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THE SUPREME COURT  
2010 TERM

FOREWORD:  
NEUTRAL PRINCIPLES, MOTIVATED COGNITION,  
AND SOME PROBLEMS FOR CONSTITUTIONAL LAW

*Dan M. Kahan*

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*Why is the “neutrality” of Supreme Court decisionmaking a matter of persistent political disagreement? What should be done to mitigate such conflict? Once the predominant focus of constitutional law scholarship, efforts to answer these questions are now widely viewed as evincing misunderstandings of what can be coherently demanded of theory and realistically expected of judges. This Foreword attributes the Court’s “neutrality crisis” to a very different form of misunderstanding. The study of motivated reasoning (in particular, cultural cognition) shows that individuals are predisposed to fit their perceptions of policy-relevant facts to their group commitments. In the course of public deliberations, these facts become suffused with antagonistic meanings that transform utilitarian policymaking into occasions for symbolic status competition. These same dynamics, this Foreword argues, make constitutional decisionmaking the focus of status competition among groups whose members are unconsciously motivated to fit perceptions of the Court’s decisions to their values. Theories of constitutional neutrality do not address the distinctive cognitive groundings of this form of illiberal conflict; indeed, they make it worse by promoting idioms of justification, in Court opinions and public discourse generally, that reinforce the predisposition of diverse groups to attribute culturally partisan aims to those who disagree with them. Just as the divisive effects of motivated reasoning on policy deliberations can be offset by science communication techniques that avoid selectively threatening any group’s cultural worldview, so public confidence in the Supreme Court’s neutrality can be restored by the Court’s communication of meanings that uniformly affirm the values of culturally diverse citizens.*

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These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. It was proper for the three-judge court to rely on the testimony of prison officials from California and other States. Those experts testified on the basis of empirical evidence and extensive experience in the field of prison administration.

— *Brown v. Plata*<sup>1</sup>

[T]he idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs about penology and recidivism. And *of course* different district judges, of different policy views, would have “found” that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make “factual findings” without inserting their own policy judgments, when the factual findings *are* policy judgments.

— Justice Scalia, dissenting in *Brown v. Plata*<sup>2</sup>

I find it hard to think the judgment really turned upon the facts.

— Herbert Wechsler,<sup>3</sup> on *Brown v. Board of Education*<sup>4</sup>

I argue that the . . . [contending] substantive theories [of constitutional interpretation] are all internally contradictory, at least beyond a narrow range of applications. If that argument is correct, neutral application is again an empty concept, for anything can be derived from a contradiction.

— Mark Tushnet,<sup>5</sup> on “neutral principles” in constitutional law

To be sure, given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance, a point that has been clear from the founding era to modern times. But invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important.

— *McCreary County v. ACLU of Kentucky*<sup>6</sup>

<sup>1</sup> 131 S. Ct. 1910, 1942 (2011).

<sup>2</sup> *Id.* at 1954 (Scalia, J., dissenting).

<sup>3</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

<sup>4</sup> 347 U.S. 483 (1954).

<sup>5</sup> Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 806 n.68 (1983).

<sup>6</sup> 545 U.S. 844, 876 (2005) (citations omitted).

## INTRODUCTION: THE NEUTRALITY CRISIS

The United States Supreme Court is an institution in crisis. By constitutional design and tradition, the Court plays the role of neutral arbiter, enforcing the state's obligations to count every citizen's preference in the democratic-lawmaking calculus but to refrain from imposing a collective vision of the best way to live. The Court's own impartiality, however, is a matter of pervasive doubt. The Left and the Right take turns assailing shifting coalitions of Justices for partisan "activism."<sup>7</sup> Leading scholars use empirical methods to prove that individual Justices' political-party affiliations better explain their votes than does their fidelity to any formal sources of law.<sup>8</sup> The Justices themselves, once unified in their commitment to protecting the Court's reputation for impartiality,<sup>9</sup> now regularly denounce one another in acrid dissents that corroborate the popular indictment of the Court as a partisan body.<sup>10</sup>

Popular concern over the Court's neutrality is not new. On the contrary, it is a recurring theme in our political history, one that reflects tensions inherent in the institution of judicial review in a liberal democracy. The two decisions that figure most consequentially in that anxiety today — *Brown v. Board of Education*<sup>11</sup> and *Roe v. Wade*<sup>12</sup> — are many decades old. The most ambitious and celebrated exercises of constitutional theorizing of the last generation — from Bickel's "pas-

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<sup>7</sup> Compare Wendy E. Long, Op-Ed., *President's Choice*, WASH. TIMES, Oct. 10, 2008, at A27 ("The Court continues to be largely a liberal activist bench . . . Justice Kennedy is a liberal judicial activist — for example, deciding that homosexual sodomy is a 'right' protected by the Constitution and that the crime of raping children can never be punished by the death penalty, and relying frequently on international and foreign laws to trump American law."), with *Nomination of Elena Kagan to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2d Sess. June 28, 2010) (statement of Sen. Al Franken), available at [http://web.lexis-nexis.com/congcomp/document?\\_m=9a75ddc62821a81c1232d5cabed14281](http://web.lexis-nexis.com/congcomp/document?_m=9a75ddc62821a81c1232d5cabed14281) ("[T]here is such a thing as judicial activism. There is such a thing as legislating from the bench. And it is practiced repeatedly by the Roberts court, and it has cut in only one direction, in favor of powerful corporate interests and against the rights of individual Americans.").

<sup>8</sup> See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT* 128–29 (2005); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 110–14 (2002).

<sup>9</sup> See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 683–96 (rev. & expanded ed. 2004) (describing how the *Brown* opinion was crafted to achieve the unanimity thought necessary to conserve the authority of the Court in ordering desegregation).

<sup>10</sup> See Philip Allen Lacovara, *Un-Courtly Manners: Quarrelsome Justices Are No Longer a Model of Civility for Lawyers*, A.B.A. J., Dec. 1994, at 50, 50 ("Recent opinions by the justices often are peppered with accusations that statements by colleagues are 'simplistic,' 'facile,' 'not rational,' 'misleading' or 'just not true.'")

<sup>11</sup> 347 U.S. 483 (1954).

<sup>12</sup> 410 U.S. 113 (1973).

sive virtues”<sup>13</sup> to Ely’s “representation reinforcement”<sup>14</sup> to Dworkin’s “moral reading” of the Constitution<sup>15</sup> to Bork’s and Scalia’s “originalism”<sup>16</sup> — all came into being to address this discontent, which was itself triggered by Wechsler’s seminal *Toward Neutral Principles of Constitutional Law*.<sup>17</sup>

But there is something different now: a widespread sense of futility, and even cynicism. We take for granted that “shaping the Court” is part and parcel of the major parties’ political agendas — at issue not just in elections of presidents, but also in the everyday operation of the Senate, which routinely blocks appointment of lower court nominees whose potential elevation to the Court might decisively shift its ideological balance.<sup>18</sup> Professions of “impartiality” ritualistically extracted from Supreme Court nominees in their confirmation hearings are contemptuously jeered as theater. Chief among the deriders, moreover, are constitutional theorists,<sup>19</sup> who have turned from constructing “grand constitutional theories” to deconstructing them.<sup>20</sup> The expectation of neutrality, in sum, is thought to reflect a confused understanding of what can be accomplished by constitutional theory and a naïve view of what can be expected from individual Justices and the political actors responsible for appointing them.

The nature of this crisis is subtle but insidious. To be sure, no torch-wielding mob is assembled outside the gate of the Supreme

<sup>13</sup> See Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 77 (1961).

<sup>14</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73–103 (1980).

<sup>15</sup> See RONALD DWORKIN, *FREEDOM’S LAW* (1996).

<sup>16</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143–86 (1990); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–4, 17 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

<sup>17</sup> Wechsler, *supra* note 3.

<sup>18</sup> See, e.g., Carl Hulse, *G.O.P. Blocks Judicial Nominee in a Sign of Battles to Come*, N.Y. TIMES, May 20, 2011, at A16 (discussing successful Republican filibuster of an Obama nominee to the Court of Appeals for the Ninth Circuit).

<sup>19</sup> See, e.g., Louis Michael Seidman, Comment to *The Sotomayor Nomination, Part II*, FEDERALIST SOC’Y, <http://www.fed-soc.org/debates/dbtid.30/default.asp> (last visited Oct. 2, 2011):

I was completely disgusted by Judge Sotomayor’s testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified. How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate — that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. . . . What does it say about our legal system that in order to get confirmed Judge Sotomayor must tell the lies that she told today?

<sup>20</sup> The “grand theory” label is from MARK TUSHNET, *RED, WHITE, AND BLUE* 1 (1988). Tushnet is arguably the most creative and aggressive critic of the Wechslerian “neutral principles” project.

Court. Most people cannot name a Justice or identify even a single decision with which they disagree.<sup>21</sup>

But in the atmosphere that sustains a liberal democratic regime, the doubt that now surrounds the Supreme Court is a kind of toxin. The most fundamental form of individual freedom that liberal constitutionalism secures for its citizens depends on the promise that government won't impose legal obligations that presuppose adherence to a moral or political orthodoxy.<sup>22</sup> It is only because citizens are assured that their laws are confined to pursuit of secular goods — ones open to enjoyment by persons of all cultural and moral outlooks — that they can view their assent to legal duties as consistent with their freedom to pursue happiness on terms of their individual choosing.<sup>23</sup> Yet ordinary individuals cannot *know*, or be reasonably expected to know, whether the myriad laws that govern their lives pass this test; they must depend on readily available and credible signs to be confident that the promise of liberal constitutionalism is being kept. All citizens in a democracy live with the risk that the law will at some point take a position that profoundly disappoints them. In a political culture devoid of the cues that would enable them to find evidence of the law's neutrality in that circumstance, citizens necessarily lack the resources required to reconcile their moral autonomy with their duty to obey the law.

In this Foreword, I want to outline a program for replenishing these resources. The first and most critical step is to recognize the environmental conditions that are depleting them. The source of the neutrality crisis, I will argue, has less to do with the inherent limits of theory or the inherently partisan outlooks of judges than with the vulnerability of pluralistic democracies to a peculiar and divisive form of collective misunderstanding. Scholars and jurists have focused their attention entirely on the content of doctrines, I will argue, without attention to the social-psychological dynamics that shape how culturally diverse groups form impressions of what the Court's decisions mean. As a result of this mismatch, rules and styles of decisionmaking self-consciously designed to assure (and furnish reassurance of) neutrality not only fail, but often perversely magnify partisan contestation over constitutional law.

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<sup>21</sup> See David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y Q. 405, 407 (1983) (citing finding that only half of respondents to national survey could identify a single Supreme Court decision); Tanya Roth, *FindLaw Survey: Can You Name the Supreme Court?*, LAW AND DAILY LIFE (June 2, 2010, 9:42 AM), [http://blogs.findlaw.com/law\\_and\\_life/2010/06/findlaw-survey-can-you-name-the-supreme-court.html](http://blogs.findlaw.com/law_and_life/2010/06/findlaw-survey-can-you-name-the-supreme-court.html) (reporting that only 35% of respondents in national survey could name a Justice).

<sup>22</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .").

<sup>23</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* 134–35 (1993).

My account centers on a collection of psychological mechanisms associated with the phenomenon of *motivated reasoning*.<sup>24</sup> Motivated reasoning refers to the tendency of people to unconsciously process information — including empirical data, oral and written arguments, and even their own brute sensory perceptions — to promote goals or interests extrinsic to the decisionmaking task at hand. When subject to it, individuals can be unwittingly disabled from making dispassionate, open-minded, and fair judgments. Moreover, although people are poor at detecting motivated reasoning in themselves, they can readily discern its effect in others, in whom it is taken to manifest bias or bad faith. Accordingly, in collective deliberations, motivated cognition can trigger a self-reinforcing atmosphere of distrust and recrimination that prevents culturally diverse participants from converging on outcomes that suit their common ends.

Such dynamics have been studied in a variety of law- and policy-making domains. Disputes over issues such as climate change, gun control, and the vaccination of schoolgirls against HPV — among others — feature disagreements between citizens of diverse cultural values. Members of these groups actually agree about policy ends: the promotion of the health, safety, and prosperity of themselves and their communities. What they disagree about are empirical facts — the magnitude of various risks, the efficacy of policies for mitigating them, and the like — evidence of which they are unconsciously impelled to fit to their group commitments.<sup>25</sup> But as each side accuses the other of deceit and rationalization, the issue of *whose* view of the facts will be endorsed by the law takes on added meaning as evidence of the groups' relative social standing. The result is a distinctive *cognitive* form of illiberalism: a divisive form of status competition originating not in any group's ambition to impose a partisan vision of the good on another but rather in the common vulnerability of all of them to motivated reasoning on empirical issues relevant to their common interests.<sup>26</sup>

The same dynamics, I will argue, routinely subvert the aim of neutrality in constitutional decisionmaking. There is broad societal consensus in support of the liberal principles that animate constitutional rights.<sup>27</sup> Citizens' perceptions of what outcomes these principles

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<sup>24</sup> See generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

<sup>25</sup> See generally Dan Kahan, *Fixing the Communications Failure*, 463 NATURE 296 (2010).

<sup>26</sup> See generally Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).

<sup>27</sup> See generally MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005) (examining data suggesting that the American public is generally supportive of liberal values and more interested in economic issues than in imposing cultural values by law); James A. Davis, *On the Seemingly Relentless Progress in Americans' Support for Free Expression, 1972–2006* (National Opinion Research Cen-

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should yield in particular cases, however, are subject to motivated cognition just as their perceptions of risk and other policy-relevant facts are. The Court's own practice of reasoned justification does not dispel this tendency; on the contrary, it inflames it. Like empirically grounded arguments in political discourse, the Court's doctrines and reasoning style feature the emphatic and self-conscious invocation of "objective" or "neutral" grounds for decision. Decisionmaking standards that have this quality, research shows, tend to enhance unconscious indulgence of extrinsic influences, including partisan cultural values. Such standards also *amplify* suspicion and resentment, not only because they disavow partisan intentions with a degree of adamance that lacks credibility, but also because they evince a form of rectitude that implies bias or self-delusion on the part of those who see things otherwise. Against this background, the neutrality of Supreme Court decisions becomes just another focus of illiberal status competition among groups who have fundamentally different visions of the good society — but who *don't* disagree about the value of neutrality or about what neutrality in law requires.

By identifying the role of motivated reasoning in conflicts over constitutional law, I am hoping not just to enlarge comprehension of the pathologies that make the Court a polarizing institution, but also to sharpen the focus of efforts to treat them. The study of motivated cognition in political and regulatory settings has identified strategies for counteracting its tendency to provoke cycles of distrust and defensive competition among groups who subscribe to competing moral outlooks. These strategies suggest the possible utility of a range of potential reforms in constitutional decisionmaking. The adoption of them, and others that empirical investigation might identify, would require important adjustments in how courts justify their decisions. But these reforms are not themselves without antecedents in our practices and history or otherwise inimical, in my view, to the sensibilities of the actors whose actions and words most decisively shape the law's professional norms.

The neutrality crisis *is* tractable. The way to resolve it, however, is not to construct a better constitutional theory; it is to equip constitutional practice with a more psychologically sophisticated understanding of how cultural meanings influence diverse citizens' perceptions of the law and how the Court's decisionmaking interacts with those meanings.

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ter, GSS Social Change Report No. 52, 2008), available at [http://publicdata.norc.umd.edu/gss/DOCUMENTS/REPORTS/Social\\_Change\\_Reports/SC52.pdf](http://publicdata.norc.umd.edu/gss/DOCUMENTS/REPORTS/Social_Change_Reports/SC52.pdf) (describing persistently high and persistently increasing levels of support across demographic groups for free speech and related principles of toleration).

I will present my account in several steps. Part I presents necessary background: the project to secure “neutral principles” by constitutional theorizing, the basic operation of motivated reasoning and related dynamics, and the potential for perverse interactions between the two. Part II presents concrete illustrations. My discussion will draw primarily, but not exclusively, on cases from the Court’s most recent (October 2010) Term.

Part III turns to remedies. The discussion takes the form of pragmatic conjecture on how techniques shown to mitigate motivated reasoning in other settings might be profitably adapted to constitutional decisionmaking. The actual utility of these and any other possible responses must be tested — by scholars employing the appropriate empirical methods to verify their effects, and by judges willing to make the best practical judgments about what might work in the meantime.

The devices I will describe reflect insights that are admittedly too formative to be expected to dispel the Court’s neutrality crisis on their own. But in order to commence the process of rational inquiry and experimentation that *can* realistically be expected to restore a culture of confidence in the Court, steps no more ambitious than these are necessary.

## I. INTERNAL CONTRADICTIONS OR PLURALISTIC IGNORANCE?

The debate over “neutral principles” of constitutional law is familiar to constitutional theorists. The phenomenon of motivated reasoning is not. In this Part, I juxtapose the two in a manner that allows me to describe with more precision the claims I want to make about the origins of the neutrality crisis and about the potential solutions to it.

### A. *Constitutional Theory and Neutrality*

It has become commonplace in constitutional theory to regard “neutrality” as lacking the analytical cohesion or power necessary to exclude reliance on contentious values in constitutional decisionmaking. Part of my argument is that the neutrality crisis, as I have described it, does not originate in such a deficiency.

I won’t attempt to accomplish that end, though, by offering a full-blown theory of constitutional neutrality capable of surviving such a critique. On the contrary, I want to suggest that the attempt to construct such a theory reflected a kind of historical mistake about exactly what the problem was. In what sense it was a mistake will emerge more clearly over the course of the argument; my goal now is just to conjure the sustained effort to secure “neutrality” by means of constitutional theorizing.

This project started in 1959. That was the year in which Herbert Wechsler delivered the Holmes Lecture subsequently published in the *Harvard Law Review* as *Toward Neutral Principles of Constitutional*

*Law*,<sup>28</sup> arguably the most influential article on constitutional law ever written — not so much for what it said as for what motivated Wechsler to say it and what impact his argument had in initiating a period of grand constitutional theorizing.<sup>29</sup>

The first part of Wechsler's lecture purported to derive judicial review from the text of the Supremacy Clause.<sup>30</sup> Wechsler's object was to rebut a critique presented by Judge Learned Hand in the same lecture the year before.<sup>31</sup>

Having established to his satisfaction that "courts cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution,"<sup>32</sup> Wechsler turned to what he regarded as the necessarily more critical question: "[W]hat, if any, are the standards to be followed in interpretation?"<sup>33</sup> The answer must have struck listeners as almost banal. "I put it to you," Wechsler pronounced, "that the main constituent of the judicial process is precisely that it must be genuinely principled."<sup>34</sup> "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result . . ."<sup>35</sup> To test whether a principle possesses "adequate neutrality and generality,"<sup>36</sup> then, it must be assessed not just by the acceptability of the outcome it produces in the case at hand, but also by the acceptability of those it would produce in "other cases, preferably those involving an opposing interest."<sup>37</sup> Only by adhering to neutral principles of this sort, Wechsler concluded, could a court equipped with the authority to overturn democratically enacted legislation "function otherwise than as a naked power organ."<sup>38</sup>

What certainly did not strike Wechsler's listeners as banal — what shocked them — was his conclusion that the Supreme Court's decision five years earlier in *Brown v. Board of Education*<sup>39</sup> did not pass his "neutral principles" test. Wechsler chastised the Court for basing its

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<sup>28</sup> Wechsler, *supra* note 3.

<sup>29</sup> See TUSHNET, *supra* note 20, at 1–3.

<sup>30</sup> Wechsler, *supra* note 3, at 2–10.

<sup>31</sup> See LEARNED HAND, *THE BILL OF RIGHTS* (1st ed. 1958). This part of Wechsler's lecture, too, has been the focus of lively and ongoing scholarly debate. See generally Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 93–96 (2003) (reviewing scholarly debate surrounding Wechsler's Supremacy Clause claim).

<sup>32</sup> Wechsler, *supra* note 3, at 10.

<sup>33</sup> *Id.* at 10–11.

<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 19.

<sup>39</sup> 347 U.S. 483 (1954).

decision to overrule *Plessy v. Ferguson*'s<sup>40</sup> “separate but equal” doctrine on expert proof of the “deleterious effects [of segregated schools] upon . . . colored children in implying their inferiority, effects which retard their educational and mental development.”<sup>41</sup> “Does the validity of the decision turn then on the sufficiency of evidence or of judicial notice to sustain a finding that the separation harms the Negro children who may be involved?”<sup>42</sup> Wechsler asked. “And if the harm that segregation worked was relevant, what of the benefits that it entailed: sense of security, the absence of hostility? Were they irrelevant?”<sup>43</sup> Or how about other communities with different facts: “Suppose that more Negroes in a community preferred separation than opposed it? Would that be relevant to whether they were hurt or aided by segregation as opposed to integration?”<sup>44</sup> “I find it hard to think,” Wechsler complained, that “the judgment really turned upon the facts.”<sup>45</sup>

Denunciations began to pour forth immediately, and have continued to this day, from commentators only too happy to help Wechsler find a principle for *Brown* that could satisfy his undemanding test.<sup>46</sup> “What, on the score of generality and neutrality,” Alexander Bickel asked, “is wrong with the principle that a legislative choice in favor of a freedom not to associate is forbidden, when the consequence of such a choice is to place one of the groups of which our society is constituted in a position of permanent, humiliating inferiority . . . ?”<sup>47</sup> Wechsler’s anxiety, we are being assured, can be written off as a symptom of moral obtuseness.

But this line of criticism was not (and still isn’t) genuinely responsive to Wechsler’s objection to *Brown*. Wechsler recognized that various neutral principles, including the very one Bickel had identified, could have supported the decision; his complaint was that the Court had failed to articulate any of them.<sup>48</sup> The Court had decided to emphasize an empirically grounded claim of harm, Wechsler inferred, so

<sup>40</sup> 163 U.S. 537 (1896).

<sup>41</sup> Wechsler, *supra* note 3, at 32.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 33.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See generally Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Pamela S. Karlan, Lecture, *What Can Brown® Do for You? Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049 (2009). For a further description of various retorts to Wechsler, see Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 514–15 (1997).

<sup>47</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 57 (2d ed. 1986).

<sup>48</sup> See Wechsler, *supra* note 3, at 33 (“Rather, it seems to me, [*Brown*] must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.”).

that it would not be bound to apply its undisclosed principle in cases in which it would produce a less palatable outcome.<sup>49</sup> For Wechsler, being neutral was all about being evenhanded in *applying* the law.

The inference that the Court was being evasive in *Brown* didn't strike even Wechsler's critics as implausible. Bickel fashioned his theory of the "passive virtues" — a systematization of various doctrines of decisionmaking avoidance — to justify prudential nonapplication of *Brown*'s latent equality principle to social institutions, including miscegenation laws, that it would be impolitic, Bickel assumed, for the Court to attack.<sup>50</sup> The same decision-evasion strategy could be used to permit the Court to look the other way should there be challenges to affirmative action programs; Bickel apparently agreed that affirmative action could not pass muster under any "neutral" equality principle,<sup>51</sup> and later in his life he implored the Court to declare such programs unconstitutional.<sup>52</sup> Accordingly, Bickel's response to Wechsler's anxiety over *Brown* was more or less to concede that a "general" principle *needn't* be applied neutrally — a startling repudiation of the part of Wechsler's lecture that might have been thought to be so obvious as to be almost vapid.<sup>53</sup>

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<sup>49</sup> See *id.* at 33–34 (noting questions that the Court avoided having to answer or tip its hand on); see also Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 986 (1978) ("[Wechsler's] main concern is with judicial craftsmanship and its relation to judicial decision. His primary argument is that the Court has not actually offered grounds for decision that pass the test of neutrality.").

<sup>50</sup> See Bickel, *supra* note 13, at 77 (identifying the Court's prudential avoidance of enforcing any general equality principle from *Brown* as explaining why "antimiscegenation statutes are yet allowed to exist"); see also Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 52 n.239 (1996) (identifying the Court's dismissal of miscegenation cases as an instance of prudential minimalism). In contrast, Wechsler in his Holmes Lecture rebuked the Court for having dodged the miscegenation issue by dismissing an appeal — exactly the sort of unprincipled strategic evasion that Bickel would later heartily endorse. See Wechsler, *supra* note 3, at 34 ("I take no pride in knowing that in 1956 the Supreme Court dismissed an appeal in a case in which Virginia nullified a marriage on this ground, a case in which the statute had been squarely challenged by the defendant, and the Court, after remanding once, dismissed per curiam on procedural grounds that I make bold to say are wholly without basis in the law."). Had the Court in *Brown* candidly endorsed a "freedom of association" rationale, it likely would not have been able to run away from the miscegenation fight, Wechsler suggested. See *id.*

<sup>51</sup> See Bickel, *supra* note 13, at 77.

<sup>52</sup> See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) ("The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is being gored.").

<sup>53</sup> See Mark DeW. Howe, Book Review, 77 HARV. L. REV. 579, 580 (1964) (reviewing BICKEL, *supra* note 47) ("The somewhat startling result of this effort in persuasion is that Professor Bickel, the ardent defender of the *School Segregation Cases*, at the conclusion of his expedition stands at a point not far distant from that occupied by Judge Hand.").

John Hart Ely's grand theory, in contrast, *was* fully responsive to Wechsler's despair. Drawing on the famous "footnote four" of *United States v. Carolene Products Co.*,<sup>54</sup> Ely identified "representation reinforcement" as the meta-neutral principle of constitutional law.<sup>55</sup> On this view, enforcement of constitutional rights is conceived of as a remedy for the lack of opportunity that "discrete and insular minorities" have to invoke the "political processes which can ordinarily be expected" to assure a fair balancing of benefits and burdens in a democratic society.<sup>56</sup> Ely saw representation reinforcement as simultaneously warranting judicial invalidation of school segregation and other laws that disadvantage African Americans, a discrete and insular and indeed historically disadvantaged minority, and judicial *validation* of affirmative action programs, the burdens of which are borne by whites, who are *not* insular, discrete, or disadvantaged and who thus *can* protect themselves by democratic means.<sup>57</sup> What's more, in Ely's dexterous hands, representation reinforcement became an interpretive lodestone for giving content to all manner of constitutional rights, the requirements of which can be tailored to remedy structural political deficits in majoritarian incentives to value one or another form of liberty.<sup>58</sup> At one and the same time, then, Ely's theory identified a neutral heuristic for deriving rules that could be neutrally applied, without embarrassment, by courts to enforce the state's compliance with *its* duty to treat citizens neutrally.

By the time Ely wrote, however, the neutrality anxiety had a new object: *Roe v. Wade*.<sup>59</sup> Echoing Wechsler, Archibald Cox wrote, "my criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment."<sup>60</sup>

This was Ely's criticism, too. The right to abortion identified by *Roe*, he declared, "is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the na-

<sup>54</sup> 304 U.S. 144 (1938).

<sup>55</sup> See ELY, *supra* note 14, at 88 (discussing the "representation-reinforcing approach to judicial review"); see generally *id.* at 73–104.

<sup>56</sup> *Carolene Prods.*, 304 U.S. at 152–53 n.4.

<sup>57</sup> See ELY, *supra* note 14, at 170–71; see also John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974). Junior Yale law professor Louis Pollak's now-classic response to Wechsler also drew on *Carolene Products*'s footnote four. See Pollak, *supra* note 46, at 27.

<sup>58</sup> See, e.g., ELY, *supra* note 14, at 97 (furnishing "representation reinforcement" conceptions of the Fourth Amendment's Search and Seizures Clause, the Fifth Amendment's Takings Clause, and the Eighth Amendment's Cruel and Unusual Punishment Clause).

<sup>59</sup> 410 U.S. 113 (1973).

<sup>60</sup> ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113 (1976), quoted in ELY, *supra* note 14, at 212 n.57.

tion's governmental structure."<sup>61</sup> He scoffed at the idea that the decision could be justified under his representation reinforcement theory.<sup>62</sup> However much judicial solicitude women might be due on account of historical disadvantage and underrepresentation (Ely defended some intermediate level of equal protection scrutiny for gender discrimination<sup>63</sup>), they surely were due less than *fetuses*: "I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer."<sup>64</sup>

Frustration over the nonneutrality of *Roe* and the Court's "privacy" jurisprudence more generally produced various species of "interpretivist" theories.<sup>65</sup> Identifying the text and intentions of the Framers as the sole legitimate guides to constitutional interpretation, these theories crossbred and evolved into the "original intent" position now associated with Justice Scalia.<sup>66</sup>

A critical step along the way came from Bork's *Neutral Principles and Some First Amendment Problems*.<sup>67</sup> The title of Bork's now-infamous paper — itself delivered as a lecture — self-consciously harkened back to Wechsler's. Nevertheless, Bork put part of the blame for the missteps that had by that point taken the Court to *Griswold v. Connecticut*<sup>68</sup> (and would in two years' time lead it to *Roe*) on the incompleteness of Wechsler's position. "We have not carried the idea of neutrality far enough,"<sup>69</sup> he explained. "[T]he requirement laid down by Professor[] Wechsler" — that the outcome of a case be explicitly tied to a more general principle to which the court is willing to bind itself in future cases — leaves judges free to pick principles reflecting their "own values"<sup>70</sup> and hence to disregard the "community judgment[s] embodied in" legal rules.<sup>71</sup> Judges must therefore be neutral not just "in the *application* of principles," Bork argued, but "in the *definition* and the *derivation* of" them.<sup>72</sup> "The philosophy of original under-

<sup>61</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–36 (1973) (footnote omitted).

<sup>62</sup> ELY, *supra* note 14, at 248 n.52 ("Attempts to defend [*Roe*] in what amount to process terms have foundered . . .").

<sup>63</sup> See *id.* at 164–70.

<sup>64</sup> Ely, *supra* note 61, at 935.

<sup>65</sup> ELY, *supra* note 14, at 2–3.

<sup>66</sup> See generally JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 134–35 (2005). For Scalia's own elaborations, see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION 37–41 (1997); and Scalia, *supra* note 16.

<sup>67</sup> Bork, *supra* note 16.

<sup>68</sup> 381 U.S. 479 (1965).

<sup>69</sup> Bork, *supra* note 16, at 7.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.* at 7.

standing,” Bork argued (in the more precise formulation set forth in his 1990 book, *The Tempting of America*), “is capable of supplying neutrality in all three respects.”<sup>73</sup>

Finding a principled constitutional grounding for *Roe* supplied part of the inspiration for Dworkin’s grand theory, which he unselfconsciously designated the “moral reading” of the Constitution.<sup>74</sup> For Dworkin, the Bill of Rights and the Due Process and Equal Protection Clauses of the Fourteenth Amendment should be read not as codifications of discrete outcomes or applications envisioned by those who drafted and ratified them but rather as directives to conform the law to certain “abstract moral principles.”<sup>75</sup> What that requires — how the principles should be articulated in general and brought to bear on particular facts, including ones that involve circumstances beyond the contemplation or comprehension of the Framers — inescapably demands the exercise of *moral* reasoning.<sup>76</sup> So even though the drafters of the Fourteenth Amendment “plainly did not expect it to outlaw official racial segregation in school,” the “best understanding of what equal moral status . . . really requires” *does* have that consequence.<sup>77</sup> By the same token, it might never have crossed the minds of the Framers of the Fourteenth Amendment that the provision would ban certain restrictions on abortion, yet the abstract moral principles of “liberty” and “equality” in the Due Process Clause, given their best understandings “in our political culture more generally,” do.<sup>78</sup>

Dworkin’s theory systematically addresses what Bork calls the “definition” element of neutral principles. But it would be wrong to accuse Dworkin of ignoring the “application” or “derivation” elements. The “moral reading” method doesn’t authorize judges to “read their own convictions into the Constitution”<sup>79</sup> or “to follow the whisperings of their own consciences or the traditions of their own class or sect.”<sup>80</sup> “[C]onstitutional interpretation is disciplined, under the moral reading, by the requirement of constitutional *integrity*,”<sup>81</sup> a process that obliges judges to attribute to the document’s abstract moral principles the meaning they believe best coheres with and extends the ones imparted

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<sup>73</sup> BORK, *supra* note 16, at 146. Ely made a similar criticism of Wechsler. See ELY, *supra* note 14, at 55 (“An insistence on ‘neutral principles’ does not by itself tell us anything useful about the appropriate content of those principles or how the Court should derive the values they embody.”).

<sup>74</sup> DWORKIN, *supra* note 15, at 2.

<sup>75</sup> *Id.* at 7. Dworkin presents this argument in other places as well. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134–35 (1977); Ronald Dworkin, *Bork’s Jurisprudence*, 57 U. CHI. L. REV. 657, 662–63 (1990) (reviewing BORK, *supra* note 16).

<sup>76</sup> See DWORKIN, *supra* note 15, at 9–10.

<sup>77</sup> *Id.* at 9, 11.

<sup>78</sup> See *id.* at 110–11.

<sup>79</sup> *Id.* at 10.

<sup>80</sup> *Id.* at 11.

<sup>81</sup> *Id.* at 10.

to them by successive interpreters over the careers of these principles in American legal and political history.<sup>82</sup>

Dworkin's embrace of moral judgment struck a defiant note against the formalist crescendo emanating from an increasingly conservative federal judiciary.<sup>83</sup> But it was not genuinely an innovation. As David Strauss has insightfully written, Dworkin's "moral reading" described a familiar member of the inventory of interpretive heuristics traditionally employed by constitutional expositors on and off the bench.<sup>84</sup> Far from identifying it as the sort of "ad hoc" or "manipulative tool" that he meant to condemn,<sup>85</sup> Wechsler took care to endorse an interpretive stance akin to Dworkin's: "[T]he clauses of the Bill of Rights [should be] read as an *affirmation of the special values they embody* rather than as *statements of a finite rule of law*, its limits fixed by the consensus of a century long past, with problems very different from our own."<sup>86</sup> Bork was wrong, then, to claim that Wechsler didn't have anything to say about the "neutral derivation" of neutral principles; Wechsler just happened to think common law elaboration of constitutional rights, understood as abstract moral principles, was one of a variety of reasoning styles that satisfied this demand.

Although in a state of declining health for at least a decade, the "neutrality age" in constitutional theory can be seen as ending sometime around October 23, 1987. There are still those who subscribe to one or another of the "grand neutrality theories" and others who are trying to generate new ones. But whatever *consensus* there had once been among theorists that "neutrality" was an attainable, or even a coherent, objective did not survive the bloodletting that marked the defeat of Robert Bork's Supreme Court nomination. "Neutrality skepticism" settled in, not so much as a theory in its own right but as the premise of the various new forms of scholarly engagement with the Constitution.<sup>87</sup>

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<sup>82</sup> See *id.* at 10–12.

<sup>83</sup> The propagation of "original intent" as a theory was linked to the concerted goal of the Reagan Administration to populate the federal bench with conservative jurists and to cultivate conservative influence in law through the Federalist Society. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 680 (2009). See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 135–80* (2008) (describing the founding and growth of the Federalist Society and its roles in propagating conservative jurisprudential style and promoting appointment of federal judges who adhered to it).

<sup>84</sup> See David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 379 (1997) (reviewing DWORKIN, *supra* note 15).

<sup>85</sup> Wechsler, *supra* note 3, at 15.

<sup>86</sup> *Id.* at 19 (emphasis added).

<sup>87</sup> For important "neutrality skeptical" works, see TUSHNET, *supra* note 20; Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) [hereinafter Brest, *The Fundamental Rights Controversy*]; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980)

The basic premise of “neutrality skepticism” is straightforward and operates as a global indictment of all the grand theories: any method for generating “neutral principles” of law “requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral.”<sup>88</sup> Thus, originalist judges must decide whether to characterize the Framers’ intentions very concretely (as, essentially, a codification of discrete forbidden practices, in which case equal protection does *not* prohibit segregated schools); very broadly (as a directive of “equal concern and respect” that would, to the surprise of the Framers, protect women and gay people from legal disadvantage); or somewhere in between (as, say, the “core idea of black equality” that Bork believed would invalidate school segregation but not state regulation on the basis of gender or sexual orientation).<sup>89</sup> The proponents of “representation reinforcement” must make similar judgments about *who* qualifies as a “discrete and insular minority” (women? homosexuals? fetuses?), and which “discrete and insular minorities” suffer *undue* disadvantage in the democratic political processes (illegal aliens? child molesters?).<sup>90</sup> Dworkin’s “moral reading” theory, too, plainly (admittedly) puts decisionmakers in the position of judging between competing plausible accounts of the best understanding of the abstract moral principles embodied in the Bill

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[hereinafter Brest, *Misconceived Quest*]; Joseph William Singer, *The Players and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992); Tushnet, *supra* note 5. It seems plausible to view the success of “neutrality skepticism” as in part responsible for the turn to historical theories — ones that try to identify political events or mass movements as “explaining” or even imparting “meaning” to the Constitution. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991); LARRY KRAMER, *THE PEOPLE THEMSELVES* (2004). These approaches are external to the practices of legal advocacy and decisionmaking; perhaps they are identifying social or political influences that cause the Court to change its interpretation of the Constitution (it is unclear how to test such assertions), but they don’t supply *legal arguments* that lawyers could convincingly make or the Court openly adopt for reading the Constitution in a particular way. The grand theorists’ accounts, in contrast, are all internal: they take the form of reasons lawyers and judges could offer, if they were so inclined, for outcomes they favor. External theories aren’t designed to help Wechsler; they are designed to let us step over him and move on. See generally Keith E. Whittington, *Herbert Wechsler’s Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 513–20 (2000) (noting a turn away from theorizing aimed at guiding judicial interpretation and the revival of theories that focus on extra-judicial dynamics of one sort or another).

<sup>88</sup> Brest, *The Fundamental Rights Controversy*, *supra* note 87, at 1091–92; see also Tushnet, *supra* note 5, at 825 (“The theory of neutral principles requires that judges be able to rely on a shared conception of the proper role of judicial reasoning. The critiques have established that there are no determinate continuities derivable from history or legal principle. Rather, judges must choose which conceptions to rely on.”).

<sup>89</sup> See Brest, *The Fundamental Rights Controversy*, *supra* note 87, at 1090–92 (quoting Bork, *supra* note 16, at 14–15); Tushnet, *supra* note 5, at 793–804.

<sup>90</sup> See Brest, *The Fundamental Rights Controversy*, *supra* note 87, at 1093–94.

of Rights and the Fourteenth Amendment.<sup>91</sup> To make these sorts of determinations, decisionmakers will be forced to resort to partisan values, rendering all theories of constitutional neutrality “internally contradictory.”<sup>92</sup>

I don’t mean to take issue with “neutrality skepticism” as a critique of constitutional theorizing. Indeed, I find it compelling as a response to any project to “theorize” constitutional decisionmaking — something that is very different from *doing* constitutional decisionmaking (or advocacy), an activity guided less by ratiocination than by professionalized perception.<sup>93</sup> I *do*, however, want to raise doubts about the suggestion that the sort of “internal contradiction” it purports to locate in constitutional theories cogently explains the neutrality crisis.

Neutrality skeptics argue that there is a “contradiction” in liberalism — either in the design of its institutions,<sup>94</sup> in its psychology,<sup>95</sup> or in its ontology of the “self”<sup>96</sup> — that dooms those engaged in construing the Constitution to credit one or another of the plurality of moral outlooks toward which the Constitution demands “neutrality.” But what sorts of behavioral mechanisms link those supposed “self-contradictions” to the political conflict we see over the impartiality of the Court?

The only evidence that a “self-contradiction” of that kind *does explain* the neutrality crisis is the neutrality crisis itself. Citizens of diverse political and moral orientations *do* regularly disagree about the Court’s neutrality. The occasions for such disagreement have been and still *are* decisions that feature the state’s obligation not to favor one or another understanding of what the best life requires. So neutrality skepticism “fits the data.”

But so too might countless other possible explanations. The alternative I have in mind is one that suggests it is possible — maybe even likely, although not inevitable — for morally and politically diverse citizens to form opposing perceptions of the Court’s neutrality *despite*

<sup>91</sup> See Tushnet, *supra* note 5, at 790–91.

<sup>92</sup> See *id.* at 806 n.68.

<sup>93</sup> See generally STANLEY FISH, *Dennis Martinez and the Uses of Theory, in DOING WHAT COMES NATURALLY* 372 (1989).

<sup>94</sup> Tushnet, *supra* note 5, at 824 (arguing that the “theory [of neutral principles] shows us an institution at the heart of liberalism that contains the potential for destroying liberalism by revealing the institution’s inconsistencies and its dialectical instability”).

<sup>95</sup> See Brest, *The Fundamental Rights Controversy, supra* note 87, at 1105 (attributing the breakdown of the theory to an irresolvable “dilemma . . . not susceptible to resolution” that “springs into existence” when the “liberal state” is “created to mediate among individuals pursuing their self-interest”); Tushnet, *supra* note 5, at 805 (arguing that the “atomistic premises of liberalism” are hostile to the shared meaning required for neutral interpretation).

<sup>96</sup> Brest, *The Fundamental Rights Controversy, supra* note 87, at 1108 (linking conflict among constitutional theories to “the essential and irreconcilable tension between self and other, between self and *self*”).

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sharing a set of understandings *capable* of generating consensus on whether constitutional issues are being neutrally resolved. I will try to ground that explanation in plausible behavioral mechanisms, something that neutrality skepticism — understood as an account of the neutrality crisis — doesn't do. Once these mechanisms are understood, however, it will be seen how the neutrality project in constitutional theory, far from solving the neutrality crisis, has in fact made things worse.

*B. Motivated Reasoning and Its Cognates*

1. *Generally.* — *Motivated reasoning* refers to the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs.<sup>97</sup> *They Saw a Game*,<sup>98</sup> a classic psychology article from the 1950s, illustrates the dynamic. Experimental subjects, students from two Ivy League colleges, were instructed to watch a film that featured a set of controversial officiating calls made during a football game between teams from their respective schools.<sup>99</sup> What best predicted the students' agreement or disagreement with a disputed call, the researchers found, was whether it favored or disfavored their school's team.<sup>100</sup> The researchers attributed this result to motivated reasoning: the students' emotional stake in affirming their commitments to their respective institutions shaped what they *saw* on the tape.<sup>101</sup>

What's meant when an extrinsic goal is said to *motivate* cognition is that it directs mental operations — in this case, sensory perceptions; in others, assessments of the weight and credibility of empirical evidence, or performance of mathematical or logical computation — that we expect to function independently of that goal.<sup>102</sup> Indeed, the normal connotation of “motive” as a conscious reason for acting is actually out of place here. The students *wanted* to experience solidarity with their institutions, but they didn't treat that as a conscious *reason* for seeing what they saw. They had no idea (or so we are to believe; one needs a good experimental design to be sure this is so) that their perceptions were being bent in this way.

Although the students in this study probably would not have been distressed to learn that their perceptions had been covertly recruited by their desire to experience solidarity, there can be other contexts in

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<sup>97</sup> See generally Kunda, *supra* note 24.

<sup>98</sup> Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

<sup>99</sup> *Id.* at 129–30.

<sup>100</sup> *Id.* at 130–32.

<sup>101</sup> See *id.* at 132–34.

<sup>102</sup> See Kunda, *supra* note 24, at 482–90.

which motivated cognition *subverts* an actor's conscious ends. This might be so, for example, when a person who genuinely desires to make a fair or accurate judgment is unwittingly impelled to make a determination that favors some personal interest, pecuniary or social.<sup>103</sup>

2. *Identity-Protective Cognition.* — The goals or needs that can motivate cognition are diverse. They include fairly straightforward things, like a person's financial or related interests. But they reach more intangible stakes, too, such as one's need to sustain a positive self-image or the desire to promote states of affairs or other goods that reflect one's moral values.<sup>104</sup>

Affirming one's membership in an important reference group — the unconscious influence that operated on the students in the *They Saw a Game* experiment — can encompass all of these ends simultaneously. Individuals depend on select groups — from families to university faculties, from religious denominations to political parties — for all manner of material and emotional support. Propositions that impugn the character or competence of such groups, or that contradict the groups' shared commitments, can thus jeopardize their individual members' well-being. Assenting to such a proposition him- or herself can sever an individual's bonds with such a group. The prospect that people outside the group might credit this proposition can also harm an individual by reducing the social standing or the self-esteem that person enjoys by virtue of his or her group's reputation. Individuals thus face psychic pressure to resist propositions of that sort, generating a species of motivated reasoning known as *identity-protective cognition*.<sup>105</sup>

Identity-protective cognition, like other forms of motivated reasoning, operates through a variety of discrete psychological mecha-

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<sup>103</sup> See generally, e.g., Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 122 (1996); Maurice E. Schweitzer & Christopher K. Hsee, *Stretching the Truth: Elastic Justification and Motivated Communication of Uncertain Information*, 25 J. RISK & UNCERTAINTY 185 (2002).

<sup>104</sup> See generally Serena Chen, Kimberly Duckworth & Shelly Chaiken, *Motivated Heuristic and Systematic Processing*, 10 PSYCHOL. INQUIRY 44 (1999); Roger Giner-Sorolla & Shelly Chaiken, *Selective Use of Heuristic and Systematic Processing Under Defense Motivation*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 84 (1997).

<sup>105</sup> See David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 119, 119–20 (2002); David K. Sherman & Geoffrey L. Cohen, *The Psychology of Self-Defense: Self-Affirmation Theory*, 38 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 183, 187–88, 205–06 (2006) [hereinafter Sherman & Cohen, *Psychology of Self-Defense*]; see also 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, 469–70 (2007).

nisms.<sup>106</sup> Individuals are more likely to seek out information that supports than information that challenges positions associated with their group identity (*biased search*).<sup>107</sup> They are also likely to selectively credit or dismiss a form of evidence or argument based on its congeniality to their identity (*biased assimilation*).<sup>108</sup> They will tend to impute greater knowledge and trustworthiness and hence more *credibility* to individuals from within their group than from without.<sup>109</sup>

These processes might take the form of rapid, heuristic-driven, even visceral judgments or perceptions, but they can influence more deliberate and reflective forms of judgment as well.<sup>110</sup> Indeed, far from being immune from identity-protective cognition, individuals who display a greater disposition to use reflective and deliberative (so-called System 2) forms of reasoning rather than intuitive, affective ones (System 1) can be expected to be even more adept at using technical information and complex analysis to bolster group-congenial beliefs.<sup>111</sup>

3. *Naïve Realism*. — Identity-protective cognition predictably impedes deliberations, negotiations, and like forms of collective decision-making. When collective decisionmaking turns on facts or other propositions that are understood to bear special significance for the interests, standing, or commitments of opposing groups (for example, those who identify with the respective sides in the Israel-Palestine conflict), identity-protective cognition will predictably exaggerate differences in their understandings of the evidence.<sup>112</sup> But even more importantly, as a result of a dynamic known as *naïve realism*, each side's

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<sup>106</sup> See Kunda, *supra* note 24, at 482–95; Sherman & Cohen, *Psychology of Self-Defense*, *supra* note 105, at 190–213.

<sup>107</sup> See, e.g., Stefan Schulz-Hardt, Dieter Frey, Carsten Lüthgens & Serge Moscovici, *Biased Information Search in Group Decision Making*, 78 J. PERSONALITY & SOC. PSYCHOL. 655 (2000).

<sup>108</sup> See, e.g., Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

<sup>109</sup> See, e.g., Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808 (2003); Diane M. Mackie & Sarah Queller, *The Impact of Group Membership on Persuasion: Revisiting “Who Says What to Whom with What Effect?”*, in ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT 135, 152–55 (Deborah J. Terry & Michael A. Hogg eds., 2000).

<sup>110</sup> See generally Chen, Duckworth & Chaiken, *supra* note 104.

<sup>111</sup> See generally Dan M. Kahan, Maggie Wittlin, Ellen Peters, Paul Slovic, Lisa Larrimore Ouellette, Donald Braman & Gregory Mandel, *The Tragedy of the Risk-Perception Commons: Culture Conflict, Rationality Conflict, and Climate Change* (Cultural Cognition Project, Working Paper No. 89, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871503).

<sup>112</sup> See generally Cohen, *supra* note 109.

susceptibility to motivated reasoning will interact with and reinforce the other's.<sup>113</sup>

Naïve realism refers to an asymmetry in the ability of individuals to perceive the impact of identity-protective cognition. Individuals tend to attribute the beliefs of those who disagree with them to the biasing impact of their opponents' values. Often they are right. In this respect, then, people are psychological "realists." Nevertheless, in such situations individuals usually understand their own factual beliefs to reflect nothing more than "objective fact," plain for anyone to see. In this regard, they are psychologically naïve about the contribution that group commitments make to their own perceptions.<sup>114</sup>

Naïve realism makes exchanges between groups experiencing identity-protective cognition even more divisive. The (accurate) perception that a rival group's members are reacting in a closed-minded fashion naturally spurs a group's members to express resentment — the seeming baselessness of which provokes members of the former to experience and express the same. The intensity, and the evident polarization, of the disagreement magnifies the stake that individuals feel in defending their respective groups' positions. Indeed, at that point, the debate is likely to take on *meaning* as a contest over the integrity and intelligence of those groups, fueling the participants' incentives, conscious and unconscious, to deny the merits of any evidence that undercuts their respective views.<sup>115</sup>

4. "*Objectivity.*" — As naïve realism presupposes, motivated reasoning is an instance of what we commonly recognize as rationalization. We exhort others, and even ourselves, to overcome such lapses — to adopt an appropriate stance of detachment — in settings in which we believe impartial judgment is important, including deliberations or negotiations in which vulnerability to self-serving appraisals can interfere with reaching consensus. What most people don't know, however, is that such admonitions can actually have a perverse effect because of their interaction with identity-protective cognition.

This is the conclusion of studies that examine whether motivated reasoning can be counteracted by urging individuals to be "objective," "unbiased," "rational," "open-minded," and the like. Such studies find that individuals who've been issued this type of directive exhibit greater resistance to information that challenges a belief predominant

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<sup>113</sup> See generally 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 (1995).

<sup>114</sup> See *id.* at 405.

<sup>115</sup> See *id.*; see also David K. Sherman, Leif D. Nelson & Lee D. Ross, *Naïve Realism and Affirmative Action: Adversaries Are More Similar than They Think*, 25 BASIC & APPLIED SOC. PSYCHOL. 275, 275-76 (2003).

within their defining groups.<sup>116</sup> The reason is that objectivity injunctions *accentuate* identity threat. Individuals naturally assume that beliefs they share with others in their defining group *are* “objective.” Accordingly, those are the beliefs they are most likely to see as correct when prompted to be “rational” and “open-minded.” Indeed, for them to change their minds in such a circumstance would require them to discern irrationality or bias within their group, an inference fraught with dissonance.<sup>117</sup>

For the same reason, emphasizing the importance of engaging the issues “objectively” can magnify naïve realism. As they grow even more adamant about the correctness of their own group’s perspective, individuals directed to carefully attend to their own impartiality become increasingly convinced that only unreasoning, blind partisanship can explain the intransigence of the opposing group. This view triggers the reciprocal and self-reinforcing forms of recrimination and retrenchment that are the hallmarks of naïve realism.<sup>118</sup>

5. *Cultural Cognition.* — Disputes set in motion by identity-protective cognition and fueled by naïve realism occupy a prominent place in our political life. Such conflicts are the focus of the study of *cultural cognition*.<sup>119</sup>

Cultural cognition refers to the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews. Cultural worldviews consist of systematic clusters of values relating to how society should be organized. Arrayed along two cross-cutting dimensions — hierarchy/egalitarianism and individualism/communitarianism — these values supply the bonds of group affinity that motivate identity-protective cognition.<sup>120</sup> People who subscribe to a relatively hierarchical and individualistic worldview, for example, tend to be dismissive of environmental risk claims, acceptance of which would justify restrictions on commerce and industry, activities they value on material and symbolic grounds. Individuals who hold egalitarian and communitarian values, in contrast, are morally suspicious of commerce and industry, which they see as sources of social disparity and vehicles of noxious self-seeking. They therefore find it congenial to believe that commerce and industry

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<sup>116</sup> See generally Geoffrey L. Cohen, Anthony Bastardi, David K. Sherman, Lillian Hsu, Michelle McGoey & Lee Ross, *Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility in Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 415 (2007).

<sup>117</sup> See *id.* at 427.

<sup>118</sup> See *id.* at 428.

<sup>119</sup> See generally Dan M. Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, in HANDBOOK OF RISK THEORY (S. Roeser ed., forthcoming 2011), available at <http://ssrn.com/abstract=11123807>.

<sup>120</sup> See *id.*

pose harms worthy of constraining regulations.<sup>121</sup> Experimental work has documented the contribution of these worldviews to various discrete mechanisms of motivated cognition, including biased search and assimilation,<sup>122</sup> perceptions of expertise and credibility,<sup>123</sup> and brute sense impressions.<sup>124</sup>

The same methods have also been used to measure controversy over legally consequential facts. Thus, mock jury studies have linked identity-protective cognition, motivated by the cultural worldviews, to conflicting perceptions of the risk posed by a motorist fleeing the police in a high-speed chase;<sup>125</sup> of the consent of a date rape victim who said “no” but did not physically resist her assailant;<sup>126</sup> of the volition of battered women who kill in self-defense;<sup>127</sup> and of the use of intimidation by political protestors.<sup>128</sup> To date, however, no studies have directly tested the impact of cultural cognition on judges.

6. *Cognitive Illiberalism.* — Finally, *cognitive illiberalism* refers to the distinctive threat that cultural cognition poses to ideals of cultural pluralism and individual self-determination. Americans are indeed fighting a “culture war,” but one over *facts*, not values.<sup>129</sup>

The United States has a genuinely liberal civic and political culture — born not of reflective commitment to cosmopolitan ideals but of bourgeois docility. Media spectacles notwithstanding, citizens generally don’t have an appetite to impose their worldviews on one another.

<sup>121</sup> See Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1083–84 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR* (2005)).

<sup>122</sup> See Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey Cohen, *Cultural Cognition of the Risks and Benefits of Nanotechnology*, 4 NATURE NANOTECHNOLOGY 87, 88 (2009); see also James N. Druckman & Toby Bolsen, *Framing, Motivated Reasoning, and Opinions About Emergent Technologies*, 61 J. COMM. 659 (2011) (showing that culturally motivated cognition is sensitive to framing effects that moderate or accentuate biased assimilation).

<sup>123</sup> See Dan M. Kahan, Hank Jenkins-Smith & Donald Braman, *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147, 149–50 (2011); Dan M. Kahan, Donald Braman, Geoffrey Cohen, John Gastil & Paul Slovic, *Who Fears the HPV Vaccine, Who Doesn’t, and Why? An Experimental Study of the Mechanisms of Cultural Cognition*, 34 LAW & HUM. BEHAV. 501, 509–11 (2010).

<sup>124</sup> See, e.g., 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, 903 (2009).

<sup>125</sup> See *id.* at 864–70.

<sup>126</sup> See generally Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010) (examining the contribution cultural cognition makes to the “no means yes” norm).

<sup>127</sup> See Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008).

<sup>128</sup> See Dan M. Kahan, David A. Hoffman, Donald Braman, Daniel Evans & Jeffrey J. Rachlinski, *“They Saw a Protest”: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1755706>.

<sup>129</sup> See Kahan, *supra* note 26, at 126–30.

er; they have an appetite for SUVs, big houses, and vacations to Disneyland (or Las Vegas). Manifested in the absence of the sectarian violence that has filled human history and still rages outside the democratic capitalist world, there is effective consensus that the state should refrain from imposing a moral orthodoxy and instead confine policy-making to attainment of secular goods — safety, health, and prosperity — of value to all citizens regardless of their cultural persuasions.<sup>130</sup>

As much as they agree about the ends of law, however, citizens are conspicuously — even spectacularly — factionalized over the *means* of attaining them. Is the climate heating up as a result of human activity, and if so will it pose any dangers to us? Will permitting citizens to carry concealed handguns in public increase violent crime — or reduce it?<sup>131</sup> Would a program of mandatory vaccination of schoolgirls against HPV promote their health by protecting them from cervical cancer — or undermine it by lulling them into unprotected sex, increasing their risk of contracting HIV?<sup>132</sup> Answers to questions like these tend to sharply polarize people of opposing cultural outlooks.<sup>133</sup>

Divisions along these lines are not due to chance, of course; they are a consequence of identity-protective cognition. The varying emotional resonance of risk claims across distinct cultural communities predisposes their members to find some of these claims more plausible than others, a process reinforced by the tendency of individuals to seek out and credit information from those who share their values.<sup>134</sup>

Far from counteracting this effect, deliberation among diverse groups is likely to accentuate polarization. By revealing the correlation between one or another position and one or another cultural style, public debate intensifies identity-protective pressure on individuals to conform to the views dominant within their group.<sup>135</sup>

Liberal discourse norms constrain open appeals to sectarian values in debates over the content of law and policy.<sup>136</sup> But our political culture lacks any similar set of conventions for constraining the tendency of policy debates to build into rivalries among the members of groups whose members subscribe to competing visions of the best life.

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<sup>130</sup> See generally ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* (20th anniversary ed. 1997); STEPHEN HOLMES, *The Secret History of Self-Interest*, in *PASSIONS AND CONSTRAINT* 42 (1995).

<sup>131</sup> See Kahan, Jenkins-Smith & Braman, *supra* note 123, at 166–70.

<sup>132</sup> See generally Kahan, Braman, Cohen, Gastil & Slovic, *supra* note 123.

<sup>133</sup> See generally Kahan, *supra* note 25.

<sup>134</sup> See generally Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL'Y REV.* 149 (2006).

<sup>135</sup> *Id.*

<sup>136</sup> See generally STEPHEN HOLMES, *Democratic Gag Rules or the Politics of Omission*, in *PASSIONS AND CONSTRAINT*, *supra* note 130, at 202; RAWLS, *supra* note 23; CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

On the contrary, one of the central discourse norms employed to steer law and policymaking away from illiberal conflicts of value plays a vital role in converting secular policy debates into forms of symbolic status competition. The injunction of liberal public reason makes empirical, welfarist arguments the preferred currency of argumentative exchange.<sup>137</sup> The expectation that participants in public deliberations will use this form of justification tends to confine political advocacy to secular ends; it also furnishes observable proof to the advocate *and* her audience that her position is not founded on an ambition to use the law to impose her own partisan view of the good.

Psychologically, however, the injunction to present culturally neutral empirical grounds for one's position has the same effect as an "objectivity" admonition.<sup>138</sup> The prospect that one's empirical arguments will be shown to be *false* creates the identity-threatening risk for her that she or others will come to form the belief that her group is deluded and, in fact, committed to propositions inimical to the public welfare. In addition, the certitude that empirical arguments convey — "it's simply a *fact* that . . ."; "how can they deny the *scientific evidence* on . . .?" — arouses suspicions of bad faith or blind partisanship on the part of the groups advancing them. Yet when members of opposing groups attempt to rebut such arguments, they are likely to respond with the same certitude, and with the same lack of awareness that they are being impelled to credit empirical arguments to protect their identities. This form of exchange — the signature of naïve realism — predictably generates cycles of recrimination and resentment.<sup>139</sup>

When policy debates take this turn, both sides know that the answers to the questions they are debating convey cultural meanings.<sup>140</sup> The positions that individuals take on whether the death penalty deters, whether deep geologic isolation of nuclear wastes is safe, whether immigration reform will boost the economy or put people out of work, and the like express their defining commitments and not just their beliefs about how the world works. Whose answer the *state* credits — by adopting one or another policy — elevates one cultural group and degrades the other. Very few citizens are moral zealots. But to protect the status of their group and their own standing within it, moderate citizens are conscripted, against their conscious will, into a divisive struggle to control the expressive capital of law.<sup>141</sup>

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<sup>137</sup> See Kahan, *supra* note 26, at 143–44.

<sup>138</sup> *Id.* at 144.

<sup>139</sup> See *id.* at 130–31.

<sup>140</sup> See, e.g., JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE 11–12* (2d ed. 1986) (explaining the cultural meanings of the debate over temperance).

<sup>141</sup> See Kahan, *supra* note 26, at 150.

### C. Cognitive Illiberalism and Constitutional Neutrality

I concluded my sketch of the neutrality crisis by suggesting that it might have an explanation distinct from either the inherent limits of theory or the inherent plurality of judges' political values. I am now in a position to identify that alternative: the dynamics of cognitive illiberalism.

The American culture war of fact, I've suggested, is a colossal misadventure. There is genuine and historically unprecedented societal consensus that law should be confined to secular ends. Nevertheless, the interaction of cultural cognition and self-defeating liberal discourse norms transforms debates over the means for securing those ends into occasions for divisive cultural rivalries. The neutrality crisis, I now want to argue, is the very same misadventure simply extended to decisions of the Supreme Court.

Judges and lawyers subscribe to an elaborate network of craft norms. Acquired through professional training and experience, these norms generate a high degree of convergence among judges and lawyers on what counts as appropriate decisionmaking. It's not appropriate, all lawyers agree, for judges to "make law" on the basis of their "personal values" — or indeed the values of any particular constituency in society whose values have not been translated into enforceable legal obligations. But professional craft norms also reflect agreement on the appropriateness of a variety of methods for discerning which values *have* been made operative in law, including the Constitution.<sup>142</sup>

It is plausible — and distressing — to think that cultural cognition might distort judges' perceptions of what their craft norms entail. Judges will be incapable of being impartial if they are unwittingly impelled to form perceptions of fact, interpretations of doctrines, and evaluations of legal arguments congenial to their own worldviews. I think the existence of this influence admits of informed speculation<sup>143</sup> but in the end can be established only by systematic empirical study *of judges*. My guess is that such study would show, as it has in connection with a range of other sorts of cognitive biases,<sup>144</sup> that judges do in

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<sup>142</sup> See, e.g., David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 583 (1999).

<sup>143</sup> See, e.g., EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION (2009); Dan M. Kahan, "Ideology in" or "Cultural Cognition of" Judging: *What Difference Does It Make?*, 92 MARQ. L. REV. 413 (2009); Kahan, Hoffman & Braman, *supra* note 124, at 896–97.

<sup>144</sup> E.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 28 (2007) (showing power of judges to resist various biases at least in some circumstances); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223–25 (2009) (finding that judges are better able to resist implicit bias than lay people in some circumstances); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA.

fact possess habits of mind that help to counteract the potentially distorting effects of identity-protective cognition, but not perfectly.

The account I am proposing, though, doesn't depend on the impact of motivated reasoning on judges. It is directed at the impact of motivated reasoning on *citizens'* assessments of judges' decisions. Constitutional rights protect the great mass of citizens who harbor no particular ambition to impose their cultural values on others from experiencing domination by those few who have not renounced zealotry. Even among nonzealots, however, perceptions of the Court's decisions remain vulnerable to identity-protective cognition in much the same way sports fans' perceptions of the calls of a referee — or dare I say *umpire* — do.

There *is* empirical evidence, founded on cultural cognition, that when citizens observe conflicts in society that affect constitutional rights — that of a nondeadly criminal suspect *not* to be subdued with lethal force by the police,<sup>145</sup> or of antiabortion demonstrators to engage in impassioned but nonviolent protest near an abortion clinic<sup>146</sup> — they are prone to form factual beliefs congenial to their values. There is thus an inherent risk that citizens will perceive decisions that threaten their group commitments to be a product of judicial *bias*. The outcomes might strike them as so patently inconsistent with the facts, or with controlling legal principles, that they are impelled to infer bad faith.

A central point of reasoned elaboration in law is to assure citizens that judges are refraining from fitting their rulings to their partisan views. Even if the Justices were themselves unaffected by cultural cognition, then, it would be essential to their function as our constitutional system's neutral arbiters to use idioms of justification that counteract cultural cognition in the public assessment of their decisions.

The idioms of justification the Court uses, however, have exactly the opposite effect. The Court's decisionmaking conspicuously features procedures, techniques, and doctrines informed by the trappings of the grand neutrality theories. These devices aggravate the problem of motivated cognition for the same reason that empirical welfare arguments and objectivity admonitions do in other decisionmaking settings. By equating prevailing interpretations with "reason" and defeated ones with mere "will" or "preference," these devices create

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L. REV. 1251, 1259 (2005) (finding that "judges were able to resist the influence of [inadmissible] information in at least some cases"). The findings by Rachlinski and his collaborators underscore why it is unpersuasive simply to assume that judges will display the same susceptibility to motivated reasoning that laypersons do, and hence why it is essential to use judicial subjects for empirical testing.

<sup>145</sup> See Kahan, Hoffman & Braman, *supra* note 124, at 841.

<sup>146</sup> See Kahan, Hoffman, Braman, Evans & Rachlinski, *supra* note 128 (manuscript at 24).

psychic pressure among members of the public — in the sorts of charged cases with which constitutional law inevitably deals — to resist identity-threatening decisions. At the same time, the force with which the Court’s discourse norms disavow its indulgence of partisan values provokes those who disagree with a decision to suspect the Court of bad faith — and to resent the implication that their own alternative position reflects rationalization or deceit.

Dissenters — off the Court, but egged on by ones *on* it — thus respond to uncongenial decisions with the unreflective sense of righteousness characteristic of naïve realism. Their denunciations of the Court provoke comparably righteous and unreflective responses from observers who agree with those same decisions. Against this background, the decisions of the Court are no longer seen as determinations of particular disputes but rather as adjudications of the status and dominance of contending cultural groups.

Critical in this process is the role that mediating institutions play in bridging the work of the Court and public consciousness of it. Most citizens don’t read Supreme Court opinions. They nevertheless have impressions of the Court’s neutrality — often extremely impassioned ones.<sup>147</sup> These impressions are formed in large part on the basis of information supplied to them by authorities in their cultural communities,<sup>148</sup> the same figures to whom ordinary citizens routinely look for guidance on complex empirical policy issues (for example, the reality and seriousness of climate change).<sup>149</sup> Because the status of these authorities — members of the media, elected officials, and other public figures<sup>150</sup> — depends on this filtering role, what *they* say on public policy is strongly affected by the cultural meanings that risks and policy-relevant facts bear. Similarly, what they have to say about the

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<sup>147</sup> See, e.g., Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633 (1998) (measuring strength and duration of negative views toward the Court in wake of controversial decisions); Janice Nadler, Shari Seidman Diamond & Matthew M. Patton, *Government Takings of Private Property*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (describing intense public controversy following decision upholding broad power of eminent domain).

<sup>148</sup> See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 660 (1992); Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 763 (1989); Nathaniel Persily, *Introduction to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY*, *supra* note 147, at 9.

<sup>149</sup> See John Gastil, Don Braman, Dan Kahan & Paul Slovic, *The Cultural Orientation of Mass Political Opinion*, PS: POL. SCI. & POL. (forthcoming 2012). See generally Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3 (1987).

<sup>150</sup> See JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 7–9, 40–52 (1992).

Court's neutrality will be shaped decisively by the meanings of the Court's decisions.<sup>151</sup> Indeed, the degree to which the Court's opinion accentuates or mutes the association of a case's outcome with contested meanings will affect whether these actors see a case as worth mentioning at all.<sup>152</sup>

That property of the Court's decisionmaking, moreover, is orthogonal<sup>153</sup> to the sort of "neutrality" that constitutional theorists debate. The neutrality skeptics disagree with the grand theorists on the prospects for attaining it, but they agree that neutrality requires a decisionmaking *method* that separates judicial enforcement of the Constitution from partisan understandings of the good. As a result of motivated cognition, however, cultural conflict over the Court's neutrality could persist notwithstanding the Justices' reliable use of any such method. Moreover, *if* the Court succeeded in creating an information climate in which its determinations did *not* threaten one cultural outlook and affirm another, its decisions would be less likely to generate the sort of political contestation at the heart of the neutrality crisis.

What's needed, then, are strategies for ensuring that cases resolved according to professional craft norms are "*meaning neutral*" in this sense. The creation of a deliberation climate in which *scientific information* is meaning neutral — not any reinvention of how scientists do science — is likewise what is needed to defeat illiberal status conflict over risk and related policy-consequential facts. By seeing the steps that have been made toward achieving the latter end through appropriate science communication strategies, the possibility of a new neutrality communication strategy for the Court comes into view.

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<sup>151</sup> See Caldeira & Gibson, *supra* note 148, at 659–60 (suggesting that "opinion leaders" are more likely than the public to evaluate the Court's performance based on the consistency of case outcomes with policy preferences but that how the Court justifies decisions shapes public perceptions of the relevance of Court decisions to public policy issues).

<sup>152</sup> See Franklin & Kosaki, *supra* note 148, at 767–68.

<sup>153</sup> See Debra Cassens Weiss, *Supreme Court Word of the Day: Orthogonal*, A.B.A. J. (Jan. 12, 2010, 9:28 AM), [http://www.abajournal.com/news/article/supreme\\_court\\_word\\_of\\_the\\_day\\_orthogonal](http://www.abajournal.com/news/article/supreme_court_word_of_the_day_orthogonal):

University of Michigan law professor Richard Friedman was trying to define the scope of the confrontation clause in oral arguments yesterday when he was called on to define another term: orthogonal.

Friedman used the word when he indicated that a justice's question was not pertinent to the present case . . . . "I think that issue is entirely orthogonal to the issue here," he said. . . .

That got the attention of Chief Justice John G. Roberts Jr. "I'm sorry. Entirely what?" he said.

"Orthogonal," Friedman replied. "Right angle. Unrelated. Irrelevant."

Friedman tried to continue, but Justice Antonin Scalia jumped in. "What was that adjective? I liked that," he said.

"I think we should use that in the opinion," Scalia later added. "Or the dissent," said Roberts.

## II. DEMOCRACY, *SELF-DECEPTION*, AND DISTRUST

I have suggested that the devices the Court uses to assert its neutrality interact perversely with motivated reasoning in public discourse. This is the origin of the sort of illiberal status competition that fuels the neutrality crisis. I will now examine these dynamics and their effects in more detail.

### A. “*Empirical Fact*” Finding

In politics, debates over policy-consequential facts can become the occasion for adjudicating the status of competing cultural groups. In constitutional law, the adjudication of facts can become the occasion for status-competitive debates about the neutrality of the Court.

*Brown v. Plata*<sup>154</sup> was among the most consequential decisions of the 2010 Term — in multiple senses. In *Plata*, California attacked an order, issued by a three-judge federal district court, directing the State to release more than 40,000 inmates from its prisons.<sup>155</sup> It was not disputed that California prisons had for over a decade been made to store double their intended capacity of roughly 80,000 inmates.<sup>156</sup> The stifling density of the population inside — “200 prisoners . . . liv[ing] in a gymnasium,” sleeping in shifts, and “monitored by as few as two or three correctional officers”; “54 prisoners . . . shar[ing] a single toilet”; “50 sick inmates . . . held together in a 12-by 20-foot” cell; “suicidal inmates . . . held for prolonged periods in telephone-booth sized cages” standing in their own waste — was amply documented (with photographs, appended to the Court’s opinion, among other things).<sup>157</sup> The awful effect on the prisoners’ mental and physical health was indisputable, too: “[I]t is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days . . . .”<sup>158</sup> These conditions, it had been determined in earlier proceedings, violated the Eighth Amendment.<sup>159</sup> The district court also saw that there was no prospect whatsoever that the State, having repeatedly rejected prison-expansion proposals and now in a budget crisis, would undertake the massive expenditures necessary to increase prison capacity and staffing.<sup>160</sup> Accordingly, it ordered the only relief that, to it, seemed possible: the release of the number of inmates that

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<sup>154</sup> 131 S. Ct. 1910 (2011).

<sup>155</sup> *Id.* at 1923.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1924–25; *see also id.* at 1949–50 (photographs).

<sup>158</sup> *Id.* at 1927 (alteration in original) (quoting 3 Joint Appendix at 917, *Plata*, 131 S. Ct. 1910 (No. 09-1233)) (internal quotation mark omitted).

<sup>159</sup> *Id.* at 1922.

<sup>160</sup> *Id.* at 1938.

the court deemed sufficient to bring the prisons into compliance with minimally acceptable constitutional standards.<sup>161</sup>

The Supreme Court, in a 5–4 decision, affirmed. The major issue of contention between the majority and the dissenting Justices was what consequence the ordered prisoner release would have on safety, a consideration to which the district court was obliged to give “substantial weight” by the Prison Litigation Reform Act of 1995.<sup>162</sup> The district court devoted ten days of the fourteen-day trial to receiving evidence on this issue, and concluded that use of careful screening protocols would permit the State to release the necessary number of inmates “in a manner that preserves public safety and the operation of the criminal justice system.”<sup>163</sup>

The determinations underlying this finding, Justice Kennedy noted in his majority opinion, “are difficult and sensitive, but they are factual questions and should be treated as such.”<sup>164</sup> The district court had “rel[ie]d on relevant and informed expert testimony” by criminologists and prison officials, who based their opinions on “empirical evidence and extensive experience in the field of prison administration.”<sup>165</sup> Indeed, some of that evidence, Justice Kennedy observed, had “indicated that reducing overcrowding in California’s prisons could even improve public safety” by abating prison conditions associated with recidivism.<sup>166</sup> Like its other findings of fact, the district court’s determination that the State could fashion a reasonably safe release plan was not “clearly erroneous.”<sup>167</sup>

The idea that the district court’s public-safety determination was a finding of “fact” entitled to deferential review caused Justice Scalia to suffer an uncharacteristic loss of composure. Deference is due factfinders, he explained, because they make “determination[s] of past or present facts” based on evidence such as live eyewitness testimony, the quality of which they are “in a better position to evaluate” than are appellate judges confined to a “cold record.”<sup>168</sup> The public-safety finding of the three-judge district court, in contrast, consisted of “broad empirical predictions necessarily based in large part upon policy views.”<sup>169</sup> “[T]he idea that the three District Judges in this case relied

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<sup>161</sup> *Id.* at 1922–23.

<sup>162</sup> 18 U.S.C. § 3626 (2006); see *Plata*, 131 S. Ct. at 1929 (quoting 18 U.S.C. § 3626(a)(1)(A)) (internal quotation mark omitted).

<sup>163</sup> *Plata*, 131 S. Ct. at 1941 (quoting Appellants’ Jurisdictional Statement at 247a–248a, *Schwarzenegger v. Plata*, 130 S. Ct. 1140 (2010) (No. 09-416)) (internal quotation marks omitted).

<sup>164</sup> *Id.* at 1942.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1945.

<sup>168</sup> *Id.* at 1953 (Scalia, J., dissenting).

<sup>169</sup> *Id.* at 1954.

solely on the credibility of the testifying expert witnesses is fanciful,” Justice Scalia exclaimed.<sup>170</sup>

Justice Scalia’s reaction to the majority’s reasoning in *Plata* is reminiscent of Wechsler’s to the Court’s in *Brown*. Like Justice Scalia, Wechsler had questioned whether the finding in question — that segregated schools “retard the[] educational and mental development” of African American children — could bear the decisional weight that the Court was putting on it.<sup>171</sup> But whereas Wechsler had only implied that the Court was hiding its moral-judgment light under an empirical basket — “I find it hard to think the judgment really turned upon the facts [of the case]”<sup>172</sup> — Justice Scalia was unwilling to bury his policymaking accusation in a rhetorical question. “*Of course*,” the members of the three-judge district court “were relying largely on their own beliefs about penology and recidivism” when they found that release was consistent with and might even enhance public safety, Justice Scalia thundered.<sup>173</sup> “And *of course* different district judges, of different policy views, would have ‘found’ that rehabilitation would *not* work and that releasing prisoners would *increase* the crime rate.”<sup>174</sup> “[I]t is impossible for judges to make ‘factual findings’ without inserting their own policy judgments, when the factual findings *are* policy judgments.”<sup>175</sup>

Justice Scalia’s dissent is also akin to the reaction to “empirical factfinding” in the Supreme Court’s abortion jurisprudence. Justice Blackmun’s majority opinion in *Roe v. Wade*<sup>176</sup> cited “medical data” supplied by “various *amici*” to demonstrate that “[m]odern medical techniques” had dissolved the state’s historic interest in protecting women’s health.<sup>177</sup> “[T]he now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth” supported recognition of an unqualified right to abortion in that period.<sup>178</sup> Ely, among others, challenged the Court’s empirics. The medical safety of abortions relative to childbirth, he asserted, “is not in fact agreed to by all doctors — the data are of course severely limited — and the Court’s view of the matter is plainly not the only one that is ‘rational’ under the usual standards.”<sup>179</sup> In any case, “it has become commonplace for a drug or food

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<sup>170</sup> *Id.*

<sup>171</sup> Wechsler, *supra* note 3, at 32.

<sup>172</sup> *Id.* at 33.

<sup>173</sup> *Plata*, 131 S. Ct. at 1954 (Scalia, J., dissenting).

<sup>174</sup> *Id.* (second and third emphases added).

<sup>175</sup> *Id.*

<sup>176</sup> 410 U.S. 113 (1973).

<sup>177</sup> *Id.* at 149.

<sup>178</sup> *Id.* at 163.

<sup>179</sup> Ely, *supra* note 61, at 942 n.117.

additive to be universally regarded as harmless on one day and to be condemned as perilous [on] the next” — so how could “present consensus” among medical experts plausibly ground a durable constitutional right?<sup>180</sup>

It *can't*. “[T]ime has overtaken some of *Roe*’s factual assumptions,” the Court noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>181</sup> “[A]dvances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier.”<sup>182</sup> Accordingly, culturally fueled enactments of and challenges to abortion laws continue — repeatedly confronting the Justices with new empirical questions to which their answers are denounced as motivated by “personal values.”<sup>183</sup>

This pattern is, in fact, a conspicuous feature of the Court’s constitutional jurisprudence generally. In cases involving sex equality, gay rights, the death penalty, police seizures, drug testing, and other charged matters, the Court has invoked empirical evidence — or sometimes the lack of it — as warrant for its decisions. When it does so, the genuineness of its reasoning has provoked accusations of bad faith, not only from within the Court but also from without.<sup>184</sup>

There are many potential explanations for this recurring form of empirics-point, denunciation-counterpoint. When Justices rely on empirical data in controversial decisions, they no doubt often honestly believe that such evidence compels a particular result. If so, it’s possible that their perceptions, those of their critics, or both could be influenced by motivated reasoning.<sup>185</sup> The impact of motivated reasoning on the Justices themselves could also explain apparent discrepancies across

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<sup>180</sup> *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 470 (1972) (Burger, C.J., dissenting)).

<sup>181</sup> 505 U.S. 833, 860 (1992).

<sup>182</sup> *Id.* (citation omitted).

<sup>183</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007) (upholding a federal law banning a procedure often called “partial birth abortion,” in part based on a congressional finding that “there existed a medical consensus that the prohibited procedure is never medically necessary”); *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000) (striking down a similar state law after finding that “substantial medical authority supports the proposition that banning . . . [the] procedure could endanger women’s health”).

<sup>184</sup> See Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1996 (2006) (critiquing courts’ reliance on facts when analyzing social change); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 191 (2003) (arguing that empiricism does not produce neutrality).

<sup>185</sup> At least one scholarly judge has concluded that judicial reasoning is subject to this form of distortion. See RICHARD A. POSNER, *HOW JUDGES THINK* 116 (2008) (observing that when “empirical claims [are] made in judicial proceedings — for example, claims concerning the deterrent effect of capital punishment or the risk to national security of allowing suspected terrorists to obtain habeas corpus” — judges, like everyone else, “fall back on their intuitions” and display “[t]he kind of telescoped reasoning . . . called . . . ‘cultural cognition’”).

cases in how the Court treats standards of review<sup>186</sup> or other doctrines relevant to the impact of empirical proof — including whether it is appropriate for judges to consider “empirical data” at all.<sup>187</sup>

It’s also likely, though, that the Court sometimes consciously resorts to empirical factfinding for strategic reasons.<sup>188</sup> The Justices might well believe that their decision — particularly if it is likely to disappoint one side or the other on an issue that *is* the focus of cultural status competition — will provoke less conflict, or impose less insult on the losing side, if framed in the seemingly neutral idiom of *fact* as opposed to the morally evocative idiom of constitutional *principle*.<sup>189</sup> The contribution empirical arguments are thought to make to muting contested values is part of their appeal in political discourse generally.<sup>190</sup> If prudential concerns of this sort are motivating them, the Justices needn’t be viewed as using empirical evidence to “hide” their reliance on their partisan values. More likely, they are trying to avoid invoking one or another of the Constitution’s liberal principles in a manner that could be understood as denigrating a particular group’s vision of the good life — as opposed to merely placing a barrier between any particular group’s vision and obligations that are legitimately enforced on all.

Conscientious, unconscious, or strategic, however, “empirical factfinding” predictably fuels the dynamics that erode public confidence in the impartiality of the Court. As a result of cultural cognition, citizens are understandably prone to conform their perceptions of the impartiality of the Court to their own values. The Court’s pronouncement that a culturally fraught decision is based on the “neutral” empirical facts doesn’t offset that reaction but rather aggravates it. Like empirical welfare arguments in political discourse generally, judicial reasoning that purports to vest decisive weight on facts evinces an air of certitude that arouses suspicion of disingenuousness or bias. As in debates over risk and similar policy issues, individuals whose opposing factual beliefs are connected to their cultural identities will resent the

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<sup>186</sup> Compare *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 771 (1994) (“We must . . . judge this case on the assumption that the evidence and testimony presented to the state court supported its findings [of disorderly behavior by protestors].”), with *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (noting that “it . . . remains our duty . . . to make an independent examination of the whole record” despite factual finding by lower court that protestors were engaging in disorderly behavior).

<sup>187</sup> Cf. *McCleskey v. Kemp*, 481 U.S. 279, 291–92 (1987) (refusing to treat empirical evidence of systemic racial discrimination in capital sentencing as grounds for invalidating the death penalty).

<sup>188</sup> See Zick, *supra* note 184, at 120–21.

<sup>189</sup> Cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 432–35 (1999) (describing such a strategy on the part of Justice Holmes in *Brown v. United States*, 256 U.S. 335 (1921)).

<sup>190</sup> See Kahan, *supra* note 26, at 143–44; Kahan, *supra* note 189, at 480–81.

implication that they and those whom they trust (such as the dissenting Justices) are either deluding themselves or trying to deceive others.

It doesn't help, either, that at some point the Court usually does reconceptualize such decisions as resting on one or another constitutional principle after all.<sup>191</sup> This process happened quickly after *Brown*. Certainly by the time the Court decided *Loving v. Virginia*,<sup>192</sup> it had become clear that the rationale for *Brown* was a general *moral* one — that any state-enforced racial separation in civil society conveys a *social meaning* of animus and hierarchy inconsistent with the Equal Protection Clause.<sup>193</sup> Likewise, in *Lawrence v. Texas*,<sup>194</sup> the Court without embarrassment overcame the reticence of its earlier decision in *Romer v. Evans*<sup>195</sup> and announced a broad antiorthodoxy principle — that the state cannot use law for the sake of endorsing a preferred way of life and denigrating or stigmatizing a group based on its disfavored moral outlook.<sup>196</sup> Similar steps toward enhanced moral enunciation appear in the Court's jurisprudence on sex-based discrimination under the Equal Protection Clause.<sup>197</sup> The point is not that decisions grounded in empirical "fact" shouldn't evolve into ones of "principle"; it is that the observable tendency of them to do so makes it predictable that citizens will suspect the Court is trying to deceive them (or is surrendering to self-deception) when it purports to lay decisive weight on "empirical facts." Empiricism is a dubious strategy for minimizing controversy.

The only citizens who *are* likely to see the Court's decision as more authoritative and legitimate when it resorts to empirical factfinding in culturally charged cases are the ones whose cultural values are affirmed by the outcome. If they were not already impelled by identity-protective cognition to believe the "facts" in question before the decision, they will be after the Court identifies those facts as "objective" and appropriately "neutral" grounds for their position. These citizens will thus react defensively and dismissively in response to those who dispute those facts — whether dissenting Justices, unpersuaded academics, or other citizens — and will suspect them of duplicity and self-

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<sup>191</sup> This pattern is engagingly documented by Suzanne Goldberg. See Goldberg, *supra* note 184, at 1974–84.

<sup>192</sup> 388 U.S. 1 (1967).

<sup>193</sup> See *id.* at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

<sup>194</sup> 539 U.S. 558 (2003).

<sup>195</sup> 517 U.S. 620 (1996).

<sup>196</sup> See *Lawrence*, 539 U.S. at 571 (forbidding "us[ing] the power of the State to enforce . . . on the whole society" standards of private conduct that originate in "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family").

<sup>197</sup> See Goldberg, *supra* note 184, at 1981–83.

delusion. They will thus respond with reciprocal recrimination against those who impugn the Court. And in this way, the answers that the Supreme Court and lower courts give to like empirical questions — that, say, a “significant body of medical opinion” demonstrates the contribution that “late term” (“partial birth”) abortions make to protecting women’s health;<sup>198</sup> or perhaps that “[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages”<sup>199</sup> — become suffused with polarizing cultural meanings as unmistakable as those in statements such as “the science on climate change is uncertain” and “the death penalty deters murder.”

This factionalized environment incubates collective cynicism — both about the political neutrality of courts *and* about the motivations behind empirical arguments in policy discourse generally. Indeed, Justice Scalia’s extraordinary dissent in *Plata* synthesizes these two forms of skepticism.

It is “*fanciful*,” Justice Scalia asserts, to think that the three district court judges “relied solely on the credibility of the testifying expert witnesses.”<sup>200</sup> One might, at first glance, see him as merely rehearsing his standard diatribe against “judicial activism.” But this is actually a conclusion that Justice Scalia deduces from premises — ones that don’t enter into his usual harangue — about the nature of empirical evidence and policymaking. The experts’ testimony, he explains, dealt with “broad empirical predictions” — ones akin to whether “deficit spending will . . . lower the unemployment rate,” or whether “the continued occupation of Iraq will decrease the risk of terrorism.”<sup>201</sup> For Justice Scalia, the beliefs one forms on the basis of *that* sort of evidence are “inevitably . . . based in large part upon policy views.”<sup>202</sup> It follows that “*of course* different district judges, of different policy views, would have ‘found’ that rehabilitation would *not* work and that releasing prisoners would *increase* the crime rate.”<sup>203</sup> “I am not saying,” Justice Scalia stresses, “that the District Judges rendered their factual findings in bad faith.”<sup>204</sup> “I am saying that it is *impossible* for judges to make ‘factual findings’ without inserting their own policy

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<sup>198</sup> *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000).

<sup>199</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010).

<sup>200</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting) (emphasis added).

<sup>201</sup> *Id.* at 1954–55.

<sup>202</sup> *Id.* at 1954.

<sup>203</sup> *Id.* (second and third emphases added).

<sup>204</sup> *Id.*

judgments” when assessing empirical evidence relating to the consequences of governmental action.<sup>205</sup>

In effect, Justice Scalia is telling us to wise up, not to be snookered by the Court. Sure, people claim that their “policy positions” on matters such as crime control, fiscal policy, and national security are based on empirical evidence. But we all know that things are in fact the other way around: what one makes of empirical evidence is “inevitably” and “necessarily based . . . upon policy views.”<sup>206</sup> At one point, Justice Scalia describes the district court judges as having “dress[ed]-up” their “policy judgments” as “factual findings.”<sup>207</sup> But those judges weren’t, in his mind, doing anything different from what anyone “inevitably” does when making “broad empirical predictions”: those sorts of “factual findings *are* policy judgments.”<sup>208</sup> Empirical evidence on the consequences of public policy should be directed to “legislators and executive officials” rather than “the Third Branch,” Justice Scalia insists.<sup>209</sup> The reason, though, isn’t that the former are better situated to draw reliable inferences from the best available data. On the contrary, the reason is that it is a conceit to think that reliable inferences can possibly be drawn from empirical evidence — and so “*of course*”<sup>210</sup> it is the “policy preferences”<sup>211</sup> of the majority, rather than those of unelected judges, that should control.

It is hard to say what is more extraordinary: the substance of Justice Scalia’s position or the knowing tone with which he invites us to credit it. One might think it would be shocking to see a Justice of the Supreme Court so brazenly deny the intention (capacity, even) of democratically accountable officials to make rational use of science to promote the common good. But Justice Scalia could not expect his logic to persuade unless he anticipated that readers would readily concur (“*of course*”) that empirical arguments in policy debate are a kind of charade.

Of course (“*of course*!”), Justice Scalia did not lack reason to expect such assent. His argument reflects the perspective of someone who senses that motivated reasoning is shaping everyone else’s perceptions, and who accepts that it must also be shaping his, even if at any given moment he is unaware of its influence. We have all experienced this frame of mind. The critical question, though, is whether we really believe that what we are experiencing when we feel this way is inevitable

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<sup>205</sup> *Id.* (emphasis added).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1955.

<sup>208</sup> *Id.* at 1954.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1955.

and normal — a style of collective engagement with empirical evidence that should in fact be treated as *normative*, as Justice Scalia asserts, for the performance of our institutions. I don't think that we do — or that even Justice Scalia does.

It is commonplace for courts to assess “predictive judgments” based in part on empirical data. The Court did so last Term, for example, in *Brown v. Entertainment Merchants Ass'n*,<sup>212</sup> in which it concluded that existing social science evidence did not support the assertion that exposure to violent video games causes aggressive behavior in children.<sup>213</sup> Justice Scalia wrote the Court's opinion. In *Bruesewitz v. Wyeth LLC*,<sup>214</sup> the Court concluded that the National Childhood Vaccine Injury Act<sup>215</sup> should be construed to preempt state-law “design-defect” suits against vaccine manufacturers.<sup>216</sup> One of its reasons rested on a “broad empirical prediction” about whether such suits would undermine the balance of incentives Congress had tried to create with a federal no-fault compensation scheme for persons injured by vaccines<sup>217</sup>: “Taxing vaccine manufacturers' product to fund the compensation program, while leaving their liability for design defect virtually unaltered, would hardly coax manufacturers back into the market,”<sup>218</sup> the Court explained, in an opinion authored by Justice Scalia.

The Court also believes Congress can, and sometimes *must*, engage empirical evidence in a manner that displays a reasoned effort to determine whether Congress's policy judgments are factually *supportable*. In a pair of decisions both captioned *Turner Broadcasting System, Inc. v. FCC*,<sup>219</sup> the Court examined the constitutionality of the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992,<sup>220</sup> which obliged cable-service providers to include network broadcasting stations in their service packages.<sup>221</sup> In *Turner I*, the Court held that protecting the viability of broadcast television outlets was a permissible governmental interest under the First Amendment but that the evidence before it did not permit a confident determination that the “must-carry” provisions were necessary to

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<sup>212</sup> 131 S. Ct. 2729 (2011).

<sup>213</sup> *See id.* at 2739. In dissent, Justice Breyer reached the conclusion that video games can cause psychological harm to children, discussing several scientific studies and providing citations to dozens more in two appendices. *See id.* at 2767–70, 2771–79 (Breyer, J., dissenting).

<sup>214</sup> 131 S. Ct. 1068 (2011).

<sup>215</sup> 42 U.S.C. §§ 300aa-1 to 300aa-34 (2006).

<sup>216</sup> *Bruesewitz*, 131 S. Ct. at 1082.

<sup>217</sup> *See id.* at 1079–80.

<sup>218</sup> *Id.* at 1080.

<sup>219</sup> 512 U.S. 622 (1994) (*Turner I*); 520 U.S. 180 (1997) (*Turner II*).

<sup>220</sup> Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

<sup>221</sup> *Turner I*, 512 U.S. at 630 (summarizing Act's must-carry provisions); *Turner II*, 520 U.S. at 224–25 (holding Act's provisions constitutionally permissible).

achieve that end.<sup>222</sup> “Congress’ predictive judgments are entitled to substantial deference,” Justice Kennedy wrote for a plurality in *Turner I*, but they are not “insulated from meaningful judicial review.”<sup>223</sup> The Court remanded the case to the district court — not to “reweigh the evidence *de novo*, or to replace Congress’ factual predictions with [its] own” — but rather to confirm that “Congress has drawn reasonable inferences based on substantial evidence.”<sup>224</sup> Reviewing the case once more after the development of an extensive evidentiary record, the Court announced in *Turner II* that it now had “no difficulty in finding” among the tens of thousands of pages of expert testimony and empirical analyses that had been available to Congress “a substantial basis to support Congress’ conclusion that a real threat justified enactment of the must-carry provisions.”<sup>225</sup>

Justice Scalia joined the dissent in *Turner II*.<sup>226</sup> But he refrained from pointing out how foolish (or disingenuous) the Court was being for failing to acknowledge that “broad empirical predictions” just “necessarily,” “inevitably,” “*are* policy judgments,” which democratically accountable actors should therefore be free to mold to their “preferences” without judges “inserting” theirs.<sup>227</sup> On the contrary, he agreed with Justice O’Connor (whose opinion he joined), and with Justices Ginsburg and Thomas (“different . . . judges, of different policy views”<sup>228</sup>), that “the evidence on remand”<sup>229</sup> had failed to demonstrate that “Congress could conclude, based on reasonable inferences drawn from substantial evidence,” that the must-carry provisions were necessary to the commercial viability of network broadcasting stations.<sup>230</sup>

Empirical factfinding, then, is a normal and basically unremarkable member of the judicial toolkit — even for Justice Scalia. Except when it isn’t: empirical factfinding has properties that provoke identity-protective cognition in cases that are culturally charged, at which point individuals of diverse values are likely to disagree about whether the tool is being applied appropriately.

Surely the same is true about the use of empirical data in policy-making generally. We believe that legislators and regulators can and should base their policy positions *on* their assessments of empirical evidence rather than use empirical evidence to “dress up” as “facts” po-

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<sup>222</sup> See 512 U.S. at 647; *id.* at 666–68 (plurality opinion).

<sup>223</sup> *Id.* at 666 (plurality opinion).

<sup>224</sup> *Id.*; see also *id.* at 668 (remanding).

<sup>225</sup> 520 U.S. at 196; see also *id.* at 187 (describing evidentiary record).

<sup>226</sup> *Id.* at 229 (O’Connor, J., dissenting).

<sup>227</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1954–55 (2011) (Scalia, J., dissenting).

<sup>228</sup> *Id.* at 1954.

<sup>229</sup> *Turner II*, 520 U.S. at 246 (O’Connor, J., dissenting).

<sup>230</sup> *Id.* at 248 (quoting *id.* at 209 (majority opinion)) (internal quotation marks omitted); see also *id.* at 236.

sitions they hold on other grounds. We do know that there is a risk, particularly on certain culturally charged issues, that people (usually not us; *them*) will fit their perceptions of policy consequences to their values. But that is a *problem* for democracy to fix — not the *reason* we use democracy to make policy.

The same normative conclusion should follow for the status of empirical evidence in adjudication. It would be untenable to banish from the judicial process consequentialist predictions and other forms of factfinding informed by empirical evidence. What a general constitutional principle entails will frequently turn on factual questions — like what the social meaning of a particular practice or government policy is<sup>231</sup> — that judges must try to answer, and not by looking merely inward. In addition, empirical evidence will often supply an indispensable tool in the use of appropriately searching review to “flush out” any hidden illicit motivation (such as hostility to a disfavored message or group) when a law is defended on otherwise legitimate grounds.<sup>232</sup>

Indeed, such review can itself be used by courts to ensure that cultural cognition does not motivate democratically accountable lawmakers to credit “empirical predictions” about risk or other facts that lack foundation but that furnish grounds for restricting behavior offensive to their worldviews.<sup>233</sup> Assurance that motivated cognition of this form is effectively checked is, I’ve argued, integral to the realization of liberal constitutional values.

But, of course, courts will not be able to use empirical evidence to perform this function or related ones if doing so itself provokes dynamics of motivated reasoning that undermine confidence in courts’ neutrality. Is it possible for courts to make appropriate use of empirical evidence without triggering these dynamics? The answer to this question doesn’t depend on whether the sort of “neutrality” that the grand theorists aspired to and that the neutrality skeptics denigrate is philosophically cogent. It turns on whether a form of constitutional practice that avoids communicating meanings that selectively threaten one or another cultural group is possible as an empirical matter.

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<sup>231</sup> See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 970 (N.D. Cal. 2010) (“Domestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States.”).

<sup>232</sup> See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 454 (1996) (arguing that judicial scrutiny and review can help reveal “impermissible” legislative purposes).

<sup>233</sup> See *id.* at 431 n.55 (“Note that it should make no difference [in determining what constitutes an improper motive] whether the impermissible motive has played a role on a conscious or unconscious level.”).

B. *The “Noncommunicative Harm” Principle*

“Broad empirical predictions” are not the only forms of decision-making that provoke dynamics of motivated reasoning. Even mundane determination of concrete historical facts — of the sort one can observe with one’s own eyes — can trigger identity-protective responses that aggravate group conflict. In *They Saw a Game*, the stake the students had in affirming their loyalty to their schools motivated them to form opposing beliefs about the impartiality of officiating decisions relating to events they saw on a film.<sup>234</sup> The stake ordinary citizens have in affirming their loyalty to their defining cultural groups can motivate *them* to question the Court’s impartiality when it adjudicates facts relevant to identifying cognizable *harms* in constitutional law.

*Snyder v. Phelps*<sup>235</sup> involved — and was itself — a spectacle. At issue in the case was the constitutionality of a judgment of \$5 million entered against members of the Westboro Baptist Church.<sup>236</sup> The Church is a homophobic hate group; it has attained particular notoriety for using the funerals of soldiers killed in Iraq and Afghanistan as occasions for demonstrations at which Church members proclaim war casualties as among the punishments that God has imposed on the United States for condoning homosexuality.<sup>237</sup> In *Snyder*, the father of one such soldier had obtained a verdict against the Church for intentional infliction of emotional distress.<sup>238</sup> The case attracted intense media coverage, which was eagerly exploited by the Church to draw even more attention to itself and its sensationally venomous modes of expression.<sup>239</sup> To the further delight of the press, one of the Church’s members herself presented oral argument, defending the funeral protest as free speech protected by the First Amendment.<sup>240</sup>

The decision itself was anticlimactic. Affirming the court of appeals’ reversal of the judgment, the Court sided with the Church.

<sup>234</sup> See *supra* p. 19.

<sup>235</sup> 131 S. Ct. 1207 (2011).

<sup>236</sup> *Id.* at 1214.

<sup>237</sup> See Mary Winter, *Westboro Church Protestors — Ignore Them*, POLITICS DAILY, <http://www.politicsdaily.com/2011/01/14/westboro-church-protestors-ignore-them> (last visited Oct. 2, 2011) (“[Westboro Baptist] Church members haul out their ‘Thank God for Dead Soldiers’ signs for one reason — to get national exposure for their bizarre belief that God is punishing America for tolerating homosexuality.”).

<sup>238</sup> *Snyder*, 131 S. Ct. at 1214.

<sup>239</sup> See, e.g., A.G. Sulzberger, *Where Free Speech Is Less an Idea than an Experience*, N.Y. TIMES, Oct. 10, 2010, at A14.

<sup>240</sup> See, e.g., Dahlia Lithwick, *Up in Their Grill: The Westboro Baptist Church Politely Shows the Court How to Be Obnoxious*, SLATE (Oct. 6, 2010, 7:10 PM), <http://www.slate.com/id/2270167> (“Margie J. Phelps represents Westboro Baptist Church, and yes, before you ask, she hates you, she really hates you. She most likely hates the six Catholics and three Jews up there on the bench, too.”).

“The protest was not unruly; there was no shouting, profanity, or violence,” noted the majority opinion.<sup>241</sup> “The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”<sup>242</sup> “[S]peech cannot be restricted,” the Court explained, “simply because it is upsetting or arouses contempt.”<sup>243</sup> The decision didn’t splinter the Court ideologically. Chief Justice Roberts wrote the majority opinion; Justice Alito authored a lone dissent.<sup>244</sup>

What made *Snyder* easy, Justice Alito’s position notwithstanding,<sup>245</sup> was just how frontally the theory of liability behind the “emotional distress” judgment collided with the central pillar of contemporary First Amendment jurisprudence. In *Private Speech, Public Purpose*, an influential article she wrote before she ascended to the bench (or descended from the academy), Justice Kagan showed how the entirety of the vast and spiraling architecture of the First Amendment could be reproduced through the recursive elaboration of a single proposition: that the government “may not restrict expression for any reason relating to [its] communicative impact.”<sup>246</sup> Government disagreement with or disapproval of a message is obviously a basis for restriction that “relates to its communicative impact,” but so is the sensation of anger, offense, or distress that hearing the message might cause in listeners. Under the First Amendment, “the government cannot count as a *harm*” the experience of such a reaction.<sup>247</sup>

The Church members’ selection of the slain soldier’s funeral as the occasion for expressing their hateful message was plainly “hurtful to

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<sup>241</sup> *Snyder*, 131 S. Ct. at 1218–19.

<sup>242</sup> *Id.* at 1219.

<sup>243</sup> *Id.* The Court found the same considerations decisive in overturning judgments against the Church for “intrusion upon seclusion” and “civil conspiracy.” *Id.* at 1219–20.

<sup>244</sup> *Id.* at 1222 (Alito, J., dissenting).

<sup>245</sup> Justice Alito’s position was not anything close to frivolous. Indeed, over the course of this dissent and other recent opinions, see *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2746–51 (2011) (Alito, J., concurring); *United States v. Stevens*, 130 S. Ct. 1577, 1597–602 (2010) (Alito, J., dissenting), Justice Alito has staked out a considered commitment to a particular conception of the First Amendment that is as rich as it is venerable. This is a view that sees the First Amendment as focused primarily on political speech and thus denies protection to various “categories” of speech that are nonpolitical in nature — thereby leaving government free to regulate those forms of expression based on their communicative impact as well as their noncommunicative impact. Its aim is to promote enjoyment of collective self-government. See generally Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011). A case like *Snyder* is easy for the majority (for Justice Alito, too, but in the other direction) because the majority has so fully absorbed a broader conception of free speech that aims to secure from collective interference the self-governing experience of autonomous individuals. See generally Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 687–89 (1988) (identifying connection between liberal political theory and treatment of First Amendment as prohibiting redress for offended moral sensibilities).

<sup>246</sup> Kagan, *supra* note 232, at 487.

<sup>247</sup> *Id.* at 428 (emphasis added).

many,” and it compounded the “already incalculable grief” of his father.<sup>248</sup> The Court got that. But such “distress [was] *occasioned by . . . the content and viewpoint of the message conveyed*” — the communicative impact of it — and so could not be treated by the state as a cognizable harm consistent with the First Amendment.<sup>249</sup> Things would have been different if the Church members had “interfer[ed] with the funeral itself”<sup>250</sup> — say by obstructing the progress of the procession from the memorial service to the cemetery — in which case the “noncommunicative impact” of their behavior would have supplied a basis for regulation “independent of the response of listeners to a message.”<sup>251</sup>

The “noncommunicative harm” principle (let’s call it) is an example of the philosophical-interpretive relay race that for Dworkin perpetually pours content into the “abstract moral clauses” of the Bill of Rights.<sup>252</sup> It wasn’t visible in the understanding of free speech the Framers handed off.<sup>253</sup> Indeed, it was brought into clear view only in 1975, when John Hart Ely half-derived and half-proposed it as a unifying theme for First Amendment jurisprudence. Exorcising First Amendment scholarship of one of its metaphysical demons, Ely proposed casting out what he called the “ontological” approach, in which the First Amendment’s scope depends critically on whether the regulated behavior is categorized as “speech” or “conduct,” in favor of a “teleological” one, in which the focus is on the government’s *goal* for regulating. “The critical question,” Ely argued, should be whether the “harm that the state is seeking to avert . . . grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant’s conduct had no communicative significance whatever”<sup>254</sup>: if the answer is the former, there is a First Amendment problem; if the latter, there isn’t. Justice Kagan’s cataloging of the myriad doctrinal devices used to distinguish noncognizable “communicative harms” from “noncommunicative” ones in *Private Speech, Public Purpose* illustrates how deeply interwoven Ely’s “teleological approach” has become in First Amendment jurisprudence.<sup>255</sup>

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<sup>248</sup> *Snyder*, 131 S. Ct. at 1217, 1218.

<sup>249</sup> *Id.* at 1219 (emphasis added).

<sup>250</sup> *Id.*

<sup>251</sup> Kagan, *supra* note 232, at 487.

<sup>252</sup> DWORKIN, *supra* note 15, at 10.

<sup>253</sup> See generally LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (rev. ed. 1985) (emphasizing narrowness of Framers’ expectations).

<sup>254</sup> John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975).

<sup>255</sup> See generally Kagan, *supra* note 232.

Her article also suggests why it has taken such deep root: the analytical contribution the “noncommunicative harm” principle makes to integrating constitutional free speech with liberal principles of “neutrality” that resonate deeply in our political culture. On this account, respect for individuals as reasoning and self-determining agents obliges the State to adopt a posture of neutrality with respect to the visions of the good they select for themselves; it must forgo imposing any particular vision, or disfavoring any. A *liberal* reading of the First Amendment sees it as securing this sort of neutrality in a domain of particular importance: if the government “cannot disadvantage a person because the way she lives is immoral or repellant, . . . or because others view it as immoral or repellant,” then it “follows that the government cannot disadvantage a person because what she *thinks* or *says* is immoral or repellant or because others view it as such.”<sup>256</sup> By forbidding the government to “count as a *harm*”<sup>257</sup> any state of affairs that relates to how “people can be expected to react to [a] message,”<sup>258</sup> the “noncommunicative harm” principle furnishes a decisionmaking heuristic for enforcing the First Amendment.

It is also what makes the Court’s First Amendment jurisprudence into another font of cognitive illiberalism. To comply with the First Amendment, the government must show that laws that impinge on expression are aimed at regulating the “noncommunicative impact” of such behavior: physical injury, intimidation, destruction of property, or interference with others’ bodily movements — harms that can be defined “independent of the response of listeners to a message,”<sup>259</sup> or that “would arise even if the defendant’s conduct had no communicative significance whatever.”<sup>260</sup> These are akin to the types of dangers and risks that the study of cultural cognition shows people are motivated to impute to behavior that denigrates their values generally. We can thus anticipate that there will be identity-protective pressure across cultural groups to seek regulation of the expression of ideas that they find “immoral or repellant” — not on the ground that they are immoral or repellant but on the ground that such activity is causing some species of noncommunicative harm. We should expect, too, that the targets of such regulation will see it as motivated (consciously or unconsciously) by hostility to their worldviews, and that those proposing the regulations will honestly and indignantly deny the same.

Courts will then have to adjudicate the “facts” in such cases. Indeed, they will be put in the position of testing assertions of noncom-

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<sup>256</sup> *Id.* at 512–13 (emphases added).

<sup>257</sup> *Id.* at 428 (emphasis added).

<sup>258</sup> Ely, *supra* note 254, at 1497.

<sup>259</sup> Kagan, *supra* note 232, at 487.

<sup>260</sup> Ely, *supra* note 254, at 1497.

municative harm with doctrines such as “time, place, manner” and “content neutrality” and with procedures such as “strict scrutiny” that Justice Kagan identified in *Private Speech, Public Purpose* as essential tools for “flushing out” concealed motivation (conscious or otherwise) to suppress disfavored ideas.<sup>261</sup> At that point, their own impartiality will be drawn into the whirlpool of cyclical recrimination and illiberal status competition.

The “noncommunicative harm” principle has generated precisely these consequences. When Congress made it a crime to destroy draft cards in 1965, was it motivated by hostility to the message of the Vietnam War protestors who were burning theirs or by the “noncommunicative impact” of such conduct on the “smooth and proper functioning” of the selective service system?<sup>262</sup> Did municipal officials deny gay pride activists a permit to march to avoid the disruption of traffic and the drain on police resources associated with permitting multiple parades at the same time — a noncommunicative harm — or to spare offense to participants in the city’s traditional St. Patrick’s Day parade scheduled for the same day — a communicative one?<sup>263</sup> Does a law that bans cross burning seek to protect citizens from “a particularly virulent form of intimidation”<sup>264</sup> or to gratify a distinctive ideological “hostility towards the particular biases . . . singled out” from among the range of proscribable assaults?<sup>265</sup> Similarly, does the tendency of “hate crimes” to “provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest” furnish “an adequate explanation for [a] penalty-enhancement provision over and

<sup>261</sup> See Kagan, *supra* note 232, at 485.

<sup>262</sup> *United States v. O’Brien*, 391 U.S. 367, 382 (1968). In *O’Brien*, the Court refused to consider evidence that the asserted “noncommunicative harms” were pretextual. See *id.* at 383 (stating that the Court “will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive”). But the Court has not taken a consistent position on showings of pretextual motive under the First Amendment. See, e.g., *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438–39 (2002) (plurality opinion) (explaining that in the face of a reason to “doubt” that the government was truly motivated by asserted empirical evidence of harm, the government must furnish “evidence . . . [to] support its rationale” and cannot “get away with shoddy data or reasoning”); *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (“In some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas. There the compelling-interest test may be one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law.”).

<sup>263</sup> Cf. *Olivieri v. Ward*, 637 F. Supp. 851 (S.D.N.Y.) (finding “logistical” concerns to be a pretext for denying gay rights group a permit to assemble in public forum along St. Patrick’s Day parade route), *aff’d as modified in part, rev’d in part*, 801 F.2d 602 (2d Cir. 1986). But cf. *Irish Lesbian and Gay Org. v. Giuliani*, 918 F. Supp. 732, 743 (S.D.N.Y. 1996) (upholding the municipal government’s reliance on content-neutral criteria involving traffic disruption and public safety to deny marching permit to gay and lesbian group).

<sup>264</sup> *Virginia v. Black*, 538 U.S. 343, 363 (2003) (plurality opinion).

<sup>265</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

above mere disagreement with offenders' beliefs or biases"?<sup>266</sup> If so, must the propensity of flag burning to cause emotional upset and resulting "breaches of the peace" be deemed a "noncommunicative harm" as well?<sup>267</sup>

In a series of divided decisions stretching from 1994 to 2000, the Supreme Court upheld (in whole or in part) various types of restrictions on the behavior of pro-life protestors conducting demonstrations near abortion clinics. The protestors asserted that the restrictions were motivated by disagreement with and offense at their message. The Court, however, refused to disturb lower court factual findings that the protestors had intimidated and obstructed clinic staff and women trying to enter the clinic.<sup>268</sup>

In one of his angry dissents, Justice Scalia implored those "seriously interested in what this case was about" to view a videotape put into evidence by the parties seeking to enjoin the protestors.<sup>269</sup> Anyone "familiar with run-of-the-mine labor picketing, not to mention some other social protests, will be aghast at what it shows we have today permitted an individual judge"<sup>270</sup> to enjoin: "singing, chanting, praying, shouting, . . . speeches, peaceful picketing, communication of familiar political messages"; "efforts to persuade individuals not to have abortions"; "interviews with the press."<sup>271</sup> "What the videotape, the rest of the record, and the trial court's findings do not contain is any suggestion of violence near the clinic, nor do they establish any attempt to prevent entry or exit."<sup>272</sup>

In a pair of famous cases decided thirty years earlier, the Court had overturned convictions of civil rights protestors found guilty of "breaching the peace" in demonstrations against Jim Crow laws in the South.<sup>273</sup> Trial court findings that the police had reasonably perceived the demonstrators to be on the verge of imminent violence were set

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<sup>266</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993).

<sup>267</sup> *Texas v. Johnson*, 491 U.S. 397, 400 (1989).

<sup>268</sup> See *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 362–63 (1997) (crediting findings that "groups of protestors consistently attempted to stop or disrupt clinic operations" by "getting very close to women entering the clinics and shouting in their faces; surrounding, crowding, and yelling at women entering the clinics; or jostling, grabbing, pushing, and shoving women as they attempted to enter the clinics"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 758 (1994) (crediting finding that "protesters continued to impede access to the clinic" after district court issued an initial injunction); see also *Hill v. Colorado*, 530 U.S. 703, 709 (2000) (crediting legislative hearing "testimony . . . that demonstrations in front of abortion clinics impeded access to those clinics and were often confrontational").

<sup>269</sup> *Madsen*, 512 U.S. at 786 (Scalia, J., dissenting).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 790.

<sup>272</sup> *Id.*

<sup>273</sup> See *Cox v. Louisiana*, 379 U.S. 559, 572–73 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 235–38 (1963).

aside by the Court, which declared its “duty in a case [alleging incipient disorder by protestors] to make an independent examination of the whole record.”<sup>274</sup> “Our conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous,” the Court explained in *Cox v. Louisiana*,<sup>275</sup> “is confirmed by a film of the events taken by a television news photographer, which was offered in evidence as a state exhibit.”<sup>276</sup> “We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout.”<sup>277</sup> Justice Clark, who presumably watched the film too, saw something else: “an effort to influence and intimidate” by a “mob of young Negroes” “staging . . . a modern Donnybrook Fair” at the entrance to a local court.<sup>278</sup>

In probing the evidence (or not) to test assertions of noncommunicative harms, were the Justices in these cases — majority or dissent — influenced by motivated reasoning? It is, of course, impossible to say.

But it *is* possible to say that the way they engaged (or didn’t engage) the facts embroiled the Court’s own neutrality in the complex of mechanisms that make up cognitive illiberalism. When we (lawyers, law students, scholars) read the Court’s opinions, we are *instantly* filled with conviction about what the facts were in the cases and who is lying to us or is deluded — “Clark must have been a racist!”; “Scalia is a political hack!” — even though we have not looked at any of the evidence. If we *do* take up one of Justice Scalia’s repeated invitations to “see for ourselves” by watching a tape, we remain divided, on the very same grounds, about what we see.<sup>279</sup> Most of us, of course, do not read the opinions or look at the videos. Yet we *hear* about the Court’s decisions, most likely from sources whom we turn to because they reliably see matters as we and others who share our worldview do; *they* are filled with confidence about what the facts “really” were and which Justices (including the dissenters) were misrepresenting them — and we make these intermediaries’ positions our own. We are filled with anger, too, when we observe (maybe in the course of class discussion in law school or as we surf across channels on cable television) that others are actually attacking/defending the Court’s decisions. But we aren’t surprised: it’s *them* again — the ones who claim (as if they themselves were scientists!) that climate change is a hoax/the end

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<sup>274</sup> *Edwards*, 372 U.S. at 235; see also *Cox v. Louisiana*, 379 U.S. 536, 545 (emphasizing that “we are required to make” an “independent examination of the record”).

<sup>275</sup> 379 U.S. 536.

<sup>276</sup> *Id.* at 547 (footnote omitted). In *Cox*, the Court issued separate opinions in convictions for breach of the peace, No. 24, 379 U.S. 536, and for picketing a courthouse, No. 49, 379 U.S. 559.

<sup>277</sup> *Cox*, 379 U.S. at 547.

<sup>278</sup> *Cox*, 379 U.S. at 585–86 (Clark, J., concurring in No. 24 and dissenting in No. 49).

<sup>279</sup> See generally Kahan, Hoffman & Braman, *supra* note 124; Kahan, Hoffman, Braman, Evans & Rachlinski, *supra* note 128.

of the world, or that concealed handguns decrease/increase crime. They are always “dressing up” their “policy preferences” as facts, just as the “conservative”/“liberal” activists on the Court do.

In this way, the Court’s decisions are transformed into symbols. In assessing *whose* “harms” are “cognizable,” the Court is adjudicating who *counts* in a factionalized society, the members of which live in a state of permanent resentment of one another’s perceived attempts to erect their worldview into a political orthodoxy.<sup>280</sup> If the Court’s decisions didn’t have that significance — if they were just about the “facts” of *particular* cases — who would think that a mistake by the Court was of any real consequence?

The Justices know that their decisions have this significance. In dissenting in *Hill v. Colorado*,<sup>281</sup> the last of the Court’s abortion protest cases, Justice Kennedy wrote, with riveting emotion, of the “insult” he believed the outcome inflicted — not on the losing parties in that decision in particular, but on a constituent community of our society.<sup>282</sup> The swing vote for rebuffing the attack on *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>283</sup> Justice Kennedy now criticized the *Hill* majority for “deliver[ing] a grave wound . . . to the essential reasoning in the joint opinion” he had authored in *Casey* with Justices O’Connor and Souter.<sup>284</sup>

“The vital principle,” Justice Kennedy wrote about *Casey*, “was that in defined instances the woman’s decision whether to abort her child [i]s in its essence a moral one, a choice the State could not dictate.”<sup>285</sup> The right to form one’s own view of the good includes the right to advocate it.<sup>286</sup> Thus, in Justice Kennedy’s view, by requiring the State to respect abortion as an inviolable component of the freedom of individuals to make their own moral decisions, *Casey* had necessarily established a reciprocal state obligation to respect as inviolable the right of “citizens who oppose abortion . . . [to] seek to convince their fellow citizens” that abortion is the *wrong* choice.<sup>287</sup> Indeed, because they had been told by the Court that they could not legitimately use “the machinery of government” to promote their understanding of

<sup>280</sup> See generally J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) (identifying conflicts over the meaning of the Constitution and over Supreme Court interpretations of it as focuses of cultural status competition).

<sup>281</sup> 530 U.S. 703 (2000).

<sup>282</sup> *Id.* at 789 (Kennedy, J., dissenting).

<sup>283</sup> 505 U.S. 833 (1992).

<sup>284</sup> *Hill*, 530 U.S. at 791 (Kennedy, J., dissenting).

<sup>285</sup> *Id.*

<sup>286</sup> Cf. Kagan, *supra* note 232, at 512–13 (arguing that if “[t]he government . . . cannot disadvantage a person because the way she lives is immoral or repellant . . . or because others view it as immoral or repellant,” then “it follows that the government cannot disadvantage a person because what she thinks or says is immoral or repellant or because others view it as such”).

<sup>287</sup> *Hill*, 530 U.S. at 787 (Kennedy, J., dissenting).

“one of life’s gravest moral” imperatives, the abortion opponents could find evidence of state respect for their worldview *only* in the Court’s protection of their right to resort to “the same peaceful and vital methods” of protest that the Court had historically safeguarded.<sup>288</sup> “The Court tears away from the protesters the guarantees of the First Amendment when they most need it,” Justice Kennedy lamented.<sup>289</sup>

The stakes Justice Kennedy perceived in *Hill* are endemic to the adjudication of constitutional rights. As then-Assistant Professor Kagan recognized in *Private Speech, Public Purpose*, the “noncommunicative harm” principle implements, but only in the domain of speech, a more general liberal command that “the government . . . treat all persons with equal respect and concern.”<sup>290</sup> The resonance of that ideal in our political culture predictably invites the expansion of its constitutional dimensions. Striking down Texas’s (desuetudinal) antisodomy law in *Lawrence v. Texas*,<sup>291</sup> the Court held that the Due Process Clause forbids “use [of] the power of the State to enforce . . . on the whole society”<sup>292</sup> standards of “private conduct”<sup>293</sup> that originate in “religious beliefs” or like “conceptions of right and acceptable behavior.”<sup>294</sup> Read for all its worth, this language (written by Justice Kennedy) can be seen as establishing a general *secular harm* principle, one reinforced by the holding of *Romer v. Evans* that the expression of “animosity” toward a group cannot be deemed a “legitimate governmental purpose” under the Equal Protection Clause.<sup>295</sup>

There may be some who will take offense at the idea that the Fourteenth Amendment enacts John Stuart Mill’s *On Liberty*, but a great many who are just fine with that idea will still be motivated by identity-protective cognition to impute secular harms to “private conduct” (from unconventional sexual behavior to recreational drug use to smoking to generation of nuclear power) that transgresses their religious or cultural values.<sup>296</sup> Members of “unpopular” groups will frequently perceive that the regulatory burdens they are being made to bear cannot genuinely be “explained by reference to *legitimate* public policies” independent of “animosity” toward their way of life.<sup>297</sup> They will quite often be right, particularly if one takes the position (as one

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<sup>288</sup> *Id.* at 787, 791, 792.

<sup>289</sup> *Id.* at 792.

<sup>290</sup> Kagan, *supra* note 232, at 511.

<sup>291</sup> 539 U.S. 558 (2003).

<sup>292</sup> *Id.* at 571.

<sup>293</sup> *Id.* at 564.

<sup>294</sup> *Id.* at 571.

<sup>295</sup> 517 U.S. 620, 634–35 (1996).

<sup>296</sup> See generally Kahan, *supra* note 26.

<sup>297</sup> *Romer*, 517 U.S. at 634–35 (emphasis added) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

person whose vote counts has) that “it should make no difference whether the impermissible motive has played a role on a conscious or unconscious level” in the state’s assertion of a secular basis for regulating morally unpopular behavior.<sup>298</sup> Adjudicating whose view of the facts is right in such matters — without adjudicating the status of contending cultural groups — will not normally be as easy as was deciding *Snyder v. Phelps*.<sup>299</sup>

### C. Theories as Cues

Relieving citizens of the anxiety that the Court is resolving cases in a partisan manner is the asserted justification for “constitutional theories.” But in fact, such theories tend to aggravate motivated reasoning and related dynamics. Purposefully bred as pit bulls to attack the political motivations of those on one side or the other in debates about *Roe*, and spectacularly let loose by angry Justices when they find it useful to impugn one another’s impartiality, interpretive theories now function as cues about which side to root for when members of culturally diverse groups are alerted to come “see a game” being played by their respective teams in a case before the Supreme Court.

There is, it turns out, a strong association between one’s cultural style and one’s attitude toward “originalism” as a theory of interpretation. In a recent study, Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere aggregated a variety of public opinion surveys that contained items relating to public attitudes toward various propositions about how the Supreme Court should construe the Constitution: that the Court should “focus . . . on what the Constitution meant when it was written”; that the Constitution should be “read . . . as a general set of principles whose meaning changes over time”; that the Constitution should be understood to “recognize a right of privacy even though it is not explicitly stated” in the text; and so forth.<sup>300</sup> Correlating the results with demographic and other individual characteristics, Greene and his coauthors came to the conclusion that “originalism” is strongly favored by individuals who are conservative in their political orientation and “hierarchical, morally traditionalist, and libertarian” (that is, individualistic) in their cultural outlooks.<sup>301</sup> For these members of the public, the authors plausibly surmised, “originalism” operates as a kind

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<sup>298</sup> Kagan, *supra* note 232, at 431 n.55.

<sup>299</sup> For an important experimental study of the impact of motivated reasoning on perceptions of “harm,” see Avani Mehta Sood & John M. Darley, *The Motivated Plasticity of Harm in the Service of Punishment Goals: Legal Implications of Outcome-Driven Reasoning* (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>300</sup> Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 CO-LUM. L. REV. 356, 367 (2011).

<sup>301</sup> *Id.* at 373, 375.

of “expressive idiom” that helps them form positions on Supreme Court cases that fit their values in much the same way that particular empirical claims about risk do.<sup>302</sup>

How does something like this happen? The answer cannot be that originalism *as a theory* uses values that are distinctively hierarchical or individualistic or that it systematically produces states of affairs that are.

Consider the Court’s decision last Term in *Brown v. Entertainment Merchants Ass’n*.<sup>303</sup> The Court in that case struck down state regulations that prohibited the rental or sale of violent video games to minors without parental consent.<sup>304</sup> Justice Thomas dissented on the ground that the majority’s conclusion did “not comport with the original public understanding of the First Amendment.”<sup>305</sup> Presenting a broad-ranging survey of historical sources — “the Puritan tradition common in the New England Colonies”; “Locke’s and Rousseau’s writings”; “Thomas Jefferson’s approach to raising children” — Justice Thomas concluded: “I am sure that the founding generation would not have understood ‘the freedom of speech’ to include a right to speak to children without going through their parents.”<sup>306</sup> I feel reasonably confident I can guess how conservative Americans with hierarchical, morally traditionalist, and individualistic values would feel about Justice Thomas’s decision: I think they’d like it a lot.

The author of the majority opinion, however, was not one of the Court’s cosmopolitan, collectivist liberals. It was Justice Scalia. He emphasized the absence of any “longstanding tradition in this country of specially restricting children’s access to depictions of violence.”<sup>307</sup> Indeed, he pointed out, works that Thomas Jefferson and his contemporaries would have expected their children to get their hands on were filled with stomach-turning scenes of carnage: eyeballs being “pecked out” (*Cinderella*) or punctured with hot stakes (Homer’s *Odyssey*); kidnapped children incinerating captors in ovens (*Hansel and Gretel*); evil queens being forcibly danced to death (*Snow White*); and politicians seeking to evade pitchfork-wielding devils by holding their breath below the surface of boiling pitch (Dante’s *Inferno*).<sup>308</sup> Just the previous Term, Scalia noted, the Court had “held that new categories of unprotected speech may not be added” to those that “[f]rom 1791 to the present” had been understood to lie outside the First Amendment’s

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<sup>302</sup> *Id.* at 356, 400–01.

<sup>303</sup> 131 S. Ct. 2729 (2011).

<sup>304</sup> *Id.* at 2741–42.

<sup>305</sup> *Id.* at 2751 (Thomas, J., dissenting).

<sup>306</sup> *Id.* at 2752, 2753, 2755, 2759.

<sup>307</sup> *Id.* at 2736 (majority opinion).

<sup>308</sup> *Id.* at 2736–37.

scope of immunity.<sup>309</sup> So there was no way California was now going to be allowed “to create a wholly new category . . . only for speech directed at children.”<sup>310</sup>

The disagreement (a very civilized one; no name calling) between Justices Scalia and Thomas illustrates two points that make it implausible to think that ordinary citizens who subscribe to a hierarchical individualist cultural style are drawn to originalism *because* it fits their values. First, the degree of generality at which to characterize the Framers’ intent, or even the principles latent in their contemporary practices (the Framers didn’t have video games, but even Justice Thomas didn’t think that settled the case), is gauged through the exercise of professional(ized) judgment. Even Justices and potential Justices who adhere to a hierarchical individualist cultural style *agree* that their theory has this feature and that as a result sometimes even *they* will disagree about what the theory entails.<sup>311</sup>

Second, the Framers of the Bill of Rights (not to mention of the Reconstruction Amendments) were not faithfully hierarchical and in-

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<sup>309</sup> *Id.* at 2733, 2734 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010)) (internal quotation marks omitted).

<sup>310</sup> *Id.* at 2735.

<sup>311</sup> One of the more interesting exchanges on originalist methodology took place between Judge Bork and then-Judge Scalia when both served on the D.C. Circuit. In *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), the D.C. Circuit sitting en banc upheld the dismissal of a libel action brought by a university professor against conservative columnists Evans and Novak, who had described the professor as a “Marxist.” *Id.* at 971. In his majority opinion, then-Judge Starr concluded that the defamatory statements were “opinion,” *id.* at 990, and thus protected by the First Amendment, as opposed to “factual statements,” *id.* at 984. Judge Bork wrote a concurring opinion to express his view that “fact” versus “opinion” was too “crude [a] dichotomy” to facilitate sensible analysis, *id.* at 994 (Bork, J., concurring); he proposed instead that courts simply engage in fact-intensive “scrutiny to ensure that cases about types of speech and writing essential to a vigorous” political debate “do not reach the jury,” *id.* at 997. Judge Bork conceded that this form of judicial screening of libel actions was not familiar at the time of the Framing. But “it is the task of the judge in this generation,” he explained, “to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know.” *Id.* at 995. The Framers, he observed, “gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression,” *id.* at 996, and “if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines?” *Id.* Judge Scalia dissented. Judge Bork’s view of the First Amendment as a mandate to fit the framers’ values to “modern problems,” Judge Scalia argued, made unrealistic assumptions about the knowledge of courts: “[I]t is frightening to think that the existence or nonexistence of a constitutional rule . . . is to depend upon our ongoing personal assessments of . . . sociological factors” essential to define liability rules that optimally balance vigor and accuracy in political expression. *Id.* at 1039 (Scalia, J., dissenting). Judges Bork and Scalia, then, advanced competing conceptions of originalism based on competing understandings of the capacity and role of courts in a constitutional democracy. What’s more, “liberal” Carter appointees Judges Wald and Edwards joined Judge Scalia’s dissent, while “strict constructionist” Nixon appointees Judges Wilkey and MacKinnon and “liberal” Carter appointee Judge Ruth Bader Ginsburg joined Bork’s concurrence. *Id.* at 971. This was not an “ideological” split over “activism”; it was a craft-norm debate among lawyers all deeply enmeshed in a shared professional culture.

dividualistic. They might be surprised by what their ideological descendants are willing to tolerate today, but it remains the case that many of today's conservative hierarchical individualists, along with majorities in their communities, would like to use state power to do lots of things (for example, ban the opening of mosques<sup>312</sup> or forbid U.S.-born children of illegal aliens from living and working in this country<sup>313</sup>) that the Framers *very specifically* intended to foreclose.

These points, moreover, reinforce one another. Sometimes communities dominated by conservatives with hierarchical individualist cultural styles want to enact laws that might or might not be constitutional for an originalist, depending on the level of generality at which the Framers' intentions are characterized. Again, this is not a proposition of dispute for orthodox originalists. Bork, for example, accepted that the Framers of the Fourteenth Amendment did not see segregated schools as unconstitutional, but he concluded that segregated schools nevertheless violated their operative intent "to enforce a core idea of black equality against governmental discrimination."<sup>314</sup> This, of course, is what neutrality skeptics have long recognized as the analytical Achilles' heel of originalism; theorists of an egalitarian collectivist outlook can be counted on to slice at it by characterizing the Framers' intentions at whatever level of generality — high or low — yields outcomes appealing to readers of the *New York Review of Books*. Card-carrying, good-faith originalists would all agree that such arguments are absurd, the hierarchical individualist can be sure. But if what the hierarchical individualist likes about originalism is the congeniality of the results it generates when Scalia, Thomas, or Bork rather than Ronald Dworkin (or Jack Balkin<sup>315</sup>) applies it, then what's making him like it is not the logic of the theory but what he believes about the *sensibilities* of the judges who proclaim themselves "originalists."

Indeed, it would be absurd to think that public attitudes toward original intent could possibly turn on anything else. Ordinary citizens (of *all* cultural styles) haven't even read the Constitution, much less tried reading it alternately with the guidance of originalist and nonoriginalist theories of interpretation to see which one produces results they like more.

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<sup>312</sup> *Herman Cain Backs Tenn. Move to Ban Mosque*, CBS NEWS (July 18, 2011, 3:50 AM), <http://www.cbsnews.com/stories/2011/07/18/politics/main20080237.shtml>.

<sup>313</sup> Andy Barr, *Graham: 14th Amendment Outdated*, POLITICO (Aug. 5, 2010, 5:34 AM), <http://www.politico.com/news/stories/0810/40635.html>.

<sup>314</sup> Bork, *supra* note 16, at 14; *see also supra* note 311.

<sup>315</sup> *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–94 (2007) (arguing that an originalist reading of the Fourteenth Amendment supports abortion rights).

Justices of a wide range of jurisprudential leanings have always used the “Framers’ intent” as one of an eclectic array of heuristics for trying to make sense of the Constitution.<sup>316</sup> The “originalism” that the hierarchical individualist likes — and that the egalitarian communitarian hates — is something other than that. As Greene has argued in another article, “originalism” is a kind of presentational style, adopted by academic critics and sometimes by angry Justices, that *citizens* (through the agency of culturally authoritative intermediaries) use as a cognitive heuristic for deciding what is at stake and whom they should trust in a charged case.<sup>317</sup>

“Originalism” is well suited for that for several reasons. The first and most obvious is its provenance. It came into being for the *sake* of coordinating and systematizing the expression of scholarly criticism of *Griswold* and *Roe*, among other decisions, which theorists attributed to political partisanship on the part of the Court.<sup>318</sup> So from the beginning it had a particular cultural valence. It also had a tone. It was both highly confident — of the incorrectness of the Court’s decisions — and highly denunciatory — of the Court and anyone else who tried to defend the outcome in those cases.

The second reason “originalism” in this sense became a way to communicate cultural affinity was the *reaction* it provoked in people with a more egalitarian style. Both the valence of “originalist” theorizing and its denunciatory and confident tone begged credulity in a manner that in turn begged *for* rebuke. Any *honest* and *reflective* person could see that the results the “originalists” derived from their theory necessarily depended on some unacknowledged criterion for deciding the level of generality at which to describe the Framers’ in-

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<sup>316</sup> See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–99 (1987).

<sup>317</sup> Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 658–61 (2009); see also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 548–49 (2006).

<sup>318</sup> See TELES, *supra* note 83, at 143–45 (describing the Federalist Society’s role in coordinating and communicating conservative and originalist ideas); Greene, *supra* note 317, at 680–82. The binding force of the Framers’ “original intention” supplied the animating theme of Raoul Berger’s 1977 *Government by Judiciary*, which presented a systematic critique of the jurisprudence of the Warren and early Burger Courts. Teles describes how “original intent” or simply “originalism” — a term apparently first used by Paul Brest in critiquing Berger’s position, see Brest, *Misconceived Quest*, *supra* note 87, at 204 n.1, 219 — was self-consciously adopted by conservatives associated with the Federalist Society movement to replace earlier terms such as “judicial restraint” and “strict constructionism” used to denigrate the Warren Court’s jurisprudential style. See TELES, *supra* note 83, at 145. Those involved credit Reagan Attorney General Edwin Meese with that decision. See *id.* Whether this is an accurate claim or an attempt to generate historical lore, Meese did play a major role in popularizing the term “originalism” in public addresses and remarks. See Greene, *supra* note 317, at 680–81; Post & Siegel, *supra* note 317, at 554–61.

tent.<sup>319</sup> The criterion they were relying on — of course! — was the fit with their own partisan outlooks, or in the case of *Brown*, opportunism, since they recognized that they would be found out and entirely discredited if they had to acknowledge they *really* were against the decision (like that interpretivist-fascist Wechsler!). The antioriginalist team's angry denunciations only helped to fix the power of originalism as a cue that could readily be used by citizens of all cultural outlooks to pin partisan meanings onto the Court's decisions as well as Supreme Court nominations.

This is a story about how “original intent” transmutes from a technique for “neutral derivation” of constitutional rules into a form of cultural “fighting words.” But the “generality problem” generalizes. As the neutrality critics point out,<sup>320</sup> the other “theories,” too, all make use of concepts too abstract to be brought to bear on particulars without the guidance of extrinsic judgments. Accordingly, those who resort to “neutrality” theories inevitably end up caught — not so much in self-contradiction as in sanctimony. Supporters of *Roe* are told they are complicit in “judicial activism” — they'd get “F's” on their first-year exams — for suggesting that women (single, poor, and pregnant) rather than fetuses are a “discrete, insular minority.”<sup>321</sup> Feminists who propose antipornography laws are lectured for not having read their John Stuart Mill in college: *surely*, you realize the “insult[] or damage[]” one experiences simply from knowing “that others have hostile or uncongenial tastes” is not cognizable as a harm;<sup>322</sup> and don't expect us to buy your specious analogy between pornography laws and antidiscrimination laws — we “forbid racial discrimination not just because the

<sup>319</sup> Cf. Dworkin, *supra* note 75, at 668 (“Sometimes Bork's question-begging is spectacular.”).

<sup>320</sup> See *supra* pp. 16–18.

<sup>321</sup> See *supra* pp. 13–14. The “majority is hurting *itself*” defense of affirmative action, see ELY, *supra* note 14, at 170–71; Ely, *supra* note 57, at 727, is also fraught with unspecified moral evaluation. It is not literally the *majority* that is being disadvantaged by affirmative action; it is a subcommunity consisting of those individuals who would have received whatever opportunity or benefit is instead being awarded to affirmative action recipients. It is not unrealistic, either, to think that democratic political dynamics will tend to concentrate that cost in subcommunities less able to protect their interests politically than other more powerful ones. See Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 647 (1991). This point does not make Ely's representation-reinforcement defense of affirmative action wrong; it just means that one can't use the defense without also addressing a difficult moral issue about when the political process can be deemed *sufficiently sensitive* to the stake of a burdened party to make it legitimate to defer to democratically arrived-at tradeoffs between that party's interests and those of others. See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1176 (1998) (“A court can conclude that a law . . . passes the [representation-reinforcement] test . . . only if the average citizen is affected by that law or policy in a way that entitles her judgment to moral respect.”). Those who blithely invoke “representation reinforcement” in any setting while ignoring this point will come off to their opponents as either self-deceived or bent on deception.

<sup>322</sup> DWORKIN, *supra* note 15, at 238.

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majority dislikes racists, but because discrimination is a profound harm and insult to its victims.”<sup>323</sup> The way those who use theory *talk* — their smugness, their incomprehension of complexity, their contempt for those they are talking to — communicates either self-deception or bad faith, which in turn breeds distrust.

Should the Justices stop using “Framers’ intent,” “representation reinforcement,” the “moral reading” approach, or any other form of interpretation? That would be a ridiculous thing to propose. All judges of all jurisprudential orientations use all of these techniques all the time, often in conjunction with one another.<sup>324</sup> When they disagree about the results, moreover, they do not (as *Entertainment Merchants* helps to show) invariably emit the sorts of cues that predictably aggravate motivated cognition.

Judges’ reasoning triggers self-reinforcing waves of self-deception and distrust only when judges make use of the simulacra of these heuristics that get packaged as “theories” and sold to the public as furnishing exclusive guides for “neutral” interpretation. The provenance, valence, and tone of these frameworks are what make them carriers of the partisan meanings that provoke the complex of identity-protective mechanisms that polarize citizens on cultural grounds.

David Strauss points out this feature of constitutional theorizing when (speaking of Dworkin’s work) he describes the pernicious effect of “writing that arrogates the high ground of ‘principle’” to justify highly charged positions of constitutional law.<sup>325</sup> “[T]he risk is that this kind of writing will convey the complacent message that the views the audience already holds on these questions are supported by rock-solid philosophical and legal arguments that no intelligent person could reject in good faith.”<sup>326</sup> Because those issues — ones involving hate speech, abortion, pornography, and many others — are almost all “wickedly complex,” theorizing of this sort dulls the critical sensibilities of those who are “inclined to agree with” it and infuriates those who are not.<sup>327</sup>

To end the neutrality crisis, the Supreme Court doesn’t need new techniques for finding meaning in the Constitution. It needs ones that reduce the risk that decisions firmly rooted in professional craft norms will become freighted with meanings that variously threaten the identity of one or another cultural group.

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<sup>323</sup> Ronald M. Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101, 112 (1987).

<sup>324</sup> See Fallon, *supra* note 316, at 1189.

<sup>325</sup> Strauss, *supra* note 84, at 386.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

## III. EXPRESSIVE VIRTUES

The goal so far has been to understand the origins of the neutrality crisis. The conventional view, in the legal academy at least, cites the “incoherence” of “neutral principles”: constitutional theories designed to insulate the law from competing partisan values cannot be made to generate outcomes in particular cases without resort to such values. I have suggested that the neutrality crisis has a different source: a self-sustaining atmosphere of self-deception and distrust. As a result of motivated cognition, citizens of diverse values are prone to forming opposing *perceptions* of the Supreme Court’s neutrality even when the Court is appropriately using professional craft norms to ensure the government is honoring its constitutional obligation to steer clear of endorsing a partisan moral orthodoxy. The Court engages in reasoned elaboration of its decisions to promote confidence in its impartiality. But far from easing public anxiety, the doctrines, rules, and procedures that the Court uses to try to assure us of its neutrality only intensify the polarizing effect of motivated cognition.

The solution, I now want to argue, is to identify forms of reasoned elaboration that reverse these dynamics. Social psychology has identified decisionmaking strategies that help to neutralize motivated reasoning. These devices are aimed at dissipating the identity-protective pressures that push members of diverse groups in opposing directions. I will now consider how these devices, and the mechanisms underlying them, might be used to improve constitutional decisionmaking.<sup>328</sup>

But two points of clarification are in order. The first is that the devices I’m proposing do not contemplate any sort of revision in what the Constitution is understood to mean or even in how its meaning should be discerned. I don’t believe that counteracting the impact of motivated reasoning on perceptions of the Court’s neutrality depends on formulating new doctrinal rules or methods. Indeed, as I’ve indicated, many of the occasions for difficulty in the Court’s jurisprudence involve modes of adjudication, such as assessments of empirical evidence, and doctrines, such as the “noncommunicative harm” principle of the First Amendment, that I believe are indispensable to reasoned

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<sup>328</sup> This analysis complements those of others who have begun to look at how the potential distorting effect of cultural cognition on legal decisionmaking might be mitigated. Paul M. Secunda discusses a variety of such techniques for mitigating potential bias in judges, particularly in the adjudication of employment and labor disputes, which are rife with potential for cultural conflict. See generally Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010); Paul M. Secunda, *Cognitive Illiberalism and Debiasing Strategies* (Marquette Law Sch., Legal Studies Paper No. 11-03, 2011) [hereinafter Secunda, *Debiasing*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1777104](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777104). In papers with collaborators, I have also addressed devices for offsetting the negative effect of cultural cognition on judges’ consideration of dispositive motions, see generally Kahan, Hoffman & Braman, *supra* note 124, and on jury factfinding, see generally Kahan, Hoffman, Braman, Evans & Rachlinski, *supra* note 128.

enforcement of fundamental constitutional norms. What's needed is a psychologically realistic understanding of how the Court should *communicate* its commitment to using these methods impartially.

The second point is that my reflections should be seen in the nature of informed conjecture. They merit refinement, augmentation, *and* empirical testing by legal scholars and others. At the same time, they do reflect my provisional assessment of the steps that judges might consider taking *now* — since courts cannot put off deciding cases to a time when our knowledge of the science of judicial decisionmaking is even more advanced. Moreover, when judges themselves self-consciously experiment with decisionmaking strategies that reflect reasoned extrapolation from current empirical evidence, their decisions generate even more evidence for empirical study aimed at generating concrete and reliable prescriptions.<sup>329</sup>

The legal academy should stop rewarding storytelling, in which behavioral mechanisms are selectively invoked and manipulated to make conclusions that are (at best) plausible appear empirically unchallengeable.<sup>330</sup> The prevalence of this style of analysis reinforces the simplistic view that “broad empirical predictions” are mere emanations of the penumbra of “policy preferences.”<sup>331</sup>

But it would be a mistake for legal scholars to refrain from offering appropriately modest — provisional — assessments of how advances in decision science might be adapted to law. The simultaneous proximity of legal scholars to social scientists and to legal decisionmakers ideally situates them to assist the latter to make reasoned use of the insights of the former.

#### A. *Aporia*

Judicial opinions are notoriously — even comically — unequivocal. It is rare for opinions to acknowledge that an issue is difficult, much less that there are strong arguments on both sides.<sup>332</sup>

This feature of opinion writing is particularly odd in the Supreme Court. How can it be that all the arguments unambiguously favor only one outcome in case after case when the main criterion for granting

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<sup>329</sup> See, e.g., *United States v. Massachusetts*, No. 09-11623-WGY, 2011 WL 1670723, at \*7–8, \*7 n.20 (D. Mass. May 4, 2011) (invoking decisionmaking heuristic aimed at neutralizing distorting effect of cultural cognition on summary judgment ruling).

<sup>330</sup> See generally Jeffrey J. Rachlinski, *Comment: Is Evolutionary Analysis of Law Science or Storytelling?*, 41 *JURIMETRICS J.* 365 (2001) (arguing against forms of analysis that treat inventive manipulation of indeterminate social science mechanisms as form of empirical proof).

<sup>331</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1954, 1955 (2011).

<sup>332</sup> See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. CHI. L. REV.* 1371, 1417 (1995) (“[W]hile judges still typically write as if they were absolutely certain about the rightness and soundness of their analysis and decisions, everyone (including the judges) knows that’s not necessarily the case.”).

certiorari is a division of authority among lower courts? In a case that splits the Justices, how can five or more view all the relevant sources of guidance as pointing in one direction when they can see that one or more experienced jurists disagree? How can the dissenters be just as convinced that all the relevant sources point the *other* way?

There are a number of possible answers. One is psychological: in general, individuals tend to be averse to persistent uncertainty, and hence adjust their assessments of more equivocal pieces of evidence to match their assessment of more compelling ones, a dynamic known as “coherence-based reasoning.”<sup>333</sup> But no doubt craft norms also play a role. Lawyers are taught to eschew doubt. Judges, moreover, are likely to believe that frankly acknowledging the vulnerability of their reasoning to counterarguments will invite the suspicion that they are deciding on the basis of some personal value or interest.<sup>334</sup>

But in fact, the opposite is more likely true. Studies of motivated cognition and related dynamics show that pronouncements of *certitude* deepen group-based conflict.<sup>335</sup>

In debates that pit rival cultural groups against one another, those on both sides tend to overestimate how uniformly and intensely members of each feel about their respective positions.<sup>336</sup> This condition reflects an interaction between social influence and identity-protective cognition. Because people sense that the position they take on a charged issue (say, climate change) influences how others who share their group commitments evaluate them, they are more likely not only to conform to the position that dominates within their group but also to keep silent if they disagree or merely harbor doubts about it.<sup>337</sup> Their tendency to suppress their dissenting views prevents others, in their group and outside of it, from observing evidence that the opinion in the group is less uniform or less intensely supportive of the position in question.<sup>338</sup> As a result, those inside the group and out form an exaggerated assessment of how single-minded and adamant the group’s

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<sup>333</sup> See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 512–13 (2004).

<sup>334</sup> See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 739–40 (1987) (recognizing but treating as “overstated” the concern with projecting authority that leads judges to avoid “candid recognition of the difficulties of decision and the strength of competing arguments”); see also Greenawalt, *supra* note 49, at 1005 (“Since opinions are written partly to persuade, judges rarely indicate exactly how close they think a case is.”); Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1432, 1436 (1995) (suggesting that judges resort to formalist idioms to shield “pragmatic” judgments from questioning or criticism).

<sup>335</sup> See Robinson, Keltner, Ward & Ross, *supra* note 113, at 414.

<sup>336</sup> *Id.*

<sup>337</sup> See Sherman, Nelson & Ross, *supra* note 115, at 286–87.

<sup>338</sup> *Id.*

members truly are — increasing identity-protective pressure all around.<sup>339</sup>

Expressions of certitude are part of this feedback effect. Even apart from whatever identity-protective incentive there might be to overstate, the reluctance of doubters to voice their views results in the overrepresentation of highly confident pronouncements by a group's members in support of the group's position.<sup>340</sup> The sheer strength of conviction with which those in the group seem to hold their beliefs in turn promotes the perception of those in the other group that their opposites are either deluded, dishonest, or both.<sup>341</sup> Indeed, part of the evidence that the other side *must* be blinded by partisanship is just how uniformly and strongly *one's peers* reject the other side's view of the matter. This is the link to naïve realism, which lubricates the mechanisms of group conflict.<sup>342</sup>

But this dynamic can be *reversed*. Research suggests that one device for dissipating group conflict consists of deliberative procedures that help to reveal latent equivocation within the groups.<sup>343</sup> Obliging every participant to identify his or her position along with the strongest *counterargument* promotes this end. Because this requirement confers a type of procedural immunity for equivocating, those individuals who feel doubt about their group's position will now add their voices to the mix. The genuineness of what they say, however, is not lost on the other participants. Those in the speaker's group are exposed to evidence that they otherwise wouldn't have seen, demonstrating that those who share their commitments hold more nuanced views. They thus feel less pressure to cling to the dominant group position themselves. Members of the opposing group, too, see that those on the other side are not in fact uncomprehending of counterarguments; they are thus less likely to write off everything else the other side has to say as originating in self-deception or deceit. Arguments once defensively dismissed in this environment earn more open-minded engagement. The groups are much more likely to converge — or at least less likely to remain divided on group lines.<sup>344</sup>

These findings suggest grounds for reconsidering the norms that promote exaggerated certitude in judicial opinion writing in cases that feature issues subject to cultural contestation. Like certitude in other deliberative settings, the overstated confidence of judicial opinions is likely to amplify the perception of those who are unconsciously moti-

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<sup>339</sup> *Id.* See generally TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES (1995).

<sup>340</sup> See KURAN, *supra* note 339, at 78–80.

<sup>341</sup> See *id.* at 78–83.

<sup>342</sup> See Sherman, Nelson & Ross, *supra* note 115, at 275–76, 286–87.

<sup>343</sup> See *id.* at 287.

<sup>344</sup> See *id.*

vated to agree with them that positions in their group are uniform and intensely held. One reason is that aggressive and unqualified rhetoric is more likely to be transmitted by the media and other intermediaries; indeed, such rhetoric is part of what signals to *these intermediaries* that the issue in the case is worthy of being reported and framed in terms that connect it to contending group identities.<sup>345</sup> Certitude in opinions also enhances the tendency of those whose identities are threatened by the decision to suspect bias by the Court.<sup>346</sup> The media intermediaries who transmit the decision to them will be more likely to question the good faith of the Court, particularly if the case is one that has drawn a dissent reflecting a reciprocally unequivocal stance.

A possible remedy for this sort of dynamic would be the cultivation of judicial idioms of *aporia*.<sup>347</sup> Now sometimes defined as a rhetorical device involving the professed expression of uncertainty or doubt, *aporia* refers as well to a particular mode of philosophical or argumentative engagement.<sup>348</sup> Its distinctive feature is acknowledgment of complexity.<sup>349</sup> Such acknowledgment pervades the *form* of the engagement — perplexity and ambivalence are featured in exposition — but is integral as well to its substance, which holds that an inescapable (perhaps tragic) difficulty is an essential property of the problem or phenomenon under investigation.<sup>350</sup> Aporetic engagement does not preclude a definitive outcome or resolution. But it necessarily treats as *false* — a sign of misunderstanding — any resolution of the problem that purports to be unproblematic.<sup>351</sup>

<sup>345</sup> See Persily, *supra* note 148, at 9.

<sup>346</sup> See *id.*

<sup>347</sup> Secunda advocates idioms of “humility,” see generally Secunda, *Cultural Cognition at Work*, *supra* note 328, at 140–44; Secunda, *Debiasing*, *supra* note 328, as have I in writing with co-authors, see Kahan, Hoffman, Braman, Evans & Rachlinski, *supra* note 128 (manuscript at 41–43). The proposal here is not materially different from the ones there, although in my view *aporia* better captures the conspicuous acknowledgement of complexity. “Humility” connotes consciousness of one’s *own* limits in solving a problem; *aporia* emphasizes the limited amenability of the *problem* to a satisfactory solution, along with apprehension of the same. Humility might, of course, conduce to seeing *aporia* more readily, but it doesn’t seem necessary or sufficient for seeing it. It also might be the case that humility, understood as awareness of limits, might help judges avoid other decisionmaking hazards related to motivated cognition — including their own — but unrelated to *aporia*. See, e.g., Kahan, Hoffman & Braman, *supra* note 124, at 894–97 (recommending that judges use humility-based heuristic when deciding dispositive motions in order to avoid risk that cultural cognition will dull judges’ awareness of the contribution cultural cognition makes to perceptions of fact).

<sup>348</sup> See generally Nicholas Rescher, *Aporetic Method in Philosophy*, 41 REV. METAPHYSICS 283 (1987).

<sup>349</sup> See *id.* at 283.

<sup>350</sup> See *id.* at 284–86.

<sup>351</sup> *Id.* at 283, 293–97; see also, e.g., United States v. Massachusetts, No. 09-11623-WGY, 2011 WL 1670723, at \*8 (D. Mass. May 4, 2011) (“Of course, I *did* have doubts. . . . The question is not

Idioms that evince the Justices' consciousness of this sort of complexity could be expected to generate an effect comparable to the one associated with eliciting equivocation in group deliberations. Without access to the cues of stridently self-confident language in opinions, cultural intermediaries in the media, in government, and elsewhere might be less able to frame a particular case as culturally consequential; they might decide not to make it a subject of communication at all, and that inattention itself might be valuable. But to the extent that members of the public are themselves exposed to language expressing the Justices' consciousness of the complexity of the issues, ordinary citizens would have less reason to believe that equivocating or even dissenting from their group's position would exact a heavy toll on their status within their group. When the result of a case disappointed those citizens, moreover, the Justices' recognition of the difficulty of the issue would help to assure those members of the public that the Justices were not blinded by partisan values — or at a minimum remove one of the major impetuses to the formation of that impression.

There is already modest empirical support for these conjectures. In one study, Tom Tyler and Gregory Mitchell examined public reactions to the Supreme Court's abortion decisions.<sup>352</sup> For respondents who *disagreed* with the outcomes, the belief that the Court should nevertheless be empowered to determine the constitutionality of abortion was strongly associated with the perception that the Court had given fair and open-minded consideration to opposing arguments.<sup>353</sup> The same perception also strongly predicted the likelihood that those who disagreed would see the Court's decisions as entitled to compliance.<sup>354</sup> These findings are consistent with the larger body of evidence that Tyler has amassed showing that the perceived procedural fairness of decisionmaking affects legitimacy more than does agreement with outcomes.<sup>355</sup>

In another study, Dan Simon and Nicholas Scurich looked directly at the effect of equivocation in judicial opinions.<sup>356</sup> Subjects in the study were instructed to evaluate a hypothetical case and a judicial decision resolving it.<sup>357</sup> Some subjects were furnished with an opinion

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whether I have doubts, but whether I am honestly certain enough to act to alter the legal relationship of the parties.”).

<sup>352</sup> Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

<sup>353</sup> See *id.* at 770–72.

<sup>354</sup> See *id.* at 774–77.

<sup>355</sup> See generally TOM R. TYLER, WHY PEOPLE COOPERATE (2011); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

<sup>356</sup> See Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision-Making*, J. EMPIRICAL LEGAL STUD. (forthcoming 2012), available at <http://ssrn.com/abstract=1888630>.

<sup>357</sup> *Id.* (manuscript at 7).

that contained only arguments supportive of the result, while others were furnished with an opinion that acknowledged the strength of arguments on both sides.<sup>358</sup> Simon and Scurich found that subjects who disagreed with the result were more likely to see the decision as fair, well reasoned, and competently resolved if they had been exposed to the equivocal — I’d say aporetic — than to the unequivocal opinion.<sup>359</sup> Simon and Scurich did not examine whether subjects were disposed to disagree with each other on cultural or other group-identity lines or whether the aporetic quality of the opinion had any effect in reducing polarization of that sort; indeed, the issues in the hypothetical cases were not culturally or politically charged ones.<sup>360</sup> Still, in conjunction with Tyler and Mitchell’s findings, Simon and Scurich’s results strengthen the plausibility of the inference that judicial *aporia*, like exposure of latent equivocation in deliberative settings, could reduce the culturally polarizing effects of opinions in constitutional law.

Nothing in this proposal, moreover, requires the Justices to lie — to adopt *aporia* as a rhetorical style that is only rhetoric. The issues they are called upon to decide *do* tend to be “wickedly complex . . . , fraught with empirical uncertainty” and “difficult to analyze.”<sup>361</sup> That tends to be why the cases are in the Court to begin with. “Sometimes the most valuable lesson that a lawyer or philosopher can convey to a lay audience about concrete practical issues, like the regulation of pornography or hate speech,” Strauss writes, “is that those issues are not straightforward matters in which one side is principled and the other is not.”<sup>362</sup> I am arguing that this can be a valuable message for the Court to convey about its *own understanding* of the issues it is deciding if it wants to assure those likely to be threatened by the outcome that the Court is not insensitive to their values and perspective.

Indeed, although not the norm, it’s not shocking for the Court to acknowledge complexity and to adopt a correspondingly aporetic idiom of justification. In *Kennedy v. Louisiana*,<sup>363</sup> for example, the Court’s tone conveyed genuine ambivalence as it justified its conclusion that the Eighth Amendment forecloses execution of a man convicted of raping a child. “It must be acknowledged,” Justice Kennedy wrote, “that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in

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<sup>358</sup> *Id.* (manuscript at 8).

<sup>359</sup> *See id.* (manuscript at 18).

<sup>360</sup> *See id.* (manuscript at 10–11).

<sup>361</sup> Strauss, *supra* note 84, at 386.

<sup>362</sup> *Id.*

<sup>363</sup> 128 S. Ct. 2641 (2008).

death.”<sup>364</sup> “The[] facts” of the case at hand, he continued, “illustrate the point.”<sup>365</sup> “Here the victim’s fright, the sense of betrayal [the defendant was the twelve-year old victim’s ‘Dad,’ or stepfather<sup>366</sup>], and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood.”<sup>367</sup> Almost as if to make amends for a regrettable lapse of self-reflection on the part of their predecessors some three decades earlier, the *Kennedy* majority also disowned an awkward passage from *Coker v. Georgia*,<sup>368</sup> which had invalidated the death penalty for rape of an adult woman:

[W]e should be most reluctant to rely upon the language of the plurality in *Coker*, which posited that, for the victim of rape, “life may not be nearly so happy as it was” but it is not beyond repair. Rape has a permanent psychological, emotional, and sometimes physical impact on the child. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.<sup>369</sup>

The Court’s explanation of why it felt constrained to bar the death penalty nonetheless was also aporetic. The Court did not purport to deduce the unconstitutionality of the death penalty from stylized behavioral axioms or moral generalities: “[I]t cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function.”<sup>370</sup> On the contrary, the decisive consideration for the Court was the *fallibility* of its own moral judgment. Characterizing its death penalty jurisprudence as “still in search of a unifying principle,”<sup>371</sup> the Court referred to the “not altogether satisfactory” results of its forty-year project to identify doctrines capable of resolving the “tension between general rules and case-specific circumstances.”<sup>372</sup> “[T]he resulting imprecision” in the line between the cases sufficiently reprehensible to merit death and all the rest, Justice Kennedy wrote, has “been tolerated” in homicide cases.<sup>373</sup> But precisely what the Court had learned about its own inability to chart this line with confidence made it clear that “expand[ing] the death penalty” to nonhomicides would be contrary to “[e]volving standards of decency.”<sup>374</sup>

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<sup>364</sup> *Id.* at 2658.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 2646.

<sup>367</sup> *Id.* at 2658.

<sup>368</sup> 433 U.S. 584 (1977).

<sup>369</sup> 128 S. Ct. at 2658 (citations omitted) (quoting *Coker*, 433 U.S. at 598 (plurality opinion)).

<sup>370</sup> *Id.* at 2661.

<sup>371</sup> *Id.* at 2659.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 2661.

<sup>374</sup> *Id.*

Much of the critical commentary about *Kennedy* has focused on the Court's effort to demonstrate a "national consensus" against capital punishment from a (flawed, as it turns out<sup>375</sup>) survey of national legislative enactments.<sup>376</sup> But far from suggesting that the decision flowed in some ineluctable way from societal norms that it was empirically measuring, the majority unmistakably asserted responsibility for its own decision. "Consensus is not dispositive";<sup>377</sup> "[t]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."<sup>378</sup> In sum, this is a hard case; here's our best shot.

Writing for the Court, Justice Kennedy *didn't* convey the same aporetic stand in *Plata*, last Term's major Eighth Amendment decision. Justice Scalia embraced a species of cynicism toxic to reasoned self-government when he asserted that it is "impossible" to revise one's beliefs about policy consequences on the basis of an impartial assessment of empirical data.<sup>379</sup> But he was right to be angry at the Court for pretending that nothing more was required — and nothing more permitted — than "clear error" review of the district court's factual findings.<sup>380</sup> The district court didn't have any special advantage over the Supreme Court in reviewing the expert evidence on which the public safety determination turned. Or at least none big enough, given the tremendous stakes of the case, to relieve the Justices of the obligation to try as hard as they could to satisfy themselves that in fact a massive release of prisoners would not put the state's citizens at risk.

I strongly suspect the Justices in the majority *did* carefully scrutinize the record and decide for themselves. But by failing to show us that they had — in a state of mind focused by painful consciousness of the difficulty involved — the Court in *Plata* failed to convey its neutrality to those who it could easily have foreseen would be much more inclined to doubt it than I am.

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<sup>375</sup> See Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1 (noting Court's omission of statutory authority for death penalty for rape of a child in Uniform Code of Military Justice); see also *Kennedy v. Louisiana*, 129 S. Ct. 1, 1 (2008) (statement of Kennedy, J., respecting the denial of rehearing) (amending opinion to correct for oversight).

<sup>376</sup> See Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 965–66 (2009); Richard M. Ré, *Can Congress Overturn Kennedy v. Louisiana?*, 33 HARV. J.L. & PUB. POL'Y 1031, 1034 (2010).

<sup>377</sup> *Kennedy*, 128 S. Ct. at 2650.

<sup>378</sup> *Id.* at 2658 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)) (internal quotation marks omitted).

<sup>379</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting); see also *supra* pp. 37–38.

<sup>380</sup> *Plata*, 131 S. Ct. at 1954.

### B. Affirmation

Identity-protective cognition is a form of psychic self-defense in which individuals process information threatening to their group commitments in a biased or closed-minded way.<sup>381</sup> One device for mitigating this dynamic is to convey information by means that are likely to *affirm* rather than to threaten individuals' group commitments.

*Self-affirmation* involves enhancing individuals' awareness of their possession of some valued trait or characteristic. They might be instructed, for example, to reflect on and describe a special skill they possess or be put in a position in which they accomplish some goal that depends on such an ability.<sup>382</sup> The resulting boost in self-esteem supplies a buffer against the threat associated with engaging information that might otherwise trigger an identity-protective impulse.<sup>383</sup> Researchers have found that self-affirmation devices can be used to counteract group conflict on political issues, such as the predicted consequences of a social-welfare policy or the performance of governmental officials.<sup>384</sup>

An analogous strategy aims to enhance individuals' perception that *others* respect the status or values of their defining group. *Expressive overdetermination* is a technique that embeds information bearing a potentially identity-threatening social meaning in a message frame that evocatively conveys additional, identity-affirming meanings.<sup>385</sup> For example, research shows that persons who hold individualistic values are more open to facts about the existence and consequences of global warming when they are advised that one response to it is greater use of nuclear power as opposed to antipollution controls: nuclear power symbolizes infinitely sustainable market behavior, and is thus affirming of individualistic values, as opposed to antipollution regulations, which symbolize natural limits on commerce.<sup>386</sup> Similarly, persons who hold egalitarian and communitarian values infer less

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<sup>381</sup> See Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 105, at 469–70; Sherman & Cohen, *Psychology of Self-Defense*, *supra* note 105, at 187–88, 205.

<sup>382</sup> See generally Amy McQueen & William M.P. Klein, *Experimental Manipulations of Self-Affirmation: A Systematic Review*, 5 SELF & IDENTITY 289 (2006) (surveying different techniques for eliciting self-affirmation).

<sup>383</sup> See Sherman & Cohen, *Psychology of Self-Defense*, *supra* note 105, at 192–93.

<sup>384</sup> See, e.g., Kevin R. Binning, David K. Sherman, Geoffrey L. Cohen & Kirsten Heitland, *Seeing the Other Side: Reducing Political Partisanship via Self-Affirmation in the 2008 Presidential Election*, 10 ANALYSES SOC. ISSUES & PUB. POL'Y 276, 285–86 (2010); 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, 1161–62 (2000).

<sup>385</sup> See Kahan, *supra* note 26, 145–46.

<sup>386</sup> See Kahan, *supra* note 119 (manuscript at 29).

risk from nanotechnology when the benefits it could confer for environmental clean-up, rather than the profits it might generate in the manufacture of consumer goods, are made more salient.<sup>387</sup> Expressively overdetermined *laws* — ones that combine elements conveying a multiplicity of culturally valued meanings — have been instrumental in dissipating political conflict over environmental regulation and social welfare policies in the United States, and abortion in Europe.<sup>388</sup>

It is plausible to imagine the Justices using expressive overdetermination in opinion-writing.<sup>389</sup> Cass Sunstein, for example, describes a decisionmaking technique that he calls *trimming*, in which courts try to reach outcomes that conspicuously meld competing positions in a manner intended to “ensur[e] that no one is excluded, humiliated, or hurt.”<sup>390</sup> Sunstein speculates that “trimming can obtain support for [judicial decisions among] people from different ‘cultures,’” avoiding the sort of conflict that is associated with cultural cognition,<sup>391</sup> a point that Paul Secunda amplifies.<sup>392</sup> Judge J. Harvie Wilkinson anticipates Sunstein’s account in an insightful description of the jurisprudence of “splitting the difference,” which aims to straddle “issues that . . . inflame the passions of the body politic.”<sup>393</sup>

Sunstein and Wilkinson contemplate a type of Solomonic decision-making. For example, they both cite<sup>394</sup> the University of Michigan affirmative action decisions: the Court permitted the law school to pursue the goal of “diversity” by treating race as an indeterminate amorphous “plus factor,”<sup>395</sup> but struck down the college’s mechanical point system because it denied applicants “individualized consideration.”<sup>396</sup> The Court similarly “split the difference” in a pair of 2005 decisions about government display of the Ten Commandments. In *McCreary County v. ACLU of Kentucky*,<sup>397</sup> it struck down a con-

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<sup>387</sup> See Dan M. Kahan, Paul Slovic, Donald Braman, John Gastil, Geoffrey Cohen, & Douglas Kysar, *Cultural Cognition and Nanotechnology Risk Perceptions: An Experimental Investigation of Message Framing*, in PROJECT ON EMERGING NANOTECHNOLOGIES RESEARCH BRIEF NO. 5, at 7, 10–16 (2009), available at [http://www.nanotechproject.org/process/assets/files/7091/nano\\_090225\\_research\\_brief\\_kahan\\_n1.pdf](http://www.nanotechproject.org/process/assets/files/7091/nano_090225_research_brief_kahan_n1.pdf).

<sup>388</sup> See Kahan, *supra* note 26, at 146–47; Kahan, Slovic, Braman & Gastil, *supra* note 121, at 1097–98.

<sup>389</sup> See Secunda, *Cultural Cognition at Work*, *supra* note 328, at 144–48.

<sup>390</sup> Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1053 (2009).

<sup>391</sup> *Id.* at 1070.

<sup>392</sup> See Secunda, *Cultural Cognition at Work*, *supra* note 328, at 139–40.

<sup>393</sup> J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1983 (2006).

<sup>394</sup> Sunstein, *supra* note 390, at 1064, 1067; Wilkinson, *supra* note 393, at 1974–75 (same).

<sup>395</sup> *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (internal quotation marks omitted) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)).

<sup>396</sup> *Gratz v. Bollinger*, 539 U.S. 244, 255, 271 (2003).

<sup>397</sup> 545 U.S. 844 (2005).

spicuous, ornamental courthouse display that evinced a “sectarian spirit.”<sup>398</sup> In *Van Orden v. Perry*,<sup>399</sup> in contrast, it upheld “passive” inclusion of the Commandments in a group of monuments calling attention to diverse “strands in [Texas’s] political and legal history.”<sup>400</sup> Sunstein<sup>401</sup> also points to *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>402</sup> which affirmed *Roe* but replaced its trimester system with an “undue burden” test that the three-Justice controlling opinion described as necessary to “fulfill *Roe*’s own promise” to recognize the state’s “substantial . . . interest in potential life throughout pregnancy.”<sup>403</sup> We might understand Justice Kennedy’s dissent in *Hill* as taking issue with the failure of the Court to generate an even greater meaning cushion for abortion opponents by resolutely protecting their right to use moral persuasion to advance their conception of the good.<sup>404</sup>

I would resist the claim, however, that expressive overdetermination could or should be implemented through a Missouri Compromise pattern of results. Sometimes governments enact laws that simply violate the Constitution, and sometimes citizens challenge laws that don’t. In those cases, the Court obviously must decide the case in favor of the side that has the better position. But even if the result is unambiguous, the Court’s opinion continues to furnish it with the opportunity to create a surplus of *meanings* for the sake of affirming groups that might otherwise be motivated by identity threat to doubt the Court’s neutrality.

The Court actually did something like that, I believe, in *District of Columbia v. Heller*.<sup>405</sup> In *Heller*, the Court painted a richly detailed picture of guns and civic virtue in the early Republic, and discovered within it an individual “right to keep and bear arms” that extended to possession of a handgun for personal self-defense in the home.<sup>406</sup> But the opinion, written by Justice Scalia, didn’t end with that. Rather, it proceeded to outline a surprisingly detailed list of the sorts of arms-bearings to which the Second Amendment right does *not* extend. “Like most rights, the right secured by the Second Amendment is not

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<sup>398</sup> *Id.* at 872.

<sup>399</sup> 545 U.S. 677 (2005).

<sup>400</sup> *Id.* at 691 (plurality opinion); see Sunstein, *supra* note 390, at 1061 (characterizing as “trimming” the Court’s position that “the constitutionality of government displays of the Ten Commandments depends on the context”); Wilkinson, *supra* note 393, at 1973 (discussing *McCreary County* and *Van Orden*).

<sup>401</sup> Sunstein, *supra* note 390, at 1061 & n.53.

<sup>402</sup> 505 U.S. 833 (1992).

<sup>403</sup> *Id.* at 876 (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

<sup>404</sup> See *supra* pp. 49–50.

<sup>405</sup> 128 S. Ct. 2783 (2008).

<sup>406</sup> *Id.* at 2822.

unlimited,” the Court remarked.<sup>407</sup> “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>408</sup> “For example,” the opinion continues, “the majority of the 19th-century courts to consider the question held that *prohibitions on carrying concealed weapons were lawful under the Second Amendment* or state analogues.”<sup>409</sup> The Court added that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions” on gun possession by potentially dangerous classes of persons such as “felons and the mentally ill” or in potentially “sensitive places such as schools and government buildings.”<sup>410</sup>

Thus, in disregard of its usually scrupulous avoidance of “advisory opinions,” the Court had effectively identified a capacious safe harbor for continuing regulation. And lest anyone think to try an *expressio unius est exclusio alterius* maneuver on these passages, the Court added in a footnote: “We identify these presumptively lawful regulatory measures *only* as examples; our list *does not purport to be exhaustive*.”<sup>411</sup>

Likely added to the opinion to nail down Justice Kennedy’s critical fifth vote, this language nevertheless placed an expressive-overdetermination shield between the Court and the dueling cultural constituencies that were most likely to question its neutrality. Guns have tremendous expressive significance for individuals with hierarchical and individualistic values, for whom they enable roles like father and protector, and symbolize virtues like honor, courage, and self-reliance. By the same token, guns are anathema to citizens with egalitarian and communitarian values, who associate them with patriarchy, Southern resistance to civil rights, and societal distrust.<sup>412</sup> The consequences of gun control for health and safety are genuinely ambiguous.<sup>413</sup> But the consequences of the gun control *debate* for the status of those subscribing to these cultural outlooks have been clear

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<sup>407</sup> *Id.* at 2816.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.* (emphasis added).

<sup>410</sup> *Id.* at 2816–17.

<sup>411</sup> *Id.* at 2817 n.26 (emphasis added).

<sup>412</sup> See generally Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003) (discussing the relationship between cultural worldviews and support for or opposition to gun control initiatives).

<sup>413</sup> See generally NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., FIREARMS AND VIOLENCE (Charles F. Wellford et al. eds., 2005) (finding evidence on impact of concealed carry laws to be inconclusive).

for decades.<sup>414</sup> As a result of the safe-harbor language in the Court's opinion, the victory of the hierarchical individualist position in *Heller* did not equate to a complete defeat of the egalitarian communitarian side.

But even more important, the crafting of the opinion made it doubtful that either side could be put in a position of domination at the hands of the other in the future. The safe-harbor language left the egalitarian communitarians free to continue seeking regulation of guns; indeed, it remained open to them, the Court was making clear, to continue opposition to *concealed-carry* laws, which had been at the heart of the battle to control the expressive capital of gun laws for decades. Yet whatever culturally inspired gun opponents might achieve at this point would be constrained by the constitutional *individual right* to own a gun. Woven out of the civic republican cloth of Founding era mythology, the simple articulation of that right conferred on gun owners the unequivocal and durable recognition of status that Justice Kennedy had wanted the Court to give abortion opponents in *Hill*. Without being denied the power to participate in the continuing political conversation about guns, egalitarian communitarians would not after *Heller* be able to make the law speak in a denigrating voice.<sup>415</sup>

The neutrality crisis started with the *Brown* Court's honorable but ineffective resort to empiricism to avoid a moral tone that it worried might heighten partisan contention. Trying to find a better approach, Alexander Bickel and others advocated that the Court might be able to protect its reputation more effectively through devices that allowed it to say nothing at all ("passive virtues") or alternatively through a style of elaboration ("minimalism") that spared it from saying more than absolutely necessary.

*Heller* helps us to see that escaping from the neutrality crisis might at least sometimes require the Court to say *much more* than is required strictly to decide a case. The point of speaking, as Wechsler understood, is for the Court to give us assurance of its impartiality. A psychologically realistic understanding of constitutional law tells us that the Court is most likely to accomplish that end not through theoretical abstractions but through idioms and gestures that convey a plurality of cultural meanings.

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<sup>414</sup> See Kahan, *supra* note 189, at 452–59. See generally MARK V. TUSHNET, *OUT OF RANGE* (2007) (noting the relationship between individuals' views on gun control and their approaches toward interpreting the Second Amendment).

<sup>415</sup> See Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 599–600 (2006).

CONCLUSION: FIXING THE COMMUNICATION FAILURES OF  
*PLATA'S* REPUBLIC

*Civis*: It is “*fanciful*,” you say, to think that *three district court judges* “relied solely on the credibility of the testifying expert witnesses”<sup>416</sup> in finding that release of the prisoners would not harm the community?

*Cognoscere Illiber*: Yes, because “*of course*” different district judges, of different policy views, would have ‘found’ that rehabilitation would *not* work and that releasing prisoners would *increase* the crime rate.”<sup>417</sup>

*Civis*: “*Of course*” judges with “different policy views” would have formed different beliefs about the consequences if they had evaluated the same *expert* evidence? Why? Surely the judges, like all nonspecialists, would agree that these are matters outside their personal experience. Are you saying the judges would ignore the experts and decide on partisan grounds?

*Cognoscere Illiber*: No. “I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make ‘factual findings’ without inserting their own policy judgments” on such matters.<sup>418</sup> The “expert witnesses” here were of the sort trained to make “broad empirical predictions” — like whether “deficit spending will . . . lower the unemployment rate” or “the continued occupation of Iraq will decrease the risk of terrorism.”<sup>419</sup>

*Civis*: But people normally assert that their policy positions on criminal justice, economic policy, and national security are based on empirical evidence. It almost sounds as if you are saying things are really the other way around — that what they understand the empirical evidence to show is “necessarily based in large part upon policy views.”<sup>420</sup>

*Cognoscere Illiber*: Exactly what I *am* saying! Those sorts of “factual findings *are* policy judgments.”<sup>421</sup> Thus, empirical evidence relating to the consequences of law should be directed to “legislators and executive officials” — not “the Third Branch”<sup>422</sup> — since in a democracy it is the people’s “policy judgments,” not ours, that should be “dress[ed up] . . . as factual findings.”<sup>423</sup>

*Civis*: Ah. Thanks for telling me — I had been naïvely taking all the empirical arguments in politics at face value. Silly me! *Now* I see, too, that those naughty judges were just trying to exploit my gullibility about policy empiricism. Shame on them!

My aim in this Foreword has been to suggest a path forward in addressing the Supreme Court’s neutrality crisis. The failure of constitu-

<sup>416</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting) (emphasis added).

<sup>417</sup> *Id.* (second and third emphases added).

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 1954–55.

<sup>420</sup> *Id.* at 1954.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 1955.

tional theorizing to quiet decades of conflict over the impartiality of the Court is usually attributed to the emptiness of neutrality as a constitutional ideal. I have suggested an alternative explanation: the inattention of constitutional theory *and practice* to an important complex of psychological dynamics responsible for divisive misunderstandings in pluralistic societies. A clear account of these dynamics, I've argued, can equip us to identify what should be done, and by whom, to repair the Court's capacity to keep the liberal peace.

To help form a more accurate picture of why we are divided about the neutrality of the Court, we should look at why we are divided about the efficacy of public policy. There is broad societal consensus that governmental power should be used to promote common welfare of the most elemental, material variety. Yet from environmental protection to crime control, from public health to national security, Americans are culturally polarized over what dangers we really face and what policies will efficiently abate them. The best explanation for this "culture war of fact" is a set of dynamics associated with motivated reasoning. To protect their status within defining groups, citizens of diverse outlooks tend to unconsciously seek out and credit empirical information in patterns congenial to their values and in line with those that predominate in their group. The resulting state of division is magnified by the tendency of those in each group to see the beliefs of the other as products of self-deception and bad faith, while overlooking the contribution group allegiances are making to the formation of their own beliefs. Alternating cycles of righteousness and recrimination then infuse the debate with *meanings* that are of even more consequence (at least for any individual) than the truth or falsity of the propositions under debate.<sup>424</sup> Determining what position the law takes on whether the earth's atmosphere is heating up as a result of human activity — or whether "deficit spending will . . . lower the unemployment rate"<sup>425</sup> or "the continued occupation of Iraq will decrease the risk of terrorism"<sup>426</sup> — is now "a struggle for the soul of America."<sup>427</sup>

The same dynamics, I've tried to show, shape public perceptions of the neutrality of the Supreme Court. We are not a nation of jihadists or crusaders. We agree the Court should enforce the liberal principles of neutrality in the Constitution that foreclose use of state power to

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<sup>424</sup> See generally Kahan, Wittlin, Peters, Slovic, Ouellette, Braman & Mandel, *supra* note 111 (maintaining that ordinary citizens face much bigger incentives to form risk perceptions that convey their allegiance to their cultural group than they do to form risk perceptions that are supported by scientific evidence).

<sup>425</sup> *Plata*, 131 S. Ct. at 1954 (Scalia, J., dissenting).

<sup>426</sup> *Id.* at 1954–55.

<sup>427</sup> Al Gore, *Climate of Denial: Can Science and the Truth Withstand the Merchants of Poison?*, ROLLING STONE, July 7, 2011, at 76.

impose a moral orthodoxy; and we share basic understandings of what it means and what it takes for the Court to identify and apply those principles in an evenhanded manner. As a result of motivated reasoning, however, we are unconsciously prone to conform our perceptions of what neutrality requires in particular instances to our defining group commitments — not in all cases, obviously, but in those that do in fact bear meanings that either threaten or affirm competing cultural worldviews. The Court’s practice of supplying a reasoned explanation for its decision is supposed to assure citizens that the Court is resolving such disputes impartially. But much like empirical arguments in policy debates, the devices the Court uses to justify its decisions — its *own* use of empirical data; its use of theories that equate one position with “reason” and “neutrality” and the other with “bias” and “will”; its use of intemperate and denunciatory rhetoric (particularly in dissents) — evince self-deception and breed distrust. They also furnish signals that are received by intermediary groups — including politicians and media commentators — who then amplify and retransmit them to members of the cultural groups who look to them for guidance on the significance of the Court’s decisions. These dynamics suffuse the Court’s decisions with meanings, too: whether a particular group of protestors engaged in “jostling, grabbing, pushing, and shoving”<sup>428</sup> or instead engaged in “singing, chanting, praying, shouting, [and] the playing of music”<sup>429</sup> becomes the moment at which the status and dignity of an entire community associated with a particular view of the good is adjudicated.<sup>430</sup>

The relationship I am asserting here between conflict over policy-relevant science and conflict over the Supreme Court’s neutrality is not an analogy but an identity. Not only are the psychological dynamics in these conflicts the same; the cultural meanings are the same, too. So are the contending groups whose status is being adjudicated. Democratically elected officials whose “broad empirical predictions” are just “policy preferences” “dress[ed] up” as “factual findings”<sup>431</sup> and judges who disguise their partisan “activism” as either “original intention” or “contemporary consensus” are parts of the same picture. They are the constituent parts of our democracy as viewed from a vantage point inside the cognitively illiberal state.

This problem is not by any means on the verge of being solved in the domain of public policymaking, but at least we understand its na-

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<sup>428</sup> *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 363 (1997).

<sup>429</sup> *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 790 (1994) (Scalia, J., dissenting).

<sup>430</sup> See *Hill v. Colorado*, 530 U.S. 703, 791 (2000) (Kennedy, J., dissenting) (arguing that the Court had “turn[ed] its back” on abortion protestors’ expectation of state respect for their convictions).

<sup>431</sup> *Plata*, 131 S. Ct. at 1954–55.

ture there, and thus can see the sort of solution that is required. It would be extravagant to infer from the culture war of fact that *science* is “incoherent” or that cultural conflict over facts that admit of empirical investigation is permanent and normal. In fact, the United States is a singularly pro-science society. Scientists are one of the most respected groups in the nation,<sup>432</sup> and citizens of diverse cultural outlooks turn to them all the time for advice on improving their lives. Ordinarily, too, culturally diverse citizens agree on what scientists are saying — that they should take penicillin for strep throat, or use a GPS system to find their way on unfamiliar roads, and the like. The existence of cultural polarization is a *pathology* — something both unusual and pernicious — that occurs when facts become entangled in partisan cultural meanings. This is a kind of *science communication failure*; fixing it requires the use of scientific methods to devise *science communication practices* that avoid such entanglements and that dissolve them when they occur nonetheless.<sup>433</sup>

The neutrality crisis, I’ve tried to show, is a kind of communication problem, too. The idea that neutrality is incoherent — that the neutrality crisis reflects some irresolvable conflict latent in liberal philosophy or epistemology or ontology — is as extravagant as the claim that science, and agreement about it, are impossible in a liberal society. Like the methods scientists use to create knowledge, the methods that the Supreme Court uses to discern meaning — the heuristics and sensibilities that are part of the situation sense of the legal profession — are in good (enough) working order. But just as it is naïve to assume that sound scientific evidence will gain popular assent just because it is sound, so it is naïve to assume that Supreme Court decisions will legitimate themselves just because they reflect the reliable employment of professional craft norms. Fixing the Supreme Court’s *neutrality communication failure* also demands developing better communication practices, ones aimed at avoiding the divisive entanglement of its decisions with cultural meanings.

Extrapolating from the best available evidence, I have proposed practices that I think can help. These include *judicial aporia* — idioms and related discursive devices that evince awareness of the difficulty of the issues the judge faces. The unflinching certitude characteristic of judicial opinions, I’ve argued, provokes both suspicion among members of groups disposed to question a contentious decision and identity-protective defensiveness by groups disposed to agree with it. *Aporia*, I’ve suggested, is a means for avoiding these effects and for

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<sup>432</sup> See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, SCIENTIFIC ACHIEVEMENTS LESS PROMINENT THAN A DECADE AGO 1 (2009), available at <http://people-press.org/files/legacy-pdf/528.pdf>.

<sup>433</sup> See Kahan, *supra* note 25, at 296–97.

stifling self-reinforcing cues that drive members of cultural groups to conceal their own acknowledgment of doubts about their groups' positions. I've also tried to describe how *expressive overdetermination* can be used to buffer the identity-threatening effect of decisions that have the potential to inflict status defeat on one or another cultural group.

But like the meaning-sensitive communication of science, the meaning-sensitive communication of judicial impartiality is a goal that admits of and demands systematic, scientific study. The project to understand dynamics of the type I have described is well underway in the legal academy.<sup>434</sup> Informed pragmatic conjecture about strategies for translating empirical findings into judicial practice is also essential. Indeed, the project to improve the communication of judicial neutrality should be seen as a collaborative one between scholars and judges, whose own pragmatic experimentation is the only sure means to validate scholarly insight.<sup>435</sup>

Members of the profession are also positioned to contribute. If we teach students and show them and younger lawyers through our own example that we regard the acknowledgment of complexity as admirable and see complexity-effacing forms of presentation to be shallow and boorish (they truly are), not to mention rife with potential for giving offense, those who become judges are more likely to acquire and exercise the virtue of decisionmaking *aporia*.

I have argued that blunting the tendency of constitutional decisionmaking to trigger the dynamics of motivated reasoning is unlikely to require the invention of radically new professional conventions or practices. Still, there are some conspicuous practices that magnify that tendency, most notably denunciatory language in dissents. Justices who deface the public image of the Court by repeated acts of rhetorical vandalism are unlikely to respond to pleas for them to stop. But the profession is still in a position to exert influence. How likely Justices of the future are to behave this way will depend heavily on whether they are part of a professional culture that comes to see this form of expression as virtuous or vicious.<sup>436</sup>

While there are multiple groups of scholars today who are promoting their work as the "new legal realism,"<sup>437</sup> it's debatable how faithful

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<sup>434</sup> See generally, e.g., Kahan, Hoffman & Braman, *supra* note 124; Secunda, *Cultural Cognition at Work*, *supra* note 328; Simon & Scurich, *supra* note 356; Secunda, *Debiasing*, *supra* note 328.

<sup>435</sup> See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (defending conception of legal scholarship that features collaborative interchange with the bench and with private practitioners).

<sup>436</sup> See generally Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES OPINIONATOR (Mar. 9, 2011, 8:40 PM), <http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects>.

<sup>437</sup> See generally, e.g., Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365; Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008); Victoria Nourse & Gregory Shaffer, *Varieties of*

any of their approaches is to the original. The conventional (vulgar) view of legal realism is that it sought to expose law as “politics” by demonstrating the indeterminacy of legal rules and the resulting room for and necessary influence of ulterior motives in judging. But Karl Llewellyn’s project, at least, was different from and richer than that. He wanted to explain the remarkably high rate of agreement among lawyers and judges. What made such convergence puzzling was indeed the premise — demonstrated by Llewellyn in various entertaining ways — that the formal legal materials did not uniquely determine the results in so many of the cases in which the lawyers and judges perceived one answer to be obviously correct. His solution to the puzzle, though, had little to do with hidden ideological agendas, something that one would have expected to create divergence, not convergence. Rather, Llewellyn attributed professional agreement to “situation sense,” a form of intuitive perception that he posited was formed by judges’ and lawyers’ immersion in common professional norms — ones that no doubt overlapped with various societal norms but that were not in any interesting way politically partisan.<sup>438</sup>

The project to fix the Supreme Court’s communication problem is one that has many genuine points of contact with realism as Llewellyn understood it. To begin, unlike the “new” legal realisms but very much like the original, the project understands legal reasoning to involve a kind of perception guided by internalized norms. Indeed, many of the mechanisms that I’ve described in this paper are ones that would, if applied to judges and lawyers, plausibly explain the acquisition and operation of “situation sense” as Llewellyn understood it. What’s more, the project is focused, as was Llewellyn’s, on trying to make the existence and content of professional norms visible and thus amenable to scholarly investigation and ultimately moral evaluation.

I doubt there is much value in debating which approach to the study of law deserves to be designated the successor to legal realism. But I am certain that the systematic study of the profession’s situation sense, of the cognitive mechanisms through which it operates, and of its interaction with broader social and political dynamics offers the best prospect for rehabilitating the capacity of the Supreme Court to satisfy the expectation of neutrality that citizens legitimately have for it.

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*New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009).

<sup>438</sup> See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 59–61, 121–57, 206–08 (1960); see also KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* § 56, at 78–80 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (1933) (discussing judicial “intuition” and “fact-guided decision making”).