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The Drifters: Why the Supreme Court Makes Justices More Liberal

Jon Hanson
Adam Benforado

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EXIT

STRATEGY

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THE DRIFTERS
Why the Supreme Court makes justices more liberal

Jon D. Hanson and Adam Benforado

When Justices William Rehnquist and Sandra Day O'Connor left the bench last year, conservatives were in an anxious mood: though pleased at the prospect of shifting the Supreme Court to the right, they were worried by the record of past Republican appointments. The refrain in conservative commentary, repeated with special intensity during the Harriet Miers affair, was: Not another Souter. Not another Kennedy. Not another O'Connor. And they might have added: Not another Blackmun. Not another Stevens. Not another Warren. They were right to be concerned. While there have been a number of relatively reliable conservative justices over the years—Antonin Scalia, Clarence Thomas, and Rehnquist being prime examples—and some important right-shifting exceptions—notably Felix Frankfurter, appointed by Franklin D. Roosevelt, and Byron White, appointed by John F. Kennedy—the tendency in recent decades to drift leftward has been strong enough to gain both popular and scholarly attention. Indeed, Larry J. Sabato, the director of the University of Virginia Center for Politics, has suggested that about one quarter of confirmed nominees over the last half century have wound up "evolving from conservative to moderate or liberal."

Richard Nixon, for instance, thought he was getting solid right-wingers when he appointed Harry Blackmun and Lewis Powell, only to find, several years later, Blackman authoring Roe v. Wade and Powell swing-voting to permit affirmative action in Regents of the University of California v. Bakke. Coincidentally, in Bakke, Justice John Paul Stevens—then a recent Gerald Ford appointee—wrote a dissent joined by the court's most conservative members, though a few decades later he would emerge as the most consistently liberal voice on the bench.

Justices O'Connor and Anthony Kennedy—though they remain tied to their conservative mainstays on certain issues, such as federalism—both seem to have embarked on similar leftward journeys, particularly with respect to individual rights and liberties. Appointed by Ronald Reagan in 1981, O'Connor struck a resoundingly conservative chord in her early opinions on women's and racial-minority rights, too, join with liberal colleagues in cases touching on the same issues over the last 15 years—most strikingly in Planned Parenthood v. Casey, which upheld Roe's central holding, and Grutter v. Bollinger, which vindicated a law-school affirmative-action program. Kennedy, also a Reagan appointee, was initially celebrated by conservatives as "Bork without the beard." Yet he later provided key votes to knock down anti-sodomy laws in Lawrence v. Texas and overturn the death penalty for juveniles in Roper v. Simmons—prompting Dr. James C. Dobson, the founder of Focus on the Family, to rechristen him "the most dangerous man in America."

There is no doubt that the presidential nomination process greatly influences the large-scale jurisprudential trends in expected directions. Still, that Supreme Court appointment is both so important—in President Bush's words, "one of the most consequential decisions a president makes"—and so scrutinized, cuss the many examples of unpredicted drift as a real mystery: Why are presidents, and other backers, so often disappointed by the eventual performance of their nominees? And why do so many Supreme Court justices drift to the left, especially on matters of individual rights?

One fashionable theory is that, in our post-Borkan world, presidents must put forward nominees who can survive the contentious confirmation process—thus, ones who have shorter paper trails and less ideological baggage. This "advice and consent" bottleneck allows through only candidates with unpredictable judicial dispositions.

While this has some validity, president's buyer's remorse is as old as the process itself and may develop even when a president nominates a lifelong ally or a well-known public figure. By the time of his nomination, Earl Warren had established himself as a dedicated conservative: he had been the attorney general and three-term Republican governor of California and Thomas Dewey's running mate in the famously narrow loss to Harry Truman and Alben Barkley. In short, Earl Warren hardly seemed an unknown quantity when Dwight D. Eisenhower appointed him as Chief Justice in 1953; and yet it was Earl Warren who as attorney general during World War II backed the internment of Japanese citizens—who as chief justice inaugurated a liberal evolution on the court and became a champion of minority rights.

The conventional story also misses the fact that justices often drift slowly over their tenures—not as if they were rudderless but as if their ideological bearings changed mid-course. Despite his own personal aversion to the death penalty, Blackmun took decades to move to the left on capital punishment. Having begun his time on the bench upholding death-penalty statutes, he ended his career with one of the most startling conclusions in the Supreme Court records—a declaration in Collins v. Hixon that he would "no longer tinker with the machinery of death." Similar shifts are evident in cases, such as the "stealth justice" for his low profile, initially emerged as a moderate conservative; a few years into his tenure, however, his opinions took a turn leftist. This gradual shift is not uncommon. Indeed, according to Lee Epstein, justices tend to vote in accordance with the political philosophies of the presidents who appoint them during their first five to ten years on the court, but after that the correlation fades considerably.

Moreover, the conventional story does not explain why the drift is so often to the left. On that question, Robert Bork provides a popular answer: justices "tend to drift to the left in response to elite opinion." According to his theory, judges come to associate with and respond to "the intellectual class...dominant in, for example, the universities, the media, church bu-reaucracies, and foundation staffs." Once seated on the court, right-leaning judges eventually adopt "the intelligentsia's at-tude, which is to the cultural left of the American people."

But why would judges who began on the right come to associate with another "class" with very different views? Why would they trade their conservative ideas, beliefs, mentors, institutions, and support—the ones that have, in many cases, gotten them where they are—for liberal ones?

And are judges really so malleable, so impressionable? Supreme Court appointees tend to be intelligent, educated, and independent. Decision-makers by profession and disposition, they think for themselves, and most have made careers of cutting through legalese and exposing lawyers' manipulations. They have proved themselves to be just the sort of people who would stoke out consistent positions regardless of circumstances and influences. Most of them have come to their views despite years of elite education and exposure to elite opinion. Not only are they painstakingly selected by the president and his advisers, but, once confirmed, they occupy a position designed to protect them from outside influences. Life tenure on the court of last resort—how much more autonomous could a judge be?

If we are the people we tend to think we are—preference-based choosers, people whose behavior principally reflects our preferences rather than our circumstances—then there should be no Warrens, no Brennans, no Blackmuns, no Stevenses, and no Souters. But confounding, there are.

So what actually accounts for this juridical drift? The short answer is that we are not who we think we are. Our inductive jurisprudential shifts of Supreme Court justices reflects a much broader phenomenon known to social psychologists as the "fundamental attribution error." As countless experiments have shown, we generally assume that behavior is controlled by personality, attitudes, choice, character, and will. But these "dispositional" factors are often far less significant than "situational" factors such as unseen features of our environments and subconscious processes within us. By allowing disposition to eclipse situation, we often misunderstand why people behave as they do—and thus are surprised when our predictions fail.

When Thaddeus Roosevelt, feeling badly betrayed by his erstwhile nominee, remarked of Justice Oliver Wendell Holmes Jr. that he could "carve out of a banana a judge with more backbone than that," and when Dwight D. Eisenhower described Earl Warren as "the biggest damn fool mistake I ever made," they both
Unnecessary Noise Prohibited

All my life I have been here, hiding behind the wimpie
a small girl-child, listening to the reemonstrations of my superiors.

"For I am like unto God," I say. They are my skeletons
as we dance the tarantella together, calling on the Virgin
to bear us over the oceans. There is sketch of me
downing a shot with the hand of sleep as the other
tweaks my cold nipple. "Yes, it was my bite that sinned,
the slow burn on this naked body,
pushing something artificial on me, a pretense of beauty.
Now my thoughts feel subjective, quieting a mind
with the counterfactual, as I lose myself in the city
of our Divine Order. Together we have taken vows,
hearing their intervals echo so long in the crypt
even the soothsayers lose their meaning. But I alone
wander the closet with water in my hair, whispering
"Ave Maria" to the passing sisters, crying out

"We are abandoned," when I feel the sharp whip
of their flagellations. The music in my head sometimes
grows too much, and I fall ill and dream
I wear the mirie of men, and not this black habit
against my skin. Now I lie with my hair in folds
as my eyes spin circles towards the crenellated ceiling.

"All spoils to the silent," I am told to repeat,
learning in those words the vibration of utterance.

—C. Durning Carroll

But more is at work than the desire to con
vay an appearance of objectivity. The job of judging, unlike most occupations,
strongly encourages individuals to see
sides of an issue that are otherwise easily
ignored. And the information that emerges
may help explain why judicial drift is so
often leftward. A basic social fact is the general belief in the merits of fair, non-ideological legal reasoning.
A person who is a fervent advocate be
to become a judge will often learn to
to present decisions as neutral and arising
naturally from the rule of law.

Duncan Kennedy has argued that the judicial role schema has an ideologically
moderating effect—particularly when judges’ decisions are compared to the argu-
ments of legislators or advocates. Ide-
ology, he explained, is a conservative or liberal, cannot
be nakedly evident in judicial decision-
making, and the norm of neutrality of
ten judges to judge decisions that are
closer to the center than they would
were they wearing other hats. As the left-
leaning judicial activist explains, I am extraordinarily role-conscious.
I think that we play roles all the time.
What is appropriate for me as a judge,
what is appropriate for me as a scholar,
what is appropriate as a dean [of Yale Law School], and what is appropriate
if I did more op-ed writing... are... completely different things.

But in those ways, perspective influences
judges. At the same time, however, judging
influences perspective. Confronting theories, evidence, and differences in life
experience that one would otherwise be inclined towards and that may challenge
or perhaps contradict commonsensical notions,
is part of the daily job for judges. In case
after case, lawyers present frameworks,
conceptions, and information to test and
disprove those offered by their opponents
and to persuade the judge and jury. That
process—in the words of Justice David J.
Brewer, the “hones and actual antifun-
tic assertion of rights by one individual
against another”—appears to have real ef-
facts. What is patently absurd to the aver-
gage American, that McDonald’s most compensate a patron for burnt hot cof
often seems appropriate and
just to a jury and a judge once they hear all the evidence. And legal scholars
who carefully examine the facts and outcomes
cases like this tend to agree that the mis-
taken perception is usually the public’s. Even Richard Posner, once a conservative
intellectual stalwart, has reconsidered
some of his positions since becoming a
federal appellate judge:

The experience of being judge is bound
to moderate one’s views. When you are dealing with large doctrinal issues in a
rattled abstract way, it’s very easy to al-
low your own inclinations and biases to carry
you for predetermined conclusions. But when
you are actually forced to consider both
sides of the case, it’s usually to resolve there is more to be said on the other side of the case
than you might have thought. So a lot of
statutes that I would have ridiculed as pre-
posterous interventions in the economy,
when looked at close in the context of the
specific case, can make more sense than
I have learned there is more to be said for some of these interventionist laws than I had
initially thought.

In addition to role schemas and perspective-changing information, it is likely that
judges’ views change over time. Judges are designed to
protect judges from outside influence also encourage juridical drift by allowing
judges greater leeway to pursue the truth
wherever it leads. Judicial independence
may help explain not only judicial drift
but also its long-term tendency. It is often
the wealthy and the powerful who have
the greatest ability to sway non-buffered
judges and lawyers, and it is they who
generally have the greatest stake in pre-
serving the status quo. And because many
drives come to the bench from occupa-
tional settings in which the most impor-
tant clients and constituents are wealthy
and powerful interests, some leftward
drift seems likely.

Consider Lewis Powell, who had built
a reputation as a first-rate corporate defense
director and was serving on 11 corporate
boards when President Nixon appointed
him to the Supreme Court. Just months
before the nomination, Powell had even
drafted a memorandum that some pun-
ishes consider the blueprint for the Right’s
successful revolution that began with Ron-
ald Reagan and has continued to this day.
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on the myth of a “good” war

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A nominee who presumes that everyone in this country has a roughly equal shot at success often discovers as a justice that the situations of real people vary.

States and the United Kingdom, which rely on more adversarial procedures As Wolfgang Zeidler, the former president of the German Federal Constitutional Court, explains, “While the English [and American] judge is an umpire sitting at the side of the court, watching the lawyers fight it out and after the case is decided, the German judge is the director of the play, the outcome of which is in part dependent on his mode of directing.” Thus, in the German system, judges may be less likely to be confused by contrasting information and therefore less likely to stray from their ideological moorings.

Similarly, the case and controversy doctrine enshrined in Article III of the U.S. Constitution, which limits federal courts to deciding actual disputes rather than theoretical principles, makes it easier for American judges to have their inquisitions challenged by European judges, many of whom may issue opinions without having to deal with hard facts or the vigorous presentation of evidence. As Louis Furey explains, in the constitutional courts of Belgium, Portugal, Spain, and France, as well as the European Court of Justice and the European Court of Human Rights, “a concrete dispute involving an individual situation is necessary to test the constitutionality of a statute; an abstract or objective question is sufficient.” As a result, juridical drift appears far more

likely in the U.S. federal courts, where, in the words of Justice Felix Frankfurter, the prohibition on advisory opinions inures that “a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.” The prohibition similarly insulates the federal judiciary from control by other branches of government, which, as in some Continental systems, might frame legal questions to suit their own needs and agendas.

Even among American courts, there are significant differences in informational structures and independence between federal courts and many state courts. For example, a number of state courts, including those of Colorado, Florida, Maine, Michigan, and Massachusetts, are authorized, like their European counterparts, to issue advisory opinions in certain instances at the request of state officials. Consequently, we might expect judges on those courts to drift less. In addition, most judges on state courts—which handle the vast majority of America’s judicial traffic—are elected, which leaves them more vulnerable to external influence than federal judges. As the legal historian Jed Shagarman has written, “Judicial elections clash with the basic—and perhaps naively—narrative that judges are supposed to interpret the law and pursue justice, regardless of party or public opinion.” Instead, they have “injected popular and partisan politics into legal deliberations” since “the slavery debates and the class struggles of the nineteenth century.”

There is also recent evidence that state courts to which judges are elected rather than appointed have been powerfully transformed by campaign financing. A study by Texas for Public Justice, for example, found that the ten Texas Supreme Court justices elected or re-elected between 1994 and 1998 raised, over half of their $12.8 million in campaign money “from lawyers, law firms and litigants who file appeals with the high court during this same period.” The study also found that, although the Texas Supreme Court declines to hear nearly 90 percent of the cases for which appeal petitions are filed, “the more money that a petitioner contributed to the justices, the more likely they were to accept a given petition.” For example, the court was ten times more likely to accept the petitions from petitioners who had made campaign contributions of more than $250,000 than they were of those of non-contributing petitioners. Trends in decisions have also shifted over the same time period in favor of corporate defendants, and it seems likely that a major factor in that drift is the lack of the same independence-holding structures enjoyed by judges in the federal system.
Of all American courts, the U.S. Supreme Court enjoys the most powerful role schemas, the most detailed and reliable information, and the greatest situational independence. And it is here that the transformative experience of the job ought to be—and, as salient historical examples indicate, probably is—the most pronounced. As the pinnacle of the third branch of government, charged with upholding the Constitution and, where necessary, the rights of minorities, and empowered by a long history of courageous, unpopular, and history-changing decisions, the role schemas for Supreme Court Justices are uniquely emboldening.

In a November 2005 television interview, Justice Breyer described the power of these influences this way:

"We're there to decide the law. And we're there to decide it independently... I'm sitting in a seat where, as I look over that court, I think, "This is the room where they decided Brown v. Board of Education."... Well, this is the nature of the job. They made the reputation of this institution. I'm a trustee. I'm a guardian of that. And first and foremost in being a guardian of that reputation is independent thinking. You're an independent judge; that's why you're entrusted with this.

Not only do Supreme Court justices speak with finality, but they also tend to take the most significant, contentious cases; they encounter the most thorough and detailed briefs; they hear the most practiced and proven orals; and they work with some of the brightest law clerks. Moreover, everything that they write is widely anticipated, meticulously reported, and thoroughly analyzed by journalists, academics, lawyers, legislators, and lower courts. As a consequence, they receive constant feedback, a good deal of which the justices cannot ignore because the issues and questions often return in subsequent cases.

On top of all this, each justice repeatedly engages with eight other independent justices, each of whom brings his or her own experience and perspective, and none of whom need be concerned about how their opinions might alter their career opportunities or be viewed by a higher court. Indeed, unlike lower federal judges, who are bound by precedent, Supreme Court justices, while constrained by longstanding case law, need not blindly defer to earlier judgments. This special freedom to pursue the truth combined with the court's unique interaction setting represents a potent catalyst for drift.

Justice O'Connor, in a tribute to the late Justice Thurgood Marshall, described the influence of his "special perspective" on her—an influence that appears to have contributed to her leftward trajectory: "At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted to her legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth." As she explained,

His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the
Although Justice O'Connor often disagreed with Justice Marshall, she helped him to see, to hear, and to voice a perspective that she might otherwise have missed.

Even after his retirement, she would still catch herself "looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world."

In sum, the situation of the Supreme Court can open justices' minds. With the pressure of being the last ones to decide a matter, with the knowledge that the outcome of any one case may influence hundreds of others and thousands of lives, with the benefit of a robust debate, with access to time, resources, information, and a variety of perspectives, it is more difficult for justices to rely on the ideological intuitions or commitments that may have helped get them nominated in the first place.

A nominee who presumes that everyone in this country has a roughly equal shot at success and that the law should be color-blind often discovers as a justice that the situations of real people vary dramatically and that the world itself sees in color. Conservative convictions can begin to waiver when a justice realizes that her vote is the last hope for addressing persistent social inequalities.

Again, Justice O'Connor's experience provides a helpful case in point. A Reagan appointee, she never drifted very far to the left. After sitting on the bench for some years, however, she, like Justice Marshall, came to listen more intently to the perspectives and experiences of the relatively weak and silenced. It was that heightened situational sensitivity that led her to be the deciding voice on decisions protecting patients' rights, affirmative-action policies, women's rights, and the environment. Asked recently about how her own experiences might have influenced her judging, she replied, "Well, I think that people can be great justices without the experience I had. But, on the other hand, it doesn't hurt."

Even on the Supreme Court there are justices who do not seem to shift much at all, let alone to the left. Judge Guido Calabresi's hope, expressed in a 1991 New York Times op-ed, that then-nominee Clarence Thomas might one day "stand up to the pack . . . and remind us all of what it is like to be poor and friendless and to face a hostile state," has, more than a decade later, yet to be realized. And being a member of the court has not seemed to do much to moderate Scalia's often fiery conservatism.

Other situational forces beyond those already canvassed may help account for such judicial immobility. For one thing, a judge's outlook is shaped by her affiliations, interests, identity, her previous professional experiences, her experience during the confirmation process, her adherence to a particular judicial approach, if any, and the existing composition of the court. Being a fundamentalist Christian, a Southerner, or someone with many friends who are corporate CEOs should all be expected to have an influence over how much the situation of judging alters a justice's outlook. Similarly, we should expect to find less drift among justices whose previous occupations had similar situations to that of judging. For example, to the extent that the independence of academics is similar to that of federal judges, we might expect a nominee coming from academia to be less likely to change ideological course than, say, someone who has been working as an advocate on behalf of a particular client base. The confirmation process itself may also be a potent force in affecting judges' post-appointment behavior. Justice Thomas, for instance, may continue to feel beleaguered by, and thus opposed to, his critics (many of whom have grave doubts about his conservative natural-law theory of constitutional interpretation). As Kevin Merida and Michael Fletcher wrote in a 2002 profile of the justice, "Thomas likes to say the cuts don't bleed, but his anger, his resentment, his hurt are hard to mask."

There may also be seemingly unrelated subconscious tendencies that influence not just a justice's ideology but also the extent to which he or she is willing to deviate from it. The social psychologist John Jost and his collaborators have discovered, for instance, that individuals who are uncomportable with ambiguity, who have a strong need for closure, and who feel a heightened sense of threat, tend to be drawn more strongly to schemas, conceptions, and world views (and, presumably, judicial philosophies) that seem to eliminate ambiguity, provide closure, and reduce threat. Consequently, the evidence suggests, those individuals tend to be ideologically conservative.

Such subconscious motivations to resist situational complexity and avoid unclear or system-threatening outcomes may help explain why Justices Scalia and Thomas embrace a code of judicial interpretation that itself emphasizes bright lines and clarity and de-emphasizes many situational considerations. Textualism—a mode of statutory interpretation that, in the words of the political theorist Amy Gutmann, is "guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time."—provides jurists a seemingly neutral touchstone and protocol and shields them from having to deal with some of a case's difficult facts. At a panel discussion last fall at Harvard Law School, Justice Scalia lamented the "politicalization of the court and stated that "it will become unpoliticiated, as it relatively used to be, as soon as we go back to saying the Constitution means what it says, and it means what it meant when it was adopted." His allegiance to rule-based textualism combined with his conception of his role as a judge, we suspect, helps him to distance himself from the particular parties and facts before him in each case and provides him a means of legitimizing outcomes that might otherwise seem troublesome. "We don't really take a case in order to, quote-unquote, do justice" or "to make sure that the good guy won and the bad guy lost," Scalia said.

Some of Scalia's more liberal contemporaries have adopted a judicial philosophy that is far more pragmatic and context- or fact-sensitive and that eschews sweeping abstractions. As Justice Breyer recently observed, "Judges do judge, and were these things to decide themselves in some automatic way, what reason would there be for a court?" It is easier to drift when applying complex, context-specific standards that presume an evolving Constitution than it is when applying relatively simple and broad rules to interpret a Constitution that is presumed to have a fixed meaning. And insofar as the latter judicial philosophy reflects a stable set of subconscious preferences for closure, system affirmation, and so on, the ideological fluidity of judges espousing it will likely be enhanced.

Justices who subscribe to a fundamentalist judicial philosophy (be it left-leaning or right-leaning), are also more likely to surround themselves with like-minded law clerks, which can lead to further ideological anchoring. During his time on the court, Justice Thomas has been the only justice to select all of his
clerks from judges appointed by presidents of one political party. Revealing the extent of his us-verse-us then mentality, Thomas likens choosing clerks to “selecting mates in a foxhole.” As he explains, “What I look for in hiring my clerks—the cream of the crop—I look for the math and the sciences, real classes, none of that Afro-American study stuff. If they’d taken that stuff as an undergraduate, I don’t want them.” Such clerks are very unlikely to alter any justice’s world view, even though law clerks can generally be important situational influences. As Jeffrey Rosen has argued, the effect may be especially strong for justices with little experience on the bench: “Justices who lack confidence and have a simplistic view of the law tend to be more susceptible to their clerks’ influence and therefore rarely diverge from the party line.”

Finally, as O’Connor’s quotations above clearly suggest, judges can be powerfully affected by the individual personalities on the court, as well as each court’s particular demeanor. Mark Tushnet has suggested that Justice Scalia’s “slash-and-burn” style and “acerbic comments on his colleagues’ work” may go “some distance in explaining O’Connor and Kennedy’s emerging affinity for more liberal positions. Justice Brennan’s personality also probably helped keep the court on a liberal course, though in his case through charm and tact.”

It would be a mistake to believe that the only situation that influences justices comes from within the Supreme Court building or individual judges’ limited spheres of interaction. The mechanisms designed to keep the judiciary independent of the other branches of government are necessarily incomplete, and there is good evidence that judges frequently interpret laws in ways that align with the particular policy desires of sitting members of Congress and the current president. This is not surprising given the forces that Congress and the president can bring to bear on the judiciary—including limiting or even stripping jurisdiction in certain areas, altering the size of federal courts, and instituting impeachment hearings. Just as important is the fact that the court cannot implement its orders without the acquiescence and assistance of other government actors. In addition, lower-court judges may be constrained by pressures not to be overruled by higher courts or the need to stake out particular positions in order to improve their chances of promotion within the judiciary.

Although the proximate influences may come from elected officials, public perceptions play a significant role in constraining judges. As John Ferejohn explains, “The basic reason why the constitutional protections for judges have remained strong and stable over the years must be that the political branches, or perhaps the public themselves, have not really wanted to alter them.” History suggests that popular unrest with Supreme Court stances can produce important policy shifts among the justices. This happened in 1937 in relation to New Deal legislation and in the late 1950s when the court, facing a strong backlash, relaxed its position on anti-communist measures. This is one of the reasons that conservative groups have poured so much money and effort into portraying courts—as opposed to state legislatures—as dangerously out of touch with the popular will. At the Justice Sunday II rally in August 2005, for instance, Congressman Tom DeLay put it this way:

Time and time again, proponents of . . . policies which have little or no support in the elected branches of government . . . bypass the democratic process by way of activist courts. Activist courts, in turn, impose new policies on our nation without passing a single bill through a single house of a single legislature. That is not judicial independence. That is judicial supremacy, judicial machinery. It has no basis in the Constitution, but merely in the frustrated imagination of an out-of-touch political movement whose worldview the American people simply will not endorse.

By treating judges as unelected and illegitimate “legislators,” critics hope to constrain judges from reaching opinions that conflict with conservative positions on key social issues. The goal is not simply to constrict those who are inclined to drift left but also to bolster those who are trying to hold fast.

Think tanks—the Cato Institute, the Manhattan Institute, the American Enterprise Institute, and the Institute for Justice, among others—have emerged to promote and provide cover for particular views of constitutional law that receive relatively little credence among legal scholars. Regent University Law School—Virginia institution founded by the televangelist Pat Robertson and embracing the mission “to bring to bear the will of our Creator, Almighty God, upon legal education and the legal profession”—devoted an entire law-review issue to praising Thomas—who has garnered few accolades within the mainstream academy. Likewise, in 1999 The Weekly Standard, a better-known conservative publication, ran a cover calling Justice Thomas “America’s leading conservative.”

Thus, even as many individual conservatives have continued to focus on finding right-leaning nominees conservative groups have recognized that the real promise for pushing the entire court rightward is to change the situations of the justices.

It may be that much of the perceived leftward drift of Supreme Court justices over the last several decades is exaggerated. Indeed, given the shifting of the American ideological “center” in that time period, a justicethereditarily firmer or more ideologically moderate Justice Kennedy would have made a difference in the court’s trajectory.

In the end, the federal judiciary, and particularly the Supreme Court, is one of only a few powerful institutions, along with the academy and the press, that stands much of a chance of hearing the silenced, appreciating their situations, and making their stories known. Indeed, the very institutions that conservatives point to as the great bastions of the liberal intelligentsia are arguably the institutions with the greatest commitment to— and best situation for—pursuing knowledge wherever it takes them.

It may be that academics tend toward the left and that their conclusions conflict with the intuitions of most Americans. It may be that some judges and justices write opinions that do not always square with the weight of American opinion. And it may be that certain newspapers or journals are not aligned with common sense and in that respect are “biased.” But that is hardly an indictment.

If anything, those claims appear to indicate fundamental constitutional principles—including freedom of the press, academic freedom, and judicial independence—intended to protect those very institutions from dominant situational influences. The press, the academy, and the judiciary are girded against the potentially overwhelming influence of the majority so that, in turn, those institutions can better protect us. It is not an unfortunate accident that journalists, scholars, or judges can sometimes be out of step with the mainstream. That is by design. As Justice O’Connor explained last July in responding to legislators who would scale back judicial autonomy:

...