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THE PREFERENCE CHANGE MYTH: 
HUGO BLACK AND CIVIL RIGHTS, 
1964-1971

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Recent scholarship has challenged the conventional wisdom that Supreme Court Justices’ policy preferences remain constant over the course of their careers. According to the new ‘preference change’ account, nearly all of the Justices who served for ten or more terms and retired from the Court between 1937 and 2003 exhibited significant preference change, among them Justice Hugo Black, who after 1964 famously renounced his liberal roots to become one of the Court’s most conservative justices. Beginning in the mid-1960s, with landmark civil rights cases like Cox v. Louisiana, in which Black denounced protesters who were arrested for picketing a segregated restaurant, many commentators argue that Black turned his back on support for the racial equality he had formerly espoused as a liberal exponent of the Warren Court. By contrast, others, including Black, maintain that Black’s policy preferences did not change in his more than three decades on the Court. Which of these ‘preference change’ accounts is correct? Drawing on an empirical analysis of the approximately 129 civil rights cases heard by the Court during Black’s tenure, this Article shows that Black remained ideologically consistent over time. What accounts for this perception of preference change are changes in the Court’s docket that led Black to appear mercurial. Although Black consistently supported efforts to effectuate a goal of racial equality, a longtime aversion to protests, demonstrations, sit-ins, and other indicia of social disorder, outlined by Black in a series of published lectures entitled A Constitutional Faith, led Black to abandon his liberal colleagues’ support for civil rights as social unrest epitomized by sit-ins and demonstrations increased in frequency. The findings detailed in this Article suggest that ideological drift on the Court may be a much rarer phenomenon than currently believed, a conclusion that has important implications for a president’s faith in the ideological stability of their Supreme Court nominees as well as conceptions of legal change more generally.

“Hugo changed, the man changed, right in front of us . . . . It’s a different Black now.”
— Justices William Brennan & Earl Warren

“I know they’re saying [about me], ‘Well, he used to be all right. He was young then, but he’s getting old and mellow and forgetting the ideas he had when he was a young man.’ Well, I don’t think I’m old yet. And I think I can state categorically that I have not changed my basic constitutional philosophy in at least 40 years.”
— Justice Hugo Black

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2 Id.
3 Justice Black Dies at 85; Served on Court 34 Years, UNITED PRESS INT’L, Sept. 25, 1971.
I. Introduction

It has been four decades since he left the Court. Nevertheless, scholarly accounts of whether or not Justice Hugo Black remained consistent in his policy preferences over time continue to proliferate. On the one hand, Black made a name for himself as an activist member of the liberal wing of the Court, responsible along with Justice William O. Douglas for liberalizing the law in areas as diverse as civil liberties, economics, and civil rights cases involving freedom of speech, social welfare policy, and racial segregation. On the other hand, after 1964, with the rise of the Civil Rights movement, Black began to appear reactionary to many of those who had initially pegged him as a liberal. Is this account of preference change correct? Did Justice Black, in his later years, suddenly become a “new conservative,” reversing his earlier support for African-American plaintiffs in historic civil rights cases such as *Missouri ex rel. Gaines v. Canada* and *Sweatt v. Painter*?

Scholars have disagreed vehemently over whether or not Black’s support for civil rights waned during the latter half of the 1960s. Some argue that Court observers simply erroneously labeled Black as a liberal to begin with, while others contend

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4 S. Sidney Ulmer, *The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties, 1937-1971*, 1 FLA. ST. U. L. REV. 131, 134 (1973). See, more generally, discussions surrounding Black’s nomination to the Court. Senator Hugo Black attracted President Franklin Roosevelt’s attention as an ardent New Dealer who had supported the President’s well-known Court-packing plan of 1937. Sensing trouble, conservatives vigorously opposed Black’s nomination. “If the President had searched the country for the worst man to appoint, he couldn’t possibly have found anyone to fill the bill so well,” grumbled one senator. “Mr. Roosevelt could not have made a worse appointment if he had named John L. Lewis,” wrote the columnist David Lawrence, and Herbert Hoover protested that the Court was now ‘one-ninth packed.’” Black’s nomination was viewed as a naked ploy to court Southern support for Roosevelt’s liberal New Deal policies, which Southern conservatives opposed. William E. Leuchtenburg, *A Klansman Joins The Court: The Appointment of Hugo L. Black*, 41 U. CHI. L. REV. 1, 5-8 (1973). As the Washington Post editorialized: “Men deficient in the necessary professional qualifications have occasionally been named for the Supreme Court. And qualified men have sometimes been put forward primarily because they were also politically agreeable to a President. But until yesterday students of American history would have found it difficult to refer to any Supreme Court nomination which combined lack of training on the one hand and extreme partisanship. In this one respect the choice of Senator Black must be called outstanding.” WASH. POST, Aug. 13, 1937, at A8.

5 Ulmer, supra note 4, at 134; Burton M. Atkins & Terry Sloope, *The “New” Hugo Black & the Warren Court*, 18 POLITY 621, 635 (1986); GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED (1974) (arguing that by the late 1960s and into the early 1970s, Black grew increasingly less supportive of the Court’s liberal decisions to the point that he became one of its most conservative justices).

6 *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (invalidating a refusal to admit African-Americans to the only state law school in the state of Missouri).

7 *Sweatt v. Painter*, 339 U.S. 629 (1950) (ordering the admission of African-Americans to a state law school despite the existence of a separate state law school for blacks, as the two educational facilities did not offer the same educational quality to students).

8 See Atkins & Sloope, supra note 5, at 622 (citing Ulmer, supra note 4, for the proposition that “Black is not and never has been a doctrinaire liberal”).
that Black’s voting behavior remained consistent throughout his career on the Court. Still others suggest that Black’s alleged retreat was merely a response to external forces, most notably, the Court’s increasing liberalism after 1964, which may have led the Court majority to embrace positions no longer acceptable to Black. And others, drawing on Chief Justice Earl Warren’s observation in early 1966 that “Black ha[d] hardened and gotten old,” have posited that Black began “to backslide, from what had been largely his public posture of . . . activist support of both civil liberties and economic liberalism . . . .” due to old age.

Regardless of the explanation, Black represents to many merely another example of preference change on the Court. In recent years, scholars have come to challenge the conventional wisdom that Supreme Court Justices’ policy preferences remain constant over the course of their careers. Several studies suggest that nearly all of the sixteen justices who served for ten or more terms and stepped down from the Court between 1937 and 2003 exhibited significant ideological drift, challenging a president’s faith in the ideological stability of their Supreme Court nominees. Nevertheless, although a string of dissents provides ample support for the proposition that Black became more conservative during his last decade on the Court, the precise contours of this preference change thesis remain unclear.

Particularly striking is Black’s supposed turnabout on civil rights. Indeed, on no other issue was Black a more enigmatic figure. Despite the fact that Black would later become a significant contributor to some of the most revolutionary civil rights decisions in Supreme Court history, at the outset of his career, Black’s

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10 Atkins & Sloopo, supra note 5, at 624; Dunne, supra note 9, at 418-419; Schwartz, supra note 9, at 630 (arguing that the appointments of Justice Arthur Goldberg in 1962 and his replacement, Justice Abe Fortas, in 1965, moved the majority so far left that the Court majority no longer adopted positions acceptable to Black).
11 Newman, supra note 1, at 570.
13 See, e.g., Andrew D. Martin & Kevin M. Quinn, Assessing Preference Change on the U.S. Supreme Court, 23 J.L. Econ. & Org. 365 (2007); Lee Epstein, Andrew D. Martin, Kevin Quinn, and Jeffrey Segal, Ideological Drift on the U.S. Supreme Court, 101 NW. U. L. Rev. 1483 (2007) (finding empirical evidence for significant ideological drift among Supreme Court Justices over the course of their careers); Lee Epstein, Kevin Quinn, Andrew D. Martin, and Jeffrey A. Segal, On the Perils of Drawing Inferences about Supreme Court Justices from their First Few Years of Service, 91 Judicature 168, 169 (2008) (finding that all but four of 26 justices included in the study exhibited “statistically significant ideological drift from their initial preferences,” and that sometimes such a shift in preferences results in “consequential doctrinal change—so consequential that a vote in favor of, say, restricting privacy rights or permitting prayer in school in the first term might translate into a vote in opposition before the justice concludes his or her first decade of service.”).
affiliation with the Ku Klux Klan called into question his liberal stance on civil rights. More puzzling still, after two decades on the Court of fighting for racial equality in education and jury participation, Black broke with his liberal colleagues beginning in the mid-1960s as Vietnam War demonstrations and civil rights protests signaled a more unruly path to securing social justice. In a much discussed turn of fate, by the late 1960s, Black grew increasingly less sympathetic towards the civil rights movement and the Court’s liberal decisions, so much so that he eventually came to be considered one of its most conservative members.

15 Two days after President Roosevelt nominated Black to the Supreme Court in 1937, having taken notice of the young senator from the South who had voted for all twenty-four of Roosevelt’s major New Deal programs, it was revealed that Black had earlier been associated with the Ku Klux Klan. Although there was at first little direct evidence of a Klan affiliation, the Klan revelations continued even after Black’s nomination to the Court had been confirmed with a six-part series published in the Pittsburgh Post-Gazette announcing that Hugo Black had been a member of the Klan. Wrote Ray Sprigle, the journalist who would later win a Pulitzer Prize for the discovery:

Hugo L. Black, associate justice of the United States Supreme Court, is a member of the hooded brotherhood that for ten long, blood-drenched years ruled the Southland with lash and noose and torch, the Invisible Empire, Knights of the Ku Klux Klan. He holds his membership in the masked and oath-bound legion as he holds his office on the nation’s Supreme tribunal—for life.

Sprigle’s “proof” of Justice Black’s ongoing membership in the Klan was a “grand passport” that had been presented to Black a full year after Black allegedly resigned from the Klan. Although the controversy eventually abated after Black denied any residual Klan ties and gave a press conference stating that he harbored no ill sentiment towards blacks, a degree of mystery surrounding Black’s position on civil rights remained. No answer was ever supplied as to why Black had joined the Klan in the first place. See William E. Leuchtenburg, A Klansman Joins the Court: The Appointment of Hugo L. Black, 41 U. CHI. L. REV. 1, 5-10 (1973); Daniel M. Berman, Hugo L. Black, 8 CATH. U. L. REV. 103, 104, 106 (1959); N.Y. TIMES, Oct. 2, 1937 (Black told the press: “I have among my friends many members of the colored race. I have watched the progress of its members with sympathy and admiration. Certainly they are entitled to the full measure of protection accorded to the citizenship of our country by the Constitution and our laws.”).

16 See, e.g., McLaurin v. Oklahoma, 339 U.S. 637 (1950) (holding that a University of Oklahoma program providing differential treatment in graduate and professional education to students on the basis of race violated the Fourteenth Amendment); Sweatt v. Painter, 339 U.S. 629 (1950) (finding that the “separate but equal” doctrine of racial segregation established in Plessy v. Ferguson is inherently unequal); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (holding that the State of Oklahoma was required under the Fourteenth Amendment to provide legal instruction to blacks equal to that afforded whites).

17 See, e.g., Patton v. Mississippi, 332 U.S. 463 (1948) (holding that exclusion of blacks from grand and petit juries on the basis of race denies black defendants in criminal cases equal protection of the laws under the Fourteenth Amendment); see also Eubanks v. Louisiana, 78 S.Ct. 970 (1958) (finding a violation of the equal protection clause in a case involving long-term exclusion of blacks from grand juries, where out of the 432 jurors selected for grand juries in Louisiana between 1936 and 1954, only a single black juror was chosen).

18 FREYER, supra note 14, at 143.

19 Atkins & Sloope, supra note 5, at 622.
The Court’s opinion in *Bell v. Maryland* is instructive.\(^{20}\) In *Bell*, the Court considered whether the eviction of civil rights demonstrators from a private Baltimore restaurant violated the First and Fourteenth Amendments. Abandoning his liberal colleagues, Black refused to sanction the protestors’ conduct, arguing that the Fourteenth Amendment did not “command either a black man or a white man running his own private business to trade with anyone else against his will.”\(^{21}\) Although Black acknowledged the demonstrators’ “constitutional right to express” their views “wherever they had an unquestioned legal right to be,”\(^{22}\) he believed that the “right to freedom of expression is a right to express views—not a right to force other people to supply a platform or a pulpit” on private property.\(^{23}\) The right to freedom of expression did not “confer upon any group the right to substitute rule by force for rule by law.”\(^{24}\)

Amidst rising social disorder, many accused Black of retreating from the liberal faith.\(^{25}\) Yet the shift in political environment—the rise of sit-in demonstrations and Vietnam War protests, and the assassinations of President John F. Kennedy, Martin Luther King, and Senator Bobby F. Kennedy—suggests an alternative explanation for Black’s seeming turnabout on civil rights that is more a product of changes in the Court’s docket than an indication that Black’s views on civil rights themselves had evolved.

Although a vast empirical literature has analyzed Black’s voting record, most research has glossed over the theoretical underpinnings for Black’s perceived ideological shift.\(^{26}\) As a result, empirical studies showing Black’s nascent conservatism in his last decade on the Court may be a function of the flawed theoretical foundation upon which such empirical models are based. This Article challenges the preference change account by arguing that Black remained consistent throughout his tenure on the Court, a staunch libertarian, whose ethos of individual liberty, law and order, freedom of expression, and self-reliance recoiled in the face of civil rights protesters’ resort to socially destructive behavior even as Black remained a strong supporter of racial equality.\(^{27}\) Under


\(^{21}\) *Id.* at 343.

\(^{22}\) *Id.* at 345.

\(^{23}\) *Id.*

\(^{24}\) *Id.* at 346.

\(^{25}\) Freyer, *supra* note 14, at 143.

\(^{26}\) See, e.g., Martin & Quinn, *supra* note 13, at 379 (noting that Justice Black became “significantly more conservative” in the late 1960s); Ulmer, *supra* note 4, at 144-46, 153 (noting that Black’s support for civil liberties declined between 1960 and 1971, and that this change in Black’s voting behavior over the entire thirty-four years he was on the Court can be modeled in quadratic form); Lee Epstein, Valerie Hoekstra, Jeffrey A. Segal, and Harold J. Spaeth, *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. Pol. 801, 810-12 (confirming Ulmer’s (1973,1981) finding that a parabolic shape accurately describes Black’s voting pattern on the Court).

\(^{27}\) Berman, *supra* note 15, at 115 (noting that “Black’s life does indeed pose something of a puzzle. There are not many Southern politicians who end up championing Negroes, aliens, and others who cannot conceivably trace their ancestry to the passengers of the Mayflower. But the
the revised account, Black’s growing conservatism was not an indication of a personal change in beliefs, but instead a response to the entirely new set of cases coming before the Court.

Although scholars have, from time to time, suggested that Black remained consistent throughout his tenure on the Court, and that his apparent conservatism during the late 1960s can be attributed to the fact that Black “never was a doctrinaire liberal of the Murphy stripe” to begin with,\(^\text{28}\) prior research has not, to my knowledge, systematically tested the validity of this claim. If the revised theoretical account is correct, we should expect to find no evidence of preference change where cases involving terminology such as “mob violence,” “social disorder,” “protesting,” and “marching”—key words signaling the very form of protest Black abhorred—are excluded from the analysis. As his sister-in-law, Jinksie Durr, later confided, Black was mortally afraid of protesters, as he believed that marching, singing, demonstrating, and picketing would, if left unchecked, lead to the destruction of Americans’ freedom.\(^\text{29}\) Unrestrained conduct could easily disintegrate into social disorder, “`the crowds that press in the streets for noble goals today . . . supplanted tomorrow by street mobs pressuring’ for `precisely opposite ends.’”\(^\text{30}\)

Understanding whether Black grew more conservative in his last decade on the Court is important not only to understanding the longitudinal voting behavior of one important figure on the Supreme Court, but to accounts of ideological drift more generally. Although scholars for a long time assumed that Supreme Court Justices’ ideological positions do not vary over time, in recent years scholars have increasingly begun to question the classic assumption that Justices do not exhibit ideological drift over the course of their careers.\(^\text{31}\) Indeed, until recently it was commonplace to assume that changes in legal approach were only produced by changes in Court membership through the judicial nominations process.\(^\text{32}\) This problems are perhaps not so great as they appear on the surface. It does indeed seem strange that a former Klansman should become a libertarian Justice and that a bitter opponent of immigration should be transformed into an articulate defender of aliens hounded by the Government. But the fact is that, superficial appearances notwithstanding, there has been remarkable continuity in Black’s political thought. He has always, for example, been a critic of corporate wealth and power. He has always been concerned with helping to improve the lot of the American worker. He has always favored an America in which dissent thrives on unrestricted freedom of speech. These ideas have been firm and immutable.”).

\(^{28}\) Ulmer, \textit{supra} note 4, at 152.


\(^{30}\) FREYER, \textit{supra} note 14, at 163.


assumption of ideological stability has provided critical guidance in presidential appointments to the Supreme Court, serving as the basis for presidents’ unwavering faith in the ideological stability of their Supreme Court nominees. Most Presidents appoint individuals who share their ideological views on the expectation that those views will not change over time. As President George W. Bush declared in nominating Harriet Miers to the bench in the fall of 2005, Miers was “not going to change . . . 20 years from now she’ll be the same person with the same philosophy that she is today.”\textsuperscript{33}

Despite such claims, however, more recent scholarship has shown this faith in ideological stability to be incorrect. In many cases, a Justice’s decisions have departed from the nominating president’s expectations. In addition to better-known examples like Chief Justice Earl Warren, whose appointment President Eisenhower later called “the biggest damn fool mistake I ever made,”\textsuperscript{34} and Justice Owen Roberts,\textsuperscript{35} whose famous “switch in time” saved the Court from President Roosevelt’s “Court-packing” plan of 1937,\textsuperscript{36} numerous quantitative empirical studies have found that most Supreme Court Justices since 1937 have grown more liberal or conservative in their voting behavior over the course of their tenures on the nation’s highest court.\textsuperscript{37}

In challenging the nascent preference change account by empirically examining the variability in Justice Hugo Black’s policy preferences over the course of his career, this Note fills an important gap in the preference change literature, by systematically assessing a potential explanation for the seeming variability in

\textsuperscript{33} President George W. Bush, Press Conference (Oct. 4, 2005) (transcript available at http://www.whitehouse.gov/news/releases/2005/10/20051004-1.html). Likewise, commentary surrounding the nomination of Justice John G. Roberts Jr. to the Bench is instructive. As Professor David A. Strauss contended at the time: “As Americans try to figure out what Judge John G. Roberts Jr. will be like as a U.S. Supreme Court [J]ustice, one idea seems to [be] that whatever Judge Roberts is now, once he is on the [C]ourt he might develop into something different. In particular, the thinking goes, even if he is the intense conservative suggested by his Reagan-era memoranda, he may become more moderate as a [J]ustice. Don’t believe it.” David A. Strauss, \textit{It’s Time to Deal with Reality: The Myth of the Unpredictable Supreme Court Justice Debunked}, CHI. TRIB., Aug. 7, 2005, at C9.


\textsuperscript{35} Epstein, Martin, Quinn, and Segal, \textit{supra} note 13, at 1497.

\textsuperscript{36} Justice Roberts switched his position on the constitutionality of the New Deal in late 1936, after which the Court voted to uphold all New Deal programs, beginning with the Court’s issuance of West Coast Hotel v. Parrish in 1937, upholding the constitutionality of minimum wage laws. \textit{See, generally}, Daniel E. Ho & Kevin M. Quinn, \textit{Did a Switch in Time Save Nine?}, 2 J. LEGAL ANALYSIS 69 (2010).

\textsuperscript{37} Epstein, Martin, Quinn, and Segal, \textit{supra} note 13, at 1483. President George W. Bush’s nomination of David Souter to the Supreme Court provides another example. Souter, who was nominated to the Court in 1990, was expected to be a conservative, yet after his appointment, his opinions increasingly gravitated towards the liberal end of the political spectrum. \textit{See} Adam Liptak, \textit{Why Newer Appointees Offer Fewer Surprises}, N.Y. TIMES, April 18, 2010, at A1.
Black’s policy preferences on civil rights over time,\textsuperscript{38} thereby calling into question a bevy of quantitative empirical studies demonstrating that Justice Black underwent a dramatic ideological transformation by the end of his career on the Court.

Part II begins by surveying the existing literature on ideological drift among the members of the Supreme Court. After reviewing the relevant background literature, Part III describes the empirical strategy for assessing Black’s ideological trajectory on the Court. This approach employs a case-by-case analysis of Hugo Black’s position on civil rights in the 129 cases pertaining to the civil rights era, sit-ins, and race, ethnicity, or national origin that were decided during Black’s tenure on the Court. In Part IV, the Article turns to a description of the results. Was Black only reactionary in cases involving mass protests, demonstrations, and mob violence? Or was his conservatism more widespread, suggesting that the change observed in the latter half of the 1960s was not merely the result of a change in the type of cases coming before the Court?

Finding that Black’s ideological drift during his last decade on the Court appears to be largely attributable to the rise of sit-in and protest cases involving mob violence and social disorder, Part V discusses the implications of this study for preference change more generally on the Court. Is Hugo Black an isolated example of ideological consistency in the face of otherwise seemingly inconsistent ideology? Or can similar theoretical intuitions be used to reconcile other notable examples of ideological drift over time?

Finally, Part VI concludes with a discussion of the study’s implications for the judicial nominations process and Justices’ policy positions once they are on the Court.

\section*{II. Preference Change on the Supreme Court}

As recent research has sought to empirically demonstrate, ideological drift has been a common feature among the members of the nation’s highest court. In a stark example of preference change on the Court, Sidney Ulmer found, for example, that both Justice Hugo Black’s and Justice William O. Douglas’s policy preferences changed drastically over time. Graphing their term-by-term support for civil liberties claims, Ulmer demonstrated that although both were relatively moderate when first nominated to the Court, they increasingly supported liberal plaintiffs’ claims seeking to vindicate their constitutional rights, though both once again became fairly conservative towards the end of their tenures on the Court.\textsuperscript{39}

\textsuperscript{38} Epstein, Martin, Quinn, and Segal, supra note 13, at 1484-85 (“These empirical findings argue for additional scholarship that systematically tests for potential causes of variability in judges’ positions, especially over the course of their careers.”).

As Ulmer described Black’s ideological trajectory: “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.”

More recently, Martin and Quinn, in a 2007 article in the *Journal of Law, Economics, and Organization*, reached a substantially similar conclusion in their empirical analysis of the sixteen Supreme Court Justices who served for ten or more terms between 1937 and 2003, concluding that fourteen of the sixteen Justices exhibited significant preference change over time. These results indicate that Justices Black, Douglas, Frankfurter, Harlan, Jackson, Reed, and White were all significantly more conservative in subsequent terms than they were in their first terms on the Court. Likewise, Justices Blackmun, Brennan, Burger, Clark, Douglas, Harlan, Marshall, Powell, and Warren were all significantly more liberal in their later years. Most dramatically of all, perhaps, Epstein et al. (1998) indicate that Justice Blackmun underwent a near-complete ideological transformation, going from being among the Court’s most conservative members to one of its most liberal towards the end of his tenure on the Court.

Persuasive as these findings appear to be at first glance, there are several problems with relying exclusively on quantitative empirical studies that assess judicial preference change simply by examining the percentage of votes cast in either the liberal or conservative direction over time. Other factors, such as the Court’s docket, which affects the type of cases entertained by the Court, may lead to spurious conclusions that a Justice has changed their ideological position over time, when, in reality, it may be that a Justice’s policy preferences have remained invariant but the type of cases the Justice has been asked to confront have not. Where this occurs, the cases themselves may produce a seeming shift in voting patterns, causing an otherwise ideologically consistent Justice to appear mercurial over time.

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40 Ulmer, *supra* note 4, at 144.
41 Martin & Quinn, *supra* note 13, at 13. Note, however, that there is an alternative explanation for what might otherwise appear to be ideological drift among the members of the Supreme Court after their first terms on the Court. Some scholars claim that Supreme Court Justices exhibit “freshman effects,” where a new justice undergoes a period of transition in which the new Justice is more likely to join a moderate block of justices in their first term on the Court than they are later on (see, e.g., Eloise C. Snyder, *The Supreme Court as a Small Group*, 36 SOC. FORCES 232 (1958); J. Woodford Howard, Jr., *On The Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968); Edward V. Heck & Melinda Gann Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 J. POL. 852 (1981)).
42 Epstein et al., *supra* note 26, at 801.
43 See, for example, discussion in Epstein, Martin, Quinn, and Segal, *supra* note 13, at 1483 (noting that “[p]erhaps in Justice B’s first term, nine of the ten cases involved warrantless searches; but in her second term, nine of the ten cases involved searches with warrants. If that were the case, then Justice B’s preferences did not necessarily move; rather the content of the cases changed—and changed in a way that made it more difficult for her to cast a liberal vote in her second term relative to her first.”).
As the remainder of this Article seeks to demonstrate, in at least one notable example, ideological drift was a mere myth. Although Justice Hugo Black appears to have become “significantly more conservative in nearly every subsequent term” on civil rights issues relative to his ideological position when he was first appointed to the Court, this seeming shift in voting preferences was due to a change in the type of cases coming before the Court. As civil rights sit-in demonstrations and Vietnam War protest cases increased in both frequency and severity over the course of the 1960s, Black’s staunch support for racial equality and freedom of speech conflicted with overriding libertarian concerns for law and order, social stability, and personal responsibility.

Hugo Black outlined his views in the James S. Carpentier lectures, delivered at Columbia University School of Law in March 1968, which set forth what Black characterized as “a confession of his articles of constitutional faith.” His views on the First Amendment help to explain Black’s supposed turnabout on civil rights. For, although Black believed that “the Constitution guarantees absolute freedom of speech,” he was “careful to draw a line between speech and conduct,” believing that disorderly civil rights and Vietnam War protest demonstrations were an enemy of “domestic peace.” Describing this distinction between “pure” speech and “speech plus conduct,” Black wrote:

It is not difficult to understand why the Founders believed that the peace and tranquility of society absolutely compel the foregoing distinction between constitutionally protected freedom of religion, speech and press, and non-constitutionally protected conduct like picketing and street marching. It marks the difference between arguing for changes in the governing rules of society and engaging in conduct designed to break and defy valid regulatory laws.

As much as Black remained a fervent supporter of racial equality throughout his tenure on the Court, his aversion to protests, marching, and demonstrations consistently led Black to side with his conservative brethren in upholding protestors’ convictions. Citing Justice Douglas’s dissenting opinion in Roth v. United States with approval, Black wrote: “freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.”

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44 Martin & Quinn, supra note 13, at 15.
45 The most extensive summary of Justice Hugo Black’s judicial views is contained in A Constitutional Faith (1969), the published version of his James S. Carpentier lectures, which were delivered at Columbia University School of Law in March 1968.
47 Id. at 53.
49 BLACK, supra note 46, at 55.
50 Id. at 53 (citing Roth v. United States, 354 U.S. 476, 514 (1957)).
Although Black believed that “[t]he Civil Rights Act of 1964, validly . . . made it unlawful for certain restaurants . . . to refuse to serve food to colored people because of their color,”51 Black refused to accept that it is “unlawful for the States to prosecute and convict ‘sit-in’ demonstrators who had violated valid state trespass laws,”52 as the Civil Rights Act, in conferring “a right to be served without discrimination in an establishment which the Act covers,” did not similarly authorize “persons who are unlawfully refused service a ‘right’ to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay.”53

III. Data Collection and Empirical Strategy

Between 1937, the year that Black was appointed to the Court, and 1971, the year of Black’s retirement, the Supreme Court decided approximately 129 civil rights cases. The composition of the Court’s docket varied significantly over that period. Whereas early civil rights cases involving non-violent equal protection claims seeking to dismantle institutionalized racial segregation, discrimination, and inequality were prevalent in the 1940s and 1950s, by the mid-1960s, civil rights activists engaged in various socially disruptive tactics in the form of sit-ins, sit-downs, lie-ins, and other demonstrations in order to effectuate a goal of racial equality.54

In order to assess the validity of the preference change thesis with respect to Justice Hugo Black’s voting record, this Article focuses on the universe of civil rights cases adjudicated while Black was on the Court between 1937 and 1971. It was in the area of civil rights that Black allegedly underwent his most dramatic evolution. Additionally, civil rights cases came before the Court throughout Black’s tenure, making it easier to detect a radical shift in voting behavior, as well as whether or not that shift was driven by internal philosophical evolution or changes in the Court’s docket.

Because the number of civil rights cases in this sample is still relatively small, to test the preference change thesis this Article employs a case-by-case approach to examining the approximately 129 civil rights cases decided between 1937 and 1971 in place of a large-N ideal point statistical analysis tracing Black’s ideological trajectory on the Court. As the data collected and analyzed in a study’s findings represents a potential threat to a study’s validity, this section briefly describes the data collection process in order to illuminate the method and criteria by which cases were selected and classified. Additional details regarding

52 Id.
53 Id. at 393.
the list of cases included in the study, broken down by case-type, are provided in Appendix A.

To avoid arbitrary case selection, this Article aims to compile a list of the population of all civil rights cases from the 1937 to 1971 terms broad enough to encompass both the early civil rights cases, which sought to promote racial equality in education and jury participation, as well as later sit-in cases, involving mass protest, social disorder, and demonstrations. In order to compile a list of cases, the Article conducts Westlaw searches to compile all cases tagged by Key Cite numbers as involving a civil rights issue, as well as all cases involving language plausibly related to sit-ins and civil rights demonstrations—e.g., “civil rights”; “protests and demonstrations”; “preferences and discriminations”; “parades, demonstrations, and picketing”; and “unlawful assembly.” To capture civil rights cases not tagged by Westlaw with readily identifiable terms, the Article conducts over-inclusive searches to capture as many cases as possible—e.g., “disobedience in general”; “failure to disperse”; “equal protection”; and “race, national origin, or ethnicity.” To be sure, such an approach does not entirely eliminate concerns about selection bias that might bias case selection in favor of disconfirmation of the preference change thesis. However, since this Article seeks to compile and examine all civil rights cases, not merely to sample from the overall population, by conducting over-inclusive Westlaw searches, the threat of selection bias is likely to be much less.

Reading each of these 129 cases, the Article classifies the population within this sample involving protests, sit-ins, or other manifestations of social disorder. Finally, the Article keeps track of all of Justice Black’s judicial votes on the merits, from 1937 to 1971, in the entire pool of 129 civil rights cases in order to assess Black’s ideological consistency over time and whether his perceived ideological shift is confined to cases involving marches, protests, and other demonstrations growing out of the Civil Rights Movement, or applies more broadly to the larger pool of civil rights cases in general.

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55 More specifically, the following Key Cite terms in Westlaw were used: “70k32 Preferences and Discriminations (refers to common carriers)”; “92XXVI Equal Protection”; “92XXVI(B)8 Race, National Origin, or Ethnicity”; “92XVIII(K) Protests and Demonstrations in General”; “92k1864 k. Anti-Government Protests and Demonstrations”; “129k132 k. Disobedience in General”; “Failure to Disperse”; “129k111 k. Parades, Demonstrations, and Picketing in General”; “92k1813 k. Breach of the Peace; Unlawful Assembly”; “231Hk2058 Picketing (under labor relations)”; “231Hk1294 Picketing (under labor and employment)”; “92k1916 Protests and Demonstrations; Picketing (labor context).”

56 Selection bias is a problem that arises any time a researcher does not observe a random sample of a population of interest. In cases where the population of observations that is selected is not independent of the outcome variable the researcher wishes to study, selection bias will lead to biased results. For a more detailed description of selection bias and its effects, see Christopher Winship & Robert D. Mare, Models for Sample Selection Bias, 18 ANN. REV. OF SOC. 327 (1992).
If the theory posited in this Article is correct, we should expect to find that Black grew more reactionary only as the type of cases coming before the Court increasingly implicated concerns about mass protest and social disorder. Indeed, although a former card-carrying member of the Ku Klux Klan, Black had earlier stood at the vanguard of the nascent civil rights movement in the late-1940s and early-1950s, siding with the majority in *Sipuel v. Oklahoma* and *Sweatt v. Painter*, which essentially invalidated *Plessy v. Ferguson*’s 1896 “separate but equal” doctrine and laid the foundation for the Supreme Court’s monumental 1954 *Brown v. Board of Education* decision.

This Article therefore seeks to reconcile Black’s support for civil rights in cases like *McLaurin*, *Sweatt*, and *Shelley* with seemingly contradictory cases like *Adderley v. Florida*, a case upholding the convictions of student-protesters at Florida A&M University for demonstrating against state and local racial segregation at a county jail. In contrast to earlier civil rights cases, involving complaints of exclusion of blacks from grand juries and anti-miscegenation laws, Black voted with the conservative wing of the Court to uphold the students’ trespassing convictions, on the ground that states are entitled to protect their property against demonstrators in order to keep the peace. Drawing a distinction between “pure” speech and “speech plus conduct,” Black wrote:

> The sheriff . . . had power . . . to direct that this large crowd of people get off the grounds. There is not a shred of evidence . . . that this power was . . . sanctioned . . . because the sheriff objected to what was being sung or

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58 *Sipuel v. Board of Regents of Univ. of Okla.,* 332 U.S. 631 (1948) (ordering the state to provide the black plaintiff, Ada Sipuel, with a legal education “in conformity with the equal protection clause of the Fourteenth Amendment.”).

59 *Sweatt v. Painter,* 339 U.S. 629 (1950) (holding that the University of Texas Law School’s refusal of admission to a black applicant and the state’s subsequent creation of a separate law school for black students violated the Equal Protection Clause of the Fourteenth Amendment).

60 *McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950) (holding that requirements that black graduate students at a predominantly white state university use separate educational facilities violated the Equal Protection Clause of the Fourteenth Amendment).

61 *Sweatt v. Painter,* 339 U.S. 629 (1950) (ordering the admission of blacks to a state law school despite the existence of a separate state school for blacks, on the grounds that there was no substantial equality in the education offered by the two schools).


63 *Adderley,* 385 U.S. at 47 (“Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff’s order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners’ argument that they had a constitutional right to stay on the property, over the jail custodian’s objections, because this ‘area chosen for the peaceful civil rights demonstration was not only ‘reasonable’ but also particularly appropriate . . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.”).

64 *Id.*
said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses . . . . Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff’s order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.65

Indeed, as Hugo Black’s biographers have described the so-called “great change,” in his last decade on the Court, Hugo Black became the “restrainer of the ebullient Justice Goldberg,” as a new generation of civil rights activists replaced the more muted protests that had previously been brought by the NAACP. Unlike their forbears, the new generation of protesters proved to be forceful, massive, and highly conspicuous, seeking to make their demands highly visible by inspiring discomfort in an “otherwise complacent and satisfied majority.”66 Increasingly disenchanted with the protesters’ method of securing equal rights, Black declared in a series of sit-in opinions: “We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by . . . patrolling, marching, and picketing on streets and highways, as those amendments afford to . . . pure speech.”67 Although Black believed that “[t]he First and Fourteenth Amendments take away from government, state and federal, all power to restrict freedom of speech, press, and peaceful assembly where people have a right to be for such purposes,” the First Amendment did not confer “the right to picket, demonstrate, or march . . . along the public streets, in or around other people’s property . . . without their owners’ consent.”68

IV. Results

Legal scholars and historians have long noted a doctrinal shift in Black’s voting behavior beginning in the mid-1960s. Although Justice Black had typically voted with liberal Justice William O. Douglas and other members of the liberal wing of the Court,69 doctrinal disagreements surfaced in the mid-1960s. The liberal Justice whom the black press had singled out in Missouri ex rel. Gaines v. Canada for praise in approving “the decision of the Court to compel” the

65 Id.
66 DUNNE, supra note 9, at 390.
67 Cox, 379 U.S. at 559.
68 BLACK, supra note 46, at 53-54.
69 BALL, supra note 29, at 131 (noting Hugo Black Jr.’s observation that “[f]or more than thirty years, the two sat together, and the odds are that in any given case, even toward the end of [Black’s] career, the two would have voted together.”).
University of Missouri Law School to ‘admit Negroes,’” was no more. 70 Unlike his liberal colleagues, Black opposed the civil rights demonstrations. 71 Whereas free speech was a fundamental liberty deserving of the Court’s protection, mass protest, disorderly conduct, and demonstrations undermined the sanctity of private property and displayed a lack of social responsibility that conflicted with Black’s overarching libertarian judicial philosophy.

Yet Black’s so-called “great change” was, upon reflection, entirely of a piece with Black’s prior voting record. For, just as Black now abandoned his liberal brethren in opposing civil rights demonstrations, the once-ardent New Dealer had in the 1940s opposed picketing in the context of unions and labor demonstrations. Indeed, Black had been nominated to the Court from the Senate, after coming to national prominence for such New Deal achievements as his introduction of a bill proposing a 30-hour work week, the Fair Labor Standards Act, and the Wage-Hour Act of 1938. 72 Yet, in Giboney v. Empire Storage & Ice Co., a 1949 case involving labor union members’ peaceful picketing of Empire Storage & Ice Company for Empire’s continued sale of ice to non-union peddlers, Black adopted a more conservative approach, writing for the Court in affirming an injunction to restrain union members from “‘placing pickets or picketing around or about the buildings’ of Empire.” 73 In so holding, Black acknowledged the Court’s mindfulness “of the essential importance to our society of a vigilant protection of freedom of speech and press,” 74 yet nevertheless emphasized that “‘[a] state is not required to tolerate in all places even peaceful picketing by an individual.’ ” 75 This part presents the analysis chronologically, identifying three broad periods that form a consistent ideological thread in Black’s judicial votes on the merits:

(1) A period involving labor protests and social unrest during the 1940s, when Black voted with the conservative wing of the Court for the same reasons that would later cause him to oppose civil rights protests in the mid-1960s;

(2) A period of peaceful civil rights activism in the 1950s through the early 1960s, led by Dr. Martin Luther King, Jr. and other ministers, when liberal members of the Court sought to promote racial equality in education, jury membership, and civic participation; and

70 FREYER, supra note 14, at 87 (citing an editorial published in the Nashville-Globe-Independent).


72 Justice Black Dies at 85; Served on Court 34 Years, N.Y. TIMES, Sept. 25, 1971.


74 Id. at 501-502.

75 Id. at 501 (quoting Bakery and Pastry Drivers and Helpers Local 802 of Int’l Bhd. of Teamsters v. Wohl, 315 U.S. 769, 775 (1942)).
The period beginning in the mid-1960s, when civil rights groups, dissatisfied with the progress of the early civil rights era, resorted to violence and arrests in order to protest racial segregation in public and private facilities.

The latter typology is consistent with existing accounts suggesting that Black’s support for civil rights and civil liberties “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.” Yet in contrast to existing accounts, this Article argues that viewed as a whole, the period from 1937 to 1971 provides strong support for the notion that Black remained consistent in his voting behavior throughout his career on the Court.

Two dimensions can be identified in Black’s voting behavior. On the one hand, in both the 1940s and 1960s, Black voted with the conservative wing of the Court in cases involving labor demonstrations and sit-ins protesting racial discrimination. On the other hand, throughout his career, Black continued to vote with his liberal colleagues on labor and civil rights issues that did not implicate libertarian concerns for social order. Whereas Black remained an outspoken proponent of racial equality, particularly with respect to education and African-Americans’ opportunities for self-advancement, in cases involving demonstrations, protests, and trespass on private property, Black took the opposite approach, upholding convictions of demonstrators, whether the protests pertained to labor unrest or civil rights.

A. Labor Unrest and Civil Rights

In many ways, the labor protests of the 1940s posed the same philosophical concerns and threats to social order that animated Hugo Black’s later response to the Freedom Riders, whose resort to civil disobedience and confrontational tactics in order to eradicate racial segregation in public and private facilities conflicted with Black’s overriding concerns with maintaining social stability.

Although outliers and borderline factual scenarios can be identified, in case after case Black used similar language indicating an aversion to protesters and strikers, particularly where violent tactics were involved. In Hotel & Restaurant Employees International Alliance v. Wisconsin Employment Relations Board, for example, in which employees of a hotel and restaurant union went on strike, picketing two hotels in Milwaukee, and assaulting scabs whom the hotels employed in the strikers’ absence, Black joined the majority in upholding the constitutionality of an order by the Wisconsin Employment Relations Board forbidding workers from picketing or striking in the absence of a collective bargaining agreement. According to the majority, the order did not violate

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76 Ulmer, supra note 4, at 144.
78 Id. at 440.
employees’ right of free speech, as states still had the right “to preserve the peace and protect the privacy, the lives, and the property of [their] residents.”

Similarly, in Allen v. Bradley Local No. 1111 v. Wisconsin Employment Relations Board, Black voted to uphold an order forbidding workers from picketing where a state statute provided that it would be an “unfair labor practice” for an employee “[t]o coerce or intimidate an employee in the enjoyment of his legal rights . . . or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.” The Court noted that the only employee or union conduct forbidden by the Wisconsin statute involved acts that threatened social disorder: “mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company’s factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees.” Such activity undermined a business’s profitability, and hence conflicted with a commitment to self-advancement and personal responsibility.

Black’s opposition to labor unrest was part of an overarching belief that individual liberties at times had to be set aside in order to ensure the maintenance of orderliness in society. This principle applied whether the issue concerned labor unrest, civil rights, or national security. For example, during World War II, the Japanese exclusion cases showed Black’s support for legislative and executive actions designed to maintain social order. Commenting on the forced evacuation of Japanese-Americans and other alien Japanese living in the United States, Black wrote:

I would do precisely the same thing today, in any part of the country. I would probably issue the same order were I President. We had a situation where we were at war. People were rightfully fearful of the Japanese in Los Angeles, many loyal to the United States, many undoubtedly not, having dual citizenship—lots of them. They all look alike to a person not a Japanese. Had [the Japanese] attacked our shores, you’d have a large number fighting with the Japanese troops. And a lot of innocent Japanese-Americans would have been shot in the panic. Under these circumstances, I saw nothing wrong in moving them away from the danger areas.

As would remain true over time, for Black, the courts, the legislature, and the executive were charged with the fundamental task of preserving communal order, even where the legislation or its implementation conflicted with the individual liberties guaranteed by the Constitution.

79 Id. at 441.
81 Id. at 741-42.
82 Id. at 748.
83 BALL, supra note 29, at 113.
84 Justice Black, N.Y. TIMES, Sept. 26, 1971, at A76.
B. Civil Rights and Equal Protection

When Black joined the Supreme Court in October term of 1937, he came to the Court with a strong commitment to a society based on the rule of law.\(^85\) This libertarian judicial philosophy rooted in a faith in social order and rule of law concerns, however, also included a society in which all citizens, regardless of social position or color, would be treated equally. It was this commitment to social equality which made Black a staunch advocate of racial equality throughout the 1940s through the 1960s, even as student sit-ins, involving acts of defiance that eventually led to passage of the Civil Rights Act of 1964, threatened to undermine peace and social stability throughout the South during the mid-1960s.

Although Black was a former member of the Ku Klux Klan, as early as 1946, when the Court began relying upon the Commerce Clause to desegregate hotels and restaurants in the South, Black declared opposition towards segregation.\(^86\) The cases during the 1940s considered racial equality in education and other public accommodations. In both *McLaurin v. Oklahoma State Regents*\(^87\) and *Sweatt v. Painter*,\(^88\) two classic early civil rights cases involving higher education, Black argued that “separate but equal” facilities are inherently unequal. In Black’s view, the state could not “`set up a new school that is equal,’”\(^89\) as segregation was a badge of inferiority, generating a feeling of inferiority among blacks as to their status in the community that would negatively impact their quest for personal development. In Black’s view, racial segregation would thus deprive blacks of their opportunity for self-advancement, thereby undermining the bulwark of a free society.\(^90\) In both cases, the Court unanimously declared racial segregation unconstitutional under the separate but equal doctrine, the Justices each privately acknowledging that *Plessy v. Ferguson*’s historic separate but equal doctrine had, at least implicitly, been overruled.\(^91\)

Justice Black’s commitment to racial equality extended not only to segregation in higher education cases, but also to other areas of racial equality as well. In *Patton v. State of Mississippi*,\(^92\) for example, Black, writing for a majority of the Court, invalidated an indictment of a black person by an all-white grand jury on the basis

\(^{85}\) BALL, supra note 29, at 107.

\(^{86}\) See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 275 (1964) (Black, J., concurring) (finding that “[t]he foregoing facts are more than enough . . . to show that Congress acting within its discretion and judgment has power under the Commerce Clause and the Necessary and Proper Clause to bar racial discrimination in the Heart of Atlanta Motel and Ollie’s Barbecue,” as “in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow.” [citations omitted]).

\(^{87}\) McLaurin, 339 U.S. at 637.

\(^{88}\) Sweatt, 339 U.S. at 629.


\(^{90}\) Id.

\(^{91}\) Id. at 637.

that although there were qualified blacks in the county for jury service, the venires from which the grand juries were selected did not contain the name of a single black person.93 Wrote Black: “[w]hen a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand.”94

Likewise, in a similar case nearly a decade earlier, Justice Black held that “[e]xclusion from Grand or Petit Jury service on account of race is forbidden by the Fourteenth Amendment,”95 as the principles which forbid discrimination in the selection of Petit Juries also govern the selection of Grand Juries: “It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color.”96 Black believed that exclusion of blacks from juries undermined a free society by depriving blacks of their right to a fair trial legitimated by the rule of law.

Indeed, in the face of those who forecast in 1937 that Black’s judicial actions would reflect his past association with the Klan, Black displayed a fervent commitment to racial equality and civil rights. In Chambers v. Florida, for example, a 1940 case involving the use of coercive third degree methods of interrogation against Negro suspects, Black was outspoken in invalidating the death sentences of four black males where the convictions rested on confessions extracted after six days of nearly continuous questioning. Referring to the documents that the black suspects had signed as “sunrise confessions,” Black looked on the case as an example of police brutality, involving dragnet methods of arrest on suspicion without warrant and the protracted questioning and cross-examination of “ignorant young colored tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers, or counselors under circumstances calculated to break the strongest nerves and the stoutest resistance.”97 Such tactics posed a direct threat to a free society, and were reminiscent of tyrannical governments that had “immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.”98 As several commentators have noted, the opinion that Black wrote in Chambers v. Florida was a harbinger of things to come. In time, Black would make himself

93 Id. at 464.
94 Id. at 469.
96 Id. at 362.
97 Chambers v. Florida, 309 U.S. 227, 235 (1940) (holding that police pressure resulting in a criminal defendant’s confession violates the Due Process clause).
the champion of minorities in cases challenging racial exclusion on grand and petit juries, as well as segregation in transportation facilities, voting, and education.

These decisions underscored Black’s underlying belief in a notion of “equal protection of the laws” as the safeguard of a free society. Whether in education, representation, or jury participation, Black was out ahead of many of his colleagues on the Court. For example, in a 1953 case, Terry v. Adams, Black, in an opinion for the Court, held that Texas’s all-white primary violated the Fifteenth Amendment. The challenged procedure in Terry involved the selection of candidates for Texas primary elections through the Jaybird Democratic Association, a successful political organization that functioned much like a political party. Despite the fact that the racial discrimination complained of was carried out by a private group, suggesting an absence of state action, Black believed that the Jaybirds’ method of selecting candidates was so closely intertwined with the public process of choosing candidates that it violated blacks’ Fifteenth Amendment right to vote, a position on which not all members of the Court were in agreement.

Although, as a white Southerner Black accepted racial segregation as a fact of life, he did not believe that white superiority meant that blacks should be denied equal rights, as this would hinder blacks in their quest for self-advancement and personal responsibility. As Black declared in 1920, “`remaining socially separate, the colored man or any other man no matter what the color of his skin

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100 See, e.g., Morgan v. Commonwealth of Virginia, 328 U.S. 373, 386 (1946) (concurring opinion) (reversing a conviction for violating a Virginia state statute requiring racial segregation of all passengers of public motor vehicles and making it a misdemeanor for any passenger to refuse to comply with a driver’s instructions to switch seats in compliance with the regulation).

101 See, e.g., Terry v. Adams, 345 U.S. 461 (1953) (holding that the Jaybird Democratic Association, a successful Texas political organization that purposefully sought to exclude blacks from voting, was a state actor subject to the Fifteenth Amendment’s command that the right to vote cannot be denied or abridged on account of race).

102 See, e.g., McLaurin, 339 U.S. at 637 (holding that a public institution of higher education violates the Equal Protection Clause of the Fourteenth Amendment when it provides differential treatment to students solely on the basis of race); Sipuel, 332 U.S. at 631 (holding that the state of Oklahoma had to provide equal educational instruction for black and white students, and therefore that black students were entitled to be admitted to previously all-white state law schools); and Fisher v. Hurst, 333 U.S. 147 (1948) (holding that the district court had adequately followed the mandate set forth in Sipuel v. Board of Regents and denying a motion for leave to file a petition for a writ of mandamus to compel compliance with that mandate).

103 Terry, 345 U.S. at 461.

104 Id. at 469.

105 FREYER, supra note 14, at 128-29.
may be, is . . . entitled to equal rights before the law.’ ”

Justice Black once said, ‘with its absolute guarantee of individual rights, is the best hope for the aspirations of freedom which men share everywhere.’ ”

It was this abiding commitment to racial equality that led Black to support landmark civil rights decisions, such as Cooper v. Aaron, in which a unanimous Court held that it was constitutionally impermissible under the equal protection clause to maintain law and order by depriving black students of their equal rights under the law. Little Rock officials were ordered to proceed with integration.

In a forceful and eloquent passage at the outset of the opinion, Black wrote:

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution . . . . We are urged to uphold a suspension of the Little Rock School Board’s plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in Brown v. Board of Education have been further challenged and tested in the courts. We reject those contentions.

Yet, in contrast to cases concerning education, juror participation, and elections, Black was not nearly so favorable towards black litigants where civil disobedience was concerned. Black, the champion of civil liberties and civil rights, would later deny a change in judicial philosophy. “ ’I haven’t changed a job or title,’ ” Black declared in 1967. In another statement, Black emphasized that there is a clear distinction between “pure” speech and the types of activities engaged in by civil rights protesters. Nevertheless, towards the end of his career, Black’s critics came to misinterpret Black’s libertarian emphasis on law and order, social stability, and equality of opportunity as Black “ ‘going conservative,’ or ‘turning his back on the Negro.’ ” In such situations, Justice Black denied that there had been a shift in ideological direction; it was the cases themselves that had changed, not Black’s judicial philosophy itself.

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106 SUITTS, supra note 57, at 523.
107 Justice Black Dies at 85; Served on Court 34 Years, UNITED PRESS INT’L, Sept. 25, 1971.
110 Justice Black Dies at 85; Served on Court 34 Years, UNITED PRESS INT’L, Sept. 25, 1971.
111 Id.
112 Id.
C. The Rise of the Sit-In Cases

By the late 1960s, a number of Supreme Court observers felt that Justice Black had moved in a reactionary direction. However, despite such opinions as a 1966 case in which the Court upheld the first convictions of African-American demonstrators protesting segregation, and a later dissent in which Black wrote that no group, irrespective of the cause they represent, has a constitutional right to demonstrate in a public place, Black maintained that he had not altered his beliefs. As Black put it in a 1968 television interview:

“I’ve never said that freedom of speech gives people the right to tramp up and down the streets by the thousands, either saying things that threaten others, with real literal language, or that threaten them because of the circumstances under which they do it. The First Amendment protects speech. And it protects writing. And it protects assembly. But it doesn’t have anything that protects a man’s right to walk around and around and around my house, if he wants to; to fasten my people—my family—up into the house, make them afraid to go out of doors, afraid that something will happen.”\[^{113}\]

The distinction between belief in free speech and a commitment to public order and safeguarding private property is consistent with Black’s earlier position in cases involving labor protests, and resurfaced in civil rights cases beginning in the mid-1960s in cases such as *Griffin v. Maryland*. Disagreeing with his liberal colleagues’ decision to reverse the convictions of five African-Americans who were arrested during a protest of a privately owned amusement park on equal protection grounds, Black argued that the Fourteenth Amendment does not cover convictions for criminal trespass on private property.\[^{114}\] In contrast to his liberal colleagues, Black acknowledged that one purpose of a “sit-in” is to “express a vigorous protest” against a store’s policy “of not serving Negroes,” yet distinguished between pure speech (“what petitioners said”) and speech plus conduct (“what they did”), noting that the protesters’ refusal to disperse from store property after having been asked to leave exceeded the scope of the Fourteenth Amendment’s protections.\[^{115}\]

Similarly, in *Cox v. Louisiana*, another sit-in case involving a demonstration in front of a courthouse in which the police had been forced to resort to tear gas in order to get the protesters to disperse, Black distinguished between the First and Fourteenth Amendments’ guarantees of freedom of speech and the right to picket, noting that “[t]his does not mean . . . that these amendments also grant a

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\[^{113}\] *Id.*
\[^{115}\] *Id.* at 325 (“none of our prior cases has held that a person’s right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner’s use of that property”).
A year later, in Brown v. Louisiana, Black went even further, voting to uphold the conviction of five representatives of the Congress of Racial Equality (CORE), who had refused a local sheriff’s order to leave a public library reading room, even though there was no indication that the protestors had talked “in unusually loud voices” or used “bad language.” Although this case, unlike Cox v. Louisiana, involved no “picketing and patrolling in the streets,” Black believed that to overturn the protestors’ convictions would be to implicitly sanction the activities of those who specifically intended “to provoke a breach of the peace.” This would leave “the custodians and supervisors of the public libraries in this country . . . helpless[] . . . while protesting groups advocating one cause or another . . . stage `sit-ins’ or `stand-ups’ to dramatize their particular views on particular issues,” thereby undermining states’ ability to maintain public order. Thus, Black concluded, “[t]hough the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else’s property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas.”

Yet it was only in cases involving picketing or mass demonstration, broadly interpreted, that Black deserted his liberal colleagues on the Court. Throughout the 1960s, in cases involving racial discrimination but no indicia of social disorder or unrest, Black continued to vote with his liberal colleagues. In Griffin v. County School Board of Prince Edward County, for example, a case involving the County School Board of Prince Edward County’s decision to close all local public schools, and instead provide vouchers to attend private schools, Black joined the liberal majority in declaring the vouchers unconstitutional under the Equal Protection Clause as a ploy designed to circumvent the Court’s holding in Brown v. Board of Education and maintain segregationist policies.122

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116 Cox, 379 U.S. at 578.
118 Id. at 157.
119 Id. at 162.
120 Id. at 165.
121 Id. at 166.
122 Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964) (holding that Prince Edward County School Board’s decision to close all of its local, public schools and award vouchers to attend private schools instead as part of a coordinated policy to maintain segregation violated the Equal Protection Clause of the Fourteenth Amendment).
Although, as noted above, limited data does not permit a large-N ideal point statistical analysis assessing Black’s ideological position over time,\(^{123}\) the validity of the theory that Black only voted with the conservative wing of the Court in cases implicating overarching libertarian philosophical concerns can be tested empirically by examining the frequency of Black’s merits votes in the liberal or conservative direction over the period studied and whether a case involved mass demonstrations or confrontational tactics. For purposes of examining the correlation between the type of case confronted by the Court and Black’s judicial merits votes, each civil rights case was coded as a binary variable—either as a “0” or a “1”—where cases coded as “0” correspond to ordinary civil rights cases, such as those concerning education, juror participation, and voting rights, and cases coded as “1” connoted “sit-in” demonstrations. Similarly, Black’s judicial merits votes are coded as “0” for liberal legal conclusions and “1” for conservative judicial votes.

Although there is not a perfect correspondence between case-type and Black’s voting record, Table 1 shows that Black voted with the liberal wing of the Court in only two cases involving sit-in demonstrations, siding with his conservative colleagues in approximately 90 percent of cases implicating mass protest or social unrest. Likewise, Black, with but rare exception, voted with the liberal justices on the Court in civil rights cases that did not involve demonstrations or protests.

Table 1: Frequency of Justice Black’s Judicial Merits Votes, By Case Type

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<thead>
<tr>
<th></th>
<th>0 = REGULAR CIVIL RIGHTS CASE</th>
<th>1 = SIT-IN CASE</th>
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<tbody>
<tr>
<td>HUGO BLACK VOTE</td>
<td>97</td>
<td>2</td>
</tr>
<tr>
<td>0 = LIBERAL</td>
<td></td>
<td></td>
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<tr>
<td>1 = CONSERVATIVE</td>
<td>10</td>
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This is the very pattern we observe in Figures 1(a) and 1(b). Indeed, with only scattered exceptions, such as Black’s unexpected liberal vote in \(\text{Robinson v. State of Florida,}^{124}\) whether a case involved a sit-in or breach of the peace appears to do

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\(^{123}\) A large-N “ideal point” analysis measures the “ideal position,” or policy outcome in a single dimension preferred by a given Justice over time, relative to the other Justices on the Court, where it is assumed that each actor has an ideal point and acts to achieve the policy outcome closest to that point. \(\text{See, generally, Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999, 10 POLITICAL ANALYSIS 134 (2002).}\)

\(^{124}\) \(\text{Robinson v. State of Florida,}^{378} \text{U.S. 153 (1964). In Robinson, Black, writing for the Court, reversed the convictions of white and African-American persons who refused to leave a lunch counter upon the restaurant manager’s request without reaching the broader question of whether the Fourteenth Amendment forbids a state from arresting and prosecuting those who, having been asked to leave a restaurant on account of their skin color, refuse to do so. Instead, Justice Black decided the case according to the Court’s prior ruling in \text{Peterson v. Greenville,}^{373}\)
a remarkably good job of accounting for Black’s reactionary position during his last decade on the Court. In regular civil rights cases, Black consistently voted with the liberal wing of the Court. By contrast, in sit-in cases, Figure 1(a) reveals that Black consistently voted with his conservative colleagues on the Court. Although Black’s last decade on the Court reveals that Black increasingly voted with the conservative Justices in regular civil rights cases, and with the liberal Justices in sit-in cases, the quantitative evidence under this revised account largely confirms the notion that “[t]he issue on which Black . . . part[ed] company with the civil rights movement” was confined to “the use of two tactics: protest demonstrations and civil disobedience.”\footnote{125} It was in these cases, involving marches, freedom rides, and sit-ins, that the evidence most strongly suggests Black abandoned the liberal wing of the Court.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1a}
\caption{Hugo Black and Civil Rights: Voting By Term in Sit-In Cases}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1b}
\caption{Hugo Black and Civil Rights: Voting By Term in Regular Civil Rights Cases}
\end{figure}

With these examples in mind, we can begin to see that what appears to be preference change may, in fact, be the product of the Court’s changing docket. It is misleading to conclude from looking only at Black’s merits votes that because he was initially quite supportive of racial

\footnote{125 Berman, supra note 98, at 395.}

U.S. 244 (1963), which held that a state law making it unlawful for restaurants to serve black and white persons in the same room or at the same table or counter constituted state action in violation of the Equal Protection Clause of the Fourteenth Amendment.
equality in civil rights cases, but later voted with the liberal wing of the Court at a much lower rate, Black became more reactionary over time. Examining judicial votes alone ignores the possibility that the content of the cases themselves varied from one term to the next.

In Hugo Black’s case, the presence of two issue dimensions led to a sharp split with the liberal wing of the Court. In contrast to liberal colleagues like William O. Douglas, Black drew a line between a belief in free speech and a commitment to public order. As a result, beginning in the mid-1960s with the rise of the civil rights movement, Black’s libertarian philosophy took over as the Court began to confront black protesters’ quest for the right to peacefully assemble and petition for redress of grievances. Black believed that property owners should be protected against protests, marches, and other disorderly conduct in their stores.

Thus, in Adderley v. Florida, a key case involving black students who were arrested on trespass charges for protesting against racial discrimination before a Tallahassee, Florida county jail, Black voted to uphold the trespassers’ convictions, on the ground that “singing and clapping” demonstrators did not have a “constitutional right to stay on the property, over the jail custodian’s objections.”126 The same logic applied equally to the anti-war context, where, in Tinker v. Des Moines Independent Community School District,127 student anti-war protesters wore black armbands on their sleeves as a symbol of their disapproval of the United States’ involvement in Vietnam. Taking issue with the liberal majority’s position, Black dissented, noting that he had “never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases.”128 Although Black acknowledged the absence of evidence that the armband students “shouted, used profane language, or were violent in any manner,” he nevertheless emphasized that “their armbands caused comments” and “warnings by other students,” and that a math teacher’s lesson period had been “practically `wrecked’ ” by one of the armband students, disrupting the students’ learning.129 In Black’s view, to allow the protests to go on meant acceding to the unarticulated premise that “people who want to propagandize protests or views have a constitutional right to do so however and wherever they please.”130

V. Implications

As the foregoing indicates, the fact that existing studies of ideological drift fail to take into account changes in case content may render their substantive conclusions suspect. Although these studies argue that the sheer number of accounts finding that a sizable number of Justices have moved to the left or right

126 Adderley, 385 U.S. at 47.
127 Tinker, 393 U.S. at 503.
128 Id. at 517.
129 Id.
130 Adderley, 385 U.S. at 45, 47-48.
over the course of their careers militates against concluding that case type is the root cause of these Justices’ ideological drift, Hugo Black’s tenure on the Court provides strong support for the conclusion that large-N quantitative studies solely looking at judicial votes in the absence of case-specific characteristics may lead to inaccurate inferences. Although numerous studies provide compelling evidence that Black became significantly more conservative in nearly every subsequent term compared to his first term on the Court, such accounts fail to consider that what appears to be ideological drift, even a dramatic jurisprudential turn, may, in fact, be the product of a changing Court docket growing out of evolving historical conditions.

Consider Justice Harry Blackmun, who, like Hugo Black, is known for having reversed ideological direction while on the Court. It has long been noted that Blackmun, once a supporter of the death penalty, later became an opponent of lethal injections; likewise, Blackmun went from being an advocate of states’ rights to a believer in the power of the federal government, and from being an opponent of stronger opposition to sex discrimination to an ardent supporter of women’s rights. Yet, despite such pronouncements, many contemporary observers of the Court described Justice Blackmun as “`consistently . . . on the conservative side of the issues,’ a jurisprudential twin of Chief Justice Warren Burger, and, in the ultimate compound taxonomy, a `White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs.’” Indeed, towards the end of his career, Blackmun himself maintained that he did not

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131 Martin & Quinn, supra note 13, at 15.
132 In so arguing, this Comment suggests that the reason behind a Justice’s seeming change in policy preferences is just as important as any empirical evidence that a Justice’s views have evolved over time. As Supreme Court reporter Linda Greenhouse argued, in criticizing the ‘preference change’ literature’s findings, “[t]he answer to the ‘why’ question is not one that can be teased from data or charts . . . It simply points to another line of inquiry, one based on insights from personal history and psychology. This Gestalt-centered rather than data-driven inquiry is necessarily anecdotal and more open to conflicting interpretations. It may even be a question without a general answer, inviting us to look at members of the Court in all the fullness and quirkiness of their individual personalities.” Linda Greenhouse, Justices Who Change: A Response To Epstein Et Al., 101 NW. U. L. REV. 1885, 1886 (2007).
133 See, e.g., Martha J. Dragich, Justice Blackmun, Franz Kafka, and Capital Punishment, 63 MO. L. REV. 853, 854 (1998) (“Over the course of his thirty-five years as a judge, Justice Harry A. Blackmun seemed to change his views on the death penalty.”); Jeffrey B. King, Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun, 33 HOUS. L. REV. 277, 278 (1996) (“Blackmun very well may have undergone one of the most marked ideological changes the United States has seen in a public figure during this century. During the span of his twenty-four years on the United States Supreme Court, Justice Blackmun went from being known as ‘Hip Pocket Harry’ to being known as a justice of compassion.”).
134 Nathan Lewin, There is No Mistaking the Swing of the Pendulum, N.Y. TIMES, June 27, 1971, at 8; Ruger, supra note 31, at 1209. See also Greenhouse, supra note 132, at 1886-87 (arguing that, based on her research of Justice Blackmun, his “post-1973 development was an example of path dependence: that being vilified by one side of the abortion debate and lionized by the other in the aftermath of Roe v. Wade led him to become more and more entrenched in his defense of Roe. As a result, he eventually came to embrace a unified jurisprudence of women’s rights and abortion rights that was almost completely foreign to the medical model of abortion with which he began.”).
change much during his career, but instead that the Supreme Court around him had.\textsuperscript{135} Just as there is reason to believe that Justice Hugo Black was being accurate when he maintained that he did not change his “basic constitutional philosophy” during his time on the Court,\textsuperscript{136} it may not be entirely accurate to conclude that Harry Blackmun’s voting shift was attributable to ideological drift in the sense that his sincere preferences, or underlying personal views, underwent a dramatic evolution during his tenure on the Court.\textsuperscript{137} Indeed, even those who argue that Blackmun changed over the course of his career insist that “Blackmun’s sincere personal opposition to the death penalty did not change,” only his “assessment of the constraint that external legal norms placed on his ability to express that view in his votes on cases.”\textsuperscript{138}

The findings offered in this Article suggest that the same could equally be said of Justice Owen Roberts, whom commentators in 1937 described as “the switch in time that saved Nine,” shifting from the anti-New Deal wing of the Court to join President Franklin D. Roosevelt’s four supporters.\textsuperscript{139} Although data suggests that Roberts made a sharp turn to the left in the 1936 term, this empirical observation is entirely consistent with the notion that Roberts’s “switch” was a response to a growing disenchantment with the hard-line views of the anti-New Deal Justices and political pressures of the day rather than a shift in Roberts’s internal judicial ideology itself.\textsuperscript{140} This casts serious doubt on the nascent ‘preference change’ account. What may appear to be ideological drift may in fact be the result of a changing caseload arising out of evolving historical conditions. The key to understanding a Justice’s voting record may be not simply to examine how that Justice voted over time, but to consider whether, apart from idiosyncratic factors, one can identify an overarching judicial philosophy, such as libertarianism, that unites a Justice’s seemingly inconsistent voting record when measured more coarsely in terms of liberal or conservative votes over time.

\section{VI. Conclusion}

Although ideological drift among Supreme Court Justices is an important topic in its own right, the significance of the preference change account is in its implications for the judicial nominations process and the type of Justices who ultimately end up on the Court. If Supreme Court Justices’ ideology remains invariant throughout the course of a Justice’s tenure on the Court, this justifies

\begin{itemize}
  \item \textsuperscript{136} \textit{Justice Black Dies at 85; Served on Court 34 Years}, UNITED PRESS INT’L, Sept. 25, 1971.
  \item \textsuperscript{137} Ruger, \textit{supra} note 31, at 1216.
  \item \textsuperscript{138} \textit{Id.} at 1217.
  \item \textsuperscript{139} Barry Friedman, \textit{The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics}, 148 U. PA. L. REV. 971, 974, n.9 (2000) (describing the history of the phrase “switch in time that saved nine.”).
  \item \textsuperscript{140} Epstein et al., \textit{supra} note 26, at 1497-98.
\end{itemize}
presidents, senators, and interest groups in believing that the president’s choice of nominee will have predictable downstream consequences for the arc of judicial decision-making on the Court in future decades. On the other hand, if turncoats like Justice David Souter and Justice Harry Blackmun are more common, interest groups and politicians likely place too much weight on the importance of individual nominations, since predicting the future ideology of any given nominee may be a risky, if futile, enterprise.

This Article has shown that a case-by-case analysis of a Justice’s historical voting record suggests that presidents may have strong reason to consider a nominee’s overarching judicial philosophy when considering whom to appoint to the nation’s highest court. Although a Justice may not consistently vote in either a liberal or conservative direction, this Article has cautioned against too readily inferring from such seeming inconsistencies that a Justice has changed their preferences while on the Court. Instead, Hugo Black provides an example of a complex Justice whose judicial ideology cannot easily be summed up as either liberal or conservative. This suggests that judicial nominees may be more likely to stay their present ideological course than current research often assumes.
Appendix A: List of Cases

(‡ Indicates Sit-In or Demonstration)

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