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THE SUPREME COURT, SELF-PERSUASION, AND IDEOLOGICAL DRIFT

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We are under a Constitution, but the Constitution is what the judges say it is.¹

Judging is not a rational pastime. This is accepted wisdom. The popularity of legal realism is evidence of this fact.² In the mid-twentieth century, legal realism, with its emphasis on the role of intuition and individualistic interpretation of the law replaced formalistic accounts of judging as logical, rule-based exercises with a single correct outcome.³ More recently, data from social science research has exploded onto the scene. Evidence of bias in decision making started with accounts of how laypeople make decisions. Legal scholars increasingly accepted and incorporated into their theories the premise that human beings in a wide variety of contexts are subject to bias and errors of logic. Predictably, scholars have applied axioms from behavioral theory to account for decision-making in individuals with particular legal roles, such as lawmakers, juries and judges.⁴ Empirical investigations focusing specifically on judges reveal familiar patterns of error, sealing the fate of formalistic accounts of judging as antiquated and inaccurate.⁵ Today, scholars in law, political science, and the behavioral sciences agree that judges are influenced by extra-legal factors in making decisions.

³ Some of the earliest writings were Oliver Wendell Holmes, The Common Law (1881) (in which Holmes wrote, "The life of the law has not been logic; it has been experience."); Karl N. Llewellyn, A Realistic Jurisprudence--The Next Step, 30 Colum. L. Rev. 431 (1930); Jerome Frank, Law and the Modern Mind 42-47 (1930); Roscoe Pound, The Call for a Realist Jurisprudence, 44 Harv. L. Rev. 697 (1931); Karl N. Llewellyn, Some Realism About Realism--Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931). For a definition of legal realism, see Brian Z. Tamanaha, Understanding Legal Realism, 87 Tex. L. Rev. 731, 732 (2009) ("Realism refers to an awareness of the flaws, limitations, and openness of law--an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases . . .")
⁵ As one jurist put it, “A man cannot see by another’s eye, nor hear by another’s ear, no more can a man conclude or infer the thing to be resolv’d by another’s understanding or reasoning . . .” Bushell's Case, 124 Eng. Rep. 1006, 1009-13 (C.P. 1670).
This essay will argue that not only are judges’ decisions, like those of laypeople, influenced by personal attitudes, but that in writing the opinions that support their decisions, judges can become ideologically polarized. Evidence from behavioral science supports the idea that a form of implicit self-persuasion can occur when judges offer justifications for the positions they take on issues. The potential for systematic movement toward extreme views is particularly concerning when it comes to the United State Supreme Court. This essay will examine data suggesting that during the process of authoring majority opinions and dissents, Justices’ ideology moves progressively in the direction of the views they have espoused in their opinions. Concern over the effect of ideological extremism, and evidence that the Court is becoming increasingly polarized suggests the need for a closer look at this phenomenon.  

Legal scholarship from the past century is rife with theories about how judges make decisions. The discussion has been enriched by scholars in the disciplines of political science, sociology, and psychology, drawing on contributions from other fields as well. It would be an impossible task to begin to do Justice to the myriad theories that are implicated in judicial decision-making in a short essay. However, in order to lay the groundwork for my claim, I offer a very brief overview of the relevant theory and empirical findings.

The modern understanding of judicial reasoning starts with legal realism. Legal realism is characterized by attention to the “peculiar views of the individual judge.” One of the most well known early legal realists was Oliver Wendell Holmes, who wrote that the law consists of “prophecies of what the courts will do in fact.” Major goals of early proponents of legal realism included challenging the absolutist notion of the interpretation of law and using social science as a tool. Legal realism teaches us that critical features of judging can be explained in terms of the jurist's political world view. As Karl Llewelyn stated eighty years ago:

Some have attempted study of the particular judge — a line that will certainly lead to inquiry into his social conditioning. Some have attempted to bring

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6 Tracey E. George, From Judge to Justice: Social Background Theory and the Supreme Court, 86 N.C. L. Rev. 1333, 1336-40 (2008) (arguing that “The Roberts Court after its first full Term appears to be deeply divided and ideologically polarized.”)

7 Other disciplines relevant to this discussion include linguistics, cultural anthropology, and philosophy.


9 Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 461 (1897). He also regarded the United States’ Constitution as "an experiment, as all life is an experiment," Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Karl Llewellyn was another early advocate of legal realism, which he characterized as a “method”. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 510 (1960).

10 See Gregory Shaffer, Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?, 95 CORNELL L. REV. 61, 72 (“The old realism had many branches, but three are worth noting here: (1) the realism that aimed to redefine law in terms of the centrality of facts and empirical evidence; (2) the realism that aimed to inform law through social science such as sociology and psychology; and (3) the realism that aimed to construct a theory of judging that refused to accept doctrine's determinacy and sufficiency.”)
Legal realism was a response to the formalist school of thought, which held that laws were absolutes with a single correct interpretation, and that it was the job of jurists to discern this singular truth. Legal realism questioned the presumption that human beings could hone in on the one correct interpretation of law; legal realism captured the notion that the truth might look very different, depending upon where one stood in the world and one's views and experiences in various areas.

Legal realism shared fundamental characteristics with behavioral law, in that they both grew out of skepticism of an account of behavior that was too neat and clean to have predictive validity. While legal realists were pushing back on the formalistic view of judging, in a parallel universe, behavioral law was questioning the assumptions of rational choice theory. Rational choice theory, popularized by the Chicago School of Economics in the mid twentieth century advanced a notion of human behavior in which the individual behaved predictably to a set of incentives, choices, or risks by maximizing chances of a favorable outcome. Originally an economic model, in the middle of the twentieth century, rational choice theory was increasingly advanced as a theory to explain human behavior in society and politics.

In the 1950s, Herbert Simon coined the term “bounded rationality” to capture the notion that the rationality of human decision making is limited by informational, cognitive, and time limitations. Shortly thereafter, Kahneman and Tversky developed prospect theory, an account of how human beings make decisions about risk under uncertain conditions. Meanwhile, scholars in the fields of social and cognitive psychology, who for the most part were not asking questions about law and policy, were independently creating a vast body of empirical work on attitude formation. Although legal scholarship has largely focused on models derived from bounded rationality and prospect theory—collectively referred to in this essay as behavioral law—the entire body of work related to judgment and choice, attitude formation, emotion, and persuasion is relevant to how judges decide issues.

By and large, the behavioral law scholarship has cataloged specific cognitive patterns that interfere with an individual’s ability to reach the logically correct conclusion on certain decision-making tasks. One example was demonstrated by asking participants in a study to answer either $9 \times 8 \times 7 \times 6 \times 5 \times 4 \times 3 \times 2 \times 1 = ?$ or $1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8 \times 9 = ?$. Under timed

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11 Karl N. Llewellyn, Some Realism About Realism — Responding To Dean Pound 44 HARV. L. REV. 1222, 1242 (1931).
12 See e.g., Gary S. Becker, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).
13 Herbert A. Simon, Models Of Man (Publisher?) (1957).
15 It is unfortunate that too much of the work developed in psychology departments in universities around the world has been largely ignored by law and policy scholars.
conditions, participants who saw the former gave an average answer of 4,200, whereas participants who saw the ascending numbers estimated on average only 500. Neither answer is correct (the correct answer is 362,880—not terribly surprising given the short amount of time provided for arriving at an answer. Most interesting is the difference in the estimates. Clearly, the order in which the numbers appear is irrelevant, why should it make such a difference? The explanation is the anchoring effect, which states that decision-makers tend to “anchor” judgments on initial values provided and adjust up or down from the initial value. While there is some sense to this approach (the initial value may provide valuable information), the application of this principle can mislead the decision-maker. This effect and others like it may be classified as heuristics, or cognitive “rules of thumb” that serve to make decision-making in a complex world manageable. The studies giving rise to some of the literature in this area involves asking subjects to answer questions that have a single, clearly correct answer. When the majority of subjects fail to provide the correct response, the erroneous nature of the answer is indisputable. Alternatively, an experiment may demonstrate the influence of some factor that is clearly, under the circumstances, irrelevant to the decision task. Although most of the work in the area of heuristics and biases is done using undergraduate students (who are plentiful and constitute a captive population in psychology departments across the country), investigations have revealed that judges are prone to the same type of cognitive errors.

Other lines of empirical work explore the role of emotion, including regret, fear, optimism, and perceptions of fairness on judgment and decision-making. The dual system concept of reasoning proposes a two-pronged approach to reasoning consisting of two “systems.” System 1 reasoning is “fast, automatic, effortless, associative, and often emotionally charged.” System 2 reasoning is slow and deliberate, and it is more likely to include consideration of probabilities and the careful weighing of costs and benefits. The widely held view is that System 1 is necessary in situations where information and time is scarce, but that this quick and dirty type of decision making is more likely to result in errors than is the

\[16\] See Susan A. Bandes, Emotions, Values and the Construction of Risk, 156 U. Pa. L. Rev. PENNumbra 421, (2008) (discussing the fact that heuristics have “mainly been tested in situations requiring judgments about quantifiable, measurable phenomena—such as judgments that rely solely on a calculation of probabilities.”)


\[18\] The term “emotion” indicates appraisals of our world, including physiological reactions, and covers a wide variety of phenomena. See Keith Oatley, EMOTIONS: A BRIEF HISTORY 3 (2004); Robert C. Solomon, WHAT IS AN EMOTION? 5 (2007).


effortful System 2 type of reasoning.21 However, few argue that the most efficient, emotion-based form of judgment formation typically results in error, and it is unlikely that it even usually does. Moreover—and perhaps most importantly—even effortful reasoning is not free of the influence of emotion, a fact that is particularly important when it comes to deliberate, effortful decision-making, such as that which characterizes juridical decisions. This notion is discussed in more detail below.

The role of affect on decisions—and whether emotions are a detriment or an advantage—is controversial.22 For example, studies have revealed the tendency of individuals to downplay the statistical odds of being the victim of a variety of misfortunes, a bias known as the optimism bias.23 This tendency has been linked to riskier behavior in areas where risk-taking is clearly maladaptive. On the other hand, maintaining a positive outlook has clear advantages. Studies have revealed that members of society who are unrealistically optimistic are happier and more successful.24 Moreover, optimism can clearly promote good decision-making. After all, many risks come with rewards, and a perennially pessimistic outlook stymies beneficial risk-taking.

One prominent theoretical perspective that has taken a positive view of emotions in judgment and choice is the cultural evaluator model. 25 “Cultural cognition” refers to the

23 Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 HARV. L. REV. 1420, 1511 (1999); see also Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CAL. L. REV. 1051, 1091 (2000) (defining the optimism bias as “the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us.”)
24 In fact, individuals who do not exhibit the optimism bias tend to be clinically depressed. See, Sharot, et al., Neural Mechanisms Mediating Optimism Bias 450 NATURE 102 (2007)
25 See Kahan supra note 25. Kahan’s work was in large part push back in response to the claim that because of pernicious effects of emotion on judgment and choice, members of the public should be largely excluded from participating in risk-policy decisions. See Paul Slovic, Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield, 1997 U. CHI. LEGAL F. 59, 59 (1997) “[Public risk judgments] are seen as irrational by many harsh critics of public perceptions. These critics draw a sharp dichotomy between the experts and the public. Experts are seen as purveying risk assessments, characterized as objective, analytic, wise, and rational—based on the real risks. In contrast, the public is seen to rely on perceptions of risk that are subjective, often hypothetical, emotional, foolish, and irrational.” Id. at 60.
influence of group values on individuals’ perceptions of facts.\(^{26}\) According to Dan Kahan and colleagues, emotional responses are expressions of socially and culturally derived values.\(^{27}\) Kahan explains the cultural-evaluator view of risk preferences in this way: “When people draw on their emotions to judge the risk that such an activity poses, they form an expressively rational attitude about what it would mean for their cultural worldviews for society to credit the claim that that activity is dangerous and worthy of regulation.”\(^{28}\) The link between emotions and values finds support in the writings of other scholars. As emotion researcher Keith Oatley notes, “[a]lthough in some ways, we humans distrust emotions, we also believe they embody our most important values. If you want to know what people value, listen to their stories. In particular, listen to the underlying emotional themes.”\(^{29}\) The take away lesson from the cultural model is that “our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice.”\(^{30}\)

The cultural evaluator model, however compelling from a popular democracy perspective, is of limited normative use in the area of judging. Assuming that emotional reactions to issues do serve as a signal of underlying values, this supposition is unlikely to calm fears we might harbor that judges are unduly swayed by personal bias. After all, values are inherently subjective, and jurists are charged with serving as unbiased arbiters, guardians of the Constitution, neutral interpreters of the intent of the legislatures, and so on. Values, as legitimate as they may be in the private realm, should not decide the outcome of a case. To the extent that judges are perceived to be interjecting personal values into judicial decisions, we worry that they are being ideological, or worse, political. Nevertheless, the cultural evaluator model has descriptive value, and hence can help to illuminate the connection between judge’s emotional reactions to issues and their policy preferences. In addition to the impact emotions can have on policy positions, affective reactions may influence judges’ perception of evidence. Kahan argues persuasively that cultural values influence the light in which judges evaluate facts.\(^{31}\) Kahan and his colleagues offer compelling empirical evidence in support of the notion that one’s worldview

\(^{26}\) Kahan, CULTURE, COGNITION, AND CONSENT: WHO PERCEIVES WHAT, AND WHY, IN ACQUAINTANCE-RAPE CASES 158 U. PA. L. REV. 729, 732 (year?).

\(^{27}\) See generally, Kahan, supra note 9. The extent to which an individual fits into a particular class—hierarchical, egalitarian, individualistic, and fatalistic—may predict that individual’s risk preferences. See RICHARD ELLIS, MICHAEL THOMPSON & ARON WILDAVSKY, CULTURAL THEORY 5 (1990) (“Group refers to the extent to which an individual is incorporated into bounded units. The greater the incorporation, the more individual choice is subject to group determination. Grid denotes the degree to which an individual’s life is circumscribed by externally imposed prescriptions.”)

\(^{28}\) Id.

\(^{29}\) Oatley, supra note 19, at xi.


can influence the interpretation of what actions are reasonable under certain conditions. This contribution is critical, because facts are widely believed to be immutable.  

While behavioral law researchers have written about how judges’ emotion or intuition affect decision-making, political scientists have reached similar conclusions in scholarship focusing on the impact of judicial “ideology.” Perhaps the most famous theory of ideology and the Supreme Court gave rise to the “attitudinal model,” proposed by Jeffrey Segal and Harold Spaeth. Legal theorists quickly adopted this model, which incorporated an entirely skeptical view of judicial objectivism. The attitudinal model has been widely linked to the legal realism of the 1920s and 30s. This model, along with the broader political science research on judicial ideology and the modern behavioralist account of judgment and choice, have contributed to a burgeoning body of scholarship devoted to the “new legal realism.” The single unifying theme is debunking what Jerome Frank called “the myth about the non-humanness of judges.”

Whether one conceives of judicial attitudes as culturally derived, emotive values, or ideology-based policy positions, the work of behavioral law theorists, political scientists, and legal realists has amply documented the influence of personal beliefs on judicial decision-making. However, there is evidence for a previously unexplored possibility; the possibility that judges may be systematically more vulnerable to ideological extremes than those outside of the judiciary. There is reason to suspect that specific features of a jurist’s job may lead him or her inevitably toward a greater commitment to his or her own worldviews. In particular, the requirement that judges draft opinions to explain rulings could increase bias, pushing judges farther in the direction of a particular ideology. Evidence for this claim comes from empirical

32 Dan Kahan et al., Perils, supra note 81 at 887 (“We have suggested that the Court in Scott was wrong to order summary judgment on the ground that it was entitled to “believe its own eyes” after watching the tape. Its decision to privilege its view of a set of facts on which even a minority of persons who share a set of defining commitments would disagree stigmatizes those citizens as outsiders and in so doing delegitimates the law.”)

33 Jeffrey A. Segal & Harold Spaeth, The Supreme Court and the Attitudinal Model (1993); See also Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of Supreme Court Justices, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).

34 See Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 NW. U. L. REV. 251, 256 (1997) (“The political science attitudinalists' empirical evidence brings something new and important to the debate over the basis of judicial decisionmaking.”)


36 Jerome Frank, Courts on Trial: Myth and Reality in American Justice 147 (1949).

37 Although there are important theoretical distinctions between the characterizations offered by legal scholars, behavioral scientists, and political scientists, my claim does not depend upon one more than another. Because I acknowledge and value the work offered by each discipline, I refer to judges’ personal views as culturally based values, attitudes, and ideology alternatively.
research on attitude formation and change. Several lines of research from social psychology suggests that when an individual provides reasons for his or her own view, that individual may become more extreme in his or her views or more committed to that position. The potential for judicial entrenchment is concerning, particularly given that judges are unlikely to perceive personal bias is operating, making it unlikely that he or she will attempt to counteract it in any way.\(^{38}\)

Two of the earliest social psychology theories addressing how individuals form attitudes were Leon Festinger’s Cognitive Dissonance Theory and Daryl Bem’s Self Perception theory. In a series of empirical investigations, Festinger and his colleagues observed that when individuals hold two beliefs that are in conflict, or when beliefs are inconsistent behaviors, individuals alter either the behavior or the belief in order to achieve consistency.\(^{39}\) Festinger hypothesized that holding inconsistent views or behaving in a way that is inconsistent with an attitude causes people to feel dissonance, a psychologically uncomfortable state. In order to resolve the dissonance, the individual alters a belief or attitude in order to achieve consistency. Bem proposed an alternative explanation and called it Self Perception Theory. He hypothesized that people infer their own attitudes through self observation. When an individual encounters an attitude or behavior that is in conflict with an existing attitude, she gains new insight into her own preferences, and changes accordingly.\(^{40}\)

In Festinger’s and Bem’s studies, the act of expressing an attitude or behaving in a manner consistent with an attitude had the effect of moving participants in the direction of that expressed attitude. In the years since the first experiments in the 1950’s hundreds of studies have been conducted achieving similar results. The robustness of this effect may have special importance for judges. When a judge issues an opinion, the very exercise of writing the opinion and providing rationale for the position may increase the commitment to the professed view. The entrenchment of existing views occurs because expressing reasons for an attitude tends to enforce that attitude. This conclusion is supported by studies designed to elucidate and refine Bem’s self-perception theory. Research has demonstrated that when attitudes are made salient, subsequent preferences in favor of the attitude become stronger.\(^{41}\) Certainly drafting opinions justifying and supporting a particular position increases the salience or cognitive availability of

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38 See Kahan et al., Perils, supra note 81 at 842-43 (Social psychology teaches us that our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor.”); see also, Emily Pronin et al., The Bias Blind Spot: Perceptions of Bias in Self Versus Others, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002).


the associated attitudes for the judge writing the opinion. One empirical study seeking to refine
the attitudinal model, investigated the degree to which the salience or prominence of a particular
case influenced the voting behavior of United States Supreme Court Justices. The findings
supported the idea that when a case was salient, Justices were more likely to vote in a way that
was consistent with their ideological leanings. A case can be salient to a judge for a variety of
reasons, including media attention or personal relevance. A common way for a case to achieve
salience is when a Justice spends time thinking in detail about the issue during the drafting of the
opinion or a dissent. Legal scholarship has offered predictions regarding a connection between
exposure to arguments favoring a Justice’s position, and the Justice’s subsequent attitudes. For
example, according to one commentator, points made by attorneys at oral argument “have the
potential to reinforce a Justice's views about a case.”

Another line of research supporting the notion that there is a connection between
exposure to pro-position arguments and subsequent attitude strength, is the literature on group
polarization. Group polarization refers to the fact that when like-minded individuals
communicate about a shared view, the position of the group members with respect to that issue
becomes more extreme. This phenomenon has been found again and again, in groups of all
kinds. Importantly, judges are not immune to this effect. For example, recent empirical
investigations have found that there is a significant difference in voting, depending upon whether
a panel of Justices is composed entirely of Democrats or Republicans, or is composed of both.
When all judges are either Democratic or Republican, panels trend toward more extreme voting
patterns. Although the group polarization paradigm involves arguments and justifications from
others, there is no reason to think that one’s own rationalizations for a position would be less
likely to reinforce the held attitude, in fact research suggests just the opposite. Brehm’s 1956
study on choice and preference indicates that when an individual chooses between alternatives,
he or she is subsequently more favorable toward the chosen alternative. The tendency for pro-
stance argument to exacerbate existing attitudes and the propensity for individuals to become
more favorable toward positions they adopt, lend credence to the theory that the job of judging
reinforces and intensifies attitudes, ideologies, and worldviews.

Nowhere is the influence of ideology perceived to be more problematic than among
Supreme Court Justices. The hierarchical structure of our courts imbues the Supreme Court with

42 See id.
43 Timothy R. Johnson et al., Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral
44 Serge Moscovici & Marisa Zavalonna, The Group as a Polarizer of Attitudes, 12 J. OF PERSONALITY & SOC.
45 CASS R. SUNSTEIN, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (Washington,
46 J.W. Brehm Post-Decision Changes in Desirability of Alternatives, J. OF ABNORMAL & SOC. PSYCH., 52, 384–389
(1956).
ultimate authority; the Court wields enormous power.\textsuperscript{47} Moreover, the job of applying the Constitution to contemporary issues is thorny; the simplicity and brevity of the document leaves much to interpretation. To the extent that modern understandings of basic governance concepts are continuously morphing, the Constitution is a living document.\textsuperscript{48} Even originalist interpretations of the Constitution are subject to personal bias. As legal realist Justice Holmes, once wrote, “The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”\textsuperscript{49}

Scholars who study the Supreme Court Justices’ voting patterns have demonstrated that contrary to popular wisdom, Justices often do drift ideologically over the course of their tenure on the bench. Measuring the possible connection between migrations in ideology and the process of self-persuasion is tricky because of the myriad features that influence voting behavior. One complicating factor is the practice of assigning the swing-vote Justice the task of writing the opinion.\textsuperscript{50} The assignment of the opinion to the Justice with the deciding vote is a strategic move that has drawn a fair amount of attention in the legal and political science academies.\textsuperscript{51} This trend, seen as a conciliatory gesture on the part of some and as pure strategy on the part of others,\textsuperscript{52} results in the most moderate Justice writing opinions that are both ideologically liberal and conservative. In the recent history of the Court, O’Connor and Kennedy each have been considered Justices who were swing votes or the “median Justice.” Because O’Connor and Kennedy were voting alternatively with the right or the left, they were reinforcing their own views on both the left and the right.\textsuperscript{53}

\textsuperscript{47} Ultimately, the power of the courts is derived from the federal Constitution. William M. Landes & Richard A. Posner, \textit{Rational Judicial Behavior: A Statistical Study}, 1 J. LEGAL ANALYSIS 775, (2009) (Because of the enormous power wielded by the highest court, “ideology matters more in the Supreme Court than in the court of appeals”)

\textsuperscript{48} “It is often said that the federal Constitution is a living document. But we hardly appreciate, I think, the degree to which this is true . . .” PAGE SMITH, \textit{THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY} 11 (1980). Even originalist interpretations of the Constitution are subject to personal bias, there are certain contemporary influences we cannot escape.

\textsuperscript{49} Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920).

\textsuperscript{50} Saul Brenner, \textit{Strategic Choice and Opinion Assignment on the U. S. Supreme Court: A Reexamination} 35 \textit{THE WESTERN POLITICAL QUARTERLY} 204 (1982); see also,

Paul J. Wahlbeck, \textit{Strategy and Constraints on Supreme Court Opinion Assignment} 154 U. OF PA. L. REV. 1729, 1755 (2006) (“[The Chief Justice] may reserve his allies for assignments to particularly salient cases, while minimizing his policy loss in cases with close conference votes by assigning those opinions to Justices at the center of the Court’s ideological spectrum.”)

\textsuperscript{51} Wahlbeck, \textit{supra} note 51, at 1742 (using the Martin-Quinn scores to show that the Court’s median “grows significantly more conservative from the 1986 Term to the 1993 Term”).

\textsuperscript{52} \textit{WOODWARD & SCOTT ARMSTRONG, THE BRETHREN} 152 (1979) (discussing Justice Douglas’ claim that “the best way to hold a swing vote was to assign that Justice to write the decision”).

\textsuperscript{53} For example, Justice O’Connor was assigned almost as many opinions by Rehnquist in the period from 1986-1993 as Rehnquist assigned himself, although this trend did not hold true for the assignments made by the associate justice during the same period of time.
One way of gauging the type (left-leaning or right-leaning) of opinions drafted by various Justices is to look at who assigned them opinions. During Rehnquist’s term as Chief Justice, when the liberal bloc prevailed, Rehnquist was rarely part of the majority, so opinions were generally assigned by the Senior Associate Justice. Conversely, when the majority took the conservative position, the Chief Justice was generally in the position of assigning the opinion. As mentioned previously, evidence suggests that the opinions that fit the attitudinal model are the important, or salient cases. The importance of salient cases for the Justices is consistent with the general findings that attitudes are most ideological when the issues are prominent. Because important cases are those in which a Justice’s position is most likely to be static, and individual values or attitudes are most conspicuous, these cases provide the best data for testing my hypothesis.

In order to investigate the potential for opinion writing to influence subsequent ideological drift, I compared the patterns of drift among Supreme Court Justices identified by Lee Epstein et al. in the article, Ideological Drift Among Supreme Court Justices: Who, When, and How Important? for the years 1986-1993, with opinion assignment data presented in Opinion Assignment and the Rehnquist Court, by Forrest Maltzman and Paul Wahlbeck. Finding are presented in the table below.

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54 Forrest Maltzman & Paul J. Wahlbeck, Opinion Assignment on the Rehnquist Court 89 JUDICATURE 121, 126 (2005-2006).
55 See infra notes 42-26 for a definition of “salience”.
56 Saul Brenner & Jan Palmer The Time Taken to Write Opinions as a Determinant of Opinion Assignments. JUDICATURE 72 (1988).
58 Maltzman & Wahlbeck supra note 55.
### Justice Greater Number of Opinions (Ideology) For Important/Salient Cases

<table>
<thead>
<tr>
<th>Justice</th>
<th>Observed Trend (Right or Left)</th>
<th>Compatible With Self-Persuasion Hypothesis?</th>
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<tbody>
<tr>
<td>Rehnquist</td>
<td>Conservative</td>
<td>Left</td>
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<tr>
<td>Brennan</td>
<td>Liberal</td>
<td>Left</td>
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<tr>
<td>White</td>
<td>Conservative</td>
<td>Right</td>
</tr>
<tr>
<td>Powell</td>
<td>Conservative</td>
<td>Slightly Left</td>
</tr>
<tr>
<td>O’Connor</td>
<td>Conservative</td>
<td>Slightly Left</td>
</tr>
<tr>
<td>Kennedy</td>
<td>Liberal</td>
<td>Left</td>
</tr>
<tr>
<td>Souter</td>
<td>Liberal</td>
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*Figure 1: Comparison of Supreme Court Justices on predominant ideology of opinions written for important cases and ideological drift.\(^{59}\)*

**Justice Rehnquist**

Rehnquist was considered a stalwart conservative at the time of his appointment, and few would argue that he remained conservative throughout his tenure on the bench.\(^{60}\) However, although he started out on the far right, the pattern of his votes suggests an eventual drift left toward a more moderate position. Although at first blush, this trend would seem to contradict the self-persuasion hypothesis, the picture may be more complicated than it looks. When Rehnquist was promoted to Chief Justice, Scalia joined the Court, and it was at this point that Rehnquist began to drift left toward a less extreme position. Scalia’s presence meant that Rehnquist had another justice who was similarly consistent in his conservative voting for important cases. When Rehnquist wanted a strong conservative opinion on an important case, he could count on Scalia to draft one. Although Scalia was not Rehnquist’s favorite target for important cases, he may have written some of the more extreme opinions that Rehnquist would otherwise have drafted. It is possible that Scalia’s presence accounted for Rehnquist’s moderate drift toward the center.

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\(^{59}\) This chart was created using data from Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, supra note 59 and Maltzman & Wahlbeck, *supra* note 56.

\(^{60}\) DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 497 (year) (insisting that Rehnquist was on the “solid right”).
Another factor that might have affected this trend was fewer high-profile left-leaning cases. Chief Justices tend to self-assign the most high profile cases.\textsuperscript{61} Compared to the Warren and Burger Courts, relatively few civil rights cases were appealed to the Rehnquist Court due, perhaps, to the perception that this Court was hostile to liberal claimants.\textsuperscript{62} An overall trend of fewer ideologically loaded cases may have meant that fewer of the most important cases, typically reserved in high proportion by the Chief Justice for himself, were fertile ground for strong conservative value arguments. Instead, the cases with important implications that Rehnquist self-assigned may have been less ideologically polarizing, and less likely to promote self-persuasion.

\textit{Justice Brennan}

Despite having been nominated by Republican Dwight Eisenhower, Justice Brennan was liberal throughout his career on the bench. He drafted more than 1,300 opinions during his tenure. During the era when Rehnquist was Chief Justice, because of his status as the Senior Associate Justice, he was in the position to assign the majority opinions he joined that were not also endorsed by Rehnquist. Brennan self-assigned many of the more prominent opinions. As a result, he drafted many of the more left-leaning opinions. Moreover, he was a prolific writer behind the scenes, often drafting memos to other Justices in an attempt to persuade or expound on some principle he considered important to a case. He earned a reputation for being persuasive, and he may have had this effect on his own thinking. He grew increasingly liberal over the course of his tenure on the bench.

\textit{Justice White}

Justice White also fits the pattern suggested by the self-persuasion hypothesis. Over the course of his tenure on the bench, which started long before the Rehnquist Court,\textsuperscript{63} he grew more conservative in fits and starts.\textsuperscript{64} His pattern of voting over his tenure seems more sporadic than many of the other Justices, perhaps because he resisted being labeled or tied to any particular ideological camp.\textsuperscript{65} He was the only Justice who had public-service or plaintiff-oriented background who was appointed by a Democratic President who voted with an agency more often when the agency reached a conservative, rather than a liberal result.\textsuperscript{66}

\textit{Justice Powell}

\textsuperscript{61} Maltzman & Wahlbeck, \textit{supra} note 56, at 126.
\textsuperscript{62} Unah & Hancock, \textit{supra} note 48, at 308.
\textsuperscript{63} He was one of the longest serving justices, having served on the Warren and Burger Courts before Rehnquist was Chief Justice.
As a Nixon nominee, Powell was hailed as a conservative, an apt characterization. Although he was known as a moderate conservative, Powell often cast the deciding vote, earning a reputation as the swing vote on the Court. Between 1986 and 1993, Rehnquist assigned Powell more opinions for important cases than any other Justice, perhaps as a way of keeping Powell’s vote. However, Powell moved left, contrary to the self-persuasion hypothesis.

Justice O’Connor & Justice Kennedy

Justice O’Connor and Justice Kennedy have both occupied the title swing-vote or median Justice on the Court. They were also both President Reagan nominees, along with Scalia. Unlike Scalia, it is certainly fair to say that at various points each has disappointed conservatives. However, they differed in important ways. For the first ten years on the bench, O’Connor remained fairly conservative; this would change as she moved left in her later years on the bench. Kennedy was more likely than O’Connor to vote with the liberals on the bench, although there certainly were exceptions. Finally, both moved left from where they were when they started as Justices, but Kennedy’s move corresponded to the majority of the important opinions he wrote, assigned by the Senior Associate Justice. O’Connor, on the other hand, wrote more opinions assigned by Rehnquist. Hence, only Kennedy’s drift confirmed the self-persuasion hypothesis.

Justice Souter

Justice Souter should have been a safe bet when he was nominated by Republican President George H. W. Bush. However, he disappointed conservatives more often than he delighted them. In discrimination cases, Justice Souter was almost as tenaciously pro-plaintiff as the Court’s most liberal member, Justice John Paul Stevens. Considered a reliable member of the liberal bloc, he moved left consistently, with several brief pauses during the mid 1990s and toward the end of his career on the Court. Souter was assigned more important opinions by the Senior Associate Justice than by Rehnquist, and increasingly, he voted in a way that was consistent with the ideology he most often espoused in his opinions.

Although this essay is the first work to propose that self persuasion might help to explain ideological movement, other theories have been offered for why the Justices drift over the course of their careers on the bench. One in particular merits mentioning here because it may be implicated by the data. Of the Justices examined, only White moved right, the other six moved left. This uneven distribution implicates the Greenhouse Effect. Named for Linda Greenhouse,

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68 Maltzman & Wahlbeck, supra note 55, at 126.
71 Lee Epstein et al., The Supreme Court Compendium, tbl.6-5 (2007).
72 Lee Epstein et al., supra note 68, at 1505-1514.
the Supreme Court Reporter for the New York Times, the Greenhouse Effect referred to the tendency for Supreme Court Justices to trend in the direction of more liberal views, a phenomenon some attributed to the left-leaning media.\textsuperscript{73} This effect has been studied and there is some debate with respect to whether it is a real phenomenon.\textsuperscript{74} Some have argued that the force moving Justices to the left is socializing with the liberal Washington D.C. elite, a theory that puts the Justices’ personal light in the spotlight, rather than blaming the media. If the Greenhouse effect is real, it could obscure or exacerbate the self-persuasion effect, depending upon whether the predicted drift was to the right or to the left.

Once we have resigned ourselves to the inevitable conclusion that the attitudes of the Justices on the Court influence their interpretation of the law, the next question is why we should care at all about the effects of self-persuasion. The only reason to examine the phenomenon (beyond mere intellectual curiosity) is if there are particular concerns over this type of attitude change. One reason for concern is that there may be systematic, undesirable effects associated with a connection between the most commonly assigned opinion-writers and migrations in ideology. The Justices who draft the most important opinions have a tremendous amount of power to influence policy.\textsuperscript{75} If there is concern about extremist attitudes on the bench, there is a corresponding reason for unease over the potential for those Justices who are drifting toward more polarized positions to be the same Justices who are also writing the majority of important opinions. Extremism among Supreme Court Justices is not generally a valuable quality for the simple reason that extremism makes it less likely that the Justice will listen to arguments with an open mind. We have particular concerns about polarized views in Justices because of the potential such views have to interfere with a fair and accurate interpretation of the law. As Larry Kramer noted, “one justification for judicial supremacy is that courts provide interpretations of constitutional law that are consistent with fidelity to principles of justice and law.”\textsuperscript{76} Finally, self-persuasion effects create attitude change without justification. From a rationality perspective, the merits of a position do not become stronger simply because someone has given voice to them, so they should not be more influential.

There are a number of reasons why self-persuasion might be adequately moderated so as to pose minimal danger at the level of the Supreme Court. As an initial matter, it is not at all clear that self-persuasion resulting in ideological drift predictably results in extremism on the bench. For conservatives writing largely conservative opinions, the Greenhouse Effect may

\textsuperscript{74} Wahlbeck, supra note 51, at 1729 (using the Martin-Quinn scores to show that the Court’s median “grows significantly more conservative from the 1986 Term to the 1993 Term”)
\textsuperscript{75} Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, Wis. L. Rev. 205, 247-48 2000 (for an example of the powerful wielded by the Justice who drafts an opinion).
result in an ideological pull in the opposite direction. Other influences, such as changes in the ideological makeup of the Court or reactions to endogenous or exogenous factors can influence Justices to vote to the left or to the right. Finally, the Chief Justice can serve as a gatekeeper. Regardless of the Chief’s personal preferences, for strategic reasons, he or she is unlikely to benefit from assigning important opinions to ideologically extreme Justices. Although there are a number of safeguards, and reason to be cautiously optimistic, the effects of self-persuasion on judicial ideology is a topic that merits greater attention and empirical study.

Consider, for example, David Cole’s argument that the Court moved left following its controversial decision in *Bush v. Gore*:

> ...the Court's most precious commodity is its own legitimacy. *Bush v. Gore* called that legitimacy deeply into question. The Court's record since then suggests that the Justices may realize this and, consciously or subconsciously, have sought to rehabilitate the Court's image by reducing partisan division, correcting to some extent the Court's considerably conservative tilt, and emphasizing the importance of a rule of law that is distinct from and rises above politics.

Cole, supra note 67, at 1431.