

IDEOLOGICAL DRIFT AND THE STRUGGLE OVER MEANING

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I. INTRODUCTION: A QUESTION OF DRIFT

PROFESSOR SCHAUER's essay on constitutional positivism¹ purports to clarify the terms of debate between positivism and natural law. By its end, however, it has become clear that he has been concerned all along with quite different matters. He wonders whether debates between positivism and natural law, formalism and antiformalism, or judicial activism and judicial restraint can ever be settled in the abstract because the political and moral consequences of these stances, programs, and theories change radically over time. Some applaud the "natural law" innovations of the Warren Court while criticizing those of the *Lochner* Court; others celebrate Justice Holmes' positivism while simultaneously denouncing that of Chief Justice Rehnquist. Formalism sometimes looks good to us, yet at other points in history the rejection of formalism looks even better. Chief Justice Marshall's judicial activism of the 1820s is revered by liberals, while Justice Peckham's deformations of the 1900s are condemned; Justice Brennan's judicial creativity in the 1960s is extolled, while that of Justice Scalia in the 1980s is disparaged.

Professor Schauer is sensitive to these historical changes in political approbation and blame. He does not attempt, as others have, to reconcile the many transformations in intellectual fashion within a larger view that justifies them all. Instead, he argues that "[t]he alleged evils of formalism, positivism, and a host of other widely castigated -isms are evils, if evils they be, not acontextually, but because of relatively time-specific, place-specific, and role-specific patterns of social and political behavior imposed on the moral landscape."²

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1. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993).

2. *Id.* at 827.

Yet this raises a more difficult problem. Are there any legal theories or legal ideas that escape this historical play? Is there any set of political or constitutional principles that might remain as fixed standards for all the others, and against which all others might be judged? This is the question that lurks beneath Professor Schauer's dogged analysis of positivism and natural law. Professor Schauer, after all, is a scholar who, in an era in which antiformalism has become an academic religion, has dared to note the many virtues of a formalist approach.³ He has regularly seen the value in what others consider valueless, the pearl in the discarded oyster. And this naturally leads him to a more general inquiry. Ultimately, Professor Schauer wants to know "whether styles of legal argument, and forms of legal structure, have some necessary and temporally indifferent normative political incidence."⁴ If they do not, Professor Schauer believes, the notion of theoretical discussion based on abstract concepts must be reevaluated, for "[a]s social and political behavior changes, then perhaps so should our view of the theoretical constructs within which we manage it."⁵

As I see it, Professor Schauer's question is whether the ideas, theories, and symbols we use to explain and justify the legal and social world have a fixed political incidence, which escapes the vagaries of a changing social context, and which can in turn be used to describe, evaluate, and judge that context. I think this is an important question; in one way or another it has been central to my own work on legal rhetoric, semiotics and deconstruction. Indeed, I believe I can offer an answer to Professor Schauer's question. The answer is no.

Styles of legal argument, theories of jurisprudence, and theories of constitutional interpretation do not have a fixed normative or political valence. Their valence varies over time as they are applied and understood repeatedly in new contexts and situations. I call this phenomenon "ideological drift."⁶ Professor Schauer offers us an example of ideological drift at work. The use of "natural law" (as opposed to positivist)

3. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

4. Schauer, *supra* note 1, at 828.

5. *Id.* at 827.

6. Various discussions of ideological drift appear in J.M. Balkin, *Ideological Drift*, in ACTION AND AGENCY 13 (Roberta Kevelson ed., 1990); J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831 (1991); J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 [hereinafter Balkin, *Some Realism*]. Recently, Professor Kathleen Sullivan has offered some useful discussions and examples of drift in Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 103-04 (1992); and Kathleen M. Sullivan, *The First Amendment Wars*, THE NEW REPUBLIC, Sept. 28, 1992, at 35-40.

approaches to judicial review can, in different contexts, or at different points in history, lead to quite different results, whether this difference is defined in terms of progressive versus conservative, or in Schauer's terms of results we like versus results we do not like.⁷ A second example is the libertarian conception of free speech. Since the 1920s left-liberals in the United States have tended to take relatively libertarian views on free speech, while conservatives have been more likely to balance the interest in free speech against the interest in social order, the preservation of important social values, and so on. In the last several years we have seen a gradual and partial reversal of these positions in debates over regulation of sexual and racial harassment, campaign finance, and pornography.⁸ A third example arises from the notion of racial equality. The concept of the "colorblind" Constitution, offered by the first Justice Harlan in 1896 as a progressive (and even radical) argument against Jim Crow, has by 1992 become the rallying cry of conservatives who seek to protect white males from racial oppression.

Ideological drift in law means that legal ideas and symbols will change their political valence as they are used over and over again in new contexts. This description envisions an idea or symbol changing its political significance over time while its content is held constant. Nevertheless, we know that meaning is equally dependent on context. Hence one might question whether it is really "the same idea" whose political meaning has changed over time—for example, whether the conception of free speech or racial equality championed by liberals in 1960 is really the same as that defended by conservatives in 1990. The possibility of such a dispute is equally central to the phenomenon of ideological drift. Thus, there are really two ways to think about the phenomenon of drift. The first is to imagine the content of the idea as held constant and consider the changing political consequences of the idea in changing contexts. This formulation is implicit in Professor Schauer's approach. A second and equally important way is to imagine

7. It should go without saying that these are not identical distinctions.

8. See Balkin, *Some Realism*, *supra* note 6. This statement must itself be subject to numerous qualifications that merely demonstrate the pervasiveness of ideological drift. As Mark Graber and David Rabban have recently noted, before the 1920s the American left (however that curious concept is defined) was decidedly cool and even occasionally hostile to what we would today regard as free speech ideology; conversely some late 19th century laissez faire libertarians (whom today we would regard as conservatives) were much more supportive. See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 *STAN. L. REV.* 47 (1992).

the content of the idea or symbol changing as the context surrounding it changes. It is to see the content and meaning of the idea as inextricably intertwined with the context in which it appears. This second conception envisions drift as the product of a struggle over the meaning and legacy of political and legal ideas. It sees all of the key concepts of political discourse as potentially contested over time, including the very ideas of liberalism and conservatism we have just used to describe our previous examples of ideological drift.

Consider, for example, the concept of racial equality. A contemporary liberal might claim that conservatives who emphasize colorblindness have perverted the notion of racial equality championed by Justice Harlan in his dissent in *Plessy v. Ferguson*⁹ and vindicated in *Brown v. Board of Education*.¹⁰ They might argue that the test of colorblindness is merely a proxy for the goal of true racial equality, and that over time fetishistic emphasis on this proxy has formalized the concept of racial equality and stripped it of its animating rationale. Conversely, modern conservative opponents of affirmative action might claim that they have preserved the true meaning of *Brown* while liberals have perverted its meaning by demanding special treatment for minority groups. Although the original conception of racial equality in *Brown* was and remains worthy, they might argue, the idea has been carried too far by zealous liberals, who have so transformed its meaning that they now hold views closer in spirit to the opponents of *Brown* and the defenders of *Plessy*.

The ideological drift of the notion of “colorblindness” is actually the result of a struggle over the meaning of the underlying concept of racial equality, and over the legacy of opinions like *Brown v. Board of Education*. More generally, ideas or symbols may appear to change their political valence over time because groups have adopted competing interpretations of relatively abstract ideas or symbols used in previous debates—ideas like liberty, equality, and progress, or symbols like the flag, the family, and so on. From competing perspectives it appears either that the “true meaning” of the idea or symbol has been preserved from revisionism, or that the meaning has been distorted by groups who owe no fealty to its true principles. Hence, we are likely to see the phenomenon of ideological drift at work when individuals complain that “a good idea has been taken too far,” or that we must return

9. 163 U.S. 537 (1896).

10. 347 U.S. 483 (1954).

to the "original reasons" behind a doctrine or a symbol.

Note that the ground of struggle can be either the definition of the abstract idea or the values that underly or accompany it. In this respect the ideological drift of the concept of "colorblindness" differs from that involving the concept of "free speech." In the case of colorblindness, liberals might claim that drift results from the confusion of a proxy or symbol (colorblindness) with a more important value that it at one time or in one context represented (racial equality). They would argue that the proxy or symbol must be discarded in order to preserve the underlying value it represents, while their opponents would respond that colorblindness is more than a proxy—it is what racial equality always requires. Here the parties are not arguing about whether the meaning of the term "colorblindness" has changed—they are arguing about whether the term has become detached from the underlying concept of racial equality, or whether it is a necessary element of racial equality. In other words, they are arguing about what racial equality means.

The case of free speech is slightly different. Contemporary left advocates could be arguing that free speech, like colorblindness, is just a proxy for a more valuable thing from which the proxy has become detached. But they need not do so. They may argue instead that free speech is still a valuable thing, but that the meaning of the term "free speech" has been perverted by their political opponents; hence, we need to return to the original meaning of this idea. In the view of progressives, the political valence of "free speech" appears to drift only because the meaning of "free speech" has subtly shifted over time. Conservatives, they will argue, have wrongly equated free speech with a formal right to speak, insensitive to disparities in power and income. However, true free speech is a substantive liberty that requires a realistic possibility of communication with an audience, reasonable access to the dominant forms of communicative technology, and reasonable safeguards to prevent speakers from being unfairly drowned out by those with disproportionately unequal economic power. Hence, guaranteeing real free speech may require what from the standpoint of a purely formal conception of liberty would look like regulation. Yet this appearance is illusory, because the goal of such regulation is to vindicate the substantive liberty of speech, just as labor regulations are sometimes necessary to vindicate the substantive freedom of contract of employees. Similarly, only under a cramped and overly formalistic conception of speech could one confuse regulation of cross burnings with regulation of speech. The left will argue that true freedom of speech is the

ability to speak free of a hostile working environment, or free of fears of physical threat. Here, unlike the case of colorblindness, the dispute is over the meaning of the term that is said to "drift."

Of course, this is not the only possible account that the left advocate could give. She could decide that antipornography laws or racial harassment statutes really are regulations of the freedom of speech, but that this right must be balanced against other rights equally precious. At that point, however, she has conceded that her opponent is the defender of the freedom of speech while she is the proponent of regulation of this liberty. She has, in other words, adopted the definition of "freedom of speech" offered by her opponent, and thus ceded the moral high ground that comes from being a defender of liberty. Similarly, she may argue that affirmative action programs involve unequal treatment based on race that is nevertheless justified by pressing exigencies. In that case, she has accepted her opponent's definition of "racial equality," with a concomitant disadvantage in articulating her views and making them persuasive to others. Because of these difficulties, it is likely that she will contest the meaning of the abstract term, hoping that she, and not her opponent, can gain the moral high ground.

Although my examples measure changing political valences in terms of a spectrum between "left" and "right," it is important to emphasize that the concept of ideological drift does not require this. Normative and political valences may change with respect to many different types of evaluative schemas: left versus right, cosmopolitan versus isolationist, assimilationist versus nationalist, populist versus elitist, religious versus secular, and so on. Moreover, the scope and content of all of these benchmark concepts will be affected by the play of contextual change. The notions of "left" and "right" or "liberal" and "conservative" are themselves subject to drift, because over time the positions taken by those who identify themselves (or are identified) as conservatives and liberals tend to change. For example, Alexander Hamilton often is considered a conservative, while Thomas Jefferson often is viewed as a liberal sympathetic to the egalitarian ideals of the French Revolution. Yet Hamilton supported a strong federal government and government investment in the economy, while Jefferson's party defended states' rights and opposed government investment in public works. Jefferson's party defended strict construction of federal powers, while Hamilton's heirs in the Federalist party (as exemplified by John Marshall) defended an expansive reading of the federal government's power under the Constitution. This divergence from contemporary as-

sumptions about political alliances allowed New Deal liberals to extol the wisdom of Hamilton and Marshall, while permitting conservatives to claim the liberal Jefferson as one of their own.

Faced with these complexities, one could claim that Hamilton was not really a conservative and Jefferson was not really a liberal, or one can acknowledge that the meaning and content of these political orientations have changed over time. The same applies to current debates about freedom of speech. One could insist that people who are willing to regulate speech for egalitarian purposes are not really part of the American left, or else one can acknowledge that "left" positions (like those of the right) change over time. Thus, we might say that the principle of relativity applies to the metaphor of ideological drift. If from one perspective *B* seems to be drifting away from *A*, from *B*'s perspective it is rather *A* that is moving away from *B*.

We can also describe the metamorphosis of benchmark concepts like "left" and "right" through our alternative conception of drift. We can understand these transformations as the product of intellectual and political struggle over the meaning of key political ideas like "left" and "right" or "liberal" and "conservative." As circumstances evolve, different groups of conservatives—for example, libertarians, religious conservatives, social conservatives, judicial conservatives, and business conservatives—may find themselves increasingly at odds over important public policy issues. Hence they may also find themselves debating who are the true conservatives, and who have departed from the conservative fold. The libertarian who supports decriminalization of homosexual sodomy may claim that the social conservative who opposes it is untrue to the conservative principle of protecting individual choice, while the traditional conservative may accuse the libertarian conservative of abandoning principles of gradualism in her quest for rapid deregulation. The benchmark concepts by which we measure drift—liberal and conservative, populist and elitist, nationalist and assimilationist—are no less subject to agonistic development and alteration than the political and legal ideas they serve to measure.¹¹

11. We can also describe the concept of drift in terms of fragmentation of positions that at one point in history were thought to be naturally allied. Suppose one believed that there was a coherent conservative position that combined (1) preference for free markets and hostility to economic regulation, (2) coolness towards redistributive social programs, (3) opposition to greater liability in tort, (4) comparatively statist views on non-economic civil rights, (5) support for state enforcement of traditional conceptions of morality and the family, (6) preference for states' rights over federal power, (7) a limited conception of judicial power, and (8) support for federal executive power over congressional power. At one point these positions might seem to be naturally allied

II. THE STRUGGLE OVER REASONABLENESS AND THE TOOLS OF UNDERSTANDING

The above examples suggest that the phenomenon of ideological drift is the result of a struggle over the meaning of abstract theoretical ideas and symbols that people use to understand the legal and social world and to persuade each other about what should be done within that world. The outcome of these struggles has consequences for theoretical discussion and for political and legal practice because it frames the terms of political debate and political thought. One of my favorite examples is what Clinton Rossiter called the "Great Train Robbery of American Intellectual History," in which laissez faire conservatives of the late nineteenth century were able to take control of the meaning of "liberty," "property," "equality," and "progress"—terms used by the Jacksonians, abolitionists, and free labor advocates before the Civil War—and define them in terms of a conservative agenda.¹² Thus liberty became the liberty to contract, equality became the formal equality of contracting parties, and progress became the ability to accumulate wealth. Opponents of laissez faire thus could be framed as paternalistic and opposed to liberty and progress. In the same way, there is currently a struggle over the meaning of racial equality in debates over affirmative action, as well as a struggle over the meaning of freedom of speech in debates concerning campaign finance, sexual and racial harassment, and access to mass media.

These intellectual struggles are much more than dictionary disputes. If racial equality is successfully defined as a formal equality, or if free speech is defined in terms of a formal liberty, this affects the way that we think about issues of racial justice and the bounds of expressive freedom, and frames the sort of arguments that can be plausibly offered about these issues. The side whose positions do not fit the victorious conception can be more easily accused of giving short shrift to racial equality and expressive freedom, of trading these important values away for other less important goals. Simultaneously, the victors

with each other—together one might think they offered a portrait of a stereotypical conservative. But this portrait is evanescent. As time passes, new issues arise in which these positions seem to conflict with each other. Different groups of conservatives go their separate ways on these issues, and this leads to disputes over who the real conservatives are. We can describe this either as a fragmentation of an alliance of ideas or a particular group of persons who hold these ideas. The theory of ideological drift contends that these alliances are not natural but artificial, not permanent but contingent. It concerns itself with how the alliances of both ideas and persons will fragment, separate, and reconstitute themselves over time.

12. CLINTON ROSSITER, *CONSERVATISM IN AMERICA* 128 (1962).

in these disputes can style themselves as defenders of racial equality and expressive liberty; they will gain the rhetorical high ground that comes from being a defender of the good and the just.

Abstract concepts used in theoretical discussion are part of the tools of our understanding of the social world. However, these tools do not exist simply as givens; they are fought over using the tools of understanding. The parties fight on a battlefield in which the shape of the terrain itself is a potential prize. Ideological drift, in this sense, is the effect of a deeper cause—the struggle over cultural and political meaning through the practice of politics and persuasion, whose reward is ideological and rhetorical power. It is the use of reason to shape the historical contours of reason, a battle for control over cultural form and intellectual agenda.

III. POWER IN REASON AND THE POWER OF REASON

The dominant metaphors used in this description of ideological drift are those of battle and struggle. These metaphors are misleading, however, in several important respects. First, they emphasize the agonistic element of theoretical discussion when in fact much theoretical discussion and development of ideas is cooperative. Culture is an enterprise of collective writing and rewriting, of thinking and rethinking. The agonistic nature of intellectual dispute may often mask a deeper unity of purpose. We may find, even in the most adversarial context, a certain degree of implicit cooperation about what constitutes an argument, what is an appropriate appeal to reason, and so forth. An agonistic enterprise is invariably also a communal enterprise, for without a shared basis of intellectual dispute, no argument could be convincing, no victory could be gained, no agenda could be set.

Second, the metaphors of combat may wrongly suggest that intellectual struggle is simply a struggle for power as opposed to a search for truth or reason. It is admittedly tempting to assume that parties who debate the meaning of racial equality are not really interested in truth, but are only interested in gaining benefits for themselves or their allies, and that the ideas and concepts they employ in this endeavor are merely instruments towards this end. This is an instrumental conception of reason, in which reason is the mere servant of political power. This view of reason and power is deeply mistaken. It is as mistaken in its own way as the assumption it rises to contest—that reason and power inhabit separate spheres of human life, and that a reason that has no connection to power can and must nevertheless act as a neces-

sary check on power.

The instrumental conception of reason is often tied to the claim that reason is a historical artifact, but the claim that reason is a mere servant of power misunderstands the historical basis of reason, and, above all, the meaning of living and thinking within a culture. The easy assimilation of reason to an instrument of raw power forgets that debates over abstract concepts like equality and liberty are always simultaneously attempts to understand and define what is more and less reasonable. They are collective exercises in the historical creation and development of reason. Viewed through a purely instrumentalist lens we forget the extent to which *intellectual disputes are exactly what they purport to be*—attempts by the members of a culture to discover and name what is true and false, better and worse, efficacious and inefficacious.

At stake in the debates over equality and liberty are the tools of understanding we use to make sense of the social world around us. These tools are not mere implements that we can take up and put down at will—they are part of us, as much as the tools we call our arms and legs. To identify the struggle for meaning as epiphenomenal, as the mere mask of a deeper and more real struggle for power, forgets that the ability to determine what is reasonable and unreasonable, what is the better and the worse argument in a culture, is perhaps the most important power of all. It is power not over the body but the soul, not over the material conditions of life but the modes of understanding those conditions. The struggle over meaning is the struggle over the forms and contours of thought, the tools of understanding which we internalize and which constitute us as human beings who live at a particular historical moment in a particular culture. These tools of understanding form the grooves in which our thought travels when we grapple with the social and moral issues of our times. Those who shape and control these grooves, those who succeed in fashioning the tools of understanding of a time and place, have enormous power over human beings. That is because the forms and contours of our thought, the tools of our understanding, are part of us; they constitute our historical existence as human beings.

Thus, much is at stake in defining the plausible and the implausible, the persuasive and the unpersuasive, the rhetorically efficacious and inefficacious. At stake is the definition of the contours of reason and the reasonable. Herein lies the poverty of the instrumentalist conception of reason, with its easy equation of reason and raw political

power. Reason is no mere slave to the power of individuals or groups. Indeed, we might rather think that individuals and groups are slaves to reason, that same reason which is shaped and articulated by and through history. Reason is a mighty power; we are simultaneously its begetters and its servants.

A final problem with the description of ideological drift in terms of struggle over meaning is that it may suggest too simplistic an account of agency. Imagining debates over affirmative action as merely instrumental to the achievement of power for particular groups assumes that these groups have some sort of control over what might count as reasonable or unreasonable, that they create reasonableness to suit their preexisting aims and intentions. But it is quite the other way around. Individuals and groups need the tools of understanding to understand and articulate their interests and goals. They do not stand outside of historical reason and decide what it shall be. The tools of understanding cannot be taken up and put down at will—if they have power over others they equally have power over the persons who seek to use them. No one can use reason as a mere instrument distanced from the power it wields; it has power only because it already has shaped the available ways in which it can be wielded.

Hence individuals and groups who struggle over the meaning of abstract ideas cannot fully control what will be considered a reasonable and unreasonable interpretation of them. Indeed, the arguments that they make to persuade others are shaped by what they already believe to be reasonable and unreasonable because of their participation in a culture of argument. That is why it is misleading to claim that a conception becomes dominant because a particular person or group of people desire it so; rather the reason that they desire it so is caused by the context in which they make their argument. “Racial equality” does not acquire a meaning because some group of individuals decides that it shall signify one thing as opposed to another; rather it is because the term is already freighted with meanings that have power over individuals that arguments about its proper interpretation must be deployed in a certain way. Reason, rather than located in the desires of a particular group, is the field of cultural power. It is the terrain in which groups find themselves and their opponents. Reason determines the shape of the struggle over the right and the reasonable, and in the course of this struggle, it is altered. It is the source of struggle, and the result of struggle, but does not exist merely for the purposes of struggle. Indeed, it might be more correct to say that struggle exists for the purposes of

developing reason.

IV. THEORETICAL OPPORTUNISM

We now turn to the most interesting and controversial part of Professor Schauer's discussion of positivism and natural law. Professor Schauer suggests that if a "rules committee" or a set of "systems designers" were asked to design a set of rules for judicial behavior that would maximize morally optimal results, they might decide that different sets of rules would apply to different periods.¹³ The committee might conclude that in one era judges should be instructed to use "natural law" justifications for the judicial role, while in another they should be told to employ "positivist" justifications.¹⁴

The use of historically variable justifications for legal practice need not be confined to theories of judicial review. We might extend the theory further, for example, by applying it to other aspects of Professor Schauer's work. Professor Schauer has been famous for the claim that we give extraordinary constitutional protection to speech because we generally do not trust majorities (or their designated governmental agents) to make appropriate judgments about what types of speech should be regulated and under what conditions.¹⁵ He argues that the dangers of corruption, overreaching, and self-interested behavior, present in all forms of majoritarian regulation, are especially great when it comes to the regulation of speech.¹⁶ Yet what Professor Schauer has said about judicial practice may hold equally well for legislative practice—there may well be historical periods in which we think legislatures can be trusted to make regulatory decisions about expression just as there may be periods in which we are confident that judges will do the right thing if allowed to give "natural law" rhetoric fuller play. In those periods, perhaps, certain types of regulations of speech should receive correspondingly less constitutional scrutiny. I do not raise this hypothetical because I believe that Schauer would necessarily apply his argument to constitutional protections of speech (although some of his recent writing suggests that he might not be wholly unsympathetic).¹⁷ I raise it because I wish to point out that the notion

13. Schauer, *supra* note 1, at 819-20.

14. *Id.*

15. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 81-86 (1982).

16. *Id.*

17. See Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853 (1992); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

of different principles of decision for different historical periods can arise in many different settings and contexts. Professor Schauer's argument for varying rules of judicial practice is merely the tip of a very large iceberg.

I suspect that what most people will find troubling about Professor Schauer's suggestions about judicial review is that they seem theoretically opportunistic. By "theoretical opportunism," I mean unashamedly offering different and even inconsistent sets of standards or principles to justify one's actions in different contexts.¹⁸ Taken to its logical conclusion, it is a policy of cheerfully invoking whatever set of standards and principles justify the outcome one happens to desire. The theoretical opportunist does not feel bound to any particular set of standards or principles over time. If they become inconvenient, or lead in directions she does not like, the theoretical opportunist simply abandons them, like a set of old clothes that she has outgrown or that she no longer fancies. The problems of this approach are self-evident: the theoretical opportunist seems unscrupulous, unprincipled, undisciplined, and unconstrained.

Professor Schauer might avoid the charge of theoretical opportunism in the following way: he might say that he is merely describing rules that an imaginary committee might offer to regulate judicial practice, given the fact that many different individuals will hold judicial office. The rules committee members themselves are not being opportunistic about what they believe is right and wrong—they know what they want and they are merely offering differing standards instrumentally in order to obtain a particular effect from the myriad of persons who will hold judicial office over time, and who may lack sufficient foresight, circumspection, judgment or ability. The results judges will reach under a set of historically changing directives will conform to a single atemporal standard of morally optimal results better than any constant set of directives given to a changing federal judiciary.¹⁹

In this way Schauer might contend that his is merely an institutional solution to an institutional difficulty. His rules committee is not claiming that there is no atemporal set of standards of judicial practice that might be properly applied over time. He is not suggesting that the committee is not faithful to some set of timeless principles of justice

18. See Schauer, *supra* note 1, at 820 (asking rhetorically whether it is "opportunistically dishonest" to "create one set of rules for those judges whose decisions we think likely to be morally misguided, and another for judges whose decisions we think likely to be morally correct.").

19. *Id.* at 820-21.

and right. He is claiming merely that, given the vagaries of judicial appointments, a changing set of directives to different judges in different eras is more likely to produce the greatest number of morally optimal results. So Schauer's suggestion for changing criteria of judicial practice is not really theoretical opportunism, but is merely a set of prophylactic measures designed to produce the results that would be reached if a single correct and principled theory of judicial practice were applied correctly by judges over time.²⁰

Yet a critic might press further. Professor Schauer has created his imaginary committee because he believes that ideological drift is a serious problem for constitutional argument. He warns us that "styles of legal argument, and forms of legal structure," may lack a "necessary and temporally indifferent normative political incidence,"²¹ so that "[a]s social and political behavior changes, then . . . so should our view of the theoretical constructs within which we manage it."²² Yet shouldn't this admonition also apply to judgments about the "morally optimal results" that the rules committee employs to plan its long-term strategy for judicial practice? Won't the concepts and standards the committee uses to determine and measure what are the morally optimal results—and hence the best judicial philosophy for an era—also be subject to ideological drift? Suppose, for example, that the committee formulated its rules of judicial practice in 1954, and thought an important moral goal was to preserve colorblindness in governmental decisionmaking, on the grounds that this preserved racial equality. Couldn't the ideological drift of the idea of colorblindness affect our views about how well the committee has drafted the changing rules of judicial practice? Perhaps the shifting standards envisioned by the committee will lead to more colorblind decisionmaking by government officials, but is this necessarily the morally optimal result?

20. To be sure, this institutional judgment might be flawed, but the terms of that debate would be about efficacy, not opportunism. For example, Professor Schauer the First Amendment theorist might counter that the best prophylactic rule is a general predisposition to strike down content-based regulation of speech, regardless of the civic virtue of the legislature that passes it; attempts to vary the rules of constitutional scrutiny over time will be too difficult to manage in practice. In a similar fashion, one might argue that a rule of judicial practice that did not vary with the times was the best approximation to morally optimal results, and that attempts to "fine tune" the practice of judicial review would be unlikely to succeed. The analogy is to the debate between monetarists and Keynesians on fiscal policy. The monetarist might reject a Keynesian approach that varied government taxing and spending to bolster the economy, arguing that one should instead adopt a uniform policy of keeping deficits low and the money supply constant.

21. Schauer, *supra* note 1, at 828.

22. *Id.* at 827.

Indeed, if none of the committee's principles and standards of measurement of what is morally optimal escape the possibility of ideological drift, should we not take this into account in giving the committee the power to draft rules for others? If so, do we need a metacommittee overseeing the committee that would take into account how changing contexts affect the political valence of the principles and standards the rules committee thinks are morally optimal at any given point in time? And what of the ideological drift that will befall the principles and standards employed by this metacommittee? An infinite regress quickly looms before us.

Professor Schauer, the critic will argue, cannot have it both ways. He cannot claim that ideological drift affects the practice of judges but not the practice of his imaginary judicial rules committee. There is no group of persons whose judgments of political morality escape the play of drift, so that they confidently can be left in charge of arranging sequences of rules for others whose views suffer from this infirmity. Drift happens. It happens to all of us and to all of our abstract principles and policies. To vary the metaphor further, normative argument is a boat we all are in together, and that boat is always drifting. Schauer's imaginary committee hopes to plant itself outside the flow of historical forces so that it might direct and control them. The very assumption that it can stand outside of a history that affects all other mortals reflects either colossal naivete or colossal hubris on the part of the committee. We do not control historical reason; it controls us. Like all examples of hubris, this one is sure to lead to unexpected results and perhaps even to tragedy.

Perhaps, then, Schauer's theory runs deeper and farther than even he has expected. Is he willing to accept the full consequences of his suggestion that styles of legal argument do not have a fixed normative political significance over time? If so, then his rules committee might feel the need to explain and justify which outcomes are morally optimal differently at different times. It might be forced to offer varying justifications and principles of decision not as a prophylactic set of directives given to others who lack sufficient ability and circumspection to know the one unchanging way, but as a faithful description of its own changing moral and political commitments. It would have to accept that it could not escape the play of ideological drift, that it also might have to change its mind every now and then on its guiding principles.

Herein lies the charge of theoretical opportunism, which Schauer cannot avoid by interposing institutional considerations and prophylac-

tic rules. If all of our theoretical conceptions may run out of steam, stagnate, or drift, should we not be prepared to modify or even discard them in order to hold fast to what we think is right—recognizing all the while that what we think is “right” is in part determined by our more abstract theoretical commitments which are subject in turn to ideological drift?

This, the critic says, will not do. It too easily tempts us to change our theoretical commitments whenever we find them uncomfortable or inconvenient. Schauer’s suggestion really does lead us down the road to theoretical opportunism and unprincipled behavior. We cannot be lulled by the siren call of expediency to do whatever seems right at the time. Principle must and should constrain us; without its constraint, great evils as well as great goods may ensue.

It is interesting to note how the positions of the so-called theoretical opportunist and his imaginary critic have inexplicably and ironically reversed themselves (or perhaps drifted). Now it is the critic who demands that we adhere to an unchanging principle as a prophylactic measure, for if we do not do so, there will be no logical stopping point on the way to immoral expediency. Now it is the defender of principle who demands that we cannot always do whatever seems “right” in an unreflective sense of that word. To act out of unchanging principle is sometimes to accept results that we do not like, just because they are demanded by the application of principle. To act according to unchanging principle is sometimes to adopt the wrong decision because it is right to do so. The paradox is complete: if principles did not sometimes cause us to do things we did not think best, we would not know that we were guided by principle rather than our own fiat or passions.

V. OPPORTUNISM AND IDEOLOGICAL DRIFT

Does ideological drift necessarily lead to some form of theoretical opportunism? Obviously, it is always possible for people to use moral and political arguments opportunistically—to make arguments regardless of their consistency with previous positions and regardless of whether one believes in them. However, the question before us is whether the forces of ideological drift must make opportunists of us all, because no articulable set of principles can continue to capture our moral judgments adequately as historical contexts change. In answering this question we must not be unduly influenced by Professor Schauer’s example of a constitutional rules committee. This committee is no more than a fictional device to dramatize the problem of ideologi-

cal drift. It cannot be taken as a realistic account of how people might actually experience or respond to this drift. Schauer's committee appears to stand outside the forces of history in order to control and direct them. But, as argued above, to exist in a culture of reason is also to be affected by the historical changes that produce drift. Thus, in order to deal with the problem of opportunism, we have to consider how morally sincere individuals experience conflicts of principle that are created by a changing cultural and political context. We must consider the internal as well as the external aspects of the phenomenon of drift.

In addition, Schauer's hypothetical relies on a very limited conception of reason. The members of his rules committee offer public principles for others to follow and believe in, but they themselves do not believe in the principles they espouse. The positions of "natural law" and "positivism" are just arguments employed at a given time to persuade others of their proper role; they are strategically alternated to produce what the committee regards as appropriate results. This conception of reason is purely instrumental—reasons are tools used by some to persuade or control others, but they are tools which do not affect or persuade the persons who wield them. Indeed, this characterization leads directly to the charge of opportunism. Nevertheless, this view of reason is defective and incomplete; it is inconsistent with the theory of historically created and constitutive reason that underlies the phenomenon of drift. Discussions of opportunism that presuppose this view of reason are therefore likely to be misguided.

If we wish to understand the consequences of ideological drift for the possibility of principled political discourse—by which I mean discourse according to principles that we use to persuade others and that we also believe in—we must try to grasp the internal experience of making political and legal arguments within a historical experience of drift. We must conceive of how people who live beneath its reign might or could respond to it. To do this, we must recognize the power that a historically developed culture of reason has over people who live within that culture.

I argued above that the theory of ideological drift is not simply a theory about the changing valence of political and legal ideas. It is also a theory of cultural meaning and cultural power. Individuals and groups struggle over the meaning and content of abstract symbols and ideas, and through this process, they re-create the tools of understanding that they use to make sense of the social world and that constitute

them as members of a culture. The creation and re-creation of the tools of understanding, the meanings of words, and the boundaries of the reasonable and the unreasonable, are the ultimate sources of ideological drift. Ideas do not drift by themselves. Drift is always the result of human activity. It is the result of continuous attempts to understand and describe the world, and to persuade others about the right and the reasonable, the just and the efficacious, in a changing historical context.

Thus, the theory of drift is more than a theory about the changing content of political and moral ideas. It is a theory about the constitution of selves in a shared yet changing political culture. It is a theory about the changing tools of understanding which constitute and have power over the self in a culture. It is a theory about the nature of reason—a historical activity of human beings engaged in articulation and evaluation, persuasion and argument. Finally, it is a theory of power—the power that the tools of understanding have over people who engage in acts of understanding, the power that historically articulated reason has over those who reason in history.

Schauer's proposal contemplates none of this. His rules committee chooses principles for others to follow that the members of the committee do not believe in. His hypothetical rests on a view of individuals who can stand outside of the force of culturally created reason, who can wield this force on others but remain utterly unaffected by it themselves.

This conception of reason and subjectivity—and not the fact of ideological drift—is the real basis of the charge of opportunism. And this instrumental conception of reason is deeply flawed. We are not in control of what we find convincing and unconvincing. We are constituted by the culture that we collectively make through our acts of reason and persuasion. Reason has force only because it has a common power over all the members of a culture. Rhetoric can have its effects on others only because it already has effects on us. The masters of argument are also the servants of rhetoric; the kings of persuasion are also the pawns of reason.

It is no doubt tempting for lawyers to view reason primarily instrumentally—as an instrument used to persuade and control. This conception of reason is implicit in the notion of the lawyer as a “hired gun,” who seeks to convince and control others without owing fealty to the principles she espouses. Thus, it is probably not accidental that the problem of opportunism, and the instrumental conception of reason

that gives rise to it, appears in a discussion among persons professionally trained as lawyers. After all, it is the job of lawyers to make arguments they do not believe in, and to defend interests that are not their own. It is the job of the lawyer to argue in one way for client *A* on Monday, and in the opposite way for client *B* on Tuesday.²³ The problem of opportunism cannot be very far from the mind of the lawyer, hard as she tries to avoid thinking about it.²⁴

Perhaps there is no professional difficulty in lawyers arguing for different institutional roles for courts at different periods in American history, because there is no professional difficulty in their doing so on successive days for different clients.²⁵ Nevertheless, the lawyer's conception of reason is colored by her special and limited social role as advocate. The position of the "systems designer" or the political theorist is not the same as the lawyer, nor can it proceed on the same conception of reason. The political theorist's use of reason is not an opportunistic use of the available means of persuasion to further the interests of clients whose values she may privately deride or disdain. Rather, it is the articulation of her own beliefs about the good society and the best means to achieve it. Unless we are deliberately trying to deceive others, or are representing clients in a socially sanctioned role as their advocate, we believe in the arguments we make. We believe in their plausibility and reasonableness, not merely to others, but to ourselves.²⁶ We are not distanced from our principles; indeed we are constituted by them. They are the means by which we reason. So the experience of

23. I am indebted to Sanford Levinson for this point.

24. And, of course, the problem of the lawyer as hired gun demonstrates in another form the poverty of the instrumentalist conception of reason. Lawyers do not ultimately succeed in being hired guns unaffected by their task. First, they cannot fully shape the contours of what is reasonable and persuasive. They must tailor their arguments within an existing culture of reason. Second, and more important, they cannot fully distance themselves from the act of persuasion; the practice of making arguments affects them in ways they cannot fully control. Advocacy has power over the advocate as well as the audience. One way that lawyers deal with the problem of opportunism is to come to believe in the arguments they make on behalf of their clients. For example, defenders of tobacco companies may come to believe that the hazards of smoking really have not been demonstrated sufficiently. Of course, this is a solution to the problem of opportunism only if one believes that reduction of cognitive dissonance by itself counts as a solution. Moreover, it cannot serve as a solution for the lawyer who continually represents clients with contradictory interests. Such a lawyer is more likely to come to believe in the process rather than the client—that zealous representation of whatever client is before her is adequate justification for her actions. The repeated experience of being a hired gun causes her to believe in the propriety of being a hired gun.

25. *But see* John S. Dzienkowski, *Positional Conflicts of Interest*, 71 *TEX. L. REV.* 457 (1993) (noting possible difficulties under existing doctrines of professional ethics).

26. And as noted above, even the advocate often comes to believe in what she advocates.

drift does not simply cause us to change our rhetorical strategy. Drift also creates a moral tension within us, a tension that does not arise in the hypothetical person who uses arguments without being affected by them. The internal experience of drift is the recognition that principles we believe in are leading us to concrete judgments we feel are inequitable, are taking us in directions we sense are wrong. How we respond to that tension is always shaped by the fact that we believe in the principles we use to make moral and legal arguments, and, more importantly, that we will judge our previous beliefs in light of our present ones.

Consider, for example, a person who has previously supported a libertarian theory of free speech, and now finds herself increasingly drawn to campaign finance reform and regulation of racial and sexual harassment. She can report her experience in many ways, but each differs greatly from a purely instrumental conception of reason. First, she may conclude that she has changed her mind, and that her earlier principles were incorrect. Unlike the members of the imaginary rules committee, she acknowledges that earlier decisions using those principles were wrong, *and that she should have decided them differently.*

Second, she might see her experience as the gradual clarification of her true beliefs. "My use of libertarian principles," she might argue, "was specific to a particular context; these arguments were merely a proxy for a deeper, more accurate set of principles that better account for what I now see as the proper solution to these questions." Perhaps a few of her earlier positions will turn out to have been wrong, but most were not.²⁷ She experiences herself as refining her principles and discarding proxies for the true principles of decision, which are gradually revealed through experience.

Third, she may view herself as having been misunderstood by her audience. Perhaps she has always seen herself as one who balances between competing principles. "In explaining my position," she notes, "I have simply articulated whichever principle was the stronger, so it may have appeared that I was being inconsistent. In fact, I was not; my statements were taken out of context."

Finally, she may experience herself as not having changed her views at all. She may argue that she has always believed that free speech required a substantive rather than a formal liberty of expression. It is rather the audience's view of freedom of speech that has

27. Implicit in this view is the assumption that most of her previous decisions will have been correct; if too many are proved wrong, then she must admit that she has not refined her principles but changed them.

changed and not her own. They have distorted the true meaning of free speech and imposed this meaning upon her, claiming that she has changed her views. But they are wrong; she has been consistent all along.

In each case, the subject embedded in a culture of reasoned argument does not experience her response to drift as the deliberate and instrumental adoption and rejection of principles and policies in order to persuade whatever audience she may need to convince or control. The person who does imagine her response to drift in this way may well be called an opportunist, and deserves the name.²⁸ But the sincere individual who lives, as we all do, in the currents of ideological drift, does not perceive her beliefs in this way. She does not see them as clothes that may be put on or discarded as fashion dictates, as disguises to be adopted and abandoned like a con artist who would defraud an unsuspecting victim. Her beliefs are neither weapon nor hoax, neither stragem nor subterfuge. They are her *commitments*, and as commitments they are not external to her but reside within her. This individual has many possible responses to the tension produced by ideological drift: she may believe that she has changed her mind, that she gradually has come to understand more clearly what she always has believed, or that her principles and commitments have remained constant, however much they may have been misunderstood by others in changing contexts. But in no case is she an opportunist. In each case she believes in her reasons, because she reasons through her beliefs.

Nevertheless, one might object, what about the person who claims that she has remained constant in her beliefs when all around her claim that she has changed her principles? Is this person not simply deluding herself? Is she not simply an opportunist who is unwilling to acknowledge her opportunism? In fact the matter is much more complicated, for, as I shall now argue, the concept of opportunism is not free from the forces of drift that give rise to the charge.

What appears to be theoretical opportunism may turn out to be so only from a perspective hostile to that of the accused. One reason why people appear to change their theories of justification is that they have been on the losing side of a struggle for control of the meaning of a key political idea. Having lost control of the meaning of racial equality to the proponents of colorblindness, liberals endorse what from the perspective of the victors looks like invidious discrimination against whites.

28. Perhaps this is one source of the unsavory reputation of lawyers among the general public.

Having failed to convince the public that real freedom of participation in the political process is best protected by campaign finance regulation, liberals appear to have shifted away from liberty and towards statist social control of individual rights.

To call this theoretical opportunism, one must accept a number of claims. First, one must accept that the winners of the struggle over the meaning of racial equality are right that racial equality means colorblindness, and that the losers were wrong in thinking that colorblindness was only a proxy that became separated from the true meaning of racial equality because of changing historical circumstances. Second, one must agree that because the winners carried the day, their concept of racial equality as colorblindness really is the original concept that they and the losers fought over, and that to accept the losers' conception of racial equality would be to pervert or alter the concept. Third, one must acknowledge that the winners prevailed because they had the better argument and not because they were more powerful in any other sense of that word.

If one does not accept these three assumptions, if one believes that the concept of "racial equality" has been altered, stripped of its original context, divorced from the set of assumptions that made it a force for good—in short, if one believes that its current meaning has more to do with reasons of power than the powers of reason—then it will not be clear which side is being opportunistic. Perhaps it is the winners who are the real opportunists and the losers who are the true exponents of principle. The uncertainty and difficulty of these issues renders the question of opportunism definitively indefinite and the question of unprincipledness decidedly undecidable.

It should be clear by now that the concept of opportunism itself does not stand above the forces of drift, dispassionately distinguishing between principled and unprincipled rhetorical combatants. It can also be a weapon wielded by the combatants, who seek to gain rhetorical control and the high ground it offers and then use that victory to label their opponents as not only mistaken but devious, not only wrong but unprincipled. What is called "opportunism," then, may not be the subversive stratagem of the rhetorically victorious but a public brand placed on the rhetorically vanquished.

As I have tried to argue in this essay, the concept of ideological drift carries with it a distinctive conception of reason—an agonistic yet communal evolution of shared tools of understanding, a historical project of developing and naming the better and the worse argument, the

boundaries of the plausible, and the realm of the reasonable. If we acknowledge that the tools we use to understand the legal and social world are just that—tools useful for the purpose at hand, but which may prove to have quite unexpected consequences as contexts change—ideological drift and the apparent changes in principled commitments it engenders need hold no terrors for us. To recognize the effects of drift is no more than to engage in a pragmatic and sober assessment of the limited powers of human reason. It is to accept the tool-like character of our understanding, the agonistic nature of our culture, and the frailty of human moral conceptions clothed as timeless principles. Surely the phenomenon of drift must humble all those who claim to be the champions of reason, but surely there is some advantage to that intellectual humility.

