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The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties, 1937-1971

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THE LONGITUDINAL BEHAVIOR OF HUGO LAFAYETTE BLACK: PARABOLIC SUPPORT FOR CIVIL LIBERTIES, 1937-1971

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I.

The comparative art owes much of its vitality to man's penchant for grouping things, objects and people. As soon as one individual is paired with another, we notice similarities and differences—qualities of each individual which might have gone unnoted had each person been left in the single state. So it is with courts of law. A single judge sitting in a lower court may, when elevated to a higher collegial court, reveal or call to our attention by contrast, traits unnoticed in his earlier career. In general we may say that the judge in a multiple judge court is under greater scrutiny than his counterpart in a single judge court.

One consequence of viewing the work of the collegial court judge through a more high-powered microscope is the reinforcement of those procedural and other values which his profession holds dear. In the American judicial system the most damaging charge that can be levied against a judge, perhaps, is that he decides cases arbitrarily—by whim, as it were. The socialization of judges in the system influences them to avoid such a criticism in order to maintain their status in the legal profession as serious and careful craftsmen. The necessity of such avoidance behavior, however, would seem to depend on tenure and the quantity of decisions made by a judge, for arbitrary behavior in a single case is difficult to establish. The difficulty is squared in the single judge court. As we move to the collegial court, long years of service coupled with large numbers of decisions make the concealment of arbitrary patterns difficult. Case comparison permits us to establish consistencies and inconsistencies in logic, theory and results from which firm inferences about the way the judge pursues his role can be drawn.

Other things being equal, the collegial court judge may be ex-

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pected to develop, or try to develop, a consistent point of view and consistent behavior patterns. As Shapiro has pointed out in regard to statutory construction:[1]

> Typically cases under a given statute tend to keep coming to appellate courts because two alternative interpretations continue to be held by different judges or litigants. But once a single appellate judge has determined that interpretation *X* is correct, he is likely to consistently interpret the statute as meaning *X* even though other legal authorities believe it to mean *Y*.

Shapiro believes this to be a function of the judge's belief about the meaning of the statute coupled with the fact that the belief, once structured, does not change. But it is equally compatible with the proposition that consistency of stated interpretation is a value which shields the judge from charges damaging to his professional status and that consistency is pursued for this reason. Thus, the interpretations which the judge presents to his publics may be stable across cases involving the same statute—even though his belief about the statute has undergone some metamorphosis. One can offer such a suggestion without asserting that consistency dominates all competing considerations. It is submitted, however, that judges are motivated to hold variations in stated interpretation to a minimum.

Two major characteristics of the United States Supreme Court are the large number of decisions made each term and the lengthy tenure of the typical Justice. Of course, not all Justices match the thirty years served by Oliver Wendell Holmes, or the thirty-four years served by John Marshall, the first John Harlan and Hugo Black. But lengthy service is not unusual and less than ten years on that high bench for any Justice is a rare occurrence. Thus conditions of longevity, quantity of decisions and collegial structure impinge upon the ability of the typical Justice to pursue erratic or discontinuous behavior. Moreover, there are thousands of lawyers and judges who value consistency, follow the work of the Court closely and have ready access to the decisions and opinions of each Justice.

> Since bench and bar constitute the Court's principal public, even the rare justice who may not share his profession's values is under extraordinary pressure to work out early in his tenure on the Court a point of view to which he can adhere with a minimum of subsequent modification.[2]

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1. Shapiro, *Political Jurisprudence,* 52 Ky. L.J. 294, 334 (1964).
2. Tanenhaus, *The Application of Social Science Methods to the Study of the*

II.

The challenge for the individual Justice is to develop a philosophic orientation that will be sufficiently general yet sufficiently directing to enable him to decide all cases coming before him with minimum stress and, hopefully, with some positive feelings of accomplishment or reinforcement of previously internalized values. The extent to which this is satisfactorily achieved may be expected to vary among Justices. Felix Frankfurter, for example, is associated in some minds with a particular perspective from which, allegedly, he rarely departed, though he sometimes implied he had the ability to do so.[3]

The early resignation of Charles Whittaker, on the other hand, was rumored to be a consequence of the philosophical demands made upon him. William O. Douglas seems to have solved such demands with aplomb. Certainly a Justice who can describe the issue of the *Segregation Cases*,[4] when discussing the matter in conference on December 13, 1952, as a "simple" constitutional question is not a Justice who is plagued by philosophical doubt.[5] A more interesting case is that of Hugo Black, who appears to have been a disappointment to those who like to pigeonhole Justices.

At Black's appointment, it was asserted that he "will carry to the Supreme Court . . . all the liberalism which one man can carry."[6] Senator George W. Norris wrote that "[h]e is a worthy representative of the common people. He understands their hopes

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Judicial Process, in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 530, 535 (G. Schubert ed. 1964).

3. Letter From Felix Frankfurter to Hugo Black, April 5, 1941:

> You may be right, and it may be impossible for me to reconsider a legal question simply because I have already voted on it, even though it is a question concerning which I really have no feeling, let alone deep feeling, nor even past intellectual attachments. However that may be, I know I can assure you that I have reread the Vallescura case not once but twice since I reread it on the bench, and have read it not casually but carefully. I can also assure you that I have read your dissent not once but twice, not casually but very carefully.
>
> For the present I need say no more than that having so read your opinion twice I want still further to think about it all.

4. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

5. Harold H. Burton Papers, Library of Congress. The reader is alerted to the fact that the manuscript sources used in this paper have been cross-validated or otherwise verified in only a few instances. However, the Burton Papers have been found reliable in every instance of cross-checking against other manuscript collections. Nothing used herein is incompatible with knowledge of Black obtained elsewhere. The original draft of this paper was read by Justice Black, and those items to which he raised particular objections concerning accuracy have been deleted.

6. J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS 100 (1949).

and ambitions, and their liberties in his hands will be safe."[7] Later, when Black's past Klan membership became known, Norris said: "Justice Black is being subjected to all this criticism because he is a liberal . . . ."[8]

In subsequent years, Black and Douglas were consistently characterized as the leaders of the liberal activists on the Court who, eventually, were responsible for liberalizing the law in regard to freedom of speech, segregation, political equality, police power and freedom of religion. The popular view over most of Black's career is encapsulated quite well in Mendelson's remark that "for Mr. Justice Black law is largely an instrument in the service of his ideals."[9]

In the 1964 term, many of those who thought they had an adequate understanding of Hugo Black's liberal philosophy and his workways on the Court appear to have been brought up short by his thirty dissents—a large number of which found him in the company of such alleged conservatives as Justices Harlan, Stewart, White and Clark. Illustrative here are the cases of *Hamm v. City of Rock Hill*[10] (dissenting with Harlan, Stewart and White, JJ.), *Cox v. Louisiana*[11] (dissenting with White, Harlan and Clark, JJ.) and *Griswold v. Connecticut*[12] (dissenting with Stewart, J.). In *Hamm*, Black vigorously disagreed with the holding of a five-man majority that the 1964 Civil Rights Act abated convictions and pending prosecutions for sit-ins that occurred prior to the passage of the Act. Congress, in his view, never intended such a result.[13] But of added interest was his indication that those who are denied a service in violation of the statute do not, as a consequence, have the right to "take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay."[14] For Black, the 1964 Civil Rights Act was intended to take such conflict out of the streets and restaurants and into the courts where orderly procedure could prevail.

In *Cox*, Black dissented from a five-to-four holding which reversed a conviction under a statute making it unlawful to parade near a courthouse with the intent of influencing a judge or jury. While the Court's ruling turned on the instructions of local officials to the

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7. *Id.*
8. *Id.* at 103.
9. W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 121 (1961).
10. 379 U.S. 306, 318 (1964).
11. 379 U.S. 559, 575 (1965).
12. 381 U.S. 479, 507 (1965).
13. 379 U.S. at 321–22.
14. *Id.* at 318.

pickets,[15] Black emphasized the importance of protecting the judicial process from intimidating mobs.[16]

One of Black's most factional dissents occurred in *Griswold.* Here the majority found Connecticut's prohibition on the aiding and abetting of married couples' use of contraceptives unconstitutional in that it violated the right to marital privacy. That this statute presented unusual difficulties for those who sought a constitutional peg for condemning it is evident from the references in the Court's opinion to six different constitutional amendments, as well as from the fact that the case produced six different opinions. In the final analysis, however, the violation was made to turn on none of the six amendments specifically but on a "penumbra" formed by "emanations" from those specific guarantees.

Black's dissent, while finding the law personally offensive, held that government has a right to invade privacy unless prohibited by a specific provision of the Constitution. He was not able to find one.[17] Equally striking was a heated condemnation of judicial activism, in which he went so far as to quote Learned Hand's dictum about Platonic Guardians.[18]

After viewing Black's voting conduct during the period of these cases, one commentator suggested that Black behaved as a political conservative, particularly in right to privacy cases—an area in which he thought Black was probably the Court's most conservative member.[19] Other scholars and newspaper students of the Court penned comments suggesting that Black had split with his old colleague, Douglas, and shifted to a conservative or moderate viewpoint on a number of issues concerning civil liberty.[20]

III.

On the basis of traditional methods of analysis, I should demur

15. 379 U.S. at 571.

16. *Id.* at 583.

17. 381 U.S. at 510.

18. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." 381 U.S. at 526-27, quoting from L. HAND, THE BILL OF RIGHTS 73 (1962).

19. G. SCHUBERT, THE CONSTITUTIONAL POLITY 118–29 (1970).

20. Frank, *Justice Black and the New Deal,* 9 ARIZ. L. REV. 26 (1967); Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law,* 53 VA. L. REV. 1030 (1967); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment,* 14 U.C.L.A.L. REV. 428 (1967); Karmin, *Justice Black: Recent Opinions Hint at a More Conservative Philosophy,* Wall Street Journal, Nov. 2, 1965, p. 18, col. 4; Lazarus, *End of the Warren Court: The New Jurisprudence of Justice Black,* New Leader, Jan. 16, 1967, p. 6; Redlich, *Justice Black at Eighty: The Common Sense of Freedom,* 202 THE NATION 322 (1966); Strickland, *Mr. Justice Black: A Reappraisal,* 25 FED. B.J. 365 (1965).

to the charge that Black, in his later years, became a "new conservative." Particularly would I do so if the charge is based primarily on evidence from sit-in, marching and privacy cases. In regard to such issues a doctrinaire liberal[21] would be expected to support the sitters, the marchers and the calculating spouse in *Griswold*. But Black was a doctrinaire liberal neither early nor late in his career. A doctrinaire liberal would not say in 1937 that "[s]ome of my best and most intimate friends are Catholics and Jews."[22] He would not vote to uphold Frank Palko's death sentence.[23] He would not speak against an anti-lynching bill in the Senate in 1935.[24] He would not vote, as Black did, to uphold Japanese exclusion from the west coast.[25] He would not vote to send Willie Francis to the electric chair a second time.[26] Nor would he agree with a Reed opinion that asserted:[27]

> the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. . . . The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.

It is unlikely that a doctrinaire liberal would vote in conference to deny Morton Sobell's request for a rehearing,[28] or take two different positions on flag salute in the schools within a three-year period.[29] None of this is meant to imply that Black did not decide these and other cases in terms of the Constitution, as he understood it. The point is that a doctrinaire liberal, by definition, would be primarily concerned not with constitutional requirements but with the negative consequences which a given decision might have for an individual litigant.

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21. A doctrinaire liberal is one who is disposed to vote, for example, for the weak against the strong, for the individual against the government, and for the disadvantaged against the advantaged.

22. N.Y. Times, Oct. 2, 1937, p. 3, col. 5, quoted in Berman, *Hugo L. Black: The Early Years*, 8 CATHOLIC U.L. REV. 103, 106 (1959).

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

24. 79 CONG. REC. 6520-45 (1935).

25. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

26. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (decided by a 5-4 vote).

27. *Id.* at 464.

28. Sobell v. United States, 347 U.S. 1021 (1954). Black's vote on the request for rehearing is recorded in the Harold H. Burton Papers, Library of Congress.

29. *Compare* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *with* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (concurring opinion).

It also appears that Justice Black was never a radical where the rights of blacks were concerned. It is true that he took positions favorable to black litigants in *Gaines,*[30] *Sipuel,*[31] *McLaurin,*[32] *Sweatt,*[33] and *Shelley.*[34] And he voted with the majority in the *Segregation Cases.*[35] But his remarks in conference while considering the *Segregation Cases* delineate his position more clearly.[36]

IV.

The Kansas, South Carolina and Virginia segregation cases were originally scheduled for oral argument on October 13, 1952. In order to wait for the developing District of Columbia case, the Court, on October 8, 1952, postponed argument and invited a petition for certiorari from the losing litigants.[37] While Douglas dissented from postponing argument and decision, Black did not. On November 24, 1952, the Court requested the State of Kansas to present its views in oral argument after being advised that the Board of Education of Topeka did not intend to argue or present a brief in support of the Kansas statute authorizing segregated schools.[38]

Though Black recorded no dissent from the November 24th order, he indicated to his colleagues on November 28 that he had some doubts about the invitation[39] and called attention to *United States v. Coolidge,*[40] a case in which the Attorney General of the United States declined to argue before the Supreme Court.

After the initial arguments in these cases, a conference was held on December 13, 1952. In conference, according to notes made by

30. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (invalidated a refusal to admit blacks to the only existing law school maintained by the state).

31. Sipuel v. Board of Regents, 332 U.S. 631 (1948) (same ruling as in *Gaines, supra* note 30).

32. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (requirements that black graduate students at a predominantly white state university use separate seating, study and eating facilities held violative of equal protection).

33. Sweatt v. Painter, 339 U.S. 629 (1950) (ordered admission of blacks to a state law school despite recent establishment of a separate state law school for blacks, on grounds that there was no substantial equality in educational opportunities offered by the two schools).

34. Shelley v. Kraemer, 334 U.S. 1 (1948) (racially restrictive covenants cannot be enforced in equity without constituting state action in violation of equal protection).

35. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

36. As recorded in the hand of Justice Burton, Harold H. Burton Papers, Library of Congress.

37. Brown v. Board of Educ., 344 U.S. 1 (1952).

38. Brown v. Board of Educ., 344 U.S. 141 (1952).

39. Memorandum From Hugo L. Black to Conference, Nov. 28, 1952 (Harold H. Burton Papers, Library of Congress).

40. 14 U.S. (1 Wheat.) 415 (1816).

Justice Burton,[41] Black was the second speaker, speaking immediately after Vinson. Black thought it deplorable for the courts to be on the battlefront of the segregation issue since he did not believe in lawmaking by judges. He was not at all sure that Congress was barred by the same constitutional limitations as the states but could readily see the anomalous results of permitting segregation in the District of Columbia but not elsewhere. Thus, it appears that the value of a consistent public policy regarding school segregation was of greater concern to Black than the limitations imposed on the District of Columbia by the Constitution. Douglas, on the other hand, stated flatly that due process imposed the same requirements in the District of Columbia as equal protection imposed on the states.

As for the states, Black thought that to bar school segregation would be a serious matter. He expected serious incidents to develop and thought it likely that South Carolina might abolish its public school system. But the fourteenth amendment, he said, was directed at discrimination based on color. He was prepared to say that segregation by race violated the amendment unless a long line of decisions prevented him from doing so.

On June 8, 1953, the cases were restored to the docket for reargument on October 12.[42] An added feature was an invitation to the Attorney General of the United States to take part in the oral argument. On June 13, Black sent a memorandum to his colleagues suggesting that the invitation to the Attorney General be withdrawn.[43] The invitation had been inserted in the Court's order as a consequence of a memorandum from Acting Solicitor General Robert L. Stern to Harold B. Wiley, the Clerk of the Supreme Court, requesting permission to argue for thirty minutes. Black, however, felt that the invitation was involving the Court in deplorable political controversy. Consequently, he intended to vote to amend the order by withdrawing the invitation if the matter should come up in conference.

Reargument in the cases occurred from December 7 to December 9, 1953. A conference on the cases was held on December 12 and a lengthy discussion among the Justices ensued. Black was not present at this conference according to Burton's notes. When the Court's decision was handed down on May 17, 1954, Black joined the unanimous opinion holding the challenged public school segregation to be

41. Harold H. Burton Papers, Library of Congress.

42. Brown v. Board of Educ., 345 U.S. 972 (1953).

43. Memorandum From Hugo L. Black to Conference, June 13, 1953, entitled "*In re* Invitation to the Attorney General To Argue the Segregation Cases" (Harold H. Burton Papers, Library of Congress).

a violation of the fifth and fourteenth amendments. The decrees to be issued were postponed and additional argument was heard from April 11 to April 15, 1955. Black was present at a conference held on April 16, 1955, and spoke second, immediately after Warren. He began by saying he had no fixed views, but expressed a willingness to do everything humanly possible to make the Court's action unanimous. His tentative ideas included issuing a decree and no more, on the ground that the less said the better off the Court would be. He remarked that the South was just beginning to feel some respect for federal officials. He quoted his law clerk as saying that he did not think blacks and whites would go to school together in the South in this generation. Attitudes, Black said, cannot be ignored. He remarked on the resemblance of South Carolina to some southern Alabama counties and expressed the view that they would never be a party to allowing blacks and whites to go to school together. There was, he said, no more chance of enforcing desegregation in the Deep South than enforcing prohibition in New York City. Black was also concerned about the ability of the courts to enforce their decrees. The greatest damage, he thought, would be done by issuing decrees that could not be enforced.

Finally, Black was under no illusion that the Virginia and South Carolina cases were going to settle the issue of segregation in the South. He favored treating the cases as individual cases, stating that he was not fond of class actions since many members of a class might not wish to be included. He closed his remarks by suggesting that the Court move gradually—with gloves on—in dealing with the problem.

Black's remarks in these two conferences provide some contrast. In the conference of December 13, 1952, Black is closer to the constitutional absolutist that he was frequently said to be. He did not want to involve the Court in politics and deplored the fact that it had to be the Court, rather than Congress, which had to grapple with the problem. Nevertheless, he took the position in the first conference that segregation was based on the belief that blacks were inferior and consequently was unconstitutional. As for earlier segregation cases, he noted that he had not gone as far as he had intended but that he would not hesitate to do so now.

Black's remarks at the second conference on April 16, 1955, reflect the more practical statesman with a sense of the difficulties inherent in changing ingrained patterns of behavior among large numbers of people. His stance here is more conservative. While a vote condemning segregation in public schools could have been predicted from his remarks in the first conference, his posture in the second would not

so readily have supported the Court's policy in attempting to eradicate public school segregation from the national scene. Black's doubts about the ability of the Court to solve the problem and the willingness of Southerners to accept desegregation were more pronounced than those of several other Justices. Of particular importance was his view that the cases should be considered on an individual basis and not as class actions. Had the Court followed this preference, desegregation would have been slowed considerably. Indeed, to require full-scale litigation to enforce desegregation in every school district where applicable would probably have meant the death of the principles enunciated on May 17, 1954.

Black's remarks in the second conference do not suggest that he sensed, when he spoke on December 13, 1952, the length to which the Court was prepared to go or that he had thought out the logical consequences of his philosophical positions. Of course he could not foresee the death of Fred Vinson and the coming of Earl Warren to the Court between the first and second conferences—a matter of real consequence as subsequent events made clear.

That Black's more conservative stance in regard to the 1955 decree was of a fundamental nature is suggested by some of the answers given in his famous interview with CBS in 1968. When asked what he thought of the phrase "with all deliberate speed" that Warren had inserted in his 1955 opinion,[44] Black replied:[45]

> Looking back at it now, it seems to me that it's delayed the process of outlawing segregation. It seems to me, probably, with all due deference to the opinion and my brethren, all of them, that it would have been better—maybe—I don't say positively—not to have that sentence. To treat that case as an ordinary lawsuit and force that judgment on the counties it affected that minute [*sic*]. That's true, that it would have only been one school and each case would have been only one case. But that fitted into my ideas of the Court not making policies for the nation.

The next day, a front page piece in the New York Times was headlined "Black Believes Warren Phrase Slowed Integration,"[46] and much was made of Black's comment on the phrase. The headline writer and the reporter who wrote the story apparently conceptualized Black's quoted response as critical of a phrase which slowed integration—a criticism carrying the implication that Black favored a more

44. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

45. Justice Black and the Bill of Rights, Script of CBS Interview, Dec. 3, 1968, at 5, reprinted in 27 CONG. Q. WEEKLY REP. 6, 7 (1969).

46. Dec. 4, 1968, p. 1, col. 2.

rapid pace in the implementation of Court policy. The significance of the response, however, lies in the decidedly conservative overtones of his answer when read as a whole. While he is recorded by Justice Burton in the 1955 conference as saying "move gradually," in 1968 he seems to think rapid movement would have been desirable. But he goes on to repeat his 1955 view that the cases should have been considered as individual cases rather than as class actions. Upon reflection, the entire episode is inconsistent with what might be expected of a doctrinaire liberal on the question of school segregation.

Finally, there is case evidence for the view that Black was inconsistently disposed toward marchers, pickets and those who claimed violation of constitutional rights through unreasonable search and seizure. As for marchers, one has only to compare Black's vote in *Giboney v. Empire Storage & Ice Co.*[47] (against pickets) with his vote in *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc.*[48] (for pickets). It is also worth noting that in 1950 Black held against pickets who tried to force a grocery store owner to hire black clerks in proportion to the number of the store's black customers.[49] In search and seizure cases, it is a well-known fact that Black was never a proponent of the idea of expanding the area of privacy protected by the fourth amendment.[50]

An exchange of correspondence between Black and Felix Frankfurter in late 1964 shows Frankfurter congratulating Black for his dissent in *Hamm*. Frankfurter's letter to Black records Frankfurter's view that the position taken by Black was to be expected since it was perfectly consistent with the posture taken by Black when the sit-in problem first came before the conference—a conference at which Frankfurter was in attendance.[51] Again we are not encouraged to think that Black made any dramatic philosophic turnabout in the way he approached his duties on the Court in his later years.

47. 336 U.S. 490 (1949).

48. 312 U.S. 287, 299 (1941) (dissenting opinion).

49. Hughes v. Superior Court of Calif., 339 U.S. 460, 469 (1950) (concurring on the basis of *Giboney, supra* note 47).

50. See Justice Black's concurring opinion in Mapp v. Ohio, 367 U.S. 643, 661 (1961), in which he upheld the exclusion of illegally obtained evidence on the combined grounds of the fourth amendment and the fifth amendment's self-incrimination protection, while expressly stating that the fourth amendment standing alone was not sufficient to uphold the exclusionary rule. In Cooper v. California, 386 U.S. 58 (1967), Black, in the majority opinion, held that inventory searches of automobiles, when related to the reason for which the driver was arrested, were not in violation of the fourth amendment. His dissent in Spinelli v. United States, 393 U.S. 410, 429 (1969), reproved the majority for requiring too great a showing of probable cause before a search warrant would issue.

51. Felix Frankfurter Papers, Library of Congress. *See* note 10 and accompanying text *supra*. Black responded graciously to Frankfurter's congratulations by letter dated December 22, 1964.

Traditional case analysis, then, does not enable us to claim that Black, having been a doctrinaire liberal of the Murphy stripe, later became a Frankfurter conservative. All commentators have not been careful to distinguish Black from the Murphy-Rutledge type of liberal and therein lies the key, perhaps, to our confusion. Neither does traditional analysis enable us to refute Black's claim that "categorically . . . I have not changed my basic constitutional philosophy —at least not in the last forty years."[52] Given what can be done with words—written or spoken—where the quantity is sufficient, an adequate defense against the charge of philosophical change can be made if both sides rely on traditional case analysis. For the basic disagreement between Black and his critics is over the substance of his philosophy rather than on the question of its logical or illogical application in specific cases. That is, it can be argued that the error lies in assigning a doctrinaire liberal model to Black rather than in the inability of that model to explain Black's behavior over his entire career.

V.

It is possible, of course, to view Black's long tenure on the Court in a different fashion. Rather than positing a doctrinaire liberal model (or any other) and tracing its logical consistency with Black's decisions and opinions, we might look at his behavior in terms of its stability or instability over time, concerning ourselves with testing theoretical models which account for the variation, if any, which we observe. From this perspective we are not interested so much in a specific case or cases or in Black's explanations of what he was doing in a given instance. We seek to learn, on balance, the support Black gave to civil liberties, the variations (if any) in that support over time and the factors associated with any variations discovered.

The significance of Court support for civil liberties lies in the Court's role as an institution designed to filter the ingredients in human relationships that seem likely to pollute the atmosphere of personal liberty. There is, of course, no guarantee that an institution assigned such a role will provide the same quality or quantity of protective output over time. On the premise that the climate of opinion for civil liberties in the United States is very much influenced by the quality and quantity of Supreme Court rulings in this area, it is important to know the level of support that is forthcoming, the variations in that level attributed to the Court and its Justices, and (if possible) the causes of such changes. In this context we can ask whether there were dramatic shifts in the level of support for

52. *Preface* to H. BLACK, A CONSTITUTIONAL FAITH at xvi (1968).

civil liberties which Black provided through his Supreme Court votes in the period 1937-1971.

Viewing the votes favorable to civil liberty as a percentage of the total votes cast by Black in civil liberty cases, considerable variation is observed. Table 1 provides the summary data. Although Black had a mean support rate for the period of 65%, we find him scoring as low as 33% in his last term and as high as 95% in the 1959 term. On the basis of the mean support score we cannot class Black as a radical or doctrinaire supporter of civil liberties over the period under ob-

TABLE 1
CIVIL LIBERTY SUPPORT SCORES
HUGO L. BLACK: 1937-1970 TERMS

Term	*Number of Cases*	*Pro Votes*	*Support Score*
1937	29	10	34%
1938	17	9	53
1939	21	12	57
1940	27	11	41
1941	33	19	58
1942	65	37	57
1943	41	15	37
1944	28	21	75
1945	43	20	47
1946	39	22	56
1947	47	37	79
1948	40	20	50
1949	35	25	71
1950	27	21	78
1951	50	41	82
1952	41	33	80
1953	29	25	86
1954	32	27	84
1955	34	26	76
1956	53	41	77
1957	66	54	82
1958	49	36	73
1959	43	41	95
1960	65	53	82
1961	58	54	93
1962	58	50	86
1963	82	60	73
1964	58	35	60
1965	64	47	73
1966	72	39	54
1967	94	60	64
1968	104	39	37
1969	72	37	51
1970	76	25	33
Total	1692	1102	65%

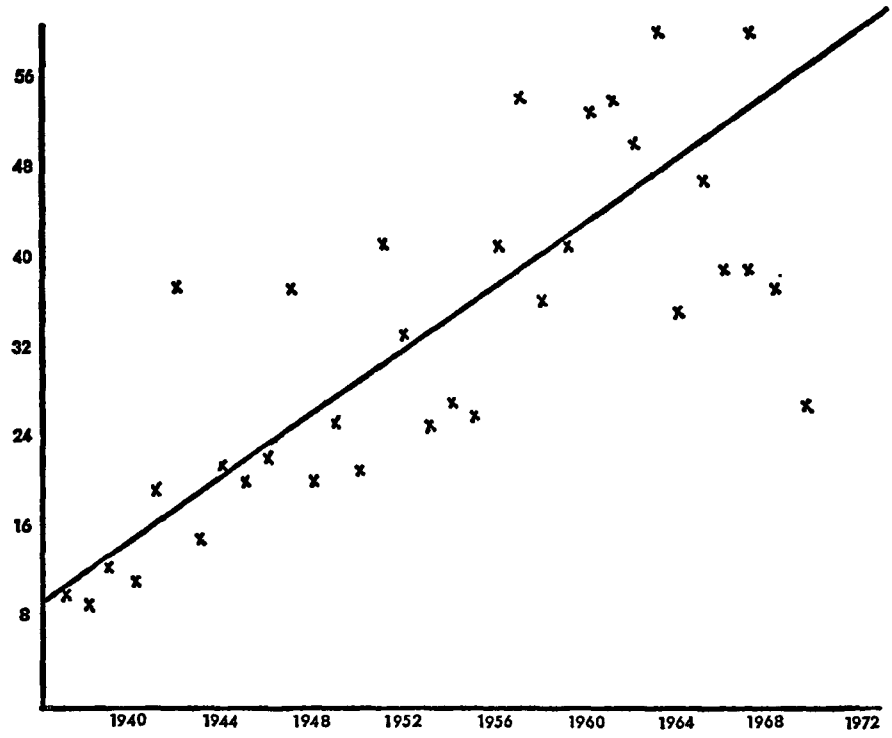

FIGURE 1.—Linear Regression of Time (in years) on Hugo L. Black's Votes in Civil Liberty Cases (by number favorable): 1937-1970 Terms.

servation. Likewise, it cannot be said that Black's support for civil liberty was stable over the same period. Comparing periods, it appears that Black was at a lower support level in his first seven years, a higher level in the second seven, his highest level in the following twelve years, after which some tapering-off is evident. Figure 1 portrays the relationship between time and the number of civil liberty cases decided favorable to the civil liberty claims by Black over a thirty-four year period.[53]

Obviously, Black tended to decide more and more cases favorably each year. A straight line with positive slope gives a fairly good fit for these data in spite of a greater dispersion in the later years. But since there has been a tendency for the total number of cases to increase, a focus on rate of support is more instructive.

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53. The equation for the line is $Y=1.4113Z$ where Z is defined as $X-16$. The curves in Figures 1 and 2 were plotted by computer for the first thirty-one terms only and the regression equations reflect that fact. At time of writing, data for the 1968–1970 terms were not available. In the process of reaching publication, these data became available and have been inserted in Figures 1 and 2 to complete the record. The new data show a continuation of earlier trends and do not change the established picture.

While the figures in Table 1 show that Black did not support civil liberty claims at the same rate throughout the thirty-four terms surveyed, this fact alone does not establish that he underwent any kind of philosophical change or that there was some kind of dramatic shift in his behavior or his loyalties in his later years.

First we ask whether the relationship of time to Black's support rate is linear. If so, it would be difficult to argue that fundamental change occurred since a straight-line relationship shows the continuation of past trends. It may be thought that better evidence for change would inhere in the observation that a curve provides a better fit for the data than a straight line.

Since it is possible to fit both a straight line and a curve to any set of points in a two-dimensional space, some criterion for choosing the proper descriptor is essential. In Figure 2 we have plotted both linear and quadratic regression lines (regressing time on the percentage of Black's support for civil liberty claims for each of thirty-four terms).[54] Decision may be made by determining which of these lines provides a significantly better least squares fit for the data (minimization of residuals). It is perfectly possible, of course, for there to exist another curve that fits the data more closely than those shown. But since the quadratic regression provides a reasonably close fit and is so vastly superior to the linear analysis, it is not necessary in this article to explore other candidates.

Comparison may be made between the two lines in Figure 2 in terms of the variance explained. While we can account for approximately one-third of the variance with linear regression, quadratic regression improves the result to approximately 60%—a level that is statistically significant at .01. While the difference between the two levels can be tested for statistical significance, it is unnecessary where, as here, the disparity is so large. Thus we are justified in choosing the nonlinear descriptor for depicting Black's support for civil liberty claims in the 1937-1970 terms. This descriptor shows that Black's support for civil liberty claims has varied parabolically, peaking in the 1959 term and reaching a low point in the 1970 term—his last year on the Court.

VI.

There are any number of strategies that might be followed in attempting to explain the variance in Black's support for civil liberty

54. The equation for the linear regression is $Y=1.016Z + 67.733$ where Z is defined as $X-16$. The equation for the quadratic regression is $Y=-.1195Z + 77.60$ where Z is defined as $X-16$.

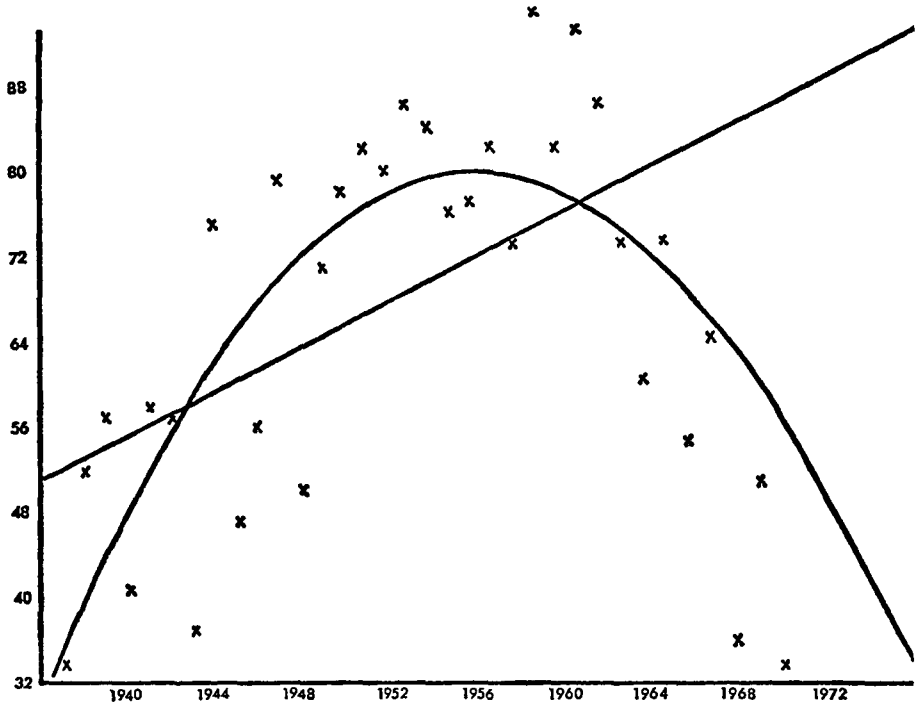

FIGURE 2.—Linear and Quadratic Regression of Time (in years) on Hugo L. Black's Votes in Civil Liberty Cases (by percentage favorable): 1937-1970 Terms.

claims. The use of multiple theoretical models characterizes the larger research effort from which this particular article is drawn. Here, however, we merely wish to suggest the possibility that Black's behavior has varied with change in certain environmental factors, offer some connective reasoning for such a relationship and provide a few empirical results of preliminary explorations in that direction. Before doing so, however, let us dispose of the sure-to-be-offered explanation that Black's support variance was a consequence of the changing subject matter mix of the civil liberty cases coming to the Court in the 1937-1970 terms.

In the eight years immediately prior to Black's peak support, he favored freedom of assembly claims 41.6% of the time. In the same period he supported twenty-one of twenty-one right to counsel claims—100%. If, for example, in the eight years following Black's support peak, the number of assembly claims increased sharply, the number of counsel claims declined dramatically, and Black's support levels in all areas remained constant, the change in case mix would have an effect on the support curve in the latter period. To see whether such dramatic changes in mix occurred in these or other areas between

TABLE 2

PERCENTAGE CHANGE IN THE SUBJECT MIX OF CIVIL LIBERTY CASES BETWEEN TWO PERIODS: 1953-1959 AND 1960-1967 TERMS.

	Total Case Pool			
	First Period		*Second Period*	
Subject	*N*	*%*	*N*	*%*
Speech	33	7.47	55	8.09
Self-Incrim.	48	10.86	87	12.79
Criminal Process	220	49.77	271	39.85
Right to Counsel	21	4.75	45	6.62
Racial Discrim.	33	7.47	57	8.38
Jury Trial	25	5.66	22	3.24
Freedom of Press	13	2.94	32	4.71
Search & Seizure	26	5.88	62	9.12
Freedom of Assembly	12	2.71	31	4.56
Freedom of Religion	11	2.49	18	2.64
Total	442		680	

the two periods, we have broken the subject matter down into ten categories.

Table 2 portrays the percentage of claims falling in each subject category for each of the two time spans. The table shows that some change in mix did occur, that the changes are not massive and that all ten subject areas continued to be represented in the second period. The eight categories showing a percentage increase include four of the five areas in which Black was most supportive in the first period and four of the five in which he was least supportive. The two categories in which subject representation declined include one in which he compiled his second highest support in the first span and one in which he attained his second lowest support level. Clearly, then, we do not have a situation in which change in case mix in the direction of enlarging the areas in which Black was initially most negative, and contracting the areas in which he was most positive, correlates with change in Black's support curve. In short, change in issue mix does not explain the change of direction in Black's support curve between two eight-year periods.[55]

Table 2 does not establish whether Black's support levels in each of ten subject categories remained constant between the eight years prior to peak support and a similar period immediately following.

55. Further analysis controlling for cases in which more than one issue was raised provided parallel results. With the exception of criminal process cases (which decreased 17 percentage points in the second period), changes in all categories were within a range of 3.5 percentage points.

TABLE 3

PERCENTAGE POINT GAIN OR DROP IN HUGO L. BLACK'S CIVIL LIBERTY SUPPORT SCORE BETWEEN TWO PERIODS: 1953-1959 AND 1960-1967 TERMS.

	First Period		*Second Period*			
Subject	*Pro Votes*	*%*	*Pro Votes*	*%*	*% Pt. Drop*	*% Pt. Gain*
Speech	23	69.7	37	67.3	2.4	
Self-Incrim.	42	87.5	74	85.1	2.4	
Criminal Process	169	76.8	201	74.2	2.6	
Right to Counsel	21	1.00	38	84.4	15.6	
Racial Discrim.	28	84.8	40	70.2	14.6	
Jury Trial	25	1.00	16	72.7	27.3	
Freedom of Press	11	84.6	23	71.9	12.7	
Search & Seizure	22	84.6	26	41.9	42.7	
Freedom of Assembly	5	41.7	18	58.1		16.4
Freedom of Religion	9	81.8	13	72.2	9.6	

However, Table 2 and our knowledge that Black's support curve declined in the latter period combine to imply that constancy was not maintained. This implication is validated in Table 3 where support levels are compared across the two time spans for each of the ten issue areas.

Of ten comparisons made, a gain in support is revealed only in regard to freedom of assembly claims. In all other issue categories, Black's support rate between the two periods was either approximately stable (speech, self-incrimination, criminal process) or declined substantially (right to counsel, racial discrimination, jury trial, freedom of press, search and seizure, freedom of religion).[56]

We cannot, of course, rule out the possibility that within a subject category the issues underwent incremental change. A search and seizure of tangibles in one's home after forcible entry, for example, differs from an electronic seizure of information. For Black, it seemed to matter whether a search was on the premises and whether it led to a seizure of tangibles. He is on record, specifically, as saying that the fourth amendment applies only to the seizure of tangible items and that conversation cannot be "seized."[57] Consequently, a shift in the percentage of search and seizure cases involving electronic eaves-

56. Further analysis controlling for cases in which more than one issue was raised provided parallel results. Of the nine issue areas in which at least one case was coded in the first period, Black showed support drops in the second period in seven, ranging from 3 to 45.1 percentage points. In the two areas of gain only one case was coded in each category in the first period. Support for freedom of religion increased 11.5 percentage points while support for freedom of press increased 50 percentage points.

57. Katz v. United States, 389 U.S. 347, 365 (1969) (dissenting opinion).

dropping, wire tapping, and other "sophisticated" searches could be partially responsible for the dramatic decline in support Black gave to search and seizure claims in the 1960-1967 terms.

Neither can we rule out the possibility that similar shifts within categories influenced the remaining drops in support and the single change in the other direction for freedom of assembly cases. But even if that were so, the significance of the data in Table 3 is not greatly diluted. The fact is that Black's support for civil liberties tapered off in nine of ten subject categories. It seems unlikely that this phenomenon was merely a function of within-category variation on particular questions. We infer, instead, that the tapering-off of Black's support curve was related to civil liberty in general and not caused by particular types of cases or questions.

VII.

In the remaining pages, we propose to introduce the notion that environmental change may be used to explain Supreme Court behavior or the behavior of one or more of the Court's Justices.[58] Two general environmental change models may be considered. Model 1 is an *Expansive Mood* (EM) model. This model suggests that when a population is in an expansive, optimistic frame of mind, greater latitude for personal liberty is feasible and acceptable. But when a public turns in upon itself, becomes pessimistic about the future, and generally repressive in its thinking, personal liberty is bound to encounter difficulties.

Support for civil liberty, as provided by the Supreme Court, is a commodity for which buyers' markets alternate with sellers' markets in some kind of a cyclical pattern. Courts of law can be expected to "read" their markets as well (hopefully) as any other producer of consumables. Thus we should not be surprised to find that the extreme solicitude for the security of social institutions which leads to a damping of efforts promoting personal freedom is usually followed by an emphasis on the social interest in individual life. In the latter case, the ability of social institutions to perform their traditional functions is likely to be severely hampered where their activities encroach upon the liberty of the person. While some theories of juris-

58. See this author's earlier work concerning a longitudinal perspective: *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court,* 8 J. PUB. L. 414 (1959); *Stochastic Process Models in Political Analysis,* in MATHEMATICAL APPLICATIONS IN POLITICAL SCIENCE 1 (J. Claunch ed. 1965); and particularly *Homeostatic Tendencies in the United States Supreme Court,* in INTRODUCTORY READINGS IN POLITICAL BEHAVIOR 167 (S. Ulmer ed. 1961) (provides empirical evidence for the view that external events can affect relationships in the Court).

prudence or decision making may tell us that support for civil liberties is objectively determined by constitutions, statutes and legal rules (and indeed it is to some extent), the EM model assumes other varying contributors to the flow of support.

As indicators to expansive mood, we have chosen two quantitative variables: (1) total consumption expenditures for recreation[59] (Model 1a—the more repressive the frame of mind, the less time and energy devoted to recreational pursuits and the more to witch-hunting and book-burning); and (2) unemployment as a percentage of the labor force[60] (Model 1b—the higher the percentage the less expansive and optimistic the mood). If recreation expenditures and unemployment rates are indicators of expansive mood, then our theory that Black was guided by variations in public mood can be tested by relating both indicators to Black's support score. Doing this, we find that the correlation between Black's support score (1937-1968) and expenditures for recreation is .814; for unemployment, -.431.[61] Both results are supportive of the general model and the r^2 of 66.3 for recreation expenditures is particularly notable. Both are also statistically significant at better than .02. Of course, correlation is not cause. But these preliminary findings do not discourage us from pursuing further the notion that judicial behavior is related to environmental change.

Continuing this line of thought, Model 2 is a *Crime Rate* (CR) model. Certainly there are few judges today who have not heard it argued that crime rates and the leniency of the courts go hand-in-hand. This model assumes that Black subscribed to that point of view over the period 1937-1971. Two indicators to crime rates are forcible rapes per 100,000 population[62] (Model 2a) and aggravated assaults per 100,000 population[63] (Model 2b), using national figures in both cases. The expectation is that soaring rape and assault rates motivated Black to reduce his support for civil liberties. Over the thirty-one year span, rapes correlated with Black's civil liberties support at .757 (r^2=57.3); assaults at .729 (r^2=53.1). But these associations are in a direction opposite to that predicted. This provides no support for the assumptions underlying Model 2.

59. Measured in millions to one decimal point. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1969, at 224.

60. Measured in thousands to one decimal point. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (various years).

61. At time of writing, more recent data were not available in a form suitable for testing these models.

62. FEDERAL BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, UNIFORM CRIME REPORTS (various years) (adjusted after 1957 to include statutory rape).

63. *Id.* (adjusted after 1957 to provide a thirty-one year time series measuring "offenses known" rather than "convictions").

In spite of the negative results from Model 2, an additional comment is warranted. If two separate analyses are run for the period from Black's accession to the Court (1937) to the peak of his support for civil liberties (1959) and the period 1960-1967, some interesting results are produced. Rape shows a positive correlation of .70 in the first period but a negative correlation of –.236 in the second. Likewise, assault correlates with Black's performance at .76 in the first span but at –.256 in his last eight years. Thus, since 1960, when rape and assault rates moved sharply upward and Black's support curve sharply downward, the association between the rates reversed in direction. This suggests, but certainly does not establish, that crime rates or other variables not traditionally associated with judicial behavior may, given dramatic change in rate of change, become meaningful on a continuing or sporadic basis. The conditions under which one or more variables become relevant for dependent variables of interests are matters worth investigating. If such a phenomenon is a general one—*i.e.,* variables start up and die off (in terms of relevance)—it would serve to remind us that we are a social and not a natural science, that we are dealing with changing rather than constant or static relations and that dynamic models are destined for a larger role in political science research.

In order that the above remarks on environmental change models not be misunderstood, certain analytical limitations should be noted and our aims underscored. In the first place, each of four specific models was restricted to bi-variate analysis. If the EM and CR models are employed with multiple indicators, questions of measurement validity arise. If the two indicators for EM are valid, then a high inter-correlation between them should be observed. This criterion is met, though not impressively, at a significance level of .05. For the CR model an r of .989 between rape and assault rates diminishes any concern we might have had about indicator validity.

A second caveat may be more serious. If the EM and CR models are independent of each other, the question of indicator relevance must be answered. Adequate conceptualization and choice of indicators would lead us to expect a very low or zero correlation between indicators across models. If this standard is not met, choice among models may not be possible. In the present case, rape and assault rates correlate quite highly with recreation expenditures. Thus the conceptualizations and indicators employed here are a long way from ideal and may imply that all indicators belong in the EM or some third model.

In spite of the limitations mentioned, we have not been deterred

from including preliminary thoughts on environmental change and judicial behavior since our interest at this stage lies in developing ideas, identifying promising paths of inquiry, suggesting to other students of judicial behavior the possible fruitfulness of viewing courts and judges from a dynamic perspective, and experimenting with nontraditional ways of generating independent and dependent variables which may have relevance for our subject matter.[64]

VIII.

In conclusion, we cannot assert, as some might like, that Hugo Black was unsuccessful in developing early in his career on the Court a philosophical orientation sufficient to enable him to decide consistently all cases coming before him in the period 1937-1971. One cannot refute Black's belief, expressed in 1937, that he would continue to be the same man after going to the Court as before, nor, from the perspective of traditional analysis, his claim that he had not changed his philosophy regarding the Constitution for forty years. The inability flows from three factors: (1) a lengthy service on the Court resulting in voluminous writings from which statements and arguments to support diverse viewpoints can be culled, (2) the always available argument that cases are unique and must be decided on their unique facts and (3) the fact that Black never was a doctrinaire liberal of the Murphy stripe—as his opinions, votes and remarks in conference make clear. Thus, in regard to the third factor, he had greater flexibility within his constitutional philosophy to take positions unfavorable to civil liberty than those who assume the doctrinaire liberal model are wont to recognize.

Shifting our posture somewhat, there is no doubt that Black varied his support for civil liberties over thirty-four terms with declining support evident in the 1960-1971 period. A parabolic curve was found to provide a significant fit for his votes in civil liberties cases over the entire thirty-four year span.

In seeking factors associated with Black's varying support rate, change in the issue mix of the civil liberty case pool was ruled out. The findings here suggest the continued usefulness of the concept

64. Possible models for investigation with such longitudinal dependent variables as civil liberty support rate are: *Legal Authority, Substantive Merit,* and *Small Group Models.* The first implies that Supreme Court behavior is governed by the behavior of other legal authority. The second model posits that variation in Court decisions is a function of the "merit" of the claims. The third model would seek to explain the behavior of a judge over time as a function of the behavior of the judges collectively. In this last case, for example, the variations in the long-term behavior of a particular judge may be explained exceptionally well by the behavior of majorities in his court.

"civil liberty case." Black's decline in support had an obvious common dimension in spite of minor deviations respecting case issues. The preliminary work reported with environmental change models provides an example of the kind of connective reasoning that might be used to construct a nexus between environment and judicial decisions. The models, as presented, are severely limited but are not, on the whole, discouraging to those who may wish to explore the extent not only of judicial reliance on "election returns" but the impact of the entire panorama of social events and relations on the behavior of judges.

Important questions related to change processes remain unanswered. If the support of the Supreme Court (rather than an individual Justice) is significant for the scope allowed civil liberties in the United States over time, then changes in Court support patterns become relevant for inquiry. We may wish to know not only the Court's support curve, but also the curves of different Courts from different eras. Beyond comparison across time, which that knowledge would make possible, we may wish to compare the curves of the Supreme Court with those of lower courts over the same time span. Comparison with courts in other nations may be instructive. And, in general, it seems worthwhile to ask about the conditions associated with institutional (judicial and otherwise) support for civil liberties.

At the level of individual Justices, we are interested in determining differences and similarities in the curves of multiple Justices. In particular, is there a common curve for all Justices or for some subset of them? In the area of civil liberties? In other areas or on other issues? If disparities are discovered, can one best account for them with attribute variables, with context variables, or with some combination of both types?

The theoretical significance of such inquiries inheres in the fact that theories of judicial decision making do not incorporate change in the decision maker as an independent variable. If change in a decision maker occurs over time, whether physiological, psychological, or as a response to environmental developments, and such change substantially influences behavior, then our theories of jurisprudence will require some modification or replacement.