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# CULTURAL COGNITION AT WORK

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## CULTURAL COGNITION AT WORK

PAUL M. SECUNDA\*

### ABSTRACT

*Cultural cognition theory provides an anthropological and psychological-based theory about how values actually influence judicial decisionmaking. It suggests that values act as a subconscious influence on cognition rather than as a self-conscious motive of decision-making.*

*Applying these insights to two controversial United States Supreme Court labor and employment decisions, this Article contends that judges in many instances are not fighting over ideology, but rather over legally-consequential facts. This type of disagreement is particularly prevalent in labor and employment law cases where the factual issues that divide judges involve significant uncertainty and turn on inconclusive evidence.*

*This distinction between ideology and cultural cognition is critical for two connected reasons. First, the identification of cultural worldviews, as opposed to partisan or legal bias, as a major influence on judicial decisionmaking assists in bringing legitimacy back to the judging function. Second, social science research indicates that techniques exist for judges to counteract their susceptibility to this form of biased decisionmaking.*

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\* Associate Professor of Law, Marquette University Law School. In shaping this article, I benefitted greatly from comments shared by Reid Fontaine, David Hoffman, Alan Hyde, Dan Kahan, Nancy Levit, Helen Norton, Chad Oldfather, and Mike Zimmer. I also profited from comments by participants in law school faculty colloquia at the Marquette, Villanova, and Tulane law schools, and at the Fourth Annual Colloquium on Current Scholarship in Labor and Employment Law at Seton Hall Law School. I am also grateful for the work of research librarian Elana Olson, and for the exceptional research assistance of Allison Luczak, Marquette Law Class of 2010. All errors or omissions are mine alone.

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*The Court's failure to recognize the culturally partial view of social reality that its conclusion embodies is symptomatic of a kind of cognitive bias that is endemic to legal and political decisionmaking and that needlessly magnifies cultural conflict over and discontent with the law.<sup>1</sup>*

## I. INTRODUCTION

At the recent United States Supreme Court confirmation hearings of Justice Sonia Sotomayor, commentators focused heavily on one comment that Sotomayor made at a number of lectures in the past. Sotomayor had said that she hoped that "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."<sup>2</sup> Although critics widely lambasted her for this statement,<sup>3</sup> and she herself later backed away from it to secure

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1. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 891 (2009).

2. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002), reprinted in N.Y. TIMES, May 14, 2009, <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>. Justice Sotomayor delivered these comments on one occasion at the University of California, Berkeley, School of Law in 2001, as part of the Judge Mario G. Olmos Memorial Lecture. *Id.*

3. See Laura E. Gomez, Commentary: What the “Wise Latina” Remark Meant, CNN.COM (July 14, 2009), <http://edition.cnn.com/2009/POLITICS/07/14/gomez.supreme.court/index.html> (“[Sonia Sotomayor’s] comment has been lampooned on the cover of the National Review, where cartoonists apparently could not quite fathom a wise Latina judge, choosing to portray Sotomayor as a Buddha with Asian features. It has caused Rush Limbaugh and others to label her a ‘racist,’ and it has caused even liberals to bristle.”).

her nomination,<sup>4</sup> a kernel of truth nevertheless emerged from this confirmation proceeding skirmish. Not that ideologically-driven judging is inevitably part of the judging function, but rather that a judge cannot help but be influenced by one's cultural background. So although reasonable people might disagree that a female Latina judge "reach[es] a better conclusion" than her white male counterpart "more often than not," this Article maintains that a judge's cultural background *does* subconsciously have a very real impact on the outcome of legal decisions.

Indeed, contrary to many commentators who have suggested that judging is generally an ideologically-driven enterprise,<sup>5</sup> Dan Kahan, Donald Braman, and other members of Yale Law School's Cultural Cognition Project have persuasively argued that such popular theories do not sufficiently explain *the mechanism* by which values influence judges.<sup>6</sup> In other words, a critical distinction exists between cultural outlooks as a source of normative judgment or evaluation, on the one hand, and cultural outlooks as an unconscious influence of perceptions of fact, on the other.<sup>7</sup>

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4. See Robert Barnes & Paul Kane, *Sotomayor Repudiates "Wise Latina" Comment, Cool Amid Barrage by GOP Senators*, THE BOSTON GLOBE, July 15, 2009, at A1.

5. In particular, this attitudinal model "represents a melding together of key concepts from legal realism, political science, psychology, and economics. This model holds that [courts] decide[] disputes in light of the facts of the case vis-à-vis the ideological attitudes of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal." See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002). For studies applying the attitudinal model, see, e.g., CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 150 (2006) ("The most difficult issues are resolved, [and] the principal empirical findings are clear. In many domains, Republican appointees vote very differently from Democratic appointees, and ideological tendencies are both dampened and amplified by the composition of the panel."); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1121 (2009) (in racial workplace harassment context, focusing on judges' race and political affiliation, among other factors, to determine judicial bias); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995). See also Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1912 (2009) ("Since the 1960s, the attitudinal model has been 'the major approach guiding research into judicial decision making.'"); Richard Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1052 (2006) ("At its crudest, [ideological voting] is the idea that judges and Justices simply vote their political preferences, so if you know whether they are Democrats or Republicans you can predict their decisions; a more refined version substitutes ideology for party affiliation.").

6. For a description of culture cognition theory and the various projects being studied by different scholars using this theory, see Yale Law School, The Cultural Cognition Project, <http://www.culturalcognition.net> (last visited Jan. 3, 2010) [hereinafter Cultural Cognition Project].

7. Cultural cognition theory explains that values act as a subconscious influence on decisionmaker cognition, rather than as a self-conscious motive for decisionmaking. See

The former may be thought of as the Dworkinian equation of law with moral value.<sup>8</sup> The latter type of cultural outlook, cultural cognition, posits that cultural understandings are prior to factual beliefs on highly-charged political issues.<sup>9</sup> This Article contends that it is cultural cognition that provides a more robust explanation of how judicial values impact judicial decisions, and importantly, how disagreements come to exist between judges in particularly hotly-contested cases or areas of the law.

One such area of the law that is highly-polarized is labor and employment law. From traditional union-management disputes to employment discrimination and employee benefit cases, the two sides of these workplace debates cannot even agree on the meaning of pertinent facts. And it is not just the parties that see the relevant facts differently, but also appellate judges reviewing these cases.

Now, it is true that workplace cases can be viewed as largely partisan exercises in which conservative judges vote for employers or management and liberal ones vote in the opposite manner in favor of union or employee interests. Yet, however one defines “ideology,”<sup>10</sup> the common ideological explanations for judges’ behavior in workplace cases are inadequate. Culture cognition theory, for its part, suggests that what judges are really disagreeing about are legally-consequential facts over which there is some

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Dan Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 156–57 (2006).

8. See RONALD DWORKIN, FREEDOM’S LAW 1-12 (1996) (arguing for judicial decisions based on moral values); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1978) (same). See also Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 133 (2007) (“Strategic models . . . view judges as acting to effect their policy preferences, but in a considerably more nuanced and less reflexive manner. They do not focus simply on the case at hand, but take a longer view.”).

9. Kahan & Braman, *supra* note 7, at 150.

10. Professor Kahan has explored at least three different ways in which legal scholars have discussed the manner in which judges’ values impact their decisions: (1) values could supply a self-conscious partisan motivation for a decision; that is, “choosing the outcome that best promotes their political preferences without regard for the law”; (2) values could supply a self-conscious legal motivation for a decision in which there does not exist “a strict separation between moral reasoning and legal reasoning;” this might be referred to as culture as evaluation; or (3) values could help judges resolve certain disputed factual claims embedded in what they agree is the controlling standard; this third way, cultural cognition, maintains that values operate through a subconscious influence on cognition. See Dan M. Kahan, “*Ideology In*” or “*Cultural Cognition of*” *Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 415-16 (2009). Although I believe the first way is what many political scientists mean when they say that judicial decisions are all about politics or ideology, in reality I believe that the second way, where judges “resort to normative theories to connect abstract concepts like ‘free speech’ and ‘equal protection’ to particular cases,” is closer to how ideology is thought to actually operate by most legal academic commentators studying attitudinal models. *Id.* at 416 (arguing that this type of ideology involves merely the sort of moral theorizing the law itself contemplates). Of course, this Article argues the third way best describes how judges’ values impact their decisions.

speculation and uncertainty. In fact, such disagreements are especially prevalent in labor and employment cases where the factual issues that divide judges involve a large amount of speculation and inconclusive evidence about: employer and employee motivations, the proper measure for efficiency in both the public and private workplace, and the proper standard for technical or arcane measurements in the workplace (like technological feasibility in the OSHA context).<sup>11</sup> To illustrate this point, this Article analyzes two of the more controversial labor and employment decisions by the Supreme Court in the past two decades where a specifically illiberal form of judicial bias – cognitive illiberalism – is on display in the Justice's opinions.<sup>12</sup>

This distinction between viewing judges as subconsciously motivated by cultural preferences rather than by prejudicial partisan or legal objectives is a crucial one. First, if the form of bias in judicial decisionmaking is not properly understood, the judging function is unnecessarily delegitimized as being merely a partisan or normative exercise. Second, although it is impossible to rid judicial decisions of all remnants of bias because of the manner in which human cognition operates,<sup>13</sup> social science and legal research indicate that debiasing techniques do exist for judges to counteract their susceptibility to the more troubling and illiberal aspects of their biased decisionmaking. Such techniques include adopting appropriate judicial habits of mind and writing

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11. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (noting that the entire purpose of the shifting burdens of proof applicable in employment discrimination cases "is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1264–66 (D.C. Cir. 1980) (per Chief Judge Skelly Wright) (observing, in OSHA standards-setting context: "As for [proof of] technological feasibility, we know that we cannot require of OSHA anything like certainty. Since 'technology-forcing' assumes the agency will make highly speculative projections about future technology, a standard is obviously not infeasible solely because OSHA has no hard evidence to show that the standard has been met."); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 492 (2006) (describing the difficulty of determining employer motivation when analyzing disparate treatment).

12. Cognitive illiberalism may be defined as "a failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society." See Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 776 n.10 (2009).

13. Indeed, some forms of judicial bias in judicial opinions are desirable. Judges should generally evaluate situations in a way that embodies a stance toward phenomena in the world that accurately expresses what they (along with others who share their defining commitments) care about. In this Article, I am merely seeking to employ debiasing strategies on more regrettable forms of judicial decisionmaking bias in which judges exhibit "overconfidence in the unassailable correctness of the factual perceptions [they] hold in common with [their] confederates and unwarranted contempt for the perceptions associated with [their] opposites." Kahan et al., *supra* note 1, at 843. This type of bias has been labeled "cognitive illiberalism" and this paper looks for techniques to preempt it. *Id.*

judicial decisions that consider the varying background values of impacted parties.

In all, then, this Article seeks to explore for the first time whether the theory of cultural cognition may provide a more complete explanation for how controversial labor and employment law issues are decided by judges with different worldviews. In the process, it also hopes to provide a roadmap for minimizing the amount of cognitive illiberalism in these highly-contested types of cases. Part II outlines the general theory behind cultural cognition, including its social science roots, its more recent application to legal issues, and finally, its meaning for judicial decisionmaking. Part III then reviews two labor and employment law cases decided by the U.S. Supreme Court to study how values appear to subconsciously influence judges' perception of legally-consequential facts and consequently, their decisions in these cases. Part IV highlights the significance of appreciating these cases through a cultural cognition prism. Finally, Part V concludes by explaining how decisionmaker bias of this form may be counteracted through innovative social science and legal techniques.

## II. A PRIMER ON THE THEORY OF CULTURAL COGNITION

Cultural cognition is a heuristic that comes to the legal academy from research conducted in the disciplines of anthropology and social psychology.<sup>14</sup> In a sentence, “[c]ultural cognition refers to a collection of psychological mechanisms that moor our perceptions of societal danger to our cultural values.”<sup>15</sup> As a result, individuals gravitate toward factual beliefs which permit them to see worthwhile conduct as also socially beneficial conduct.<sup>16</sup> Moreover, to the extent that disagreement exists about the harmfulness of a particular form of conduct, individuals tend to trust those who share their values.<sup>17</sup>

The first section of this Part explores the foundational roots of cultural cognition theory and the connection between cultural values and perceived societal risks. The second section then explains how cultural

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14. See Kahan & Braman, *supra* note 7, at 152.

15. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 117 (2007). See also Cultural Cognition Project, *supra* note 6 (“Cultural cognition refers to the tendency of individuals to conform their beliefs about disputed matters of fact (e.g., whether global warming is a serious threat; whether the death penalty deters murder; whether gun control makes society more safe or less) to values that define their cultural identities.”).

16. See Kahan, *supra* note 15, at 120 (“Whether we regard putatively harmful activities (deviant sexual practices, gun possession, nuclear power) with fear or admiration, with disgust or equanimity, with dread or indifference, expresses the cultural valuations we attach to those activities.”).

17. See Nancy Levit, *Confronting Conventional Thinking: The Heuristic Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 394 (2006) (“[W]hen decision makers use simplifying heuristics, they are likely to make mistakes in the direction of their pre-existing biases.”).

cognition theory applies to legal issues and controversies, with emphasis on a recent empirical study conducted by Dan Kahan, David Hoffman, and Donald Braman in the criminal procedure/civil rights context.

A. *The Roots of Cultural Cognition Theory*

1. The Anthropological Roots

Cultural cognition theory borrows heavily from well-known anthropological studies that explore the relationship between risk perception and cultural worldviews.<sup>18</sup> These worldviews “are the filters through which a person views the world--how it is and how it should be--that profoundly influence peoples' attitudes.”<sup>19</sup> In one of her well-known works, anthropologist Mary Douglas sets up a typology of cultural worldviews.<sup>20</sup> Under this framework, there are two basic worldviews: “the first concerns the relationship of the individual to the group (individualistic versus communitarian orientation); the second concerns the nature of society (hierarchical versus egalitarian).”<sup>21</sup>

Kahan and Braman have aptly summarized one way of potentially understanding the meaning of these various cultural preferences for individuals' worldviews:

A “low group” worldview coheres with an individualistic social order, in which individuals are expected to secure their own needs without collective assistance, and in which individual interests enjoy immunity from regulation aimed at securing collective interests. A “high group” worldview, in contrast, supports a solidaristic or communitarian social order, in which collective needs trump individual initiative, and in which society is expected to secure the conditions of individual flourishing. A “high grid” worldview favors a hierarchical society, in which resources, opportunities, duties, rights, political offices and the like are distributed on the basis of conspicuous and largely fixed social characteristics--gender, race, class, lineage. A “low grid” worldview favors an

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18. People generally use simplifying heuristics to think about risk, including, “some psychological (people fear the unfamiliar), some social (people fear what their friends fear), and some cultural (people fear things that threaten their shared worldviews).” See James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1160 (2009) (citations omitted).

19. Marjorie Kornhauser, *Cognitive Theory and the Delivery of Welfare Benefits*, 40 LOY. U. CHI. L.J. 253, 258 (2009). See also *id.* (“Worldviews are primarily unconscious and affectively-based cognitive systems of beliefs, attitudes, and assumptions. They serve as a framework for an individual's interaction with her surroundings, including other people and society.”).

20. See MARY DOUGLAS, *NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY* 54–68 (1970).

21. Kornhauser, *supra* note 19, at 258.



egalitarian society, one that emphatically denies that social characteristics should matter in how resources, opportunities, duties and the like are distributed.<sup>22</sup>

Consider how Douglas' cultural worldviews framework can be utilized to illuminate the nature of the political and legal disputes endemic to American labor and employment law. Pro-union or employee-rights individuals tend to be low grid-high group in orientation.<sup>23</sup> Such individuals embrace collectivist values such as solidarity with their fellow workers and are content to wield the power of the collective against employers even though they must generally put aside their individual wants and desires.<sup>24</sup> Many of these same individuals also tend to believe in egalitarianism and dislike any notion of a ruling, corporate upper class in America.<sup>25</sup> They support the expansion of constitutional equal protection doctrine and a robust reading of federal statutory rights under equal employment opportunity laws.<sup>26</sup> Finally, individuals with these values tend to believe that unsafe work conditions and the social inequality that results from unequal bargaining power justify labor regulations that level the proverbial playing field.<sup>27</sup>

On the other side of this ledger, many pro-employer types can be viewed as individuals who are high grid-low group in orientation. These individuals tend to embrace values such a liberty, market freedom,

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22. Kahan & Braman, *supra* note 7, at 153–54 (citing Steve Rayner, *Cultural Theory and Risk Analysis*, in SOCIAL THEORIES OF RISK 83, 87 (S. Krinsky & D. Goldin eds., 1992) and Jonathan L. Gross & Steve Rayner, MEASURING CULTURE 6 (1985)). Although cultural cognition does not require application of the grid-group framework, this framework does present one easily understandable method for measuring cultural conflict.

23. Though, to be fair, under another view, people who like unions could also be viewed as high group/high grid. This may be a generational distinction as historically unions believed in a society which distributed resources based on fixed characteristics like seniority. Unions may be more egalitarian today. *See infra* note 25.

24. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (“The practice and philosophy of collective bargaining looks with suspicion on . . . individual advantages.”).

25. *See, e.g.*, ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 100 (1997) (describing unions as one of society's most potent counterweights to the inequalities generated by markets and maintaining that unions are “a force for greater equality, because they promote[] a more egalitarian distribution of earnings.”).

26. *See, e.g.*, Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767 (2001) (“[U]nion support was essential to the passage of Title VII.”) (citing MILTON DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865–1965, 95 (1970)).

27. The National Labor Relations Act embodies the type of regulation that low grid-high group individuals favor. *See* 29 U.S.C. § 151 (2006) (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.”).

autonomy, and self-reliance.<sup>28</sup> In the workplace context, these individuals dislike legal regulations because they undermine their vision of how to run their businesses.<sup>29</sup> They also tend to believe that unions wrongly monopolize the labor market and that employers should not be overly constrained in running an efficient workplace.<sup>30</sup>

Anthropological worldviews, as developed by Douglas, thus may help explain how different populations have divergent factual perceptions about risk. Furthermore, the grid/group framework works well to illuminate the fundamental disagreements that separate union members from management, and employees from employers.

## 2. The Social Psychological Roots

Whereas anthropology categorizes people's cultural identities based on worldviews, social psychology assists in explaining the mechanism by which individuals become attached to these worldviews. Specifically, social psychology posits that cultural values play a large role in helping people determine which state of affairs promote their interest.<sup>31</sup> Four overlapping social psychological mechanisms that assist in explaining individuals' attachment to different worldviews include: (1) cognitive-dissonance avoidance; (2) affect; (3) biased assimilation; and (4) group polarization.<sup>32</sup>

The avoidance of cognitive dissonance refers to the way the mind tries to avoid conflict in facts or ideas-whatever those facts or ideas are-with

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28. In this regard, consider the recent "Tea Party" phenomenon. One Tea Party website describes its movement thusly: "Participants at Tea Party protests come from all over the spectrum of the ideological dial, but all share the small government, 'Don't Tread On Me' thinking that our Founders envisioned. That is the central idea . . . .") See The New Tea Party and Revolution, *Frequently Asked Questions*, <http://www.teapartyrevolution.com/FAQ.aspx#q3> (last visited Feb. 10, 2010).

29. See, e.g., Thomas J. Donahue, *The Mother of All Regulations*, U.S. Chamber of Commerce, January 2001, <http://www.uschamber.com/press/opeds/0101donohueergo.htm> (last visited December 30, 2009) (stating, with regard to Clinton OSHA ergonomic standards: "On January 16 [2001], the most costly, burdensome, and far-reaching government regulation in U.S. history took effect, marking a dangerous new government intrusion into the private-sector workplace and the lives of honest, hardworking Americans.").

30. See, e.g., National Right to Work Legal Defense Foundation, Inc., *Big Labor's Top Ten Special Privileges*, [http://www.nrtw.org/d/big\\_labor\\_special\\_privileges.htm](http://www.nrtw.org/d/big_labor_special_privileges.htm) (last visited Jan. 3, 2010) ("The Clayton Act of 1914 exempts unions from anti-monopoly laws, enabling union officials to forcibly drive out independent or alternative employee bargaining groups.").

31. Kahan & Braman, *supra* note 7, at 71 ("The phenomenon of cultural cognition refers to a series of interlocking social and psychological mechanisms that induce individuals to conform their factual beliefs about contested policies to their cultural evaluations of the activities subject to regulation.").

32. *Id.* at 155 (citing LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957)).

pre-existing beliefs.<sup>33</sup> So, we avoid cognitive dissonance by noting and assigning importance to instances of harm associated with conduct we dislike and by ignoring or minimizing instances of harm associated with conduct we admire.<sup>34</sup> Applied to the workplace context, a pro-union individual will tend to believe that employer intimidation of employees during a union organizing campaign is the most important conduct to regulate, while simultaneously dismissing or minimizing union intimidation of these same employees during a card-check authorization procedure. An individual with a pro-employer orientation would tend to believe the opposite with equal certainty.<sup>35</sup>

Affect deals with the role emotions play in shaping a person's perceptions.<sup>36</sup> Research has shown that individuals connect danger to activities that evoke emotions such as fear, anger, and disgust.<sup>37</sup> This heuristic occurs because individuals do not have access to the necessary information to form their own opinions about the issue. They therefore conform "their perceptions of risk to the visceral reactions that putatively dangerous activities evoke."<sup>38</sup> So, for example, some employers may see danger in unions because they associate unions with loss of profit and perhaps, even dread mobsters infiltrating their businesses.<sup>39</sup> On the other hand, employees feel anger and dread when fellow employees are

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33. See Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 377 n.28 (2009) ("[A] strong precommitment to one way of thinking renders subjects prone to reject different approaches as untrue, regardless of the actual merits of the new position.").

34. Kahan, *supra* note 15, at 120.

35. Indeed, much of the recent debate over whether to enact the Employee Free Choice Act and its card-check recognition provision can be seen as part of a larger debate over whether employer intimidation or union intimidation of workers is more problematic. Compare James Sherk, *The Truth About Improper Firings and Union Intimidation*, The Heritage Foundation, June 20, 2007, <http://www.heritage.org/Research/Labor/wml393.cfm> ("[L]abor activists regularly downplay the possibility that unions would intimidate workers.") with Erin Johansson, *Out of Control: Employer Misconduct During Organizing*, American Rights at Work, Sept. 17, 2008, <http://www.americanrightsatwork.org/eye-on-the-nlrb/editions/out-of-control-employer-misconduct-during-organizing-20080917-656-311-311.html> ("Such [employer] intimidation includes firing union supporters, threatening to shut down the workplace even when such claims are unfounded, and bribing workers into voting against the union.").

36. Levit, *supra* note 17, at 399 ("[The affect heuristic] suggests that people often base decisions on affective responses or feelings rather than systematic judgments.").

37. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 40 (1966); Melissa L. Finucane, Ali Alhakami, Paul Slovic & Stephen M. Johnson, *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1 (2000).

38. See Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. PENNUMBRA 741, 743 (2008). See also Levit, *supra* note 17, at 400 ("People consult their own emotions (visceral feelings about the goodness or badness of something) and use those as information in reaching a conclusion about an issue.").

39. See Levit, *supra* note 17, at 426.

terminated in an arbitrary manner under an employment-at-will regime and thus, are more likely to support laws and regulations that prevent this type of situation from occurring.

The third psychological mechanism, biased assimilation, refers to the tendency of individuals to condition their acceptance of new information as reliable based on its conformity to their prior beliefs.<sup>40</sup> Rather than accommodating their current beliefs to new contrary information, studies suggest that people will instead discount new information if inconsistent with their prior views.<sup>41</sup> This phenomenon makes sense from the perspective that most people do not have sufficient information of their own to decide whether to believe or disbelieve new information. Especially where new information challenges a belief that is central to a person's cultural identity, the push-back against new contrary information may be significant. So, for instance, new evidence that unions help make workplaces more profitable will be disbelieved by an anti-union employer, while similar proof that raising the minimum wage causes unemployment will be disregarded by pro-employee types.

Finally, the phenomenon of group polarization explains how cultural worldviews conditions an individual's beliefs about societal harms through a set of in-group/out-group dynamics. Again, because of a lack of original information of their own, individuals tend to rely on those whom they trust to tell them which risk claims are serious and which specious.<sup>42</sup> So while conservatives flock to Limbaugh and Fox News, liberals find solace in Maddow and MSNBC. Democrats believe President Obama's campaign pledges, while Republicans disbelieve him and even call him a "liar."<sup>43</sup> In fact, this state of affairs is hardly surprising given that, "[s]tates of persistent group polarization are . . . inevitable--almost mathematically so--as beliefs feed on themselves within cultural groups, whose members stubbornly dismiss as unworthy insights originating outside the group."<sup>44</sup>

In all, these social psychological mechanisms aid in describing how values work to change factual perceptions and behavior. Further, the melding of Douglas' anthropological worldviews with these mechanisms provides the powerful story of cultural cognition: how a person's values

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40. See Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism*, 83 ST. JOHN'S L. REV. 231, 275 (2009).

41. *Id.*

42. See Albert C. Lin, *Evangelizing Climate Change*, 17 N.Y.U. ENVTL. L. J. 1135, 1182-83 (2009) ("The cultural identity of an advocate can have a very powerful effect on how the advocate's message is perceived.").

43. See Nico Hines, *Washington Turns on Obama Heckler Joe Wilson After Healthcare 'Liar' Gibe*, TIMESONLINE, September 10, 2009, [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_america/article6828905.ece](http://www.timesonline.co.uk/tol/news/world/us_and_america/article6828905.ece) ("Joe Wilson, [Congressman] of South Carolina, breached Washington etiquette by calling Mr. Obama a liar as he addressed the joint houses of Congress last night.").

44. Kahan, *supra* note 15, at 124.

subconsciously influence how they perceive the world and the risks within it.

### *B. Cultural Cognition Theory and the Law*

As explained in the prior section, culture cognition theory provides a linkage between a person's cultural worldview and how they interpret social harms. The observation that diverse cultural groups view risk perceptions through various cognitive lens could have practical applications in numerous fields of study, but such discernment certainly has potential value in the legal arena. This is hardly surprising given that law concerns itself with the regulation and minimization of social harms.<sup>45</sup>

In fact, cultural cognition theory provides insight into both the enactment of legislation and judicial decisionmaking. For instance, although citizens of a country might agree that law should generally increase society's material well-being, much disagreement exists over which laws will lead to that desired result.<sup>46</sup> Individuals disagree fiercely about what laws will achieve their desired ends as an empirical matter. Two people with different cultural worldviews might agree that they want a safer and more secure society within which to live, but will disagree about whether more or less nuclear power will achieve that desired result.<sup>47</sup> In fact, these factual disagreements among individuals from different cultural worldviews have been empirically shown to best explain patterns in how people disagree about hot-button legal and political issues.<sup>48</sup>

A case in point is an empirical study completed by Kahan, Hoffman, and Braman, on a recent Supreme Court case involving the alleged

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45. See Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 176-77 (2007) (maintaining that the New Deal introduced the modern regulatory state in the United States with its emphasis on introducing laws to minimize the social harms of the market).

46. Kahan & Braman, *supra* note 7, at 170-71.

47. See Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575, 620 (2009) (explaining how "different groups respond to the suggestion that a reinvigorated nuclear energy program is needed to respond to global warming. For those opposed to nuclear energy, the juxtaposition of the two issues seems absurd; but to those in favor of the technology the linkage is obvious."); See also Lin, *supra* note 42, at 1138-39 ("[R]ecognizing the role of values has critical implications for practical strategies for changing individual conduct, for the content of the laws to address climate change, and for presenting and justifying proposed laws and policies to the public.").

48. See Dan M. Kahan, Donald Braman, John Gastil, Paul Slovic & C.K. Mertz, *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465 (2007) (showing that cultural worldviews more powerfully explain differences of risk perception and legally-consequential facts than do other individual characteristics). On the other hand, empirical studies seeking to correlate trends in judicial decisionmaking to demographic characteristics of judges are notoriously all over the place. See Chew & Kelley, *supra* note 5, at 1132 ("Some [attitudinal] studies find little relationship between the judges' attributes and their decision making, while others find significant patterns.").

excessive use of force by police officers in a high speed car chase.<sup>49</sup> In *Scott v. Harris*,<sup>50</sup> police officers conducted a harrowing chase of a suspect's car through busy roads with other cars and pedestrians present.<sup>51</sup> The chase ended with one of the police cars intentionally bumping the suspect's car, causing it to roll over at high speeds and rendering the suspect a quadriplegic.<sup>52</sup> The suspect then sued the police department under federal civil rights law alleging that the use of deadly force to terminate the chase constituted an unreasonable seizure under the Fourth Amendment to the United States Constitution.<sup>53</sup>

What makes the case unique is that the whole car chase was captured on two different police cars' video cameras and the combined video was submitted as evidence on behalf of the police to establish that their conduct was reasonable under the circumstances.<sup>54</sup> Agreeing with the police, Justice Scalia, for eight members of the Court,<sup>55</sup> found that with the video as the primary evidence, it was impossible to disagree that the police acted in a reasonable manner.<sup>56</sup> In a footnote, Justice Scalia further stated: "We are happy to allow the videotape to speak for itself."<sup>57</sup>

Justice Scalia's conclusion that only one interpretation was possible after viewing the video, however, was rendered suspect by Justice Stevens' dissent. Justice Stevens stated that after watching the video of the high speed chase he did not necessarily believe that the police acted in a reasonable manner.<sup>58</sup> Rather, he mentioned that growing up in a different age and time made the swerving between lanes on a two-lane highway of the suspect's car seem less harrowing than it might have seemed to others.<sup>59</sup> He

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49. See Kahan et al., *supra* note 1, at 837.

50. 550 U.S. 372 (2007).

51. *Id.* at 374. The chase lasted over six minutes and ten miles. *Id.* at 375.

52. *Id.*

53. *Id.*

54. Readers of this Article can watch the video on the Court's website. See Supreme Court of the United States, *Scott v. Harris* Video, [http://www.supremecourtus.gov/opinions/video/scott\\_v\\_harris.html](http://www.supremecourtus.gov/opinions/video/scott_v_harris.html) (last visited Dec. 28, 2009).

55. Justices Breyer and Ginsburg wrote separate concurrences, but joined Justice Scalia's majority decision. See *Scott*, 550 U.S. at 386 (Ginsburg, J., concurring); *id.* at 387 (Breyer, J., concurring).

56. *Id.* at 381 ("Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment."). See also *id.* at 383–84 ("Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.").

57. *Id.* at 378 n.5.

58. *Id.* at 390 (Stevens, J., dissenting) ("Rather than supporting the conclusion that what we see on the video 'resembles a Hollywood-style car chase of the most frightening sort,' . . . the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue.").

59. See *id.* at 390 n.1 (Stevens, J., dissenting) ("Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways-when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic

also noted that the suspect had not done anything wrong at the point of the chase besides flee from the police.<sup>60</sup> In all, Justice Stevens challenged the majority's interpretation of the videotape and found that the case should be submitted to a jury, as reasonable fact finders could disagree over whether the police used excessive force against the suspect in these circumstances.<sup>61</sup>

Based on the fact pattern of this case, Dan Kahan, David Hoffman and Donald Braman set out to empirically determine whether Justice Scalia's challenge about the videotape could be met and whether cognitive illiberalism best explained the nature of the opinion.<sup>62</sup> Taking a diverse demographic sample of 1,350 American citizens which included hierarchs and communitarians, as well as individualists and egalitarians, the authors showed the high-speed chase video from *Scott v. Harris* and asked them a number of questions.<sup>63</sup> Although most of the respondents agreed with Justice Scalia's interpretation of the video tape,<sup>64</sup> a surprising number of

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were routine-they might well have reacted to the videotape more dispassionately.”). The Eleventh Circuit similarly found:

[T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

*See Harris v. Coweta County*, 433 F.3d 807, 815-16 (11th Cir. 2005).

60. *See Harris*, 550 U.S. at 393 (Stevens, J., dissenting) (“I recognize, of course, that even though respondent's original speeding violation on a four-lane highway was rather ordinary, his refusal to stop and subsequent flight was a serious offense that merited severe punishment. It was not, however, a capital offense, or even an offense that justified the use of deadly force rather than an abandonment of the chase.”).

61. *Id.* at 391 (“A jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance, and that their reactions were fully consistent with the evidence that respondent, though speeding, retained full control of his vehicle.”). *See also id.* at 395 (“Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable.”).

62. Kahan et al., *supra* note 1.

63. *Id.* at 841. Kahan and his co-authors utilized the same classifications to identify the cultural worldview of different groups based on the system first developed by Douglas. *Id.* at 859–60. The authors also classified the different type of surveys individuals as either *aleph* or *bet* research subjects. *Aleph* research subjects “morally disapprove of challenges to lawful authority and defiance of dominant norms,” while *bet* subjects’ “egalitarian worldviews and left-leaning politics sensibilities can be expected to incline [them] to condemn authority figures for abuses of power much more readily than they condemn putative deviants for defying authority.” *Id.* at 863–64.

64. *Id.* at 879 (“A very sizable majority of our diverse, nationally representative sample agreed with the Scott majority that Harris's driving exposed the public and the

individuals, particularly from defined cultural subcommunities, agreed with Justice Stevens's dissent that the video did not necessarily speak for itself.<sup>65</sup>

More specifically, the authors found that "African Americans, low-income workers . . . [and] individuals who characterized themselves as liberals and Democrats" shared a cultural orientation "that prize[d] egalitarianism and social solidarity,"<sup>66</sup> and therefore, agreed with Justice Stevens that the pro-police outcome of the case was troubling.<sup>67</sup> On the other hand, the cultural profile of the group who agreed with Justice Scalia held "individualistic and hierarchic worldviews and associated political commitments [that] tend[ed] to approve of highly punitive responses to law-breaking."<sup>68</sup> This latter group believed that the Supreme Court majority decided the case correctly when they found the police acted appropriately under all the circumstances.<sup>69</sup>

Kahan, Hoffman, and Braman argue that Justice Scalia's opinion for the majority in *Scott* constituted a "type of decisionmaking hubris that has cognitive origins and that has deleterious consequences that extend far beyond the Court's decision in *Scott*."<sup>70</sup> In these scenarios, the question becomes "whose eyes the law should believe when identifiable group of citizens form competing factual perceptions."<sup>71</sup> The Article concludes by taking issue with Justice Scalia's insistence that there was only one reasonable view of the *Scott v. Harris* facts, even with the presence of the videotape. Justice Scalia suffered from "cognitive illiberalism," the authors maintain, because of his inability to recognize the connection between his own perceptions of social risks and the contestable nature of his views about what constitutes an ideal society.<sup>72</sup> Justice Scalia's legal method for deciding *Scott v. Harris* also "incur[s] [a] cost to democratic legitimacy

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police to lethal risks, that Harris was more at fault than the police for putting the public in danger, and that deadly force ultimately was reasonable to terminate the chase.").

65. *Id.* at 841.

66. *Id.*

67. *Id.* at 879 ("Individuals who hold egalitarian and communitarian views, whose politics are liberal, who are well educated but likely less affluent, and whose ranks include disproportionately more African Americans and women, in contrast, were significantly more likely to form pro-plaintiff views and to reject the conclusion that the police acted reasonably in using deadly force to terminate the chase.").

68. *Id.* at 863. *See also id.* at 879 ("Individuals (particularly white males) who hold hierarchical and individualist cultural worldviews, who are politically conservative, who are affluent, and who reside in the West were likely to form significantly more pro-defendant risk perceptions.").

69. *Id.* at 863.

70. *Id.* at 842.

71. *Id.* (emphasis in original).

72. *Id.* at 842–43 ("[Social psychology] . . . 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.") (citing Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 414–16 (1995)).



associated with labeling the perspective of persons who share a particular cultural identity ‘unreasonable’ and hence unworthy of consideration in the adjudicatory process.”<sup>73</sup> However, by taking steps to counteract this bias, Kahan, Hoffman, and Braman suggest that courts can divest the law of culturally partisan overtones that detract from the law's legitimacy.<sup>74</sup>

To this point, no article has considered the application of cultural cognition theory and the presence of cognitive illiberalism to judicial decisions in the labor and employment law context.<sup>75</sup> In the next Part, this Article considers the insights that cultural cognition theory can bring to

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73. *See id.* at 842.

74. *Id.* at 843 (“Judges, legislators, and ordinary citizens should therefore always be alert to the influence of this species of ‘cognitive illiberalism’ and take the precautions necessary to minimize it.”). To be clear, in this Article, I do not seek to psychoanalyze the Justices or analyze the motives of any judge. It makes no sense to look at a particular individual and say that a particular perception on his or her part involves “cultural cognition,” as the theory is best understood as a phenomenon of collective decisionmaking. Rather, this Article offers an account of how we, as observers of judges’ decisions, make sense of what’s going on in those decisions. Yet, to avoid awkwardness in exposition in the analysis below, the Article frequently talks about the Justices’ reasoning as if we could see cultural cognition operating in judges’ minds. (I am indebted to Dan Kahan for helping me to clarify my thoughts on this important point).

75. On the other hand, James Atleson long ago noted in traditional labor law cases the importance of judicial perception of facts and how they reflect previously-held values and assumptions, rather than record evidence. *See generally* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983). *See also* GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND (1999) (concluding that judges’ views of boycotts have been shaped by metaphors used to describe boycotts). Additionally, other recent empirical studies do suggest that judges harbor implicit biases similar to those that exist in the general population. *See, e.g.,* Jeffrey Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (authors administered Race Implicit Assumption Test (IAT) to 133 white and black trial court judges from three jurisdictions in different parts of the U.S. and found that they harbored implicit biases that may have some bearing upon their judgment); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (based on empirical research, positing judicial “intuitive-override” model of decisionmaking). *See also* Edwards A. Adams, *Race & Gender of Judges Make Enormous Differences in Rulings*, *Studies Find*, ABA JOURNAL, Feb. 6, 2010, available at [http://www.abajournal.com/weekly/article/race\\_gender\\_of\\_judges\\_make\\_enormous\\_differences\\_in\\_rulings\\_studies\\_find\\_aba](http://www.abajournal.com/weekly/article/race_gender_of_judges_make_enormous_differences_in_rulings_studies_find_aba) (citing Chew & Kelley, *supra* note 5) (“In federal racial harassment cases, one study . . . found that plaintiffs lost just 54 percent of the time when the judge handling the case was an African-American. Yet plaintiffs lost 81 percent of the time when the judge was Hispanic, 79 percent when the judge was white, and 67 percent of the time when the judge was Asian American.”); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 431 (2007) (describing how IAT tests measure latency responses to diverse racially-oriented stimuli); Jennifer L. Peresie, Note, *Females Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1761 (2005) (“[E]mpirical analysis of 556 federal appellate cases decided in 1999, 2000, and 2001 reveal[ed] that judges’ gender mattered to case outcomes. Though plaintiffs lost in the vast majority of cases, they were twice as likely to prevail when a female judge was on the bench.”).

courts deciding controversial types of labor and employment law disputes by analyzing two specific controversies—one in traditional labor law, the other in public employment law. In subsequent Parts, it then takes up the challenge of Kahan and his co-authors to spell out the precautions necessary to reduce the amount of cultural conflict in labor and employment law decisions. It does this by considering potential social science and legal techniques for ridding legal decisions of delegitimizing bias and simultaneously making them more acceptable to a larger segment of society.

### III. CULTURAL COGNITION IN ACTION: LABOR & EMPLOYMENT LAW CASE STUDIES

Whereas the empirical study of reactions to the chase videotape in *Scott v. Harris* focused on the cultural biases of individuals, this paper focuses on the role that these biases may play in the fashioning of judicial decisions in closely-contested labor and employment law cases.<sup>76</sup> This shift of emphasis aids in considering how cultural attitudes of judges may provide a method for understanding larger policy debates among citizens in society.<sup>77</sup> Consequently, the specific cultural debates being played out in the courtrooms of this country become magnified when such arguments are given substantial weight because of the esteem in which judges are held in the United States.<sup>78</sup>

To more specifically understand what cultural cognition theory can tell us about the judicial disputes in labor and employment law cases, this Article applies the theory to two such controversial cases by the United States Supreme Court. The first case, *NLRB v. Curtin Matheson, Inc.*,<sup>79</sup> involves the issue of whether striker replacement workers should be presumed to hold pro- or anti-union sentiments. The second case, *Engquist v. Oregon Department of Agriculture*,<sup>80</sup> explores a completely different aspect of employment law, concerning a contested constitutional interpretation of equal protection doctrine in the public employment context.

#### A. NLRB v. Curtin Matheson Scientific, Inc.

In the first case, *NLRB v. Curtin Matheson Scientific, Inc.*,<sup>81</sup> the United States Supreme Court, in a closely-divided opinion,<sup>82</sup> reasoned that

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76. See Kahan, *supra* note 10, at 421 (arguing that if cultural cognition operates when ordinary people make sense of ambiguous facts, than “it’s plausible that it’s what happens with judges when they have to do so in cases.”); Rachlinski et al., *supra* note 75.

77. Kahan & Braman, *supra* note 7, at 167 (“For many citizens, men and women in white lab coats speak with less authority than (mostly) men and women in black frocks.”).

78. *Id.* at 151 (maintaining that individuals “have to take the word of those whom they trust on issues of what sorts of empirical claims, and what sorts of data supporting such claims, are credible.”).

79. 494 U.S. 775 (1990).

80. 128 S. Ct. 2146 (2008).

81. 494 U.S. 775.

the anti-union bias of striker replacements<sup>83</sup> could not be presumed and that this determination had to be made on a case-by-case basis.<sup>84</sup> The specific facts of the case established that the employer unilaterally withdrew recognition after hiring twenty-nine permanent replacement employees to replace twenty-two strikers.<sup>85</sup> Subsequently, the employer refused to bargain with the incumbent union maintaining that it had the necessary doubt that the union no longer had the support of the majority of workers in the bargaining unit.<sup>86</sup> The Court held that the National Labor Relations Board (NLRB or Board) had acted appropriately within its discretion to not adopt the replacement worker anti-union presumption.<sup>87</sup> The presence or absence of this presumption was critical in determining whether the company could unilaterally withdraw recognition from the incumbent union consistent with the National Labor Relations Act (NLRA).<sup>88</sup>

Under the NLRA at the time, a company could only withdraw recognition if it had “good faith doubt” based on “objective considerations”<sup>89</sup> that a majority of workers no longer supported the union.<sup>90</sup>

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82. The five-to-four decision produced four separate opinions, including the majority opinion by Justice Marshall (joined by Justices Brennan, White, and Stevens), a concurrence by Chief Justice Rehnquist, and separate dissents by Justice Blackmun and Justice Scalia (joined by Justices O'Connor and Kennedy). In this article, I focus only on the opinions by Justice Marshall, 494 U.S. at 775–96, and Justice Scalia, 494 U.S. at 801–19.

83. A striker replacement is a person who is hired to replace union workers who are on strike. This type of employer response to union concerted activity has long been permitted under the doctrine of *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) (reaffirming the validity of the replacement worker doctrine).

84. *Curtin Matheson*, 494 U.S. at 793 (“Even if replacements often do not support the union . . . , it was not irrational for the Board to conclude that the probability of replacement opposition to the union is insufficient to justify an antiunion presumption.”). In teaching this case in labor law class, I sometimes point to the so-called “Billy Elliott” scenario in which one-time strikers cross picket lines and become “scabs” to provide for their families’ needs (and even tuition for a son’s dance class). See *BILLY ELLIOT* (Faber & Faber 2000).

85. *Curtin Matheson*, 494 U.S. at 783.

86. *Id.* at 782. At the time of the refusal to bargain in *Curtin Matheson*, the bargaining unit consisted of 19 strikers, 25 permanent replacements and 5 employees who had crossed the picket line. Based on these numbers, the employer assumed that there were 24 workers for the union and 25 against. There was some debate whether the five who crossed the picket line could be presumed to be anti-union. *Id.* at 782–83.

87. *Id.* at 788 (“We find the Board’s no-presumption approach rational as an empirical matter.”).

88. 29 U.S.C. §§ 151–169 (2000).

89. See *Brooks v. NLRB*, 348 U.S. 96 (1954); *Bartenders Ass’n v. Local 510*, 213 NLRB 651 (1974).

90. See *Celanese Corp.*, 95 NLRB 664 (1951). Presently, an employer may only unilaterally withdraw recognition where the union has *actually* lost the support of the majority of the bargaining unit. See *Levitz Furniture*, 333 NLRB 717 (2001) (in response to *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998)), adopting a more demanding standard for an employer’s unilateral withdrawal of recognition from an incumbent union); see also Sarah Pawlicki, *Levitz Furniture Co.: The End of Celanese and*

If the replacement workers could be placed on the anti-union side of the ledger, a company could conceivably provoke a strike, hire enough replacement workers so that the union would no longer enjoy majority support,<sup>91</sup> and then have a group of anti-union employees file a decertification petition to rid itself of the union, making the statutory right to strike illusory.<sup>92</sup> One of the dissents, written by Justice Scalia, focused on the inevitable antagonism between strikers and replacement workers and concluded that it was lawful for an employer to withdraw recognition based on its reasonable doubt that the union still had majority support with these replacement workers in place.<sup>93</sup>

To better understand the manner in which Justice Marshall for the majority and Justice Scalia in his dissent were disagreeing over legally consequential facts in this area of labor law, it is first necessary to review the withdrawal of recognition labor law doctrine.

## 1. Employer Withdrawal of Union Recognition Generally

This debate surrounding whether striker replacements must be presumed to be anti-union in their outlook takes place in the larger context of deciding when an employer may unilaterally withdraw recognition from a union that currently represents a unit of the company's employees. Unions are entitled to an irrebuttable presumption of majority support for one year after being certified by the National Labor Relations Board ("certification bar"),<sup>94</sup> one year after a representation election ("election bar"),<sup>95</sup> and up to three years after the conclusion of a collective bargaining agreement ("contract bar").<sup>96</sup> If the employer refuses to bargain with the union during

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*the Good-Faith Doubt Standard for Withdrawing Recognition of Incumbent Unions*, 78 CHI-KENT. L. REV. 381 (2003). The exact standard now in existence, however, is not relevant to the focus of this Article about how judges have interpreted legally-consequential facts in controversial labor and employment decisions.

91. The NLRA requires that "representatives designated or selected for the purposes of collective bargaining" be appointed "by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159(a). The importance of this majoritarian principle becomes clearer when one considers that a union so designated is deemed the "exclusive representative of all the employees in such unit." *Id.*

92. The statutory right to strike is found in Section 13 of the NLRA. 29 U.S.C. § 163 ("Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.").

93. *Curtin Matheson*, 494 U.S. at 801–02 (Scalia, J., dissenting).

94. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987).

95. 29 U.S.C. § 159(c)(3).

96. *See Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 77 (D.C. Cir. 1999). A voluntary recognition bar also exists, which is currently in a state of flux. *See Dana Corp.*, 351 NLRB No. 28 (2007) (limiting voluntary recognition bar of usually six-months by not imposing this bar until after 45-days have expired without the filing of a valid decertification petition). *Gissel* bargaining order bars also sometimes come into play. *See Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F. 3d 209 (D.C. Cir. 2002) (permitting

that time, it is a *per se* unfair labor practice (ULP) under Sections 8(a)(1) and 8(a)(5) of the NLRA.<sup>97</sup>

Thereafter, the presumption becomes a rebuttable one, and a unionized employer has a number of ways to establish that the incumbent union no longer enjoys majority support.<sup>98</sup> On the one hand, a group of anti-union employees can file a Recognition Method (RM) petition seeking to decertify the union through a formal, Board-supervised election.<sup>99</sup> On the other hand, the employer can attempt to unilaterally withdraw recognition and cease to recognize and bargain with the union as the bargaining representative of its employees based on good faith doubt.<sup>100</sup> Not surprisingly, because of the uncertainties that come with any secret ballot election, employers historically used the unilateral withdrawal route and much controversy has existed over what showing the employer needed to make to meet this standard.<sup>101</sup>

## 2. Withdrawal of Union Recognition in Striker Replacement Scenario

*Curtin Matheson* concerned the latter way of proving that the union no longer enjoyed majority status among the employees it represented—by showing it had a “good faith doubt” based on “objective considerations.” The objective considerations to form the good faith doubt in *Curtin Matheson* involved the employer’s belief that striker replacements that crossed the picket line to take striking workers’ jobs could be reasonably presumed not to support the union.<sup>102</sup>

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a “reasonable period” of time for union to maintain irrebuttable presumption of majority status after receiving a bargaining order).

97. See *Celanese Corp. of America*, 95 NLRB 664, 672 (1951) (“This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.”).

98. The burden of rebutting the union’s majority status is on the employer. See *Levitz Furniture Co.*, 333 NLRB 717 (2001).

99. 29 U.S.C. § 159(c)(1)(A).

100. See Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 393-97 (1995) (discussing Board’s application good faith doubt approach). This doubt must be based on “objective considerations,” and the employer’s refusal to bargain must not be intended “to undermine the union.” See *Bartenders Association*, 213 NLRB 651, 651 (1974). Essentially, not intended “to undermine the union” means the refusal to bargain must be advanced free of associated employer ULPs. See *Station KKHII*, 284 NLRB 1339 (1987).

101. See, e.g., Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS. L. REV. 653, 678-79 (maintaining that “high employee turnover, a small or declining number of union members or employees authorizing union dues deductions, employee disinterest in union activity, inactivity on the union’s part . . . and employee statements regarding other employees’ opposition to the union” does not constitute the required good-faith doubt.”)

102. *Curtin Matheson*, 494 U.S. at 782. See also ROBERT GORMAN, *LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 112 (1976) (“[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, as a strikebreaker, or worse), it is generally

In his majority opinion, Justice Marshall noted that new employees who are hired in non-strike situations are presumed to support the incumbent union “in the same proportion as the employees they replace.”<sup>103</sup> On the other hand, the law has been inconsistent in evaluating the views of replacement workers who were hired in strike situations.<sup>104</sup> By 1987, however, the Board, in the *Station KKHI* case, had come to conclude that no universal generalizations could be made about whether striker replacements supported or opposed the union and settled on a “no presumption” rule in these cases.<sup>105</sup>

The Board maintained that the pro-union presumption lacked “empirical foundation” because “incumbent unions and strikers sometimes have shown hostility toward the permanent replacements,” and “replacements are typically aware of the union's primary concern for the striker's welfare, rather than that of the replacements.”<sup>106</sup> Equally, however, the antiunion presumption was unsupportable factually because striker replacements may just not approve of the specific strike or face financial problems, even though they would normally support the union.<sup>107</sup> Finally, the Court noted the Board's reluctance for policy reasons to adopt a presumption that would further undermine the employees' right to strike.<sup>108</sup> In the end, then, the Board decided to adopt a no-presumption rule and require independent evidence on a case-by-case basis of replacement workers' sentiments toward the union.<sup>109</sup>

After reviewing current Board law, the Court began its analysis by restating the initial rebuttable presumption that employees support the union

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assumed that he does not support the union and that he ought not be counted toward a union majority.”). Justice Marshall takes issue with the appellate court that this statement by Professor Gorman actually endorses an anti-union presumption in these cases and instead, merely restates the Board law at the time it was written. See *Curtin Matheson*, 494 U.S. at 785 n.6.

103. See *National Plastic Products Co.*, 78 NLRB 699, 706 (1948).

104. Compare *Curtin Matheson*, 494 U.S. at 779 (collecting cases showing that the Board from 1959-1968 thought it reasonable to assume that replacement workers were not union adherents), and *People Gas System, Inc.*, 214 NLRB 944 (1974) (recognizing that it is possible that striker replacements could be pro-union, while reasonableness of employer view that their support of unions maybe weaker given their willingness to cross union picket lines), with *Cutten Supermarket*, 220 NLRB 507 (1975) (treating new employees and striker replacements the same in presuming that they support the union); *Windham Community Mem. Hosp.*, 230 NLRB 1070, 1070 (1977) (reaffirming the *Cutten* holding); and *Pennco, Inc.*, 250 NLRB 716, 717–18 (1980) (same).

105. *Station KKHI*, 284 NLRB 1339 (1987).

106. *Curtin Matheson*, 494 U.S. at 782 (citing *Station KKHI*, 284 NLRB at 1344).

107. *Id.*

108. *Id.* (finding “that adoption of an antiunion presumption would ‘substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line.”).

109. *Id.* at 782. This part of decision appears to consist of a legislative factfinding. An interesting and complex question that this Article does not explore is what the interaction is between cultural cognition and legislative factfinding.

in these cases.<sup>110</sup> The burden is then on the employer to rebut the presumption of majority union support through good faith doubt based on objective considerations.<sup>111</sup> Critically, then, Justice Marshall in the majority decision rejects the employer's argument that the Board must adopt "a second, subsidiary presumption-that replacement employees oppose the union."<sup>112</sup> Such an approach would be inconsistent with the requirement that the good faith doubt of the employer in unilaterally withdrawing recognition from the union be based on objective considerations—under the anti-union presumption "the employer would not need to offer *any* objective evidence of the employees' union sentiments to rebut the presumption of the union's continuing majority status."<sup>113</sup> Therefore, the majority decision concludes that the Board's refusal to adopt the anti-union presumption was rational and consistent with the NLRA.<sup>114</sup> Because such evidence of anti-union orientation among the replacement workers was lacking,<sup>115</sup> the Court affirmed the Board's decision - that the employer had committed an unfair labor practice when it had withdrawn recognition from the union.<sup>116</sup>

### 3. *Curtin Matheson* Through the Prism of Cultural Cognition Theory

Recall now that cultural cognition theory teaches that judges' values play a subconscious role in the way that they interpret facts.<sup>117</sup> *Curtin Matheson* is all about facts as Justice Marshall points out: "We find the Board's no-presumption approach rational as an empirical matter."<sup>118</sup> In this sense, Justice Marshall appears to be privileging one view concerning whether strike replacements generally have an anti- or pro-union view in the replacement worker context.

Note, however, that Marshall's decision does not amount to the same decisionmaking hubris that Justice Scalia was guilty of in the *Scott v. Harris* decision and it instead recognizes that there are different ways to interpret the facts in a case such as this one. Note also that Justice Marshall must engage in an evaluation of the facts from a particular cultural standpoint because, short of taking an unlikely survey of replacement workers who cross picket lines, it is impossible to know for sure their pro- or anti-union orientation.<sup>119</sup>

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110. *Id.* at 787.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 788.

115. *Id.* at 784.

116. *Id.* at 796.

117. See Kahan & Braman, *supra* note 7, at 167 ("[C]ultural cognition operates as an information-processing filter.").

118. *Curtin Matheson*, 494 U.S. at 788.

119. Interestingly, from the Board standpoint, the good faith doubt standard was never supposed to be a search for the subjective sentiments of replacements, but a rule that employers should not be able to rid themselves of unions merely by hiring replacements

Justice Scalia, for his part, does not appear to view his reading of the facts as necessarily just one interpretation. Like his opinion in *Scott v. Harris*, he writes from the vantage point that “no reasonable person” could possibly disagree with the proposition that good faith doubt of continuing union majority status could be based on replacement workers holding anti-union views.<sup>120</sup> Scalia claims that a necessary and eternal conflict exists between union members and replacement workers as a result of unions seeking to have replacement workers discharged when the strike is over.<sup>121</sup> As further evidence, he notes the use of the derogatory “scab” term for those who cross the picket line.<sup>122</sup> To Justice Scalia, it therefore makes “plain” sense to presume replacement workers have an anti-union outlook.

Yet, such an analysis unnecessarily alienates cultural subcommunities and delegitimizes the law for a segment of society.<sup>123</sup> Like in *Scott v. Harris*, Justice Scalia simply does not consider that there might be cultural sub-communities that disagree with his assessment of the pertinent facts because of their different cultural commitments.<sup>124</sup> And perhaps Justice Scalia’s argumentative approach in his dissent in *Curtin Matheson* is really not all that surprising because cultural cognition theory teaches that judges gravitate toward factual beliefs that are most congenial

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workers. See Station KKHI, 284 NLRB at 1344. Yet, in the hands of the Supreme Court, the subjective sentiments of replacement workers are clearly central to the Justices’ disagreement.

120. See *Curtin Matheson*, 494 U.S. at 801 (Scalia, J., dissenting) (“Since the principal employment-related interest of strike replacements (to retain their jobs) is almost invariably opposed to the principal interest of the striking union (to replace them with its striking members) it seems to me impossible to conclude on this record that the employer did not have a reasonable, good-faith doubt regarding the union’s majority status.”).

121. *Id.*

122. Here are the famous words of the union adherent, Jack London, on the worth of “scabs”:

After God had finished the rattlesnake, the toad, and the vampire, he had some awful substance left with which he made a scab. A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue.

Jack London, *The Scab* (1902).

123. Consider the over-heated language Justice Scalia employs in disagreeing with the majority opinion: “Also embarrassingly wide of the mark is the Court’s observation that ‘[u]nions do not inevitably demand displacement of all strike replacements.’” *Curtin Matheson*, 490 U.S. at 808 (Scalia, J., dissenting). See also *id.* at 812 (“I reiterate that the burden upon the employer here was not to demonstrate 100% assurance that a majority of the bargaining unit did not support the union, but merely ‘reasonable doubt’ that they did so. It seems to me absurd to deny that it sustained that burden.”). Clearly, he could have made both of these points without disparaging his opponent’s argument. By choosing otherwise, Justice Scalia unnecessarily delegitimizes the cultural subgroups who agree with Justice Marshall’s version of the facts. See also *infra* Part V (discussing methods for counteracting cognitive illiberalism in judges).

124. See *id.* at 805 (Scalia, J., dissenting) (“The precise question presented is whether there was substantial evidence to support this factual finding. There plainly was not.”).



to their existing values – this is cognitive illiberalism.<sup>125</sup> Especially in this type of labor law case where there is necessarily speculation about what motivates the replacement worker to cross the picket line and the evidence must remain somewhat inconclusive, judges become motivated, understandably, to find conduct they see as praiseworthy as also socially beneficial.<sup>126</sup>

Although it is not possible to say what thoughts crossed Justice Scalia's mind when he wrote his dissent in *Curtin Matheson*, its assertions certainly would seem to appeal to individuals with individualistic and hierarchial conceptions of the world. Under this view, individual replacement workers are praiseworthy in working to secure jobs that they would otherwise not have if the union were in complete control of the situation. Moreover, it is good that employers be able to exercise their managerial prerogative to unilaterally withdrawal recognition from the union as long as they establish the relatively-low standard of good faith doubt since employers after all should be deferred to in the workplace.<sup>127</sup> By benefitting employers in this manner in the labor law context, the opinion is filled with hierarchial ideas about how a workplace should be run. The opinion appears antagonistic to any outcome that would support the continuance of union representation, since unions undermine the right of employers to run their businesses as they deem best and bring unnecessary regulation to the company.

Now, all of this is not to imply that Justice Marshall's majority opinion is a paragon of how a culturally-aware opinion should be written by a judge in a labor and employment law case. Yet, Justice Marshall's majority opinion in *Curtin Matheson* more closely approaches an understanding that there actually can be disagreement about the empirical reality of the replacement worker situation. By discounting both the pro-union presumption and anti-union presumption in favor of a no presumption rule, his opinion indicates an understanding that different cultural communities might view the relevant facts divergently.<sup>128</sup> Nevertheless, his

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125. See Kahan & Braman, *supra* note 7, at 151 (maintaining under cultural cognition theory that people's views of conduct "will inevitably be guided by their cultural evaluations of these activities.").

126. This psychological orientation of individuals can be called "naïve realism" or "cognitive illiberalism." Kahan et al., *supra* note 1, at 843. It is the "overconfidence in the unassailable correctness of the factual perceptions we hold in common with our confederates and unwarranted contempt for the perceptions associated with our opposites." *Id.*

127. This concept of "managerial prerogative" finds resonance in Lawrence Rosenthal's use of the term in the public employee free speech context. See Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 49 (2008).

128. Particularly note the use by Justice Marshall of words like "may," "in some circumstances," and "otherwise," to indicate his understanding that different groups may understand the motives of replacement workers differently. See *Curtin Matheson*, 490 U.S. at 789 ("Although replacements often may not favor the incumbent union, the Board

majority decision is very much written for individuals with egalitarian and communitarian commitments when he sees the reality of the situation in a way that allows unions to continue to effectively strike (and he expressly condones that policy goal),<sup>129</sup> while at the same time allowing unions to keep their privileged, exclusive representative status in the workplace.

In short, the manner in which legally-consequential facts are interpreted in *Curtin Matheson* are consistent with Justices Marshall and Scalia's prior cultural commitments. In this sense, culture is indeed prior to facts as culture cognition theory suggests.

*B. Engquist v. Oregon Department of Agriculture*

Whereas *Curtin Matheson* involved an issue of statutory interpretation under the NLRA, *Engquist v. Oregon Department of Agriculture*<sup>130</sup> involves a constitutional interpretation of equal protection doctrine in the public employment law context. In another closely-divided Supreme Court case, the Court held in *Engquist* that a "class-of-one" equal protection claim does not exist for public employees.<sup>131</sup> The facts of the case were fairly straightforward and common: a personality dispute existed between a worker and new supervisor, who replaced an agreeable old supervisor, in a public-sector workplace.<sup>132</sup> In addition to other constitutional and statutory claims, the employee sued her state employer under the Equal Protection Clause, arguing that her termination was for "arbitrary, vindictive, and malicious reasons."<sup>133</sup> Put differently, even under rational basis review, the employee alleged that the State's adverse employment actions were without any rational basis and solely for arbitrary reasons and thus, violated the Equal Protection Clause.<sup>134</sup> The jury agreed with the employee on this "class-of-one" equal protection claim and she was

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reasonably concluded, in light of its long experience in addressing these issues, that replacements may in some circumstances desire union representation despite their willingness to cross the picket line. Economic concerns, for instance, may force a replacement employee to work for a struck employer even though he otherwise supports the union and wants the benefits of union representation.").

129. *Id.* at 794 ("The Board's approach to determining the union views of strike replacements is directed at this same goal because it limits employers' ability to oust a union without adducing any evidence of the employees' union sentiments and encourages negotiated solutions to strikes.").

130. 128 S. Ct. 2146 (2008). The six-to-three decision produced two opinions, including the majority opinion by Chief Justice Roberts (joined by Justices Scalia, Thomas, Alito, Kennedy, and Breyer); and a dissenting opinion by Justice Stevens (joined by Justices Ginsberg and Souter).

131. *Id.* at 2148–49 ("We hold that such a 'class-of-one' theory of equal protection has no place in the public employment context.").

132. *Id.* at 2149.

133. *Id.*

134. *Id.* at 2149–50.

awarded \$175,000 in compensatory damages and \$250,000 in punitive damages.<sup>135</sup>

Chief Justice Roberts, writing for the majority, overturned the jury's verdict, finding that public employees cannot bring such "class-of-one" claims.<sup>136</sup> He reasoned that the class-of-one theory was simply a "poor fit" for public employment and that public employees only had equal protection claims if class-based discrimination existed.<sup>137</sup> He also based his holding on the need for greater latitude for the government in its employment role to maintain control and discipline in the workplace.<sup>138</sup> The dissent by Justice Stevens maintained, however, that no compelling reasons existed for not applying the usual rational basis review to employment actions by the government.<sup>139</sup>

## 1. The History of the "Class of One" Equal Protection Doctrine

For those most familiar with reading about equal protection cases involving heightened judicial scrutiny because of a suspect classification<sup>140</sup> or fundamental right,<sup>141</sup> it might be surprising to learn that a whole field of equal protection jurisprudence—the so-called "class-of-one" cases—has existed for a long time. Starting with *Sioux City Bridge Co. v. Dakota County*,<sup>142</sup> the Supreme Court found a "class-of-one" equal protection violation when there was an intentional undervaluation by state officials of property in the same class as other property that was properly valued.<sup>143</sup> The Court found that this state action contravened the equal protection rights of the company taxed on the full value of its property.<sup>144</sup>

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135. *Id.*

136. *Id.* at 2148-49.

137. *Id.* ("[W]e have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.").

138. *Id.* at 2157.

139. *Id.* at 2161 (Stevens, J., dissenting).

140. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (racial classification); *Craig v. Boren*, 429 U.S. 190 (1976) (gender classification); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (alienage classification).

141. *See, e.g.,* *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right to access justice); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Reynolds v. Sims*, 377 U.S. 533 (1964) (right to vote).

142. 260 U.S. 441 (1923).

143. *Id.* at 442. As the Court points out in *Engquist*, this principle derives from some of the first cases to be decided under the Fourteenth Amendment's Equal Protection Clause. *See Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887) (Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.").

144. *Sioux City Bridge*, 260 U.S. at 447.

Some seven decades later, in *Allegheny Pittsburgh Coal Co. v. Commission of Webster County*,<sup>145</sup> the Court considered the “class-of-one” theory in a similar scenario involving a taxing scheme. There, landowners challenged the valuation placed on their property by the county tax assessor.<sup>146</sup> The Court held that the County could not assess the plaintiffs’ property “at 50% of what is roughly its current value, [when] neighboring comparable property which has not been recently sold is assessed at only a minor fraction of that figure.”<sup>147</sup> Consequently, the Court held that the taxing scheme of the County violated the Equal Protection Clause.<sup>148</sup>

In a more recent case involving government regulatory action, the Court also applied this “class-of-one” theory of equal protection. In *Village of Willowbrook v. Olech*,<sup>149</sup> the Court recognized a “class-of-one” equal protection claim in a situation in which a property owner sued his Village when he was required to have an easement eighteen-foot longer than what was required of other citizens to connect his property to a municipal water supply.<sup>150</sup> Although *Olech*, like the other two previous cases, did not involve a claim of class-based discrimination, the Court nevertheless recognized that the Equal Protection Clause also protects against government action which “irrationally singled out as a so-called ‘class of one.’”<sup>151</sup> In short, the Court in *Olech* permitted an Equal Protection Clause claim where an allegation had been made that the government had intentionally treated someone different than others and there was no rational basis for the disparate treatment.<sup>152</sup>

## 2. Public Employment and the “Class of One” Doctrine

In *Engquist*, the employee had argued that the “class-of-one” theory should also apply to public employment. She argued: (1) the Equal Protection Clause protects individuals, not classes; (2) that the Clause proscribes “discrimination arising not only from a legislative act but also from the conduct of an administrative official”; and (3) the Constitution applies to the State not only when it acts as regulator, but also when it acts as employer.<sup>153</sup> Consequently, she argued: “[D]ifferential treatment of government employees-even when not based on membership in a class or

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145. 488 U.S. 336 (1989).

146. *Id.* at 338.

147. *Id.* at 342.

148. *Id.* at 343.

149. 528 U.S. 562 (2000).

150. *Id.* at 563.

151. *Id.*

152. *Id.* at 564 (citing *Sioux City Bridge*, 260 U.S. 441 (1923) and *Allegheny Pittsburgh Coal Co.*, 488 U.S. 336 (1989)).

153. *Engquist v. Oregon Dep’t of Agric.*, 128 S. Ct. 2146, 2150 (2008).

group-violates the Equal Protection Clause unless supported by a rational basis.”<sup>154</sup>

Although Chief Justice Roberts agreed with all three of the employee's legal premises, he nevertheless held against her based on his views concerning the empirical reality of public workplaces.<sup>155</sup> First, he sought to distinguish the previous class-of-one equal protection claims. Using the phraseology “what seems to have been significant in *Olech*,” he reasons that the previous cases were about “the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed.”<sup>156</sup> On the other hand, the government employer was exercising discretionary authority based on subjective, individualized determinations.<sup>157</sup> Because the other cases involved instances of differential treatment which raised concerns of arbitrary classification, but the current case did not, those other cases could not be read to require a “class-of-one” theory in the public employment context.<sup>158</sup> Equal protection in this context is just a “poor fit,”<sup>159</sup> at least when the government employer is not making class-based distinctions.<sup>160</sup>

Chief Justice Roberts next calls upon a line of precedent for support that government acting as employer has much more latitude to act against employees than the government as sovereign when it interacts with citizens.<sup>161</sup> Yet, although legally speaking this reading of past precedent is accurate,<sup>162</sup> the Court had never made the leap to previously hold that

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154. *Id.*

155. *Id.* at 2151.

156. *Id.* at 2153.

157. *Id.* at 2154–55 (“Unlike the context of arm's-length regulation, such as in *Olech*, treating seemingly similarly situated individuals differently in the employment context is par for the course.”).

158. *Id.* at 2153–54.

159. *Id.* at 2155.

160. *Id.* (“Our cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently.”) (citing *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 (1979)). Public employees might now need to consider alternative due process arguments for poor treatment in the workplace now that “class-of-one” Equal Protection claims are no longer viable. See Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law*, 44 GA. L. REV. 161, 164 (2009).

161. *Engquist*, 128 S. Ct. at 2155.

162. Justice Marshall famously stated in *Pickering v. Board of Education*: “[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that *differ significantly* from those it possesses in connection with regulation of the speech of the citizenry in general.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (emphasis added); see also *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994) (plurality opinion) (explaining why government as employer has broader powers with regard to its citizen than when acting in its sovereign capacity); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (“The restrictions that the Constitution places upon the government in its capacity as lawmaker, i.e., as the regulator of private conduct,

therefore, the Equal Protection Clause does not apply to individual public employees when government takes arbitrary administrative action against them.<sup>163</sup>

To make that leap, Chief Justice Roberts relies upon “unique considerations” involving the ability of public employers to run their workplaces as they see fit.<sup>164</sup> Calling on similar language from cases involving public employment and the First Amendment free speech context, he argues that courts would be overwhelmed if every government personnel decision could be challenged under the Equal Protection Clause.<sup>165</sup> He raises the specter of a litigation apocalypse<sup>166</sup> without pointing to any statistics or other evidence that in fact there has been a problem previously with these types of cases flooding the courts.<sup>167</sup> In the name of managerial prerogative,<sup>168</sup> he denies some twenty million public employees the

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are not the same as the restrictions it places upon the government in its capacity as employer.”).

163. The Court has, however, made a similar leap of reasoning in the First Amendment free speech case of *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that public employee speech made pursuant to their official duties receives no First Amendment protection). See also Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009) (asserting that courts’ “unblinking deference to [government speech] assertions . . . frustrates a meaningful commitment to republican government.”); Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1106 (2008) (arguing for First Amendment *Bivens* claim for federal employees because “such protections will not only benefit employees, but all citizens who depend on public employees to bring a substantial degree of transparency and accountability to our representative government.”).

164. *Engquist*, 128 S. Ct. at 2151 (“[U]nique considerations applicable when the government acts as employer as opposed to sovereign, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context.”).

165. See *id.* (“[T]he government has a legitimate interest ‘in ‘promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service’”) (citing *Connick v. Myers*, 461 U.S. 138, 150-151 (1983)).

166. See *id.* (citing *Connick*, 461 U.S. at 143; *Waters*, 511 U.S. at 674 (plurality opinion)).

167. *Id.* at 2157 (“The practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack.”). As documented by Andrew Seigel, the Court has a recent propensity to bar the courthouse door to civil rights litigants. See Andrew Seigel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006); see also Secunda, *supra* note 163, at 1147 (quoting *Wilkie v. Robbins*, 127 S. Ct. 2588, 2615-16 (2007) (Ginsburg, J., concurring in part and dissenting in part) (“The ‘floodgates’ argument . . . has been rehearsed and rejected before.”)).

168. See *Connick*, 461 U.S. at 146 (“When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices.”); Rosenthal, *supra* note 127.

protection of rational basis review under the Equal Protection Clause.<sup>169</sup> This astounding act, supported by five other Justices, derives from Chief Justice Robert's "common-sense realization that government offices could not function if every employment decision became a constitutional matter."<sup>170</sup> In other words, he takes for granted that such class-of-one claims could not factually co-exist with an effectively-run, public workplace.

Last, Chief Justice Roberts argues for the need to protect public at-will employment. This is also a factual error because the vast majority of public employees are not employed-at will. Forty percent of them are unionized under a just-cause standard and most of the rest are under state or federal civil service protections which also trump the common-law standard.<sup>171</sup> Nevertheless, Chief Justice Roberts argues that permitting rational basis review under a class-of-one equal protection theory would conflict with this at-will principle.<sup>172</sup>

Justice Stevens, writing in dissent for himself and two others, appears to divine Roberts' and his cohorts' motivations. He also has a very different view of the empirical reality of the public workplace. Seeing the majority decision as being part of the same line of reasoning as that found in the *Garcetti* free speech context, he calls out the majority for "carving out a novel exception out of state employees' constitutional rights."<sup>173</sup> More specifically, and relying on numerous passages from *Olech*, he observes:

Unless state action that intentionally singles out an individual, or a class of individuals, for adverse treatment is supported by some rational justification, it violates the Fourteenth

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169. See U.S. Dept. of Labor, Bureau of Labor Statistics, Employment, Hours and Earnings from the Current Employment Statistics Survey (2008), <http://data.bls.gov/PDQ/outside.jsp?survey=ce> (reporting that federal, state, and local government currently employs over 22 million workers).

170. *Engquist*, 128 S. Ct. at 2157 (citing *Connick*, 461 U.S. at 143).

171. Chief Justice Roberts appears to recognize as much. *Engquist*, 128 S. Ct. at 2156 (2008) (citing 5 U.S.C. § 2302(b)(10)(2006)) ("To be sure, Congress and all the States have, for the most part, replaced at-will employment with various statutory schemes protecting public employees from discharge for impermissible reasons."). He nevertheless concludes that, "a government's decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate." *Id.* And there is "only one Equal Protection Clause," *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring), and that clause clearly does not distinguish between government actions taken against individuals versus groups.

172. *Engquist*, 128 S. Ct. at 2156 ("[R]ecognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment. The Constitution does not require repudiating that familiar doctrine.").

173. *Id.* at 2157 (Stevens, J., dissenting) (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

Amendment's command that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>174</sup>

He therefore takes issue with the majority's idea that public employment decisions are somehow special in being inherently discretionary and therefore, a poor fit for “class of one” treatment.<sup>175</sup> He points out that the zoning decision at issue in *Olech* was similarly discretionary and yet, the Court applied the class-of-one theory there.<sup>176</sup> Stevens also points out that although employment at will was the widespread practice in the 1890s, it has not been so at least since the 1960s.<sup>177</sup>

Yet, even in the midst of all of these legal arguments, it appears that Justice Stevens' dissenting opinion is really about contesting the empirical reality of the majority's decision. His dissenting opinion contends that the subtext of Chief Justice Roberts' opinion is that public agencies will not be able to operate efficiently if they have to defend all of these equal protection lawsuits.<sup>178</sup> He points out that there have been exceedingly few “class-of-one” equal protection lawsuits hitherto and no evidence exists that any federal, state, or local agency, anywhere in the country, has become overrun by such lawsuits.<sup>179</sup> To the contrary, they remained quite sparse given the large number of public employees in the United States.<sup>180</sup> Justice Stevens therefore concludes that, “[e]ven if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal

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174. *Id.* at 2158–59.

175. Accord Robert C. Farrell, *The Equal Protection Class of One Claim: Olech, Engquist, and the Supreme Court's Misadventure*, 61 S.C. L. REV. 107, 109 (2009) (“By excepting all discretionary government action from the class of one claim, *Engquist* seems to eliminate any cause of action for a plaintiff harmed by the vindictive act of a government official when that act is part of an exercise of discretion.”).

176. *Engquist*, 128 S. Ct. at 2159. He also points out that there is a, “clear distinction between an exercise of discretion and an arbitrary decision.” *Id.*

177. *Id.* at 2160 (“In the 1890's that doctrine applied broadly to government employment, but for many years now ‘the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.’”) (quoting *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605–06 (1967)).

178. *Id.* (“Presumably the concern that actually motivates today's decision is fear that governments will be forced to defend against a multitude of ‘class of one’ claims unless the Court wields its meat-axe forthwith.”).

179. *Id.*

180. *Id.* at 2160–61 (“Experience demonstrates, however, that these claims are brought infrequently, that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial.”). In support of this assertion, Justice Stevens drops a footnote which states: “Prior to the Ninth Circuit's decision [sic] this case, ‘class of one’ claims arising in the public-employment context were permitted by every court that was presented with one. Yet there have been only approximately 150 cases-both in the district courts and the courts of appeals-addressing such claims since *Olech* [in 2000].” *Id.* at 2160–61 n.4.



protection ‘class of one’ claims, the Court should use a scalpel rather than a meat-axe.”<sup>181</sup>

### 3. *Engquist* Through the Prism of Cultural Cognition Theory

Based on the above analysis in *Engquist*, it would not be surprising for a reader to take the following lesson from the case: irrespective of the actual facts of the case, Chief Justice Roberts and his conservative allies will rule for employers in most cases and Justice Stevens and his liberal allies will rule similarly for employees.<sup>182</sup> Yet, I want to argue here that although there might be some truth to these assertions, it is more valuable to apply cultural cognition theory to the decision in *Engquist* because this theory helps to explain the mechanism by which the majority and dissenting Justices bring their values to bear on legally-consequential facts in the case.

The factual dispute in *Engquist*, as I have argued above, is over the empirical situation that public employers currently would face as a result of recognizing a class-of-one equal protection theory claim. Chief Justice Roberts maintains that such claims will eventually interfere with the ability of government employers to run an efficient workplace.<sup>183</sup> Using cultural cognition theory, it is possible to see how Roberts’ opinion would appeal to those with cultural beliefs with a focus on hierarchial values – will appropriate government authorities be able to control this type of litigation from spinning out of control? Throughout the majority opinion, Roberts also mentions the special needs of the government employer to exercise wide latitude in managing the workplace, but does not explain why this managerial latitude is somehow more important in a public workplace than a private one. His opinion also discounts risks to republican values if public employees are squelched because he perceives that these same concerns could lead to restrictions on how the employer chooses to run its workplace.<sup>184</sup>

On the other hand, Justice Stevens’ dissent in *Engquist* appeals to individuals with a cultural commitment to egalitarian values.<sup>185</sup> His opinion

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181. *Id.* at 2158.

182. This is the simplest form of the argument that judges are motivated by ideology. Kahan, *supra* note 10. Alternatively, under the more nuanced view of what ideology means, Roberts could be viewed as simply resorting to a normative theory to connect the abstract concept of equal protection to the particular circumstances present in *Engquist*. See *id.* Either way, the ideological view shrouds in mystery the process by which values come to impact judicial decisionmaking.

183. See *Engquist*, 128 S. Ct. at 2154 (“[A]llowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.”).

184. Kahan, *supra* note 10, at 418 (discussing similar concerns in environmental law case).

185. Interestingly enough, Justice Stevens does not appear to rely on communitarian values in the same way that Justice Marshall does in *Curtin Matheson*. Had he done so, he

prizes the ability of any individual, whether in government employment or not, to call upon the protections of the Equal Protection Clause if the government acts towards them in an arbitrary and irrational matter. To those who agree with Stevens, it would appear more important that public employees are treated equally by their employers than whether there is some distant potential for future litigation that *might* disrupt the workplace. Stevens also appears to try to dispel the fears of the individualists and hierarchs by proving that at least the present experience suggests that such floods of litigation are unlikely to happen. But notice that it is because there is necessarily speculation and inconclusive evidence concerning whether such litigation will actually ensue that the cultural commitments of the various Justices come to play a more prominent role in how they view these legally-consequential facts. Even though we have some evidence from the lower appellate courts that such claims are rather unusual in public employment, the evidence still remains inconclusive. As a result, the Justices fall back on their cultural commitments to decide these disputed factual questions.

In each opinion in *Engquist*, then, the cultural worldview indicates how Justices will come to evaluate disputed factual claims embedded in what they agree is the controlling legal standard. Both sides in each of these opinions are sincerely basing their decisions on their views of the law, but as Kahan explains, “what they understood the law to require was nevertheless shaped by their value—operating not as resources for theorizing law, but as subconscious, extralegal influences on their perception of legally consequential facts.”<sup>186</sup>

#### IV. THE SIGNIFICANCE OF THE CULTURAL COGNITION INSIGHT

Because of its ability to shed light on the mechanism by which values shape judicial opinions, cultural cognition theory is vital to future attempts to tamper down cultural judicial biases that invariably lead to conflicted legal decisions. As argued above, the recognition of cultural cognition as an explanatory device for why judges act the way they do in these cases is especially helpful in labor and employment decisions. This is because many of these judicial decisions appear to be based on a large amount of speculation and inconclusive evidence about: employer and employee motivations (in the labor, employment discrimination, and employee benefit contexts); the proper measure for efficiency in both the public and private workplace; and the proper standard of technical measurements (like technological feasibility in the OSHA context).<sup>187</sup> In

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might have pointed out that the loss of this equal protection claim for public employees has dire consequences for the community at large. See *infra* Part V.A.

186. Kahan, *supra* note 10, at 417.

187. *Id.* at 419 (discussing case where cultural cognition provided important insights where the factual issues that divided the judges involved considerable uncertainty and inconclusive evidence). See also *supra* note 11 and accompanying text.

these circumstances, this Article maintains that prior cultural commitments of the judge do a better job explaining how they are likely to come out in the end in these disputes than any other type of ideology-based analyses.<sup>188</sup>

Knowing the mechanism by which judicial values foment controversy in labor and employment decisions is important for two related reasons. First, if we see judges as acting self-consciously on partisan or legal motives to find for the employer versus the employee, the whole judicial enterprise is likely to lack legitimacy for a broad segment of society.<sup>189</sup> As Kahan explains, “the cultural cognition thesis, if true, [would] spare us from the disappointment associated with believing that judicial agreement stems from self-conscious, and self-consciously concealed, political disregard for law.”<sup>190</sup>

When it comes to issues of justice, individuals want to see that there are certain minimum conditions of legal process being met.<sup>191</sup> One of those essential conditions is an independent, neutral, and unbiased adjudicator.<sup>192</sup> Now, it might be impossible to rid judicial decisionmakers of subconscious bias of the cultural variety, but at least people should take comfort in knowing that most of the time most judges do not make decisions based on partisan or normative preferences.

This leads to a second, connected, point. To the extent that individuals find legitimacy in judicial systems based on the absence of illiberal bias in judges, it is necessary to consider if approaches exist to minimize the amount of this type of subconscious bias. Both social psychologists and legal scholars suggest that there are.

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188. *Accord* Posner, *supra* note 5, at 1060 (“At bottom, . . . the sources of ideology are both cognitive and psychological, but the I think the psychological dominates, because psychology exerts such a great influence on our interpretation of our experiences, including the weights assigned to the possible consequences of deciding a case one way or the other.”).

189. Kahan, *supra* note 10, at 421.

190. *Id.*

191. See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1025 (2008) (“The allure of Legal Process (then and now) is . . . that good process is probably more likely to lead to good results.”); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (maintaining that procedural justice is critical factor in the evaluation of the legitimacy of adjudication). But see Martinez, *supra* (“The danger of Legal Process (then and now) is that its seeming neutrality often obscures value judgments about the underlying substantive policies.”).

192. See Gilles Cuniberti, *Beyond Contract--The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L L.J. 417, 449 (2009) (“[W]hen an unbiased adjudicator who has allowed the parties to present their case fully makes a decision, the parties should at least consider that the resolution of their dispute was not illegitimate and thus accept the decision.”) (citing Tom R. Tyler, *Justice and Power in Civil Dispute Processing*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 309, 330 (Bryant G. Garth and Austin Sarat eds., 1998)).

## V. METHODS FOR COUNTERACTING JUDICIAL BIAS

Realizing the importance of identifying the mechanism of disagreement as being cultural, the question remains as to what techniques might be helpful in eliminating some of this biased decisionmaking from the courts. Two possible approaches include fostering humility as a judicial habit of mind and using expressive overdeterminism in opinion writing to promote self-affirmation among the opinion's audience.

### A. *Humility as a Judicial Habit of Mind*

Cultural bias in the judicial decisionmaking process may be able to be minimized by embracing the concept of judicial humility. Initially, the idea derived from an article by Cass Sunstein about judges exercising humility in decisions which foreseeably cause community outrage.<sup>193</sup> Kahan, Hoffman, and Braman subsequently adopted the idea as a response to the problem of cognitive illiberalism in judges.<sup>194</sup>

Sunstein argues that judges, being human, are necessarily prone to making mistakes about the law and also about the practical consequences of their decisions.<sup>195</sup> One possible solution for this judicial predicament is for judges to develop “sensitivity to anticipated community outrage.”<sup>196</sup> In other words, where it is foreseeable that a decision will likely cause outrage among an identifiable subgroup, humility “counsels the judge to treat the foreseeability of such outrage as a cue that maybe she is in fact wrong.”<sup>197</sup>

Referring to appropriate judicial habits of mind in this vein, Kahan, Hoffman and Braman argue that judges should engage in a “double mental check,” especially when ruling on a motion or petition that would summarily dispose of a case.<sup>198</sup> By engaging in this judicial habit of mind, judges would be self-correcting for their inability to fully appreciate how their subconscious values operate to shape their perceptions of particular facts.<sup>199</sup> Rather, when coming to a decision that will likely cause a cultural subcommunity to react with outrage, judges should consider whether there “are people who bear recognizable identity-defining characteristics--

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193. See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

194. Kahan et al., *supra* note 1, at 897.

195. Sunstein, *supra* note 193, at 164. Accord Rachlinski et al., *supra* note 75, at 1221 (“[J]udges, like the rest of us, carry implicit biases.”); Chew & Kelley, *supra* note 5, at 1131 (“Increasingly, . . . more legal scholars are acknowledging that judges have human inclinations and that judges’ ability to be purely objective about the case may be largely theoretical.”).

196. Sunstein, *supra* note 193, at 164; Rachlinski et al., *supra* note 75, at 1202-04 (suggesting that people may have the ability to compensate for the effects of implicit bias) (citing Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164-65, 170-71 (2008)).

197. Kahan et al., *supra* note 1, at 898.

198. *Id.*

199. *Id.*

demographic, cultural, political, or otherwise,” and “whether privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of such subcommunities.”<sup>200</sup>

Now, this does not mean that judges should not grant the motion or should decide the case in the opposite manner.<sup>201</sup> One would certainly not have expected the Supreme Court to have decided *Brown v. Board of Education*<sup>202</sup> differently just because an irate group of Southerners preferred that segregation continue in their public schools.<sup>203</sup> Rather, judges, when possible, might write an opinion in a manner that does not unnecessarily alienate a group whose cultural identities are in tension with the court's decision.<sup>204</sup>

Consider how judicial humility might have operated in the labor and employment law cases examined in this Article. In *Curtin Matheson* and the dispute over the labor orientation of replacement workers, due judicial humility would have counseled that Justice Scalia consider that individuals come with different circumstances to a picket line. At the very least, this approach might have helped him to tone down his rhetoric and write his opinion in a manner that would appeal in different ways to both management and union-types. So, rather than focusing on the inevitable antagonism between replacement workers and strikers, Justices Scalia might have agreed on emphasizing the need for a consistent standard that took into account the different reasons why workers cross picket lines, emphasizing the need for uniformity in this area of the law, or focused on the advantages of a political rather than judicial regulation of these strikebreaking regulations. In any event, Justice Scalia's highly-charged language about the relationship between strikers and replacement workers needlessly burdens the law with cultural partisanship, detracting from its legitimacy.<sup>205</sup>

Justice Marshall could also have chosen a different route in argumentation in support of the no presumption rule in *Curtin Matheson*.

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200. *Id.* at 898–99.

201. *Id.* at 901 (“[A]ppropriate humility does not forbid judges to select an outcome that is likely to be more congenial to one cultural style or another, but only to justify that outcome in terms that avoid cultural partisanship.”).

202. 347 U.S. 483 (1954).

203. See Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1070 (2009) (“Of course judicial rulings on some issues will inevitably offend some people, and judges should not trim simply to avoid offense. In striking down school segregation, the Supreme Court did not trim”). “Trimming,” as Sunstein uses the word, refers to an interpretative strategy whereby judges attempt to “steer between the poles.” *Id.* at 1050.

204. Kahan et al., *supra* note 1, at 901 (“Alternatively, the court can decide the case summarily on some announced basis that doesn't stigmatize the potentially aggrieved subcommunity's view of reality as flawed.”); Sunstein, *supra* note 203, at 1053 (describing judicial trimming as involving “borrow[ing] ideas from both sides in intense social controversies” and as seeking to “preserve what is deepest and most sensible in competing positions”).

205. Kahan et al., *supra* note 1, at 902 (discussing similar “take no prisoners” approach by Justice Scalia in *Scott v. Harris*).

Rather than focusing on what the motivations of replacement workers might have been, he could have just embraced an approach that focused on the policy decision of the NLRB, which already contained indicia of appropriate judicial habits of mind. Indeed, he spends a significant amount of time pointing out that the Court normally defers to interpretations of the Board that are rational and consistent with the NLRA.<sup>206</sup> Perhaps rather than focusing on the subjective sentiments of replacement workers, the Court could have just “emphasized . . . that the NLRB has the primary responsibility for developing and applying national labor policy,”<sup>207</sup> that “a Board rule is entitled to deference even if it represents a departure from the Board's prior policy,”<sup>208</sup> and concluded that because no one knows with certainty whether individual replacement workers support or do not support a union, the Board's approach was one of a number of reasonable ones.<sup>209</sup> This judicial approach would offer the advantage of not having the Justices engage in a cultural debate over the relevant empirical facts about striker replacement workers' motivations. In a word, it would have been a decision full of judicial humility.

In the *Engquist* decision, Chief Justice Roberts could have exercised more humility by not just considering the desires of public employers to have wide latitude to run their workplaces, but also the concerns of a discernible group of public employees and the citizenry at large who depend on these workers to keep government transparent and accountable. Especially in a case like *Engquist* where the jury already rendered a verdict for the plaintiff based on equal protection concerns,<sup>210</sup> Roberts should have thought about what message his decision sent to the various cultural subgroups. Roberts would not have had to change how he ruled but rather could have changed how he talked about the facts in the way that he did rule. Exercising judicial humility in this way, Chief Justice Roberts could have avoided offending millions of public employees by saying, in effect, that they do not have the same equal protection rights as others who come under this foundational provision of the federal Constitution.

All this may feel and sound a little too wishy-washy for some, and one is certainly right to wonder whether this type of debiasing strategy will actually do much good in helping judges overcome their natural cultural

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206. *NLRB v. Curtin Matheson Scientific, Inc.*, 490 U.S. 775, 786 (1990) (“This Court . . . has accorded Board rules considerable deference.”).

207. *Id.*

208. *Id.*

209. Indeed, Justice Marshall already wrote something similar in his opinion: “Although replacements often may not favor the incumbent union, the Board reasonably concluded, in light of its long experience in addressing these issues, that replacements may in some circumstances desire union representation despite their willingness to cross the picket line.” *Id.* at 788.

210. See *Engquist v. Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2159 (2008) (Stevens, J., dissenting) (“The jury's verdict . . . established that there was no rational basis for either treating *Engquist* differently from other employees or for the termination of her employment.”).

biases.<sup>211</sup> As Kahan, Hoffman, and Braman point out in their discussion of the *Scott v. Harris* case, however, this exercise in judicial humility is helpful if for no other reason than that it helps to guide courts away from unnecessary decisions that appear to embrace partisanship and delegitimize the concerns of a group of citizens who come out on the losing end in such cases.<sup>212</sup>

Moreover, recent research on educating judges about their own biases has shown that “more precise techniques in encouraging self-analysis” may be more successful than past debiasing strategies.<sup>213</sup> For instance, one such strategy that would require judges “to consider the opposite” might help them to overcome entrenched thinking that leads to culturally-biased errors.<sup>214</sup> In other contexts, this strategy has proven effective,<sup>215</sup> and there is every reason to believe that judges, most being conscientious seekers of justice, may be receptive to taking seriously social science research which highlights frailties in their own judging behaviors.<sup>216</sup>

Yet no matter how dedicated judges are to this debiasing enterprise, it is beyond cavil, and even beyond what the most idealistic of commentators could contemplate, that unions and management, employers and employees, will continue to be at loggerheads over what arrangements provide the greatest amount of material well-being for society. This persistent state of affairs only means that judges will have to work harder to craft their decisions with appropriate humility and self-awareness. It might be difficult to measure any meaningful progress in judges’ decisions in this

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211. See Levit, *supra* note 17, at 437 (“One concern about debiasing in the realm of legal decisionmaking is that judges might come to have excessive confidence in their own decisional abilities and be resistant to impartiality training.”).

212. Kahan et al., *supra* note 1, at 899.

213. See Levit, *supra* note 17, at 436 (“More recent research in debiasing training demonstrates that more precise techniques in encouraging self-analysis of specific cognitive biases have better prospects of success.”).

214. *Id.* at 436-37 (“This [debiasing] strategy—sometimes referred to in shorthand as ‘consider the opposite’—is based on the idea that a number of cognitive biases are caused by ‘the tendency to neglect contradicting evidence’ and that specific instruction in considering alternative beliefs or positions will minimize the entrenched thinking that leads to both probability and self-serving or motivational errors.”) (citations omitted).

215. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2523-24 (2004) (“Psychologists have repeatedly found that considering the opposite reduces overconfidence, biased information assimilation, biased hypothesis testing, and excessive perseverance of beliefs. This technique is effective because it tears people away from anchors favorable to their own positions and makes contrary anchors more accessible and salient.”). See also Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1256 n.40 (2005) (asking people to consider the opposite “ameliorate[s] the adverse effects of several biases, including the primacy or anchoring effect, biased assimilation of new evidence, biased hypothesis testing, the overconfidence phenomenon, the explanation bias, the self-serving bias, and the hindsight bias.”).

216. See Gregory Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 776 n.197, 777 (2005).

regard empirically,<sup>217</sup> but if judges would take the time to contemplate that “what strikes them as an ‘obvious’ matter of fact might in fact be viewed otherwise by a discrete and identifiable subcommunity,”<sup>218</sup> such a judicial approach could function as a means to take out the more troubling cultural cognition that appears to be at play in many cases across different areas of the law. In the end, by having judges consider the mechanism by which they bring values to bear on legally-consequential facts, they can begin the work of counteracting the message of exclusion associated presently with too many contested legal decisions.

### *B. Expressive Overdetermination and Self-Affirmation*

Another plausible way to overcome biased decisionmaking would be to embrace the theory of expressive overdetermination. Under this theory, laws would be interpreted by judges to forge a pluralistic accommodation of competing worldviews. In this manner, judicial decisions would be fashioned with meanings that are satisfactory simultaneously to hierarchs and egalitarians, individualists and communitarians.<sup>219</sup> Decisions would be stripped “of partisan social meanings . . . by infusing [them] with so many that every cultural group can find affirmation of its worldviews within it.”<sup>220</sup> The reason why this theory works, according to psychological theory, is because it allows individuals to affirm their identity in some aspect of the law.<sup>221</sup>

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217. Edwards & Livermore, *supra* note 5, at 1963 (“It is far from clear . . . that empirical scholars will ever be able to meaningfully measure the effects of cultural cognition on appellate decisionmaking.”). Yet, these same authors appear to concede that cultural biases can be reduced through appellate judges’ deliberations. *Id.* (“[T]he process of deliberation in a collegial environment can reduce the impact of any individual judge’s cultural cognition.”). However, I believe Edwards and Livermore overstate their case when they continue by saying, “it is likely the case that judicial deliberations often will counter any effects of cultural cognition.” *Id.* That would seem to depend on many factors, including the strength of the cultural commitments of the individual judges. As a result, cultural bias among judges even in the most deliberative of bodies will most likely continue to play a substantial role. On the other hand, to the extent that appellate judges practice humility in their opinion writing, I do not see why subconscious cultural biases cannot be substantially curtailed.

218. Kahan et al., *supra* note 1, at 905.

219. Kahan, *supra* note 15, at 146.

220. *Id.* at 145. The concept of expressive overdeterminism finds resonance with Sunstein’s idea of “trimming.” See Sunstein, *supra* note 203, at 1053.

221. Sunstein, *supra* note 203, at 1070 (“Trimmers try to reach results that can be accepted or at least not rejected by people with disparate self-understandings and different foundational commitments. The hope is that trimming can obtain support for people from different ‘cultures.’”). See also Kahan, *supra* note 15, at 148-49 (“[S]o long as [individuals] can see evidence that the law in fact affirms their outlooks, they do not demand that the law be framed in a way that denies persons of an opposing cultural persuasion the opportunity to experience the same sense of affirmation.”). In this regard, social psychologist Geoffrey Cohen and his cohorts have demonstrated that providing information to people that raises their self-esteem allows them to take a position on an issue



Let's consider how this approach would play out with the cases studied in this Article. In *Curtin Matheson*, Justices Marshall and Scalia differed on the meaning of legally consequential facts about why permanent replacement workers cross the picket line. Justice Marshall focused on a myriad of possible reasons and decided that a no-presumption rule concerning whether these workers were pro- or anti-union made the most sense. Justice Scalia, for his part, focused on the antagonism between replacement workers and unions as a result of the many ways in which unions work for the advancement of strikers over replacement workers.

Drafting a legal opinion which affirmed the values of the dissenting Justices might have made the disagreement in *Curtin Matheson* less dramatic. By utilizing expressive overdetermination, Justice Marshall could have continued to discuss the many reasons why workers might choose to cross the picket line, while equally giving credence to the antagonism theory advanced by Justice Scalia. Because the standard of whether to follow the NLRB in such cases is whether the agency interpretation is consistent with the Act, perhaps Justice Marshall could have emphasized more of the posture in which the Court reviews such cases.<sup>222</sup> He could have even said that he might well agree with Justice Scalia in some instances about the endless antagonism between the union and replacement workers, but there is enough evidence to support the Board's no-presumption, policy-based rule in this case.

To be clear, I will be the first to admit that such an expressive overdetermination approach might not work well with judges who are ideologically committed to their way of looking at the world.<sup>223</sup> But perhaps through this technique, other judges in an appellate setting might be moved and provide more consensus for the majority opinion or be more successful in counseling moderation to their colleague.<sup>224</sup> Of course, this is all sheer speculation, but there would not appear to be any harm in attempting to draft the opinion in a way that allows deliberating judges to come to greater agreement.

As far as *Engquist*, an expressively overdetermined decision would attempt to not only address the disparate concerns of a Chief Justice Roberts and Justice Stevens, but might conclude the opinion by focusing on an

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that is at odds with their normal cultural group. See Geoffrey L. Cohen, Joshua Aronson & Claude M. Steele, *When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1151 (2000). See also generally David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 119 (2002).

222. See *supra* notes 207-209 and accompanying text.

223. See Edwards & Livermore, *supra* note 5, at 1964 ("There may be some judges who care little about their colleagues' views and who are determined not to engage in collegial interactions. However, they are not in the majority.").

224. See *id.* ("During the course of judicial deliberations, judges more often than not persuade one another until a consensus is reached.").

overarching principle to which both sides would seem likely to agree. One of the parts missing from Justice Stevens' dissent, in my opinion, was some acknowledgment of the role that public employees play in keeping the government honest.<sup>225</sup> The mantra "government of the people, by the people, for the people,"<sup>226</sup> means that these public employees are the vanguard of the citizenry;<sup>227</sup> they alert other citizens to issues of fraud, waste and abuse in government. Clearly, if such employees do not have meaningful legal redress because their equal protection rights have been drastically reduced, not just the public employees suffer, but all Americans.<sup>228</sup>

So, Chief Justice Roberts could have written an expressively overdetermined opinion while keeping his current legal arguments about past case precedent, the nature of government employment, and the importance of public employment at will. But expressive overdeterminism would have then counseled Roberts to concede some validity to Justice Steven's evidence about the current lack of class-of-one claims. Roberts might have highlighted the importance in a republican form of government of ensuring that those who work for the government can report to fellow citizens without fear of retribution. With that principle as the backdrop, he might have continued that it was still appropriate to eliminate rational basis equal protection review from public employees for claims of irrational government behavior because such a principle would not in fact substantially undermine this important principle of republican government. By taking this tact, at least, he would have permitted Justice Stevens, and those who agree with him, to affirm their communitarian values by discussing the needs of a vigilant public workforce to maintain transparent and accountable governments. An expressively overdetermined opinion would not only define those realities of the workplace in the terms of the employees needs, but also in terms of the needs of public employees and the

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225. See Norton, *supra* note 163, at 4 ("Courts' unblinking deference to [government employer] assertions . . . frustrates a meaningful commitment to republican government because it allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters' views and facilitate their ability to hold the government politically accountable for its choices.").

226. The phrase, oft-repeated, comes from President Lincoln's Gettysburg Address. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *available at* <http://showcase.netins.net/web/creative/lincoln/speeches/gettysburg.htm> ("[T]hat we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth.").

227. See Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 144 (2008) (contending that current state of federal employee free speech rights has taken away from the three million federal employees of the United States the ability to be the vanguard of the citizenry).

228. Norton, *supra* note 163, at 7 ("[G]overnment's expansive claims to control public employees' expression mark a disturbing trend that imperils not only free speech rights of more than twenty million government workers, but also the public's interest in transparent government.").

larger citizenry to allow those who cherish communitarian values to find affirmation of their values in his opinion.<sup>229</sup> This balancing approach to these issues would have also been consistent with what Chief Justice Roberts himself suggests is required in these types of cases.<sup>230</sup>

Now, this is not to say that expressive overdeterminism always supports an ad-hoc test as in *Curtin Matheson* or a balancing test as I propose in *Engquist*. Even in a bright-line rule case, a court could fashion an analysis which seeks to illuminate how different types of values are embraced by the legal rule. Moreover, I do not mean to suggest that the more progressive or liberal judicial views will be necessarily advanced by this theory. Instead, the hope is whether a conservative or liberal judge, or a mixed panel of appellate judges, is writing the majority opinion, the decision can be written in a way that bears “a plurality of meanings,” so that it “relieve[s] both sides [of the dispute] of the anxiety that the state was taking sides in a cultural dispute.”<sup>231</sup>

One additional point: expressive overdeterminism might make disingenuous, outcome-determinative reasoning in judicial opinions happen less often. By showing how a legal interpretation considers the concerns of various cultural viewpoints, it would permit judicial decisionmakers to write forthrightly about how a legal interpretation expresses meanings distinctive of their own values.<sup>232</sup> Simultaneously, this approach would keep the decisionmaker from “insist[ing] that the promotion of secular aims--such as avoidance of harm or the production of societal wealth--motivates their advocacy independently of any understanding of how a law or policy coheres with their visions of an ideal society.”<sup>233</sup> In this manner, expressive overdetermination, which capitalizes on ideas of individual self-affirmation, could provide a powerful tool in toning down the rhetoric and the overheated disagreements, which are all-too-frequent in not only labor and employment law cases, but also in many other types of cases.

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229. See *id.* at 14. Accord William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means For Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 69–70 (2009) (“*Engquist* . . . pretermits any such case-by-case balancing by concluding that equal protection class-of-one rights simply do not apply in the workplace context . . . . The result reflects yet another instance of the Court deciding on a categorical basis the outcome of a balancing test that includes constitutional interests on both sides.”).

230. *Engquist v. Oregon Dep’t of Agric.*, 128 S. Ct. 2146, 2152 (2008) (“Although government employees do not lose their constitutional rights when they accept their positions, those rights must be *balanced* against the realities of the employment context.”) (emphasis added).

231. Kahan, *supra* note 15, at 147.

232. *Id.* at 146.

233. *Id.* To be clear, “expressive overdetermination can’t ‘debias’ [individuals], at least not in the sense of liberating them . . . from their cultural identities as they make sense of the world.” *Id.* at 152. But the theory “can reduce the incidence of culturally grounded disagreement over policy.” *Id.*

## CONCLUSION

The theory of cultural cognition provides a more satisfying explanation than ideologically-driven theories about how hotly-contested cases are decided by judges with different cultural worldviews because it focuses on the mechanism by which values impact judicial decisionmaking. Believing that cultural cognition theory provides the best explanation, this Article suggests some strategies for ridding judicial opinions of cognitive illiberalism, especially in the area of labor and employment law.

In so doing, I hope that cultural cognition theory will help reclaim legitimacy for the judicial function, while simultaneously focusing future scholarly energies on how to counteract biased decisionmaking at its root causes. Indeed, the very act of having judges work in good faith to counteract messages of exclusion associated presently with many labor and employment law decisions would be a major step toward diminishing cognitive illiberalism in these types of cases.