precepts of his role as a justice shaped the events that led to the decision in *Mapp*).

\(^8\) For the purpose of this article, we might define "marshal" as "to put or set in order," "organize," "line up," "shepherd," "guide," or "lead." See THE SYNONYM FINDER 709 (1978).


According to Bernard Schwartz, former Supreme Court Justice Abe Fortas once referred to *Mapp* as "the most radical decision in recent times." BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 391 (1983). Schwartz himself found the *Mapp* case to be one "of the most significant cases" of the Warren era. Id. at 388.
How, then, did Clark's and Black's very different, and frequently conflicting, interpretations of a justice's proper role and the law combine, through their behind-the-scenes give-and-takes, to trigger Mapp's historic "cyclone"?

I. JUSTICE CLARK'S ROLE CONCEPTION

Tom Clark's leading role in the Mapp case was deeply grounded in his conception of the judicial function. He had been a member of the Court for a dozen years by the time Mapp came before him. In later years, he would frequently maintain that he had only achieved a real sense of confidence as a justice after he had served his first five. By then, he contended, he had adopted a set of normative principles that he believed were viable limitations upon what he saw as his potentially enormous powers. Reduced to their fundamentals, he maintained, these principles encompassed three rules.

First, central to his approach to cases was his conviction that obedience to the law was the foundation, even the "salvation," of the American constitutional system. Civil rights and liberties could never be protected in a lawless society. Hence, when a court made its decision, everyone, even those conscientiously opposed to its conclusions, was bound by it.

For Clark, "everyone" included judges and justices. These officials symbolized the law in the eyes of the citizenry. They were "the present embodiment of [the community's] ideal of justice." They should never, therefore, show a contempt for or indifference to the law. Yet, in Clark's mind, that was precisely what a judge or a justice did when he or she dissented term after term from his or her court's application of one of its doctrines. Through such an action, a United States Supreme Court justice defied its precedents—thereby holding himself or herself above the law.

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Students of the U.S. Supreme Court's decision-making may well want to compare and contrast the portrait of Clark developed in this essay with FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT (2000), a highly-acclaimed, cutting-edge analysis of the Burger Court. See also Cornell W. Clayton, Book Review, 95 AM. POL SCI. REV. 1001 (2001). CRAFTING LAW ON THE SUPREME COURT has just won the American Political Science Association's C. Herman Prichett Award for the best book on law and courts written by a political scientist during 2000. See Organized Sections Distribute Awards at 2001 Meeting, 34 P-S POL. SCI. AND POLITICS 895, 895 (2001).


For this reason, Clark explained, he had developed his "no subsequent dissent" rule. He would only dissent from a case with which he disagreed during the term in which it was established. Technically, it was then still under his Court's jurisdiction. But after that time, it was the law of the land and he, as any other citizen, was bound by it. He had no choice but to apply it to future cases.

Of course, he conceded, this principle was hardly embraced by all of his brethren. Justices whom he considered legal giants rejected it. Hugo Black, for one, refused to follow it. When Black thought a precedent was wrong, he gave himself the option of dissenting every time the Court applied it. Clark respected such a stand. "Hugo thought he ought to preserve his position," he observed. "He believed that if you no longer dissented, you couldn't maintain your identity" as a rallying point for allies. Nevertheless, Clark could not embrace Black's stand. When a member of the Court carried over a dissent from term to term, he was "like a bull in a china shop," causing "more dissension than ever.""I'm a simple guy," he proclaimed, and "I'm not above the law."

Second, this approach did not, however, require Clark to adhere blindly to past precedents. From his first days on the Court, he had expounded the view that the law was "an agency of our society, to be shaped with conscious recognition of the interests of those whom it must serve." He had always considered the resolution of cases a "dynamic process" that required a deliberate "adjustment of legal [principles] to change."

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13 This term is the author’s. Justice Clark did not have a specific name for this precept.
14 See Justice Tom C. Clark, Remarks at an American University Washington Semester Seminar at the United States Supreme Court Building in Washington, D.C. (May 5, 1970) [hereinafter Clark’s May 5th, 1970 Remarks] (on file with author) (“Even when I dissent I feel like I’m bound by the opinion ever since. The case is already the law of the land and you haven’t any business dissenting from it.”).
16 Id.
17 Id.
18 Id.

Of course, Black's position was that he had taken his oath as a justice to defend and support the Constitution, not what he considered Supreme Court misinterpretations of it. And he took this so seriously, Justice Potter Stewart informed the author, that in his later years, he would not join an opinion by another justice until that colleague removed from it all citations approving previous holdings from which Black had and still dissented. See Interview by Dennis D. Dorin with Justice Potter Stewart, Washington, D.C. (Nov. 13, 1981) [hereinafter Stewart Interview] (on file with author). See also Mark Silverstein, Constitutional Faiths—Felix Frankfurter, Hugo Black, and the Process of Judicial Decisionmaking 20 (1984) (comparing and contrasting Black's and Frankfurter's conceptions of their judicial roles).
20 Id. at 411.
Hence, if Clark found a precedent unsound, he could rightfully seek to overturn it. He could, as previously noted, dissent from it during the term in which it was established. Then he could attack it yet again as he concurred in its application to future cases. And, of far-reaching importance, he could work behind-the-scenes at the Court to persuade at least four other justices to overrule it. His “no subsequent dissent” rule was in no way violated if he marshaled a majority in support of a decision, and opinion, that overturned one rule and set up another. This course of action would not flout, but would simply change, the law.\textsuperscript{21}

Third, Clark asserted that it was one thing to overrule a precedent in explicit terms and quite another to do so by implication. A justice should never misconstrue purposely, and thus deliberately water down, precedents. Such a tactic was intellectually dishonest. It might also actually diffuse and deflect attempts to eradicate destructive cases. “If a law is a bad one and you enforce it strictly,” he advised, “you’ll get rid of it more quickly.”\textsuperscript{22}

Additionally, the Court had the responsibility to overturn past cases in clear terms. Certainty in legal rules was essential if they were to be enforced fairly and effectively. For this reason, every justice had a duty to write opinions that clearly defined the Court’s doctrines. A confused, unduly complex or subtle, or otherwise ambiguous holding signaled a justice’s failure to fulfill this obligation. Justices would have the opportunity of positively influencing the governmental system only so long as their treatment of cases embodied this precision. “I’ve heard people say that it’s pretty severe when you overrule cases, so how about softening the blow?” Clark observed, “But I’d rather overrule them more forthrightly. I believe in going ahead and cutting the Gordian knot. Why prolong the agony?”\textsuperscript{23}

In a significant number of instances, though, the imperatives of the second and third orientations proved incompatible. In accordance with the former, Clark needed not only the votes of four of his fellow Justices, but also their signatures on his opinion, in order to overrule a past rule and establish a new one. But the price for one or more such allies might well be violations of his third principle. He might well have to dilute, or blur, a prospective majority holding. Intellectual purity might, therefore, have to defer to compromise. At such a juncture, Clark would have to calculate how much ambiguity he could permit an additional signature to cost him.

\textsuperscript{22} Id.
\textsuperscript{23} Clark Interview, supra note 15.
Nowhere was his acceptance of this reality better expressed than in his description of the “Clark Method” of securing another justice’s signature. He would always try to be alert to a brother’s possible uncertainty during the Court’s secret conference discussions. “If another Justice said something like ‘I’m inclined to affirm,’” he related, “you knew you had a much better chance [of persuading him] to your side.”24 “I’d let him simmer for a few days,” Clark recounted, “then I would type up my own first draft and personally bring it over. ‘Well,’ I would say, ‘it’s just the first try. It’s rough. I remember what you said at the conference; I think this agrees with it. But go through it and see if there is something else I might put in it that would appeal to you.’”25

In such a way, he recalled, “I would try to get a man even if I had to give [up] a sentence or paragraph. I was one to think that the 6-3’s sounded better than the 5-4’s. They not only sounded better; they had more force!”26 Generally, the more justices endorsing an opinion, the higher the chances not only that it would be retained, but that it would be implemented.

II. CLARK AND STATE SEARCHES AND SEIZURES BEFORE MAPP v. OHIO (1949-61)

A. Options

At the time of Justice Clark’s appointment, the corpus of search and seizure law to which he might have applied such principles was hardly well settled, and the dimension relating to state searches and seizures was especially fragile. The Supreme Court’s supervision of search and seizure law had begun only a few months before, with its six-to-three landmark decision in Wolf v. Colorado.27 In Wolf, Justice Frankfurter’s majority opinion had proclaimed that the “security of one’s privacy against arbitrary intrusion by the police” was “at the core of the Fourth Amendment” and therefore “implicit in the ‘concept of ordered liberty’” safeguarded against state infringement by the Fourteenth Amendment’s Due Process Clause.28

The enforcement of this constitutional “right to privacy,” however, he concluded, was largely the states’ responsibility. It was protected in the United States courts by Weeks v. United States,29 which excluded, inter alia, the fruits of unreasonable searches and seizures

24 Id.
25 Id.
26 Id.
28 Id. at 27.
29 232 U.S. 383 (1914).
by federal law enforcement officers from prosecutions against their victims. But Weeks’ doctrine was not required by the Fourth Amendment. It had been formulated as an exercise of the Court’s supervisory power over the federal judiciary, a prerogative that it did not have over state courts. The Court was thus neither authorized nor obliged “dogmatically” to impose the Weeks rule upon state judiciaries. Indeed, most of the English-speaking world had not found an exclusionary rule an “essential ingredient of the right [to privacy].”\textsuperscript{30} And the states’ lack of agreement as to its advisability was “particularly impressive.” Thirty-one had rejected it; only sixteen had adopted it.\textsuperscript{31}

The Court’s 1949 refusal to extend Weeks to the states hardly settled the issue, however. Wolf became only the prelude to over a decade of attempts by civil rights and liberties groups, defense attorneys, and defendants to induce it to reverse its stand. In the vanguard of this movement were the Wolf dissenters, Justices Murphy, Rutledge, and Douglas. The Weeks rule, they argued through a Murphy dissent, was a constitutional requirement. It alone provided sufficient protection of the Fourth Amendment’s “right to privacy.” Only by exclusion could the judiciary impress “upon the zealous prosecutor” that violations of the Fourth and Fourteenth Amendments would “do him no good.”\textsuperscript{32} Only when that point was driven home could he be expected to “emphasize the importance of observing” the Constitution’s commands when instructing police officers.\textsuperscript{33}

\textbf{B. Irvine v. California}

After nearly five years on the Court, Clark had not authored an opinion supporting either Frankfurter’s or Murphy’s position. Nevertheless, his votes suggested that he adhered to the Wolf case. In Schwartz v. Texas,\textsuperscript{34} for example, he let Douglas stand alone in his contention that Weeks’ exclusion of the fruits of unreasonable searches and seizures should be extended to the states. And in Rochin v. California,\textsuperscript{35} Clark again failed to respond to Douglas’s call. On the contrary, he joined Rochin’s majority, in its attempt, via another Frankfurter opinion, to develop a corollary to Wolf—the “shock the conscience” test. Confronted with the California authorities’ forcible pumping of Rochin’s stomach for evidence, he endorsed the Court’s

\textsuperscript{30} \textit{Wolf}, 338 U.S. at 29.
\textsuperscript{31} \textit{See id.}
\textsuperscript{32} \textit{Id.} at 44.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} 344 U.S. 199 (1952).
\textsuperscript{35} 342 U.S. 165 (1952).
new doctrine: convictions based upon the fruits of state law enforcement tactics that "shock[ed] the conscience," offended "even hardened sensibilities," and were "too close to the rack and the screw to permit of constitutional differentiation," were void as violations of the Fourteenth Amendment's Due Process Clause.36

Coming two years after Rochin, however, Irvine v. California37 suddenly revealed fundamental disagreements between Clark and Frankfurter concerning the very nature of the Fourth and Fourteenth Amendments. California police, suspecting Irvine of gambling offenses, had secretly, and illegally, entered his home three times, setting up and adjusting electronic surveillance devices through which, while eavesdropping for over a month on Irvine's and his wife's most intimate privacies, they had secured the evidence against him.38

For Frankfurter, these actions were obviously sufficient, under Rochin, to "shock the conscience." Wolf had never held that everything secured by state law enforcement officials, no matter how obtained, was admissible in state courts choosing to accept it. Due process set limits upon what the state could introduce into a prosecution, and in Irvine, California had far exceeded them.39

The Court's secret conference vote revealed, though, that the new Chief Justice, Earl Warren, as well as Justices Reed, Jackson, Clark, and Minton, saw Irvine very differently. Rochin, they asserted, only excluded the fruits of searches and seizures involving police brutality.40

Perhaps Clark, however, Frankfurter speculated, might be persuaded to reconsider. "Dear Tom:" he wrote him, "this is a word addressed to you in particular because of the views which you alone expressed at Conference about the problem in this case."41 "Your position, as I understood it," Frankfurter recalled, "was that you are prepared to overrule Wolf v. Colorado, but if that is not to be done then you would apply Wolf"—thereby affirming Irvine's conviction.42

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36 Id. at 209-10.
38 See id. at 130-31, 145 (discussing the facts of the case).
39 See id. at 142-49 (Frankfurter, J., dissenting).
40 See id. at 133 (distinguishing Irvine from Rochin because it did not "involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping").
41 Memorandum from Justice Frankfurter to Justice Clark 1 (Dec. 29, 1953). This mode of citation will apply to all subsequent references to the Justice Tom C. Clark Supreme Court Papers available in the latter’s personal files at the U.S. Supreme Court Building from 1974-75. Since then, the Clark Supreme Court Papers have been catalogued for scholarly use at the University of Texas School of Law Tarlton Law Library. Please check there initially; the author also has a copy or notes of the referenced items.
42 Id.
But "[w]ill you not agree," Frankfurter entreated, "that Irvine is not precisely Wolf?" Of course, the Wolf case could be stretched so broadly that it would permit any relevant evidence, no matter how obtained, to be introduced at trial. But that, he asserted, was not what Wolf had decided. For Wolf to govern Irvine, Clark "would have to extend Wolf and not merely apply it." Frankfurter's memorandum closed with a statement designed to dramatize what, for him, was the absurdity of Clark's position:

Because I do not want to overrule Wolf does not require me to extend it. A fortiori, it surely is not incumbent upon you, who do not like Wolf, to extend the area of its undesirability, in your eyes, because not enough people will go with you to remove that area altogether. Because one does not like a decision but feels he must respect it, is hardly a reason for enlarging what one does not [like.] I know there are some Catholics who are more Catholic than the Pope. You do not have to be more Wolf-ish than Wolf.

Clark had thus attempted to invoke his "no subsequent dissent" rule during the Court's conference. But Frankfurter was arguing that, no matter how valid such an approach might be in some instances, it was inapplicable to this one because neither Wolf nor Rochin triggered it.

Clark was not persuaded. Indeed, in a circulation only to Justice Jackson, who was then attempting to author a majority opinion, he excoriated Wolf's refusal to extend the exclusionary rule to the states. And Clark had nothing good to say about Frankfurter's version of Rochin either, which he dismissed as so vacuous and subjective as not to meet even the minimum standards for an effective promulgation of the law.

Clark went still further, threatening even to violate his "no subsequent dissent" rule. Frankfurter and Burton, based upon the former's rendition of Rochin, were going to vote to vitiate Irvine's conviction. Black, with Douglas's support, wanted to do so on self-incrimination grounds. Now Clark was warning Jackson that he might well give these Justices their crucial fifth vote by joining Douglas's plea that Wolf's refusal to require exclusion by the states be overturned.

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43 Id.
44 Id.
45 Id. at 2.
In the end, though, Irvine would remain in prison. Jackson, Warren, Reed, and Minton would hold that Rochin did not cover the admittedly flagrant violation of rights to which the Irvines had been subjected. The “shock-the-conscience” test, for them, was restricted to instances in which defendants suffered physical violence or coercion. To “extend” it to any searches and seizures “shocking” to a majority of the Justices at any particular time, they contended, would leave Wolf so indefinite that no state would be able effectively to mold its behavior by it.\(^{47}\)

In a short sole concurrence, Clark explained why he was voting with them—championing two positions that would, within the next several years, become the law at least into the next century—that a Fourth Amendment-based exclusion should be applied to the states and that Rochin should be restricted to cases of official brutality.\(^{48}\)

Parting company with all of his brothers except Douglas, Clark made public for the first time that, had he been a member of the Wolf Court, he would have voted to extend the exclusionary rule to all state jurisdictions. But the majority had not chosen to do so then, and it was holding to that decision in Irvine. Hence, in a clear recourse to his “no subsequent dissent” rule, Clark had to concede that Wolf remained “the law and, as such, [was] entitled to the respect of the Court’s membership.”\(^{49}\)

Therefore, unlike Douglas, and in direct contrast to what he had threatened to do in his memorandum to Jackson, Clark would not use Weeks to reverse Irvine’s conviction. Although he found the police tactics in Irvine to be outrageous, he like everyone else was bound by Wolf. But, he noted prophetically, he invoked it with “great reluctance,” and hoped that strict adherence to its tenor would “produce needed converts for its extinction.”\(^{50}\)

This course had a substantial impact upon the law. Had Clark voted for reversal, Jackson, Warren, Reed, and Minton would have been overpowered by a curious majority. The world outside the Court would have learned that Clark and Douglas were reversing on the ground that Weeks should have been applied; that Black, with Douglas, would do so voting on self-incrimination grounds; and that Frankfurter and Burton were joining the others based upon their particular interpretation of Rochin.

Clark thus avoided such a doctrinal mishmash by means of a concurrence that made it clear to the plethora of jurists, prosecutors,

\(^{47}\) Irvine, 347 U.S. at 129-38.
\(^{48}\) Id. at 138-39.
\(^{49}\) Id. at 138.
\(^{50}\) Id. at 139.
defense attorneys, law enforcement officials, and defendants who looked to the Court for guidance that Wolf still prevailed, but that he, as Douglas, invited its destruction.

Clark’s refusal to embrace Frankfurter’s interpretation of Rochin had similar repercussions. Of course, he maintained, he could join Frankfurter in what Clark saw as a movement to undermine Wolf by implication. He could thus help to “sterilize” it by means of a policy whereby a conviction would be reversed, and a guilty man would go free, whenever five Justices were sufficiently revolted by the police behavior that had secured the evidence against him. “But,” he concluded, such a strategy would make “for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one’s home must be in order to shock itself into the protective arms of the Constitution.”

Such a course of action would not “shape the conduct of local police one whit.” Clark reasoned that “[u]npredictable reversals on dissimilar fact situations [were] not likely to curb the zeal of those [law enforcement officials] who may be intent on racking up a high percentage of successful prosecutions.” Clark had thus invoked what he saw as his second and third precepts to limit Rochin only to instances of physical coercion. By voting with the Jackson faction, he thus provided its crucial fifth vote for the narrow rendition of “shock the conscience.”

Whether the Irvinas appreciated such explicitness and symmetry in the law is highly doubtful. Because of Clark’s recourses to his definition of his role, Irvine would not be getting a new trial, even though every member of the Court believed that his constitutional rights had been massively violated. Irvine marked the end of Clark’s close to five years of silence regarding state searches and seizures. He had emerged as a major player in its resolution. Indeed, he had been its “swing” Justice. Seven years later, he would unleash a “cyclone” which would overturn Wolf v. Colorado’s refusal to extend the exclusionary rule to the states.

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51 Id. at 138.
52 Id.
53 Id.
III. MARSHALING MAPP

A. An Easy Case?

Very few of the Supreme Court's cases could be described as "easy." When Mapp v. Ohio54 arrived, however, it seemed an exception. Dollree Mapp had been convicted of violating an Ohio statute that made the mere knowing possession of "obscene, lewd, or lascivious" materials a felony. Such a law, Miss Mapp's attorney, A. L. Kearns, asserted during his oral argument before the Court, obviously denied her the freedom of expression protected by the First and Fourteenth Amendments. A majority of the justices of the Ohio Supreme Court had already so held.56 The only reason his client's conviction had not been reversed on this ground was because of a provision of the Ohio Constitution that required the votes of six of its seven Justices before a state statute could be declared unconstitutional.57 In Mapp, only four members of the Ohio Supreme Court had voted to strike down this legislation.58

However, Kearns did have some back-up arguments. He contended, for example, that the search through which Ohio secured its key evidence was unconstitutional. Particularly, when the circumstances of its intrusion on Ms. Mapp's privacy were considered, they had to constitute the kind of police overreaching condemned by Rochin.59

Justice Clark wanted to know, in particular, whether Kearns was asking the Court to overturn Wolf v. Colorado.60 Kearns responded that, having carefully gone over Wolf, he had decided that he should rely upon it and Rochin.61 But, obviously, he was primarily basing his case upon the freedom of expression issue. Indeed, the only intimation that Mapp had anything at all to do with a possible overturn-

55 Id. at 643 n.1.
56 See State v. Mapp, 166 N.E.2d 387, 390 (Ohio 1960) ("If such a legislative prohibition of possession of books and papers is valid, it may discourage law abiding people from even looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States.").
57 See id. at 391 ("'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void.'") (quoting OHIO CONST. art. IV, § 2).
58 See id. ("Since more than one of the judges of this court are of the opinion that no portion of the statute upon which defendant's conviction was based is unconstitutional and void, the judgment of the Court of Appeals must be affirmed.").
59 See RICHARD C. CORTNER & CLIFFORD M. LYTLE, MODERN CONSTITUTIONAL LAW: COMMENTARY AND CASE STUDIES 128-30 (1971) (noting that Mapp's attorneys argued that the police's conduct met Rochin's "shock the conscience" standard for exclusion).
60 338 U.S. 25 (1949).
61 See Clark Interview, supra note 15; Stewart Interview, supra note 18.
ing of *Wolf* was contained in a few closing lines of an *amicus* brief and an oral argument submitted by the American and Ohio Civil Liberties Unions. The two groups had "respectfully request[ed] that [the] Court re-examine [Wolf]" and conclude that "the ordered liberty concept guaranteed to persons by the Due Process Clause . . . necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings."62

When the Court addressed the *Mapp* case in conference, Kearns's First Amendment strategy seemed clearly to have prevailed. The vote was nine-to-zero. Ohio, everyone agreed, had blatantly violated Mapp's right of free expression. How could a law survive that made the mere knowing possession of obscene materials a felony? During a term with plenty of controversy and strong emotions, *Mapp* seemed easy. Its opinion for the majority, which within the next few days would be assigned by Warren to Clark, could be expected to be somewhat routine.

### B. From Obscenity to Search and Seizure

Responding to this assignment, Clark took legal pad and pen in hand and began to sketch his opinion. The record showed, he noted, that Ms. Mapp had challenged her conviction on two grounds. First, she maintained, the allegedly obscene materials on her premises had been seized in violation of the Fourth Amendment and, therefore, should have been excluded from her trial. Second, she contended that the statute under which she had been convicted violated the First and Fourteenth Amendments.

On the search and seizure question, Clark observed, "the Court adheres to its rule announced in *Wolf* v. *Colorado* . . . and hence this contention of appellant is denied."63 But her freedom of expression claim was valid, and the case would be decided on that ground.

The next three pages detailed the facts. The Cleveland police had broken into Miss Mapp's home. On the advice of her lawyer, she had demanded to see their alleged warrant. An officer showed her something on paper. She grabbed it from him and placed it in her bosom. "A struggle ensued in which the officers took [it back,] handcuffed Miss Mapp and took her up to her bedroom."64 The second and basement floors were searched—ultimately yielding the materials that Ohio claimed were obscene. No warrant was ever produced at trial, and whether it even existed appeared to be "under question."65

62 CORTNER & LYTLE, supra note 59, at 129.
64 Id. at 3.
65 Id. at 4.
Clark spent several more lines delineating the content of the Ohio statute and the alleged crime for which Ms. Mapp was convicted. He was poised to treat the merits of her First and Fourteenth Amendments claim, but failed to reach them. The draft trailed off. It was never developed further. Perhaps Clark's recitation of the Cleveland police's tactics had been too much for him. Whatever the reason, he had begun to transform *Mapp* into a state search and seizure landmark.66

Clark's second role orientation, as noted previously, gave him the option to overturn a case such as *Wolf* as soon as he could muster, on an opinion so holding, the signatures of four other Justices. Could he, with this in mind, use *Mapp* to extend the Fourth Amendment part of *Weeks* to the states? Douglas would obviously agree. Warren and Brennan were very good possibilities. Frankfurter, of course, would never condone such an action. The chances of Harlan, Whittaker, or Stewart supporting Clark were very small. If, then, there was a critical fifth vote, it belonged to Hugo Black. But Black had never endorsed *Weeks'* extension to the states. Indeed, he had explicitly stated in case after case that the exclusionary rule was not a part of the Fourth Amendment. Black was, as Clark maintained repeatedly in later years, "soft" on the Fourth Amendment.67

66 Author Bernard Schwartz claims that Clark had decided to make *Mapp* into a search and seizure case "just after the conference." SCHWARTZ, supra note 9, at 392-93. He supposedly, at that time, turned to Black and Brennan, as the three of them rode the elevator after leaving the conference room, "and asked, 'wouldn't this be a good case to apply the exclusionary rule and do what *Wolf* didn't do?'" Id. at 393. "Under questioning by the others," according to Schwartz, "Clark confirmed that he was serious and that he had, indeed, shifted his ground to the Douglas position." Id. Schwartz did not identify his account's source or sources, although he did interview all three of the justices who allegedly were involved in this exchange.

This initial draft of a Clark majority opinion found in his files, written in the Justice's own hand, does tend to suggest, however, that several days, if not weeks, later, Clark still may have been planning simply to decide *Mapp* on the obscenity issue.

Did he make such comments to Black and Brennan? In a series of seminars and interviews with the author, he never mentioned them. If he did volunteer them to his colleagues, was he merely attempting to get a feel for Black's and Brennan's possible reactions? Definitive answers remain elusive.

67 See Clark Interview, supra note 15.

Lucas Powe contends that Black's "softness" stemmed from "his Senate investigating years." During that period, he had come to see "the Fourth Amendment as Wall Street's amendment and therefore entitled to no respect." Powe, supra note 9, at 196.

Clark never propounded such a theory to the author. His stated belief was that Black was far too weak on key Fourth Amendment protections because of his experiences as a youth with his father's general store in rural Alabama. Occasionally, items on the shelves might be stolen. Black, according to Clark's speculation, may have thus grown up wanting law enforcement officials to have minimal restraints upon them when they conducted searches of suspects' homes, barns, sheds, automobiles, and other possible hiding places. See Clark Interview, supra note 15.

A prevalent and persuasive reason for Black's reluctance to view the Fourth Amendment as expansively as Clark is based on Black's belief that the term "unreasonable" was so vague as to afford the judiciary far too much discretion interpreting and applying it. Hence,
Yet, he seemed the best chance. So, why not at least attempt to persuade him? The first and second Clark full drafts, ones discarding completely the obscenity issue, would not be sent to the Court’s printer. These typescripts would go only to Black.

C. Overtures to Black

How to convince Black? Clark focused upon this task during the next two and one-half months as his opinion evolved. How could he possibly find a doctrinal basis for extending an exclusionary rule to the states that would appeal to a justice who had repeatedly denied that the Fourth Amendment even contained one?

Clark turned to his clerks. They were to examine all possibly relevant precedents. He wanted any statements that might help him. The result was a large pile of slips of paper. Each treated one or a couple of cases. They tended to fall into three categories. First, there were the seemingly irrelevant ones; they appeared to contain “no helpful language.” Second, there were the potentially useful ones. Third were what seemed to be the injurious ones.

An example from the first batch was the Court’s latest case, Wilson v. Schnettler. The clerk’s memo sketched it and dismissed it in the following fashion: “Irrelevant case. Defendant had sought injunction from District Court against federal officer testifying in state court as to what had been found on defendant. Defendant failed to allege that his arrest by federal officer had been illegal, therefore, motion denied.”

The second group was discouraging. It contained few cases. As the third pile would show, the clerks had had little difficulty finding opinions in which the Court had stated explicitly that Weeks was derived solely from its supervisory powers. But they could not find a single case that held, in no uncertain terms, that its exclusionary rule was a part of the Fourth Amendment. The best they could do was to argue that several cases at least suggested it.

If the Weeks doctrine was intended to be merely a rule of evidence and was not a part of the Constitution, the clerks reasoned, was it not “strange that it was not so described in any of the cases follow-

Black advocated a heavy dose of judicial restraint when a judge was called upon to give life to it. See, e.g., Silverstein, supra note 18, at 213-16 (noting that in the 1940s and 1950s Justice Black consistently voted narrowly to confine the Fourth Amendment under the reasonableness standard).

68 365 U.S. 381 (1961) (holding that an arrest and incidental seizure are lawful if officer has probable cause for the arrest).

ing immediately on [Weeks'] heels?" Indeed, seven significant ones seemed to imply the opposite.71

How slim such reeds were, however, is suggested by the clerks' allusions to three additional cases. The latest ones that they thought might help Clark's position were McNabb v. United States72 and Trupiano v. United States.73

In the former, the Court, by means of a Frankfurter opinion, invoked its supervisory power to "knock out" a conviction because the defendant had not been promptly arraigned, as required by federal statutes, before a committing magistrate. Why was this case "significant"? Because Frankfurter, when discussing the Court's supervisory powers, had not cited Weeks. Instead, he had employed it when developing the proposition "that evidence obtained in violation of constitutional liberties cannot be admitted at trial."74 But was such a distinction really useful? Frankfurter had never wavered in his view that the exclusionary rule rested solely upon the Court's supervisory powers. Everyone knew that.

Clark may well have found the recourse to Trupiano equally disappointing. This complicated case involved, inter alia, whether federal agents had constitutionally seized contraband. The clerks mentioned it because Black, when concurring in a later case, United States v. Rabinowitz,75 had said that Trupiano's "inarticulate premise" was that the exclusionary rule was mandated by the Constitution.76 But was it really useful to Clark that a justice who agreed strongly with Frankfurter that the exclusion of evidence was not required by the Fourth Amendment so alluded to Trupiano in a minority opinion?

The best case the clerks said they could find appeared to be the third, Olmstead v. United States.77 Olmstead had not employed the exclusionary rule, however. Instead, it had found by a five-to-four vote that a wiretapping without a trespass was not an unreasonable

70 See id. (describing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)).
71 See id. at 1-4 (providing brief descriptions of these cases).
72 318 U.S. 332 (1943) (holding that when the confession of an accused was secured by unlawful detention and continuous questioning for five to six hours without aid of counsel, the confession is inadmissible).
73 334 U.S. 699 (1948) (holding that the fact that a valid arrest was made does not necessarily render lawful a search or seizure without a warrant; such search must be required by inherent necessities of the situation at the time of arrest).
74 Note from Clerk to Clark, supra note 69, at 3 (describing McNabb v. United States, 318 U.S. 332 (1943)).
76 Note from Clerk to Clark, supra note 69, at 4 (describing Trupiano v. United States, 334 U.S. 699 (1948)).
77 277 U.S. 438 (1928).
search and seizure. Its majority opinion, the clerks nevertheless proclaimed in caps, contained "EXCELLENT LANGUAGE IN SUPPORT OF [THE] IDEA THAT WEEKS' EXCLUSIONARY RULE IS CONSTITUTIONAL."79

In Olmstead, Chief Justice Taft had stated for the majority that, in Gouled v. United States,80 the Court had held that the admission of unconstitutionally obtained evidence violated the Fourth Amendment. Taft continued:

The striking outcome of the Weeks case . . . was the sweeping declaration that the Fourth Amendment . . . really forbade [the admission of evidence secured in violation of it by government officers. In the] Weeks case . . . this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held . . . that the evidence thereby obtained could not be received.81

But deployed against this useful Taft language were a dozen or so cases, stretching from 1921 to 1960, in which the Court or individual Justices stated explicitly, or implied very strongly, that exclusion was not mandated by the Fourth Amendment.

In United States v. Wallace & Tiernan Co.,82 for example, Justice Black, speaking for a unanimous bench, "clearly . . . described the exclusion rule as one of judicial origin to enforce the Fourth Amendment . . ."83 And, of course, Jackson spoke for a large majority when he took the same stand in Irvine. Perhaps the most potentially damaging statement of all came from a justice writing for the Court in United States v. Jeffers.84 Congress, he argued, had not intended through recent legislation "to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment."85 "THIS LANGUAGE HURTS US," the clerks pointed out, "BECAUSE IT SAYS THE EXCLUSIONARY RULE

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78 See id. at 438 (holding that since "no trespass was committed upon any property of the defendants . . . the obtaining of the evidence and its use at the trial did not violate the Fourth Amendment") (citations omitted).
79 Note from Clerk to Clark, supra note 69, at 3 (describing Olmstead v. United States, 277 U.S. 438 (1928)).
80 255 U.S. 298 (1921).
81 Olmstead, 277 U.S. at 462-63.
82 336 U.S. 793 (1949).
83 Note from Clerk to Clark, supra note 69, at 1 (describing United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949)).
84 342 U.S. 48 (1951).
85 Id. at 54.
IS COURT MADE AND IMPLIES CONGRESS CAN CHANGE IT, AND PARTICULARLY, BECAUSE CLARK, J. SAID IT!86

Perhaps even more serious trouble stemmed from Boyd v. United States.87 Three decades before Weeks, Boyd had held that the Fourth and Fifth Amendments ran “almost into each other.”88 These Amendments, together, it found, were sufficient to bar the federal government from compelling Boyd to produce certain papers.89

How did Boyd pose a problem? Citing both Boyd and Weeks, the Court had ruled in cases like Agnello v. United States,90 that it was “well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through [a] search and seizure made in violation of his rights under the Fourth Amendment.”91

The implications of such language were ominous. It assumed, the clerks related, that the exclusionary rule rested on the Fifth, and not the Fourth, Amendment. Hence, it could be inferred that if evidence were not seized in violation of the Fifth Amendment, as it was not in the Mapp case, it would be admissible. It was inconceivable that the Court would consider the possibility of using Mapp to extend the Fifth Amendment to the states. Moreover, Clark was a particularly strong opponent of the self-incrimination safeguard’s being applied at the state level. Yet, a conclusion that exclusion only attained a constitutional stature when derived from the Fourth and Fifth Amendments did seem “to stem from Boyd’s obliteration of the dividing line between the [two] Amendments.”92

This serious threat made the first draft of Clark’s opinion to leave his chambers especially audacious. He would not attempt to ignore or distinguish Boyd. Nor would he dream of arguing that the Fourth and Fifth Amendments together comprised a doctrinal basis for an extension of the exclusion doctrine to the states. He would try, instead, to employ just enough of Boyd’s language to tempt Black. No Justice superseded Black in championing the view that the Fifth Amendment’s right against compelled self-incrimination had been

86 Note from Clerk to Clark, supra note 69, at 1 (describing United States v. Jeffers, 342 U.S. 48 (1951)).
87 116 U.S. 616 (1886).
88 Id. at 630.
89 See id. at 616 (“When the thing forbidden in the Fifth Amendment, namely, compelling a man to be a witness against himself, is the object of a search and seizure of his private papers, it is an ‘unreasonable search and seizure’ within the Fourth Amendment.”) (quoting from the syllabus).
91 Note from Clerk to Clark, supra note 69, at 1 (describing and quoting Agnello v. United States, 269 U.S. 20, 33-34 (1925)).
92 Id.
“incorporated” within the Fourteenth Amendment’s Due Process Clause. From *Adamson v. California* on, he had never wavered from his stand that this protection applied, in full force, to state criminal justice. But could a somewhat general, yet pregnant, allusion to *Boyd* attain the crucial Black signature?

Approximately three weeks after Warren had assigned him to write *Mapp*, Clark sent his first typescript draft exclusively to Black. It began with the observation that while, at the time of *Wolf* in 1949, “almost two-thirds of the states” opposed the exclusionary rule, fifty-seven percent of those presently passing on it endorsed it. For, Clark argued, experience had resoundingly refuted *Wolf*’s assertion that the Constitution’s right against unreasonable searches and seizures could be adequately protected at the state level through other means.

Only last term, he noted, *Elkins v. United States* had barred from federal courts all evidence secured by state law enforcement

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93 332 U.S. 46, 89 (1947) (Black, J., dissenting).


95 See id. ("The experience of California that such other remedies have been worthless and futile is buttressed by statistics from the City of Chicago where thousands of illegal searches and seizures by police officers occur each year.").


Justice Clark’s decision-making in the *Elkins* case was, to say the least, enigmatic—even to him, when he reconsidered it almost a decade and a half later. See Clark Interview, supra note 15.

In *Elkins*, through a Stewart opinion, the Court struck down the “silver platter” doctrine whereby evidence seized unconstitutionally by state law enforcement officers was admissible in federal prosecutions. See *Elkins*, 364 U.S. at 208. Stewart’s reasoning—upon which Clark would later draw heavily in *Mapp*—seemed to go a long way toward supporting *Wolf*’s overturning. Stewart argued that federal courts encouraged state police to violate the Fourteenth Amendment by permitting the fruits of such violations into evidence. See id. at 221-22. He contended that the exclusionary rule seemed the only effective deterrent to unconstitutional assaults upon privacy. See id. at 217. And he maintained that federal courts could distinguish between the parts of federal search and seizure law that were and were not constitutionally mandated—the very task that would be imposed upon the states if *Weeks’* exclusionary rule were extended to them. See id. at 223-24.

Yet Clark dissented! He joined a Frankfurter opinion that contended that only the “core” of the Fourth Amendment, not its entirety, had been extended to the states by *Wolf*. See id. at 237-38 (Frankfurter, J., dissenting). Like Frankfurter, he saw no evidence of what Stewart had referred to as a “seemingly inexorable” movement on the part of the states toward the adoption of the exclusion approach. See id. at 241-42. He was with Frankfurter in the view that great difficulties would attend attempts by federal judges to determine which parts of federal search and seizure law were constitutionally required. See id. at 243-45. Stewart, he agreed, had not provided valid evidence that either federal or state law enforcement officials were abusing the “silver platter” doctrine. The jury was still out, he agreed with Frankfurter, on whether the exclusionary rule could effectively deter searches and seizures. See id. at 243.

Indeed, he seemed to believe so strongly in the “silver platter” doctrine that he could not join Frankfurter in his suggestion that federal courts should reject evidence obtained unconstitutionally by state police officers in states that *did* have exclusionary rules. He thus joined Justice Harlan in the view that the “silver platter” rule should apply without exceptions, for it had behind it “the strongest judicial credentials, the sanction of long usage, and the support of . . .
officers in violation of the Fourth Amendment. *Elkins* had thus destroyed whatever might have been left out of *Wolf*’s doctrinal basis. The Court could no longer permit “the double standard” whereby state courts would still be permitted to use the fruits of unconstitutional searches and seizures. To do so would only encourage continuing illegalities whereby federal officials would provide their state counterparts with unconstitutionally acquired evidence that they knew was inadmissible within the federal court system. As cases like *Olmstead* and *Elkins* made clear, the perpetuation of such practices was intolerable because it violated one of the administration of justice’s foremost precepts—“the imperative of judicial integrity.”

In support of his contention that the Court could no longer permit violations of citizens’ rights against unreasonable searches and seizures in any American court, Clark made his first allusion to *Boyd*. That case, he contended, without even mentioning the Fifth Amendment:

held that the doctrines of the Fourth Amendment “apply to all invasions on the part of the government and its employees, of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.”

Leaving *Boyd*, Clark then asserted that the Court had concluded in *Weeks* that this “indefeasible right of personal security” could
only be protected through exclusion. "More than a mere rule of evidence," the mandate of the Weeks case had always been clear. Without a "judicial implication" of a rule of exclusion, the Fourth Amendment would be reduced, in Justice Holmes's term, to a mere "form of words."\textsuperscript{100}

It was thus high time, Clark concluded, for the Court to afford the precious Fourth Amendment right of privacy the same level of protection from state overbearing that it provided to other fundamental liberties. No longer could the Court permit it to be "revocable at the whim of every policeman who, in the name of law enforcement itself, chooses to suspend its enjoyment."\textsuperscript{101}

In this fashion, Clark ignored all of the language that cut against him in cases like Wallace & Tiernan Co. and Irvine, not to mention his own statement in Jeffers. And, on the basis of what he related, the Fifth Amendment had not even been a factor in the Boyd case! How would Black respond?

The rapidity of Black's response and Clark's attempt to accommodate it is indicated by the fact that the second, and significantly revised, Clark draft was on its way back to Black just three days later. "Dear Hugo," he wrote in his brief cover letter, "I hope this is better. I have re-arranged and inserted new materials. [Thanks] for the suggestions."\textsuperscript{102}

This version moved Clark's Elkins argument to the front of the opinion. Introducing few new contentions, it simply added considerable detail to those delineated by the first one. Significantly, however, its most provocative changes concerned Boyd. It was now introduced on page three, rather than on page eleven. Once again, Clark did not even mention the Fifth Amendment. But he added a new line. The Boyd case, he contended, had declared that the condemnation of the Fourth Amendment encompassed "the illegal taking of 'private papers to be used as evidence' and it specifically prohibited the use of such [materials] as being 'unconstitutional.'\textsuperscript{103}

This observation was inserted yet again as Clark argued that the "double standard" regarding the admissibility of unconstitutionally seized evidence in federal and state courts could no longer be tolerated. Wolf's failure to extend the exclusionary rule, although it "had been recognized [as part of the prohibitions of the Fourth Amend-

\textsuperscript{100} Id. at 12 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).
\textsuperscript{101} Id. at 15.
\textsuperscript{102} Memorandum from Justice Clark to Justice Black (Apr. 25, 1961) (appended to Mapp Second Opinion Draft, see infra note 103). See supra note 41.
ment since Boyd,” he concluded, “[was] bottomed on factual considerations” that were no longer valid.104

Was Clark testing Black? Was he trying to see whether Black would permit him to invoke Boyd without even mentioning its reliance upon self-incrimination? He had upgraded Boyd’s importance in his opinion. But he had also taken a more explicit step toward retroactively transforming it—in relation to its exclusionary rule issue—into an exclusively search and seizure holding. Would Black tolerate it?

Apparently, he had led Clark to think so. For, three days later, Clark’s chambers took the dramatic step of circulating a Mapp draft “for the Court” to all of the justices. Hence, in that brief period, Black’s signals had been sufficiently positive for Clark to have revised his second typescript and to have had his third version run off by the Court’s printer.

This circulated draft contained a number of significant changes. For the first time, Clark took his law clerks’ advice to employ such statements as Taft’s in Olmstead and Frankfurter’s in McNabb as part of his argument that the rule of exclusion was embedded in the Fourth Amendment.105 He again emphasized the obsolescence of the factual grounds upon which he claimed Wolf had rested. By the time the Mapp decision was pending, a majority of the states had voluntarily opted for the exclusionary rule. But he also added the contention that Frankfurter should not have even considered such factors in his Wolf opinion. They were irrelevant, he argued, to a proper determination of whether the rule of exclusion was inherent in the Fourth Amendment, as it was visited upon the states through the Fourteenth Amendment’s Due Process Clause.

Toward the end of his opinion, Clark reiterated his conviction that it made palpably good sense to bind both the state and federal authorities by the same Fourth and Fourteenth Amendment strictures. Such an approach, he contended yet again, would discourage federal authorities from illicitly forwarding tainted evidence to their state counterparts. But he now tried to buttress this position through the inclusion of a sentence that was to become the most well known of his judicial career: “There is no war between the Constitution and common sense.”106

The circulated draft contained a heavy dose of new language that must have appealed strongly to Justices such as Black and Douglas,

104 Id. at 6.
105 Justice Tom Clark, Mapp Opinion Draft 2-6 (Apr. 28, 1961) [hereinafter Clark’s April 28th Mapp Opinion Draft]. See supra note 41.
106 Id. at 12.
given their belief that the Due Process Clause fully "incorporated" all of the protections of the Bill of Rights. "Since the Fourth Amendment has been incorporated through the Due Process Clause of the Fourteenth," Clark argued, "it is enforceable against the States, in the same manner and to the same extent as it is against the Federal Government."\(^{107}\) Therefore, when the substantive protection of due process was extended to all unreasonable searches and seizures, both state and federal, Clark maintained, "it was logically and constitutionally necessary that the exclusion doctrine—part and parcel of the Fourth Amendment—be also transmitted as an essential ingredient of the right newly recognized by the *Wolf* case."\(^{108}\)

No revisions must have been as salutary for Black, however, as those respecting the *Boyd* case. Once again *Boyd* had been upgraded. It was now in the very first line of Clark's exegesis. For the first time, he prefaced its quote on the "indefeasible right of personal security" with the observation that, seventy-five years previously, *Boyd* had found the Fourth and Fifth Amendments "as running 'almost into each other.'"\(^{109}\)

Perhaps most significant of all, deep within the opinion, Clark proclaimed that the Court had found that the Fourth and Fifth Amendments enjoyed "an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty secured . . . only after years of struggle,'" and that "the philosophy of each [was] complementary to, although not dependent upon, that of the other—no man is to be convicted on unconstitutional evidence."\(^{110}\)

It is doubtful that Black could have expected more. Clark was attempting to mold a relatively routine obscenity case into a search and seizure landmark. The chances must have seemed nil that he could also hold explicitly that the Fifth Amendment applied to state prosecutions. As noted previously, he had always opposed the exten-

\(^{107}\) *Id.* at 10

\(^{108}\) *Id.*

\(^{109}\) *Id.* at 2 (quoting *Boyd*, 116 U.S. at 630).

\(^{110}\) *Id.* at 11 (quoting *Bram v. United States*, 168 U.S. 532, 544 (1896)). Clark asserted in later years that at the time of *Mapp*, Black did not want "to swallow the fourth amendment; he wanted to bring in the fifth." Tom C. Clark, *Some Notes on the Continuing Life of the Fourth Amendment*, 5 AM. J. CRIM. L. 275, 279 (1977). And so, he related, "we sat down and worked in the fourth and had [it] and [the] fifth mentioned together." *Id.* "If you still do not understand it," he quipped before an audience at the University of Texas School of Law in 1977, "I do not either! But we overruled [Woo], and we started things moving the right way." *Id.*

Given Black's "blind spot" on the Fourth Amendment and his "soft" one for the Fifth, Clark had told the author four years before, the *Boyd* language "went in there as a trade-out." Clark Interview, supra note 15.

As this article makes clear, however, the Clark-Black exchanges on *Boyd* involved far more complexities, subtleties, and maneuverings than the two Justices' merely sitting down together and hammering out their compromise!
sion to the states of its self-incrimination safeguard. And even if he had possessed an inclination to extend it, at this point, Mapp's record was barren of any Fifth Amendment claim. Surely at least one, if not several, of the other members of his potential majority would have balked at such an action.

Whether or not Black reacted positively, Clark was now circulating his opinion to all of the Justices. Yet, Black's guarantee of his signature would not come until very late in the process. The Boyd issue would simmer. It would remain in the background as Clark sent successive drafts to his colleagues.

D. From Unanimous to Six-to-Three

Clark's second role precept, as we have seen, only permitted him to overrule a precedent and establish a new one if he could secure the signatures of at least four other Justices. Assuming that he would eventually have Black's, he awaited the returns from the rest of his circulations. They were not long in coming. From Earl Warren came the simple note: "Dear Tom: I agree."111 "That is a mighty fine opinion you have written," read the return from a delighted Douglas, "Please join me in it."112 But the most complimentary response of all came from Brennan. "Of course you know [that] I think this is just magnificent and wonderful," he proclaimed, "I have not joined anything since I came with greater pleasure."113

The rest of the Court was hardly as jubilant. "Dear Tom," Potter Stewart responded, "As I am sure you anticipated, your proposed opinion in this case came as quite a surprise."114 Stewart had to question the wisdom of using Mapp as a vehicle to overrule a very important doctrine so recently established and so consistently adhered to as Wolf. "Without getting into the merits," he pointed out "that the idea of overruling Wolf was urged in the brief and oral argument only by amicus curiae."115 It was not even discussed at the conference, where everyone agreed, as he recollected it, that the judgment should be reversed on First Amendment grounds. "If Wolf is to be considered," Stewart concluded, "I myself would much prefer to do so only in a

113 Memorandum from Justice Brennan to Justice Clark 1 (May 1, 1961). See supra note 41.
114 Memorandum from Justice Stewart to Justice Clark 1 (May 1, 1961). See supra note 41.
115 Id.
case that required it, and only after argument by competent counsel and a full Conference discussion.”

John Harlan expressed the same reservations. But he went beyond them to sketch for Clark why he also considered the circulated opinion incorrect on the merits. Harlan’s letter prompted a rejoinder. And the exchange between the two Justices seemed both to simplify and to sharpen their perspectives.

“Dear Tom:” Harlan began, “I hope you will not mind my writing you candidly as to my concern over your opinion in this case.” He would have supposed that the Court would have had little difficulty in agreeing, as he thought it had, that the Ohio statute contravened the Fourteenth Amendment, in that it “impermissibly [deterred] freedom of belief and expression, if indeed it [was] not tantamount to an effort at ‘thought control.’” With this in mind, Harlan could not understand why Clark had chosen a ground for deciding *Mapp* that was “not only highly debatable and divisive,” but also required the overruling of a decision to which the Court had “many times adhered over the past dozen years.”

Clark’s proposed overturning of *Wolf* was “both unnecessary and inadvisable” for at least three reasons. First, it threatened “a jail delivery of uncertain, but obviously serious, proportions.” Second, it would “prompt much and perhaps confusing, writing among the Brethren.” Third, allegedly derived from the Constitution, it hardly received support from the rule that the Court should try to avoid controversial constitutional issues.

Harlan did not think the time apropos for an extended discussion of the merits of what Clark was holding. But “a few observations” might be in order. At the outset, he seriously questioned the validity of Clark’s reasoning. He was not ready to find that *Weeks* was “constitutionally based.” Even if it were, there was no reason to conclude that the Fourteenth Amendment carried it over to the states. Surely Clark was not “suggest[ing] that the Fourteenth ‘incorporates’ the Fourth as such. *Wolf* itself, let alone the uniform course of the Court’s decisions, have laid that ghost at rest.”

According to Harlan, Clark had been inaccurate when he claimed that *Wolf*’s decision not to extend the exclusionary rule to the states had rested upon “mere ‘factual considerations’ devolving from the

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116 Id.
117 Memorandum from Justice Harlan to Justice Clark 1 (May 1, 1961). See supra note 41.
118 Id.
119 Id.
120 Id. at 2.
121 Id.
122 Id. at 3.
circumstances that most of the States at that time had no ‘exclusionary’ rule.”

“Rather,” Harlan argued, “it most certainly [was premised upon] the fundamentals of federal-state relations in the realm of criminal law enforcement.”

“The upshot of all of this,” Harlan concluded, “is that I earnestly ask you to reconsider the advisability of facing the Court, in a case which otherwise should find a ready and non-controversial solution, with the controversial issues that your proposed opinion tenders.”

“Perhaps you will have gathered from the foregoing,” Harlan quipped, “that I would not be able to join you in your present opinion!”

Maybe Harlan re-read his letter and thought again about the seriousness of the “incorporation” danger. Whatever the reason, he added a penned postscript. “If you don’t mind my saying so,” he admonished his colleague, “your opinion comes perilously close to accepting ‘incorporation’ for the Fourth Amendment, and will doubtless encourage the ‘incorporation’ enthusiasts.”

Clark was apparently impressed, maybe even persuaded, by some of Harlan’s arguments, but not enough to be converted. In less than three days, he forwarded to Harlan a detailed response. “You are quite right,” he conceded, “that the case might go off on the ground that a conviction based upon mere possession of obscene material without a showing as to dissemination would be impermissible.”

But Mapp also raised the Wolf question. Direct reference was made to it by the opinion of the Ohio Supreme Court. Indeed, during the conference discussion “three gave the latter as an alternative ground for reversal.”

Had the search and seizure issue, as Justices Stewart and Harlan contended, not even been discussed at the conference? Perhaps the answer depended upon how one defined “discussed at the conference.”

In an interview with the author two decades later, Stewart maintained that he had “had no inkling” that Clark would focus on the search and seizure issue until he received Clark’s circulated opinion. The threshold issue, if the Court were contemplating switching from the First to the Fourth Amendment, he contended, would have been whether Wolf should have been reargued—a matter no one brought up during the Mapp discussion. See Stewart Interview, supra note 18.

Clark’s conference notes did indicate “that three unidentified Justices [had] said that they were willing to base reversal on [the] ‘4th Amendment point.’” Hutchinson, supra note 9, at 260. Warren’s notes, which contained a one-clause account of each Justice’s position except...
It was also true that *Wolf* had been followed in several cases. But in each case in which a full dress treatment resulted, it was invoked “grudgingly.” Clark advised Harlan to see *Irvine*, “where Bob Jackson indicated that it was not then time to overrule or change it,” and *Elkins*, which “indicated that Wolf had muddied the waters.”\(^{130}\)

Clark was not worried about a “jail delivery.” For defendants to take advantage of the new doctrine, they would have needed to claim at their original trials that the exclusionary rule applied to the states. He imagined that “relatively few before or since Wolf would have raised the point.”\(^{131}\) Anyway, he observed, possibly predicting the argument he would develop for the Court three years later in *Linkletter v. Walker*,\(^{132}\) which held *Mapp* non-retroactive, “their attack would be a collateral one which [would raise] other problems.”\(^{133}\)

Clark conceded that his opinion, as those in all controversial cases, afforded grounds for disagreement. But, he maintained, “I have a court and therefore my theory at least has support.”\(^{134}\) “I think,” he continued, “the trouble stems from Wolf which . . . enunciates a constitutional doctrine which has no escape clause militating against the present inexorable result.”\(^{135}\) According to Clark, “if the right of privacy is really so basic as to be constitutional in rank and if it is really to be enforceable against the states,” then the Court may not “carve out of the bowels of that right the vital part, the stuff that

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\(^{130}\) Clark’s May 4th Memo to Harlan, *supra* note 128, at 1.

\(^{131}\) *Id.*

\(^{132}\) 381 U.S. 618 (1965).

\(^{133}\) Clark’s May 4th Memo to Harlan, *supra* note 128, at 1.

\(^{134}\) *Id.*

\(^{135}\) *Id.*
gives it substance, the exclusion of evidence."\textsuperscript{136} It was long recognized and honored "as an integral part of the equivalent right against federal action."\textsuperscript{137}

"Naturally I think, as I indicated in my concurrence in Irvine," Clark observed, "that the Weeks rule is a constitutional one."\textsuperscript{138} He believed the Court's opinions supported him. Even Wolf stated that the exclusion doctrine was "a constitutional rule formulated by 'judicial implication.'"\textsuperscript{139} Although Elkins did not pass on this question, Clark felt that it too afforded much support for his view.

Clark did agree with Harlan that Wolf rested on the "fundamentals of federal-state relations."\textsuperscript{140} But the problem was that the statistical trend Wolf used to defend the Court's abstention had now reversed. "All I say," Clark responded, "is that since Wolf made privacy a constitutional right enforceable against the states we are obliged to enforce it as we do other basic rights—and that what, if any, pressure the federalism concept brought to bear upon the judgment in Wolf is now dissipated."\textsuperscript{141} "Quite frankly," Clark concluded on this point, "I believe that the present result achieves a necessary measure of symmetry in our... doctrine on both federal and state exercise of those powers incident to their enforcement of the criminal law which deal most directly with individual freedom and pose perhaps its greatest threats."\textsuperscript{142}

"Nor do I believe, John," he added, "that the opinion is a windfall to 'incorporation' enthusiasts."\textsuperscript{143} "If it is," he contended, "then Wolf brought it on."\textsuperscript{144} "However," he reassured Harlan, "I adhere to all that is said in Palko [Palko v. Connecticut]\textsuperscript{145}—a landmark case that repudiated the "incorporation" theory— and will be glad to say so if I am understood presently to be saying otherwise."\textsuperscript{146} "I hope you will restudy the opinion, John," Clark closed, "and find logic and reason in it. If you have any suggestions I shall welcome them."\textsuperscript{147}

Harlan, however, could not possibly embrace such arguments. The two Justices were on a collision course. Mapp's votes and opinions were crystallizing.

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 2.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} 302 U.S. 319 (1937).
\textsuperscript{146} Clark's May 4th Memo to Harlan, supra note 128, at 2.
\textsuperscript{147} Id.
Nevertheless, and possibly as a result of this exchange, Clark had made a number of significant changes in his draft when it was recirculated to the Court several days later. Harlan’s warnings may well have impelled him to tone down substantially statements indicating that Mapp rested upon Black’s “incorporation” theory. Whatever his motivation, his recirculated opinion seemed to go out of its way to part company with an explicit invocation of Black’s doctrine. The original draft had stated, for example, that since the “Fourth Amendment had been incorporated through the Due Process Clause of the Fourteenth,” it was enforceable against the states in the same manner and to the same extent as it was against the Federal Government. The recirculated draft, however, began with a marked change of phrasing: “Since the Fourth Amendment’s right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth . . . .” The outright “incorporation” language in this and other places had been extirpated.

The recirculation at least began a reconsideration of the interplay between the Fourth and Fifth Amendments in a way that Black would welcome. Clark had lengthened his main quotation from the Boyd case. Added to Boyd’s account of how the Fourth and Fifth Amendments protected the individual’s “indefeasible right of personal security” was the statement that “[b]reaking into a house and opening boxes and drawers are circumstances of aggravation,” but that “any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him or forfeit his goods is within the condemnation” of both of these Amendments.

Yet toward the end of his opinion, he added language relating to the Fourth and Fifth Amendments that Black could hardly have been expected to appreciate. In the original draft, Clark argued that they enjoyed an “intimate relation” in their perpetuation of “principles of humanity and civil liberty.” Their common philosophy, which Clark implied strongly was applicable at the state level through his citation of Rochin, was that “no man is to be convicted on unconstitutional evidence.”

The recirculated opinion, however, reflected an awareness that such phrasing might be read as holding that Mapp was extending to the states both the Fourth and Fifth Amendments. The corrective was

148 Clark’s April 28th Mapp Opinion Draft, supra note 105, at 10.
150 Id. at 4 (quoting Boyd, 116 U.S. at 630).
151 Clark’s April 28th Mapp Opinion Draft, supra note 105, at 11.
152 Id.
a series of cumbersome lines attempting to make clear that the Fifth Amendment did not bind the state judiciaries. Whatever protections it provided the citizen, they were enforceable solely against the Federal Government. At the state level, its interplay with the Fourth Amendment was not relevant. Instead, the individual possessed "the freedom from unconscionable invasions of privacy and the freedom from convictions based on coerced confessions."\textsuperscript{155} It was these two protections, therefore, that enjoyed the "intimate relation" that perpetuated "principles of humanity and civil liberty."\textsuperscript{154} And it was apparently these safeguards, and not any stemming from the interaction between the Fourth and Fifth Amendments, that at the state level reflected the philosophy that no man was to be convicted upon unconstitutional evidence. Hence, Clark's attempt to root out anything that sounded like "incorporation" also cut directly against Black's campaign to extend the Fifth Amendment to state prosecutions.

Within a month, the first draft of Harlan's dissent was circulated. It largely developed the arguments that his letter to Clark had pronounced. The Court, he contended, should never have "reached out" to overrule \textit{Wolf}. Such a course was "not likely to promote respect either for the Court's adjudication process or for the stability of its decisions."\textsuperscript{155} Nor, as he had argued previously, was the opinion sound on the merits. Harlan regretted that he found "so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights."\textsuperscript{156} Unfortunately, however, Clark's voice had been one "of power, not of reason."\textsuperscript{157}

With few significant changes, Harlan's dissent would win the support of Frankfurter and Whittaker. Its argument against the Court's "reaching out" to overturn \textit{Wolf} would also be reflected in Potter Stewart's and William Douglas' opinions in radically different ways. Stewart would find it especially congenial. It reflected the very concerns that he had communicated to Clark in his return. He therefore joined it, but refrained from considering the merits of whether the exclusionary rule should be extended to the states. He agreed completely with Harlan that that momentous issue had, in no way, been properly briefed and argued. He parted company with Harlan, Frankfurter, and Whittaker, however, when they sought to rebut Clark's treatment of it. He found it equally inappropriate for

\begin{footnotesize}
\begin{enumerate}
\item Clark's May 4th \textit{Mapp} Opinion Draft, \textit{supra} note 149, at 11.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
him, or them, to consider it. Hence, he had no choice but to continue to treat Mapp as an obscenity case. From that perspective, Ohio's statute was clearly in violation of the First and Fourteenth Amendments. He was thus compelled to vote for reversal. Potter Stewart would, therefore, be the only justice to emerge from Mapp where he entered. He would be the only one of the original nine to rest his decision upon Ms. Mapp's freedom of expression.158

Through his concurrence, Douglas, on the other hand, defended Clark against Harlan's "reaching out" argument. Mapp was an appropriate case with which to overturn Wolf, he argued, because it showed, as few others, "the casual arrogance of those who have the untrammelled power to invade one's home and seize one's person."159 Moreover, it met all the technical requirements for such a holding. The grounds for and against Wolf's overruling had been propounded ever since it had been decided. They were no strangers to any of the justices.160

Clark's opinion would go through two more circulations during the first week of June. They would, however, entail relatively minor changes. Clark's rebuttal to Harlan's "reaching out" charge would be similar to Douglas's. He would emphasize the many defendants since 1949 who had called for Wolf's overturning. He would add an explicit—and possibly fateful—statement that the main purpose of exclusion was the deterrence of illegal police actions.161 Anticipating what would be an onslaught of "law and order" criticism, he would argue that the application of Weeks' standards to state law enforcement officers would not inhibit their effectiveness.162 But, for all intents and purposes, the Mapp ruling had crystallized before Harlan's, Stewart's, and Douglas's circulations.

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158 See Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Stewart, J., memorandum) (statutory provision was "not consistent with the right of free thought and expression").
159 Id. at 671 (Douglas, J., concurring).
160 See id. at 671 (Douglas, J., concurring) ("The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here.") (quoting Elkins v. United States, 364 U.S. 206, 216 (1960)).
161 See id. at 658 ("If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated."). This assertion easily supported the opening of the Court's doors to holdings embracing deterrence as the purpose of the exclusionary rule. See, e.g., United States v. Leon, 468 U.S. 897, 906 (1984) (noting that the purpose of the exclusionary rule is not served in some cases where officers rely on an invalid search warrant); Stone v. Powell, 428 U.S. 465, 493 (1976) (deciding that the effect of the exclusionary rule would not be diminished if search and seizure claims could not be raised for federal habeas corpus review); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (noting that the deterrent purpose of the exclusionary rule would not be advanced by applying it retroactively).
As the smoke began to clear, Clark had come a very long way toward marshalling a largely routine obscenity case into a search and seizure landmark. In the process, the Court's unanimity had been shattered. The Justices seemed on their way to a six-to-three decision. But where exactly was Black? Would he, in fact, sign the opinion? If he refused, Clark's entire holding might well explode. His second role orientation would not permit him to overturn Wolf unless he could induce four of his brethren to join him, through their signing of his opinion.

E. Understandings

Black may well have been biding his time. He had sent Clark neither a return nor a draft during over a month of the Court's Mapp exchanges. Now, as the Justices were on the brink of their summer recess, and as Clark's opinion appeared to be reaching a final form, he responded. Clark was invited to examine in advance a typescript of a possible Black concurrence. What he read must have shocked him. "'[A]s I understand the Court's opinion in this case," Black had written, we "now definitely hold that the Fifth Amendment's protection against enforced self-incrimination and the Fourth Amendment's protections against unreasonable searches and seizures have been extended to the states through the Fourteenth Amendment.'"\footnote{Memorandum from Justice Clark to Justice Black 1 (June 6, 1961) [hereinafter Clark's June 6th Memo to Black] (quoting from Justice Hugo Black's draft opinion). See supra note 41.}

How to respond to such a contention? Somehow Clark had to tell Black that he was very wrong while, at the same time, striving to induce him to sign Clark's majority opinion. "As you know," he delicately began his reply, "I certainly would not wish you to change any statement of your understanding of the Court's opinion."\footnote{Id.} "In all fairness, however," Clark had to inform him that it was not his opinion's intention impliedly to overrule Twining v. New Jersey,\footnote{211 U.S. 78 (1908).} the main case holding that the Fifth Amendment's safeguard against self-incrimination did not apply to the states. It was unnecessary to consider Twining when deciding Mapp. Clark declared again that he was "personally satisfied that the Fourth Amendment, standing alone, [was] sufficient authority for a constitutional rule of exclusion."\footnote{Clark's June 6th Memo to Black, supra note 163, at 1.} His opinion had only drawn upon the Fifth Amendment "for analogous support of that conclusion."\footnote{Id.} There seemed no reason in law to distinguish between "coerced real evidence and coerced verbal evi-
when both were secured prior to trial by methods that offended the Constitution. "Testimonial compulsion at trial [was] not involved in this case," however, and consequently, Clark had neither cited nor considered *Twining*.

As noted previously, Clark's third role orientation required him to formulate new doctrines as clearly as possible. He was to root out any ambiguities that might be expected to reduce their clarity. Nevertheless, his memorandum, while stating explicitly that *Mapp* was not extending the Fifth Amendment to the states, also emphasized that he did not wish Black to change any statement of his understanding of the opinion.

Clark was thus posing a bargain. He would not use his opinion in *Mapp* to rebut Black's Fifth Amendment contention if Black would sign on. Clark's second role orientation was dramatically taking precedence over his third. Marshalling a majority for his holding superseded the imperative of doctrinal purity. He was willing, at least for this particular case, to paper over Black's and his differences concerning whether *Mapp* was "incorporating" the Fifth Amendment.

Black, too, was disposed to make concessions. But he was also determined to use his leverage as the crucial fifth signature to induce Clark to take a clear-cut "incorporation" position on at least the Fourth Amendment. His memo of slightly over a week later conceded that the facts in *Twining* and *Mapp* were so different "that they could be distinguished on this basis." In a step that must have given Clark enormous satisfaction, Black was dropping his *Twining* contention.

Black, however, would not compromise the "incorporation" issue. As we have seen, Clark had deliberately toned down a number of initial passages in his opinion stating that the Fourth Amendment had been "incorporated" within the Fourteenth Amendment's Due Process Clause. Indeed, he had substituted for one of them the far more ambiguous declaration that the Fourth Amendment's "right to

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168 Id.
169 Id.
170 In future cases, Clark and Black were to continue their battle over whether *Mapp* extended the Fifth Amendment's prohibition against compelled self-incrimination to the states. See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 8-9, 21 (1964) (stating, in opinion joined by Black, that the Fifth Amendment is incorporated into the Fourth Amendment; while dissent, joined by Clark, states that it is not); *Dorin*, supra note 1, at 69 n.21 (describing the *Malloy v. Hogan* dissent stating that *Mapp* did not hold that the Fifth Amendment was part of the basis to extend the exclusionary rule to the states).
171 Memorandum from Justice Black to Justice Clark 1 (June 15, 1961) [hereinafter Black's June 15th Memo to Clark]. See supra note 41.
privacy” had been found to be “enforceable against the States through the Due Process Clause.”\textsuperscript{172}

This set of changes, however, had greatly disturbed Black. He therefore thought it made it necessary for him to say that his agreement to Clark’s opinion depended upon his understanding that Clark read \textit{Wolf} as having held—and that the Court was so holding in \textit{Mapp}—“that the Fourth Amendment \textit{as a whole} is applicable to the States and not some imaginary and unknown fragment designated as the ‘right of privacy.’”\textsuperscript{173}

“This understanding,” Black continued, “is one of the reasons I am willing to decide in this state case the question of the scope of the Fourth Amendment as applied to the Federal Government.”\textsuperscript{174} “If I am wrong on this,” he noted ominously, “I am unwilling to agree to decide this crucial question in this case and prefer to wait for a case that directly and immediately involves application of the Fourth Amendment to the Federal Government.”\textsuperscript{175}

Black wanted to be understood clearly on this score. “In other words,” he emphasized, he was “agreeing to decide this question in this case and [consenting to Clark’s holding] as the opinion of the Court” solely on the basis of Black’s understanding “that hereafter the Fourth Amendment, when applied either to the state or federal governments, is to be given equal scope and coverage in both instances.”\textsuperscript{176} “If this is not correct,” Black concluded, “I think the case should be set down for reargument as the dissenters suggest.”\textsuperscript{177}

For Clark, the worst possible development might well have become a reality. He was, at the very last moment, possibly losing Black. If he did lose him, the whole basis for his overruling of \textit{Wolf} disintegrated. Black was demanding an airtight commitment to the “incorporation” of the Fourth Amendment. He was sending the message that there was no other way, doctrinally, for him to join Clark’s opinion. But Clark had assured Harlan, in the most explicit language, that his \textit{Mapp} holding did \textit{not} rest upon “incorporation.” Indeed, he had even offered to insert a citation from \textit{Palko v. Connecticut},\textsuperscript{178} the Court’s most anti-“incorporation” precedent, if there were any doubts about it.

Harlan was now the leader of the dissenters, however, and Black’s was the crucial fifth signature for Clark’s proposed \textit{Mapp}

\textsuperscript{172} Clark’s May 4th \textit{Mapp} Opinion Draft, \textit{supra} note 149, at 12.
\textsuperscript{173} Black’s June 15th Memo to Clark, \textit{supra} note 171, at 1.
\textsuperscript{174} \textit{Id}.
\textsuperscript{175} \textit{Id}.
\textsuperscript{176} \textit{Id}.
\textsuperscript{177} \textit{Id}.
\textsuperscript{178} 302 U.S. 319 (1937).
opinion. Perhaps Clark had changed in his conception of the case in the weeks since he had written Harlan. Or maybe he had forgotten what he had assured him. Then again, he might have been confused in his own mind about,179 or did not even care,180 whether Mapp

179 Such confusion may have lingered to trigger a bizarre episode in late June 1964 involving a Clark dissent, joined by Black and Stewart, in Aguilar v. Texas, 378 U.S. 108 (1964).

180 Two terms after Mapp, Clark was still drafting opinions failing to resolve whether the Fourteenth Amendment’s Due Process Clause “incorporated” the Fourth Amendment. His April 9, 1963 circulation in Ker v. California, 374 U.S. 25 (1963), for example, was sufficiently free of “incorporation” language as to inspire the following Harlan return: “Dear Tom: I agree with your opinion, and think you have handled the Mapp problem with great artistry.” Memorandum from Justice Harlan to Justice Clark 1 (Apr. 26, 1963). See supra note 41.

A former Clark clerk during the term in which Mapp had been decided was appalled when he read the slip opinion conveying Clark’s dissenting commentary in Aguilar. It said, citing Wolf v. Colorado, 338 U.S. 25, 28, 39-40 (1949), and Harlan’s dissent in Mapp v. Ohio, 367 U.S. 643, 678 (1961), that by 1958, the Court had “consistently held that the exclusionary rule was not a Fourth Amendment requirement but one of evidence” under its “supervisory powers.” For, Clark continued, it was not until Mapp in 1961 that the federal rule was held to be a constitutional mandate and was, accordingly applied to the States. See Telephone Call from Former Clerk to Justice Tom Clark’s Law Clerks 1 (June 18, 1964).

Why was the former clerk shocked by these assertions? First, he noted, via a transcribed June 19, 1964 telephone call to the Justice’s present clerks, that they “directly contradicted” the entire doctrinal exegesis of Part I of Clark’s Mapp opinion—the gist of which was that the exclusionary rule was regarded by the Court as a part of the Fourth Amendment as early as Boyd in 1886, and most surely, as late as Weeks in 1914! See id. at 1. See also Mapp, 367 U.S. at 648-50.

Of the three page citations used to support these two sentences, he continued, “the first was used in Mapp for the opposite proposition, . . . [the] second was only Mr. Justice Black’s view in Wolf, which [Justice Clark] ignored” in Mapp, and Justice Black abandoned in that case. And the third was Justice Harlan’s attack on Part I of Clark’s Mapp holding! See Telephone Call from Former Clerk to Justice Tom Clark’s Law Clerks 1 (June 18, 1964).

The only “solution” to this “potential source of trouble,” for the former clerk, therefore, was for Clark to delete both contentions. See id at 2 (“Instead of changing language I would delete both sentences.”). But would Clark’s fellow dissenters, Black and Stewart, agree to that? And Aguilar had already “come down”—it had been officially promulgated. Was not the Court’s resolution of it now res judicata?

Apparently not for Clark! At least the slip opinion could be headed off at the pass—or press—before publication in the United States Reports! “For the sake of clarity and to avoid any ambiguity,” he wrote the Reporter of Decisions, “I would like to have you eliminate a few lines.” Memorandum from Justice Clark to the Reporter of Decisions 1 (June 20, 1964). See supra note 41.

On page 118 of Aguilar v. Texas are these seriatim sentences: “The dissent in the case, in commenting on the Court’s holding that the complaint was invalid, said: ‘The Court does not strike down this complaint directly on the Fourth Amendment, but merely on an extension of Rule 4,'” and “Since Giordenello [Giordenello v. United States, 257 U.S. 480 (1988)] was a federal case, decided under our supervisory powers (Rules 3 and 4 of the Federal Rules of Criminal Procedure), it does not control here.” Aguilar, 378 U.S. at 118. The duo that Clark, with his former clerk’s assistance, had eliminated had been sandwiched between them.
rested upon "incorporation." Or he might have simply been willing to
tell Harlan and Black whatever they wanted to hear. Whatever
Clark's motivations, he did not re-insert the explicit "incorporation"
phrasing that had been in his draft—the one directly before the letter
from Harlan. His final opinion would continue to state that "the
Fourth Amendment's right of privacy [had] been declared enforceable
against the States."

But he did author a note to Black that con-
veyed the direct antithesis of his earlier communication to Harlan.
"Dear Hugo," he replied the same day as Black's ultimatum, and only
four days before Mapp would be handed down, "the gist of the opin-
ion is that Wolf held the entire Fourth Amendment to be carried over
against the states through the Fourteenth." Therefore, he assured
his colleague, "the exclusionary rule which Weeks applied to federal
cases must likewise be made applicable to state prosecutions."

Clark's and Black's last-minute understandings made it possible
for each to continue to use Mapp for his own purposes. Clark gained
the decisive fifth signature for the exclusionary rule's extension to the
states—an objective that he later said he had sought from the moment
he had taken his seat on the Court in 1949.
Clark’s, Warren’s, Douglas’s, and Brennan’s silence permitted Black to claim that *Mapp* was endorsing his long-held view that the Fifth Amendment was “incorporated” within the Fourteenth Amendment’s Due Process Clause. “I am still not persuaded that the Fourth Amendment, standing alone,” he stated in his published concurrence, “would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands.”  

Reflection upon this problem since *Wolf*, however, had convinced him that when “the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.” Hence, he was joining the majority in its *Mapp* holding. “As I understand the Court’s opinion in this case,” he concluded, not revealing the views Clark, in his recent letter, had related to him, “we . . . set aside this state conviction in reliance upon the precise, intelligible, and . . . predictable constitutional doctrine enunciated in the *Boyd* case.”

Clark’s majority opinion began with his graphic account of the Cleveland police’s blatant violations of Ms. Mapp’s right to privacy—a more detailed articulation of the facts that he had been relating a month and one-half before, when he may well have made the decision actually to address Mapp’s search and seizure. Then came his somewhat ambiguous page-long allusion to *Boyd*, which gave Black his foothold.

This phase largely behind him, he marshaled his quotations from cases such as *Weeks*, *Silverthorne*, *Olmstead*, and *McNabb* to argue that the exclusionary rule was inherently a part of the Fourth Amendment. It was time to tackle the “factual considerations” that he claimed underpinned *Wolf*’s failure to apply *Weeks* to the states. Although they were “not basically relevant” to the issue of whether a

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*supra* note 41. “But my early experience [with it] did have some influence, I am sure. My firm belief in the right of privacy, brought home to me during [this] early [episode,] played a definite part in shaping my convictions.” *Id.* The student, Linda Skirvin, was taking a Cornell University civil rights and liberties course taught by political scientist, David J. Danelski.

This account, of course, seems to clash dramatically with Clark’s performance, just one year before the *Mapp* case, in the “silver platter” landmark of *Elkins v. United States*, 364 U.S. 206 (1960). Yet, he apparently thought that this stark contradiction required no public explanation!

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185 *Mapp*, 367 U.S. at 661.
186 *Id.* at 661-62.
187 *Id.* at 666.
188 See *id.* at 644-45.
189 See *id.* at 646-47.
search and seizure rule of exclusion was within the Due Process Clause, he did his best, relying heavily upon Elkins, to refute them. A majority of the states now supported an exclusionary rule. Large areas of confusion in federal search and seizure law that had made Frankfurter reluctant to extend it to the states in 1949 had now been eliminated.190

Since the Fourth Amendment’s “right of privacy [was] enforceable against the States through the Due Process Clause,” Clark argued, while not reinstating his initial “incorporation” language, it was “enforceable against them by the same sanction of exclusion as is used against the Federal Government.”191 Only through such a rule could law enforcement officers be effectively deterred from making unreasonable searches and seizures.

This policy, he continued, would make “very good sense.”192 For one thing, he argued with a heavy reliance on Elkins, it would eliminate temptations on the part of the federal authorities illicitly to make tainted evidence available to their state counterparts. Moreover, Weeks’ extension to the states could not be expected to result in a diminution of police effectiveness. The federal judiciary, the Court had observed in Elkins, had operated under Weeks for almost half a century. It had not been suggested that either the Federal Bureau of Investigation, specifically, had been rendered ineffective, or that the administration of justice in federal courts, generally, had been disrupted.193

Clark again drove home his point that it was time for the Fourth Amendment to no longer be treated as the Bill of Rights’ stepsister. His closing lines may have been revised to counter Harlan’s accusation that, by “seizing the time,” his Court had spoken only with a voice of raw power. “Our decision,” he proclaimed, “founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him.” It gives to the police officer, he added, “no less than that to which honest law enforcement is entitled.” And, to the courts, he closed, it bestowed “that judicial integrity so necessary in the true administration of justice.”196

It had been critical to Clark to attain the precious words, “MR. JUSTICE CLARK delivered the opinion of the Court,” at the top of what he had transformed into his landmark search and seizure opin-

190 See id. at 647-50.
191 Id. at 655.
192 Id. at 657.
193 See id. at 659-60.
194 Id. at 660.
195 Id.
196 Id.
ion. For his second role orientation would not have permitted any such holding to be prefaced by the phrase, "MR. JUSTICE CLARK announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, AND MR. JUSTICE BRENNAN join."  

CONCLUSION

Justice Clark’s contributions to the Court’s decision-making in Mapp were, to a significant extent, ad hoc, disjointed, ragged—similar to the cyclone he described in relation to Gideon. Mapp’s development was thus less smooth and neat than has been suggested by such accounts as those by Bernard Schwartz and Dennis Hutchinson.

In his important lead-up to Mapp, Clark’s participation in Irvine, he changed directions radically before he bound himself by the majority’s interpretations of two cases that were far from his favorites, Wolf and Rochin. But when he finally sensed his chance to overrule Wolf in Mapp, he scarcely hesitated in transforming the Mapp case from a conventional piece of obscenity litigation into a landmark in search and seizure.

Then his remarkable run with Boyd! It started with his clerks telling him that Boyd’s emphasis on both the Fourth and Fifth Amendments was troublesome. Clark, nevertheless, took this potential pitfall and skillfully molded it into the bridge to Black’s crucial fifth signature. Boyd was sent through one avatar after another, as Clark sought to win Black’s support via the smallest possible concession on the self-incrimination issue. In so doing, he applied, at the vortex of his opinion, a case that such contemporary students of the Fourth Amendment as Akhil Reed Amar regard as one of the Court’s most important—and controversial—doctrinal passages.

197 The agreement between Clark and Black had been so fragile that, two decades later, Justice Potter Stewart had thought that the case actually had come down as “MR. JUSTICE CLARK announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, AND MR. JUSTICE BRENNAN join.” He recalled that it was obvious to everyone at the Court at the time that Black and the other four were, in no way, sharing a common ground on the self-incrimination issue. He was thus amazed, when informed otherwise, that Clark had still been able to persuade a purist like Black actually to sign his opinion. See Stewart Interview, supra note 18.

198 See SCHWARTZ, supra note 9, at 393-98 (discussing the development of Mapp from Clark’s original draft of Apr. 22, 1961).

199 See Hutchinson, supra note 9, at 198-202 (discussing the development of Mapp from oral argument on Mar. 29, 1961).

Then the seemingly epic battle between Black and Douglas, on the one side, and Frankfurter and Harlan, on the other, over "incorporation." In case after case, they fought on. Law professors from both camps clashed in countless tomes and articles. Yet Clark seemed not to care so very much. Harlan wanted some "absorption" language? Clark would try to oblige. Black demanded more along the "incorporation" line? Clark would see what he could do. Neither of these theories had unquestioned credentials. He thus intimated one when it seemed to help him. He would imply the direct opposite with the other when that appeared like a good idea. Stewart found the Clark opinion in Mapp to be far too "result-oriented." With four other signatures on his opinion, he seemed willing to establish almost anything. Clark thought that sometimes Stewart was out of bounds; he overruled too many cases sub silentio.

What was judicial duty and what was improper activism depended upon each justice's role conceptions. All of them constantly had to play off of each other's approaches. For Clark, in particular, the decisive influence upon how he untangled an Irvine or a Mapp seemed to be the interplay of his three role precepts. Time and time again, when his initial positions in cases seemed especially fluid, his juggling of their imperatives seemed to crystallize his decision.

From all of this, when Clark sensed that the time was right, he "reached out" to decide Mapp v Ohio. He would not seek full argumentation. He would not wait for a selection of cases, as in Brown v. Board of Education before Mapp, or in Miranda v. Arizona after it. Windows of opportunity usually shut quickly. In 1961, therefore, there would be no compilation of both "home" and "street" cases. Frankfurter, Harlan, Whittaker, and Stewart protested, but Clark went ahead anyway—most properly acting, as he saw it, in accordance with his second role principle.

The result was a landmark proclamation that even incontestably reliable evidence should be, in the great majority of state prosecutions, barred from trial if it had resulted from an unreasonable search or seizure. And this "cyclone" seemed destined to play itself out—in seemingly endless contexts—the product of the development of phrasings and intimations, through give-and-takes relating to draft after draft of opinions, that constituted the great part of Tom Clark's judicial life.

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201 See Stewart Interview, supra note 18.
202 See Clark Interview, supra note 15.
203 344 U.S. 1 (1952).