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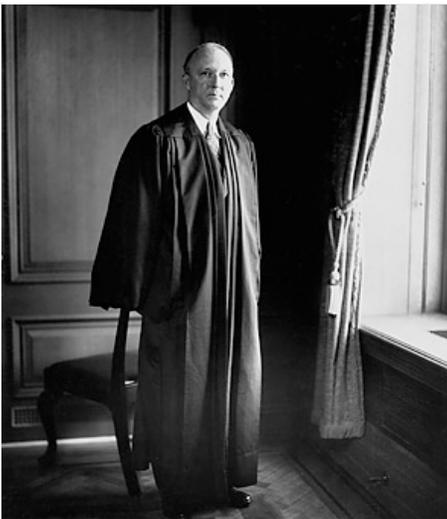
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# The Drifters

By REYNOLDS HOLDING

Thursday, Apr. 05, 2007



ENLARGE PHOTO

Supreme Court Justice Hugo L. Black

CORBIS

Has Anthony Kennedy gone green? The Supreme Court Justice clinched a victory for environmentalists when he joined in the court's 5-4 majority authorizing federal regulation of greenhouse gases from cars.

In a sense, it was familiar ground for Kennedy, whose spot near the court's ideological center often makes his vote determinative in tight cases. But the decision's high-profile rebuke to the Bush Administration makes you wonder whether Kennedy is shifting left.

If so, he wouldn't be the first Justice on the move. Contrary to everything we think we know about Justices, they're ideological drifters, according to a surprising study scheduled for publication this summer in the Northwestern University Law Review. They apparently move from right to left, left to right and sometimes back again. And it's not just a Hugo Black, who dismayed liberals by rejecting a right to sexual privacy between married couples, or a Harry Blackmun, the conservative who came to write the landmark abortion case *Roe v. Wade*. It's virtually every Justice appointed since 1937, the study says.

In Kennedy's case, the vote on greenhouse gases probably turned less on an ideological move than on his support for states' rights, since a basic issue was whether Massachusetts and other state plaintiffs had standing to sue for federal regulation. But the study says Kennedy started out conservative and shifted left before leveling off, meaning a renewed leftward tilt is possible.

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O.K., so what? Well, according to the study, the law probably looks a lot different because of the shifts over the years. Prayer at public school graduations, for example, is unconstitutional largely because George H.W. Bush appointee David Souter slid left before the case was decided by a 5-4 vote in 1992. The shifts could also mean we can tone down the bitter battles over court nominees. Justice Rehnquist's 1986 nomination as Chief Justice might have irked Democrats less had they foreseen what the study calculates as his tilt toward moderation by 2003, a year in which he voted to reverse a death sentence. And now that we realize how fluid judicial ideology may be, perhaps Presidents can emphasize talent over politics in picking nominees.

Experts who study the court say they have only recently figured out how to measure these ideological movements. A big problem has always been trying to compare Justices and cases from different decades. The math is complex, but Professor Lee Epstein of Northwestern Law School and three other professors came up with a formula that in effect puts the 26 Justices who served at least 10 court terms since 1937 on the bench at the same time. They essentially grouped cases involving similar areas of the law and placed the votes in those cases on a scale ranging from very liberal to very conservative. They then assigned each Justice an ideological position based on whom he served with, his actual votes and those of the other 25 Justices. The model can predict how each Justice would probably vote on any given case.

It shows that 12 of those 26 Justices grew more liberal and seven more conservative, and three shifted back and forth; only four barely changed. We also learn that most Justices, before drifting, stick to their initial ideology for at least a term or two. So why do Justices, legally sophisticated and surely familiar with their own minds, change at all? Some experts say it's the political environment (Chief Justice Warren Burger, appointed by Richard Nixon, was most liberal when Jimmy Carter was President and most conservative under Ronald Reagan). Others say Justices particularly skilled in persuasion sway their more malleable brethren. A more hopeful theory is that cases are so thoroughly briefed and argued by the time they reach the court that the truly compelling side, regardless of ideology, wins out. In other words, Justices often abandon ideology simply to make the right decision.

What this may mean for the current court is unclear. With decisions due on abortion, affirmative action and similarly ticklish issues, George W. Bush's appointees--John Roberts and Samuel Alito--will probably deliver the conservative goods this term. But after that? If the study is correct, don't bet on it. A lot surely depends on Justice Kennedy. If he remains steady in his opposition to affirmative action, for example, that will mean the policy is in trouble. Not so if he renews his drift to the left.

It's a groaning cliché, but "Time will tell" is surprisingly useful here. The study suggests that time will change the Supreme Court even without new Justices. So if you don't like the current ideological tilt, just be patient.



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