"THEY SAW A PROTEST": COGNITIVE ILLIBERALISM AND THE SPEECH-CONDUCT DISTINCTION

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"Cultural cognition" refers to the unconscious influence of individuals' group commitments on their perceptions of legally consequential facts. We conducted an experiment to assess the impact of cultural cognition on perceptions of facts relevant to distinguishing constitutionally protected "speech" from unprotected "conduct." Study subjects viewed a video of a political demonstration. Half the subjects believed that the demonstrators were protesting abortion outside of an abortion clinic, and the other half that the demonstrators were protesting the military's "don't ask, don't tell" policy outside a military recruitment center. Subjects of opposing cultural outlooks who were assigned to the same experimental condition (and thus had the same belief about the nature of the protest) disagreed sharply on key "facts"—including whether the protestors obstructed and threatened pedestrians. Subjects also disagreed sharply with those who shared their cultural outlooks but who were assigned to the opposing experimental condition (and hence had a different belief about the nature of the protest). These results supported the study hypotheses about how cultural cognition

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would affect perceptions pertinent to the speech-conduct distinction. We discuss the significance of the results for constitutional law and liberal principles of self-governance generally.

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> Anyone seriously interested in what this case was about must view that tape. And anyone doing so who is 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 to do.
>
> —Justice Scalia, dissenting in *Madsen v. Women's Health Center, Inc.*[1]

> Justice Stevens suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. We are happy to allow the videotape to speak for itself.
>
> —Justice Scalia, majority opinion in *Scott v. Harris*[2]

INTRODUCTION

In a 1950s social psychology experiment, students from two Ivy League colleges were instructed to evaluate a series of controversial officiating calls made during a football game between their respective schools. Researchers found that the students, from both institutions, were much more likely to perceive error in the penalty assessments imposed on their school's team than in those imposed on their rival's. The students' emotional stake in affirming their loyalty to their institutions, researchers concluded, had unconsciously shaped what they had *seen* when viewing events captured on film.[3] This study is now recognized as a classic demonstration of "motivated cognition," the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires.[4]

Motivated cognition poses an obvious hazard for law. Sports fans are permitted—even expected—to be partisan. But legal decisionmakers must be neutral. Just as the integrity of a sporting contest would be undermined by unconscious favoritism on the part of the referee, so the legitimacy of the law would likewise be compromised if legal decisionmakers, as a result of motivated cognition, unwittingly formed perceptions of facts that promoted the interests and values of groups with whom they had an affinity.[5]

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1. 512 U.S. 753, 786 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

2. 550 U.S. 372, 378 n.5 (2007) (Scalia, J.) (citations omitted).

3. *See* Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

4. *See generally* Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCHOL. 612 (2006); Roger Giner-Sorolla & Shelly Chaiken, *Selective Use of Heuristic and Systematic Processing Under Defense Motivation*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 84 (1997); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990); Anca M. Miron et al., *Motivated Shifting of Justice Standards*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 768 (2010).

5. *See generally* Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 59-66 (2011) [hereinafter Kahan, *Neutral Principles*]. A number of recent studies

This effect could be particularly subversive of constitutional law. The Free Speech, Equal Protection, and Due Process Clauses all mandate governmental evenhandedness. Within their respective domains, each forecloses the state from privileging particular affiliations, ways of life, or points of view and mandates that law be justified by its contribution to secular interests—physical security, public health, economic prosperity—valued by all citizens.[6] But if decisionmakers (particularly adjudicators) unconsciously apply these provisions to favor outcomes congenial to favored ways of life, citizens who adhere to disfavored ones will suffer the same array of disadvantages for failing to conform that they would in a regime expressly dedicated to propagation of a sectarian orthodoxy. This distinctively psychological threat to constitutional ideals, which we will refer to as "cognitive illiberalism,"[7] has received relatively little attention from commentators or jurists.[8]

We performed an experimental study designed to help assess just how much of a threat cognitive illiberalism poses to constitutional ideals. The study focused on a discrete and recurring task in constitutional law: discernment of the line between "speech" and "conduct" for purposes of the First Amendment. Embodied in a variety of doctrines, the speech-conduct distinction aims to assure that coercive regulation is justified on grounds unrelated to governmental or public hostility to disfavored ideas.[9] Most importantly, the speech-conduct distinction has historically played, and continues to play, a vital function in preventing the government from invoking its responsibility for maintaining "public order" to disguise suppression of impassioned political dissent.[10] Our

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examine motivated cognition in law. *See* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010) [hereinafter Kahan, *Culture, Cognition, and Consent*]; Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008); 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 (2009); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255 (2012); Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Punishment Goals: Legal Implications of Outcome-Driven Reasoning*, 100 CALIF. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641022.

6. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

7. *See generally* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).

8. For a provocative and insightful exception, see Sood & Darley, *supra* note 5.

9. *See generally* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

10. *See* Texas v. Johnson, 491 U.S. 397, 408-09 (1989) (holding that the First Amendment does not permit speech to be restricted on the ground that "an audience that takes serious offense at particular expression is necessarily likely to disturb the peace"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces

study furnishes strong evidence that this function is indeed highly vulnerable to the power of motivated cognition to shape decisionmakers' perceptions of the facts that mark the speech-conduct boundary.

The features of the speech-conduct distinction that make it susceptible to this influence, moreover, are shared by a host of other constitutional doctrines. The study results thus highlight the need to fortify constitutional theorizing with psychological realism. Normatively ideal standards for enforcing the Constitution are of little value if applying them defies the capacities of constitutional decisionmakers.

After presenting background discussion, we describe the study design and results. We then address the study's normative and prescriptive implications.

I. THEORETICAL BACKGROUND

The context for our study comprises three elements. The first is the speech-conduct distinction in First Amendment doctrine. The second is the phenomenon of "culturally motivated cognition." And the third is the threat the latter poses to the former.

A. *"Speech" Versus "Conduct"*

Because the Free Speech Clause confers special protection on *speech*, First Amendment jurisprudence is said to "draw vital distinctions between words and deeds, between ideas and conduct."[11] Regulations of speech are subject to myriad restrictions that regulations of conduct need not satisfy.[12]

The division between "speech" and "conduct," however, is notoriously problematic.[13] *Words* are often the key—sometimes the exclusive—

a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.").

11. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

12. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 777 (2001).

13. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring) ("[V]irtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition."); John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975) ("Burning a draft card to express one's opposition to the draft is an undifferentiated whole, 100% action and 100% expression, and to outlaw the act is therefore necessarily to regulate both elements."); Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (arguing that the "distinction between speech and nonspeech has no content" and is "specious"). Thomas Emerson is the constitutional theorist most famously associated with the distinction. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

instruments of prohibited forms of *conduct*, from price-fixing[14] to treason.[15] *Deeds* such as lighting fire to an American flag or to a towering cross—not to mention violently assaulting a person on account of his race or sexual preference—can potently express *ideas*. In short, we "do things with words and say things with actions."[16] Insisting that every act be definitively categorized as *either* "speech" *or* "conduct"—a position John Hart Ely called the "ontological fallacy"—thus invites sophism and ad hocery.[17]

One way to avoid this problem is to adopt instead what Ely referred to as a "teleological" conception of the speech-conduct distinction.[18] Rather than directing courts to determine whether a particular act is "really" expression or "really" conduct, this approach focuses attention on the government's *goal* in regulating it. The "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[19] It therefore makes sense to treat a regulation as abridging *speech* whenever the government's *purpose* is to attain some good or state of affairs that reflects aversion to a disfavored idea.[20] If, in contrast, a regulation seeks to promote a good that can be defined independently of hostility to a disfavored idea, we can say that a violator, even if she intends to communicate a message, is being punished for engaging in "illegal conduct," not "*for* speaking."[21]

The Supreme Court has used the teleological strategy to distinguish "speech" from "conduct" across a diverse range of settings. The government can ban sleeping overnight in Lafayette Park to protest homelessness, for example, not because sleeping just can't be "speech," but because the government's reason for the ban is "unrelated to suppression of expression": "limit[ing] wear and tear on park properties" justifies prohibiting overnight camping there regardless of whether the campers mean to express a message.[22]

The government can criminalize the burning of draft cards,[23] the Court has held, but not the burning of American flags.[24] The basis for the distinction isn't

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14. *Cf.* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 427 (1990) (holding that boycott conducted to effect increase in prices is not protected by First Amendment).

15. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) . . . .").

16. Rubenfeld, *supra* note 12, at 784 (emphasis omitted); *see also* Henkin, *supra* note 13, at 79 ("Speech *is* conduct, and actions speak.").

17. *See* Ely, *supra* note 13, at 1495-96.

18. *See id.* at 1496.

19. Texas v. Johnson, 491 U.S. 397, 414 (1989).

20. *See* Ely, *supra* note 13, at 1496-500; Kagan, *supra* note 9, at 428-32; Rubenfeld, *supra* note 12, at 777.

21. Rubenfeld, *supra* note 12, at 778 (emphasis added).

22. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295, 299 (1984).

23. United States v. O'Brien, 391 U.S. 367, 382 (1968).

24. United States v. Eichman, 496 U.S. 310, 312 (1990); *Johnson*, 491 U.S. at 399.

that the latter is more speech-like than the former; indeed, both might be recognized (and were in the 1960s) as cogent statements of opposition to a war. The difference stems from the government's reasons for regulating them. Preserving ready proof of compliance with selective-service laws supplies a justification for prohibiting destruction of draft cards independent of any hostility toward the statement of dissent such behavior might express; accordingly, the government's interest in prohibiting the burning of them is (once more) "unrelated to the suppression of free expression."[25] The government's interest in banning the burning of American flags, however, is not. "[P]reserving the flag as a symbol of nationhood and national unity" necessarily involves favoring one set of messages over another.[26] Nor can "preventing breaches of the peace" be viewed as a justification independent of hostility toward a disfavored message if the only cause for such disorder is the "serious offense" *onlookers* would take toward the burning of the flag.[27]

The government's interest in protecting individuals from "distinct emotional harms" and in averting retaliatory cycles of violence supplies "an adequate explanation" for hate crime laws "over and above mere disagreement with offenders' beliefs or biases,"[28] the Court has reasoned. Likewise, protecting individuals from *fear* of physical attack is a constitutionally sound basis for prohibiting dramatic gestures, such as cross burnings, intended to intimidate.[29] Nevertheless, if the selectivity with which the government prohibits such assaultive behavior reflects a "special hostility towards the particular biases thus singled out," punishment of such conduct reflects exactly the sort of disapproval of ideas that the First Amendment is meant to proscribe.[30]

In addition to systematizing a diverse body of cases, the teleological conception of the speech-conduct distinction also integrates First Amendment doctrine into a more general theory of constitutional liberty. The prohibition on state endorsement of a partisan conception of the good life—the core tenet of liberal neutrality[31]—is reflected in the First Amendment injunction that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[32] The principle of "liberal public

25. *O'Brien*, 391 U.S. at 377.

26. *Johnson*, 491 U.S. at 407; *see also Eichman*, 496 U.S. at 316-17 (stating that protection of the meaning of the flag as a symbol of national unity cannot be understood without reference to interest in regulating the ideas associated with various uses of the flag).

27. *Johnson*, 491 U.S. at 407-08.

28. Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993).

29. *See* Virginia v. Black, 538 U.S. 343, 347-48 (2003).

30. R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

31. *See, e.g.*, Ronald Dworkin, *Liberalism*, *in* LIBERALISM AND ITS CRITICS 60, 63-64 (Michael J. Sandel ed., 1984).

32. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see* DWORKIN, *supra* note 6, at 237-38 (writing that the First Amendment reflects the liberal principle that "no one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and example, just because these tastes or opinions disgust

reason," which requires that law be justified by its contribution to attainment of secular goods of value to citizens of diverse cultural and moral outlooks,[33] is advanced when courts scrutinize the asserted basis of regulations to assure that they advance interests "unrelated to suppression" of disfavored ideas.[34] Decisions construing equal protection[35] and due process[36] to forbid imposition of other types of legal disabilities solely to promote favored moral and religious norms can be read in like fashion.[37] Distinguishing "speech" from "conduct," then, can be seen as characteristic of the type of judgments courts must make to perfect the liberal underpinnings of the American constitutional regime.[38]

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those who have the power to shut him up or lock him up"); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 688 (1988) (arguing that the First Amendment implements a bar on state endorsement of the good by treating "aversion that some persons feel toward the life choices of others" as a noncognizable harm).

33. *See* JOHN RAWLS, POLITICAL LIBERALISM 175, 217-18 (expanded ed. 1993) (articulating the norm of "public reason" that prohibits political actors in most contexts from invoking "comprehensive views" that "include[] conceptions of what is of value in human life, as well as ideals of personal virtue and character" and instead requires them to "explain . . . how the principles and policies they advocate and vote for can be supported by" considerations consistent with "a diversity of reasonable religious and philosophical doctrines"); *see also* David A. Strauss, *Legal Argument and the Overlapping Consensus* 20-21 (July 12, 1998) (unpublished manuscript) (on file with author) (arguing that conventional modes of legal reasoning and justification reflect a liberal public-reason norm).

34. *See, e.g.*, Kagan, *supra* note 9, at 453-54 (explaining that "the strict scrutiny standard . . . is best understood as an evidentiary device" to furnish "assurance that the government has acted for proper reasons" and that the interest asserted is not a pretext for "antipathy toward the speech affected" by regulation).

35. *See* Romer v. Evans, 517 U.S. 620, 634-35 (1996) ("[I]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (alteration in original) (internal quotation marks omitted) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

36. *See* Lawrence v. Texas, 539 U.S. 558, 564, 567-71 (2003) (holding that the Due Process Clause forbids the "majority [to] use 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").

37. *See generally* DWORKIN, *supra* note 6, at 110-12 (arguing that the right of individuals "to confront for themselves, answering to their own consciences and convictions, the most fundamental questions touching the meaning and value of their own lives" inheres in "the structure of the Constitution" as well as in various textual provisions of it); RICHARDS, *supra* note 6 (using liberal theory to explicate constitutional guarantees of free speech, freedom of religion, equality, and privacy); Dworkin, *supra* note 31, at 70 (asserting that "the rights encoded in the Bill of Rights of the United States Constitution, as interpreted (on the whole) by the Supreme Court, are those that a substantial number of liberals would think reasonably well suited to what the United States now requires").

38. *Cf.* Kagan, *supra* note 9, at 511 (suggesting that the First Amendment prohibition on making aversion to ideas a basis for regulating reflects the "principle that the government must treat all persons with equal respect and concern" and that the same principle "may well explain much of equal protection law").

B. *Culturally Motivated Reasoning*

"Cultural cognition" is a species of motivated reasoning that promotes congruence between a person's defining group commitments, on the one hand, and his or her perceptions of risk and related facts, on the other.[39] A variety of mechanisms contribute to this effect. Thus, individuals tend selectively to credit empirical information in patterns congenial to their cultural values.[40] They are also disposed to impute knowledge and expertise to others with whom they share a cultural affinity.[41] And they are more likely to note, assign significance to, and recall facts supportive of their cultural outlooks than facts subversive of them.[42] These dynamics protect individuals' connection to others on whom they depend for material and emotional support.[43]

At a societal level, however, culturally motivated cognition can be a source of intense and enduring political conflict.[44] Citizens who subscribe to an egalitarian ethic that identifies free markets as fonts of unjust disparity readily credit evidence that commerce and industry are destroying the environment; citizens who adhere to an individualistic ethic that prizes private orderings dismiss such evidence and insist instead that needless government regulation threatens to wreck economic prosperity.[45] Associating firearms with patriarchy, racism, and distrust, egalitarian and communitarian citizens blame accidental shootings and crime on insufficient regulation of guns; hierarchical and individualist citizens, in contrast, worry that *too much* regulation will render law-abiding citizens vulnerable to predation, a belief congenial to the value they attach to guns as instruments of social roles (father, protector) and symbols of virtues (self-

39. For this reason, we refer interchangeably to "cultural cognition" and "culturally motivated cognition" or "culturally motivated reasoning." *See generally* Kahan, *Neutral Principles*, *supra* note 5, at 19-26.

40. *See, e.g.*, Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey Cohen, *Cultural Cognition of the Risks and Benefits of Nanotechnology*, 4 NATURE NANOTECHNOLOGY 87, 87 (2009).

41. *See, e.g.*, Dan M. Kahan, Donald Braman, Geoffrey L. 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, 504 (2010).

42. *See generally* Dan M. Kahan, Hank Jenkins-Smith & Donald Braman, *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147 (2011).

43. *See generally* David K. Sherman & Geoffrey L. Cohen, *The Psychology of Self-Defense: Self-Affirmation Theory*, 38 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 183 (2006).

44. *See* Dan Kahan, *Fixing the Communications Failure*, 463 NATURE 296, 296 (2010).

45. *See* MARY DOUGLAS & AARON B. WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS 177-79 (1982); Karl Dake, *Orienting Dispositions in the Perception of Risk: An Analysis of Contemporary Worldviews and Cultural Biases*, 22 J. CROSS-CULTURAL PSYCHOL. 61, 78 (1991); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 158 (2006).

reliance, honor) distinctive of their ways of life.[46] Citizens who combine hierarchical and communitarian values believe that the right to abortion demeans those women who eschew the workplace to be mothers; correspondingly, they worry that abortion poses a health risk to women.[47] Citizens who combine egalitarian and individualist values, and who assign status to women as well as men for professional and commercial success, believe that *restrictions* on abortion put women's health in danger.[48] Myriad other issues—from the risks and benefits of the HPV vaccine for schoolgirls[49] to the efficacy of legally mandated medical treatment for (noninstitutionalized) mentally ill persons[50]—divide citizens along lines that correspond to the social meanings these policies connote within opposing ways of life.[51]

Conflicts of this sort expose democratic pluralism to a distinctive threat: cognitive illiberalism. Because their perceptions of risk and related facts are unconsciously motivated by their defining commitments, even citizens who are genuinely committed to principles of liberal neutrality are likely to end up persistently divided along cultural lines—not over the proper *ends* of law (physical security, economic prosperity, public health, and the like) but over the *means* for securing them.[52] Nor is the cultural complexion of these seemingly empirical disputes likely to evade notice by those involved in them. On the contrary, consistent with a dynamic known as "naive realism," each side in these conflicts is likely to suspect the other (realistically), but not itself (naively), of fitting its empirical beliefs about how the world works to its moral vision of how it should.[53] Citizens defeated in political conflicts of this sort will thus face the same form of humiliation they would suffer had their worldviews been explicitly denigrated by culturally partisan laws. To avoid this experience, groups predictably mobilize and energize their members by advocating positions that ex-

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46. 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, 474, 485-88 (2007).

47. *See id.* at 475-76, 489-91.

48. *See id.*

49. *See* Kahan et al., *supra* note 41.

50. *See* Dan M. Kahan, Donald Braman, John Monahan, Lisa Callahan & Ellen Peters, *Cultural Cognition and Public Policy: The Case of Outpatient Commitment Laws*, 34 LAW & HUM. BEHAV. 118 (2010).

51. *See* Roberto Gutierrez & Roger Giner-Sorolla, *Anger, Disgust, and Presumption of Harm as Reactions to Taboo-Breaking Behaviors*, 7 EMOTION 853, 853-54 (2007) (finding that individuals are motivated to impute harm to intrinsically immoral behavior); Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191, 212-13 (2001) (same).

52. *See* John Gastil, Don Braman, Dan Kahan & Paul Slovic, *The Cultural Orientation of Mass Political Opinion*, 44 PS: POL. SCI. & POL. 711 (2011); Kahan, *supra* note 7, at 118-42.

53. *See generally* Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naive Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404 (1995).

pressively affirm their own partisan values—thereby provoking reciprocal anxiety and resistance by their adversaries, who can be expected in turn to resort to status-protective symbolic political action.[54]

C. *Cognitive Illiberalism and the Speech-Conduct Distinction*

There is an obvious tension between the phenomenon of culturally motivated cognition and the teleological conception of the speech-conduct distinction. Delimiting the scope of the First Amendment requires legal decisionmakers to determine whether a regulation (in general, and as applied in particular instances) is justified by a governmental purpose independent of aversion to any idea expressed by regulated acts. Such an assessment involves factual judgments akin to the empirical assessments that lawmakers and citizens make in considering the utilitarian efficacy of policies and laws: Is there a basis for believing the regulated behavior is causing the asserted harm? Are the magnitude of the harm and the effect of the regulation in abating it sufficiently large in relation to the cost of the regulation? Is indifference to behaviors that cause like harms grounds to suspect the genuineness of the regulators' professed motivations? In making these sorts of determinations, legal decisionmakers are thus likely to experience the same type of identity-protective pressure that influences them to form culturally congenial perceptions of risk and other policy-consequential facts.

The potential impact of culturally motivated cognition on facts pertinent to the speech-conduct distinction, however, is arguably even more troubling than its impact on perceptions of policy-consequential facts. The vulnerability of democratic policy making to antiliberal impulses is familiar. It is precisely because we anticipate that democratically accountable officials will sometimes indulge the temptation to make law an instrument of cultural orthodoxy that we envision the Constitution, enforced by an independent system of adjudication, as integral to realization of liberal political principles in law. Indeed, the idea that democratically accountable actors might sometimes unwittingly succumb to partisan temptation is itself contemplated by the practice of judicial "strict scrutiny," which probes the proffered justification of laws that incidentally abridge constitutional liberties to "flush out" unconscious illicit intentions as well as deliberately concealed ones.[55] However, this critical checking function would be subverted if factfinding and other elements of constitutional review were themselves subject to unwitting corruption by cognitive illiberalism.

Is this a psychologically realistic concern? Cultural cognition has already been shown to exert an impact on perceptions of legally consequential facts very similar to the one it exerts on perceptions of risk. Issues such as "consent"

54. *See* Kahan, *supra* note 7, at 148-51. *See generally* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (2d ed. 1986).

55. *See, e.g.*, Kagan, *supra* note 9, at 431 n.55, 453-55, 500-01.

in acquaintance rape cases,[56] the risks posed by fleeing suspects against whom the police use deadly force,[57] and the feasibility of nonlethal alternatives when battered women and other controversial offenders resort to homicidal violence in self-defense[58] are ripe with social meanings. Studies show that citizens of diverse cultural outlooks divide along predictable lines when assessing such facts. This evidence furnishes reason to worry that factfinding essential to constitutional law will be similarly pervaded by culturally motivated cognition.[59]

But conjecture and storytelling, as suggestive of hypotheses as they might be, are not a substitute for proof.[60] The most reliable way to examine the potential impact of culturally motivated cognition on the speech-conduct distinction is to conduct an empirical study of the possibility.

II. STUDY

A. *Overview and Hypotheses*

We conducted a study to test the hypothesis that culturally motivated cognition will distort perception of the line between speech and conduct. The study focused on the lawfulness of police action to halt a political demonstration for allegedly obstructing, threatening, or intimidating members of the public. In broad outlines, this is a recurring scenario across diverse settings, from antiwar rallies, to pro- and anti-civil rights marches, to the picketing of commercial establishments, courthouses, foreign embassies, and abortion clinics.

First Amendment jurisprudence here reflects the teleological conception of the speech-conduct distinction. The state's obligation to permit expression of unpopular views rules out the enforcement of any governmental interest that is related to the communicative content of protest activity, such as protecting targets of criticism from suffering the indignity of "public odium,"[61] shielding parties from the "inconvenience" or "annoyance" of having to avoid disagreea-

56. *See* Kahan, *Culture, Cognition, and Consent*, *supra* note 5.

57. *See* Kahan et al., *supra* note 5.

58. *See* Kahan & Braman, *supra* note 5.

59. Sood & Darley, *supra* note 5, report that individuals are likely to impute "harm" to behavior they find offensive when told that only "harmful" behavior can be criminalized, a finding, they recognize, with implications for constitutional law. Our study complements theirs both by connecting motivated reasoning to the specific facts relevant to distinguishing permissible regulations of conduct from impermissible regulations of speech, and by examining how motivated cognition interacts with diverse systems of values, the distinctive focus of cultural cognition.

60. *See generally* Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of "Subsequent Remedial Measures" Evidence*, 110 COLUM. L. REV. 1616 (2010); Jeffrey J. Rachlinski, Comment, *Is Evolutionary Analysis of Law Science or Storytelling?*, 41 JURIMETRICS J. 365 (2001).

61. *See* Boos v. Barry, 485 U.S. 312, 316, 320-21 (1988).

ble ideas,[62] or forestalling unrest caused by onlookers' aversion to the message protectors are conveying.[63] "[T]he right to attempt to persuade others to change their views . . . may not be curtailed simply because the speaker's message may be offensive to his audience."[64] Indeed, because "a function of free speech under our system of government is to invite dispute," it is to be expected that it will sometimes "induce[] a condition of unrest, create[] dissatisfaction with conditions as they are, or even stir[] people to anger."[65] Nevertheless, the police needn't stand idly by "when . . . the speaker passes the bounds of argument or persuasion and undertakes incitement to riot."[66] Nor does the First Amendment prevent the police from intervening to stop demonstrators from engaging in assaultive behavior such as "jostling, grabbing, pushing, and shoving" or from intimidating others through "'in your face' yelling."[67] Discharging the "responsibility to keep [the] streets open and available for movement" and to assure passersby "entrance to a public or private building" also justifies police action to terminate a political demonstration.[68] Yet in all cases, it is necessary to scrutinize the facts to assure that the assertion of the "interest of the community in maintaining peace and order on its streets"[69] is not used to disguise censorial motives on the part of either the authorities or the public.[70]

In our study, subjects were instructed to imagine they were jurors in a case that turned on whether a group of protestors had crossed the speech-conduct line, so conceived. The subjects indicated their findings on key facts after viewing a videotape of a political demonstration that we told them was halted by the police. The use of a video was designed to enhance the realism of the design. Cases challenging the use of police authority to halt allegedly violent, intimidating, or disorderly demonstrations often feature videotapes of the demonstra-

62. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

63. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 408 (1989) ("The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption." (footnote omitted)); Cox v. Louisiana, 379 U.S. 536, 550 (1965) (finding "[t]he fear of violence . . . based upon the reaction of" angry onlookers insufficient to justify breaking up a civil rights demonstration).

64. Hill v. Colorado, 530 U.S. 703, 716 (2000).

65. *Terminiello*, 337 U.S. at 4.

66. Feiner v. New York, 340 U.S. 315, 321 (1951).

67. Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 363 (1997).

68. *Cox*, 379 U.S. at 555.

69. *Feiner*, 340 U.S. at 320.

70. *See, e.g.*, *Cox*, 379 U.S. at 546 ("The State argues . . . that while the demonstrators started out to be orderly, . . . [their behavior thereafter] converted the peaceful assembly into a riotous one. The record, however, does not support this assertion." (footnote omitted)); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("The state courts have held that the petitioners' conduct constituted breach of the peace under state law, and we may accept their decision as binding upon us to that extent. But it nevertheless remains our duty in a case such as this to make an independent examination of the whole record.").

tors' behavior.[71] When such cases are reviewed by appellate courts, moreover, judges sometimes disagree with each other about whether the video depicts protected speech or regulable conduct.[72]

To sharpen exploration of how values affect such perceptions, our study involved an experimental manipulation. Half of the subjects were advised that the filmed demonstration occurred outside an abortion clinic and was aimed at protesting legalized abortion ("abortion clinic condition"); the other half were told the demonstration occurred outside of a college career-placement facility during interviews by the military and was aimed at protesting the armed forces' then-existing ban on service by openly gay and lesbian soldiers ("recruitment center condition").[73] In both conditions, subjects were advised that the protestors were suing the police for ordering the protestors to disperse on the basis of an ordinance prohibiting "obstructing," "intimidating," and "threatening" persons seeking to use the facilities in question. Protests of this character are realistic. They also feature values that can be expected to maximize opposing forms of culturally motivated cognition. The design thus permitted us to examine, first, whether subjects with opposing cultural worldviews would form different fact perceptions when they were assigned to the same experimental condition (that is, when they had the same beliefs about the cause of the demonstrators); and second, whether subjects assigned to one condition would form fact perceptions at odds with those of subjects who shared their worldview but who were assigned to the other condition (that is, who had a different belief about the cause of the protestors).

To measure the subjects' worldviews, we employed scales used in previous studies of cultural cognition.[74] These scales characterize worldviews along two orthogonal dimensions. The first, hierarchy-egalitarianism, measures the subjects' orientations toward social orderings that either feature or eschew strati-

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71. *See*, *e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) (abortion clinic protest); *Cox*, 379 U.S. at 547 (civil rights protest); Papineau v. Parmley, 465 F.3d 46, 52 (2d Cir. 2006) (tax protest); United States v. Soderna, 82 F.3d 1370, 1373 (7th Cir. 1996) (abortion clinic protest).

72. *Compare, e.g.*, Cannon v. City & Cnty. of Denver, 998 F.2d 867, 872 (10th Cir. 1993) (reversing grant of summary judgment against abortion clinic protestors suing police for breach-of-peace arrest, stating that "[w]e find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse," but rather "only an effort to persuade a willing listener"), *with id.* at 880 (Anderson, J., concurring) ("Frankly, in my view if the plaintiffs' evidence at the end of a trial remained as it now stands, the trial judge would be entitled to grant a defense motion . . . for judgment as a matter of law. Thus, technically, the record before us now could support the grant of summary judgment to the defendant City.").

73. The study was conducted in November 2010, before congressional repeal of the military's "don't ask, don't tell" policy.

74. *See* Dan M. Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, *in* HANDBOOK OF RISK THEORY: EPISTEMOLOGY, DECISION THEORY, ETHICS, AND SOCIAL IMPLICATIONS OF RISK 725 (Sabine Roeser et al. eds., 2012).

fied roles and forms of authority. The second, individualism-communitarianism, measures their orientations toward orderings that emphasize individual autonomy and self-sufficiency, on the one hand, and those that emphasize collective responsibilities and prerogatives, on the other. Combining the two scales generates four sets of worldviews: hierarchical individualism (HI), hierarchical communitarianism (HC), egalitarian individualism (EI), and egalitarian communitarianism (EC), to which individuals' affinities can be measured with continuous worldview scores.[75]

Based on the nature of these cultural predispositions and on previous research, we formed a set of discrete hypotheses. We enumerate them and assign each a descriptive label to facilitate exposition.

Based on their predispositions, subjects with opposing cultural values were expected to disagree with each other within each experimental condition, while those with the same values were expected to disagree with one another between experimental conditions. The EI/HC polarization hypothesis predicted that egalitarian individualists and hierarchical communitarians would form diametrically opposed perceptions in both conditions. The EC/HI semipolarization hypothesis predicted that egalitarian communitarians and hierarchical individualists would polarize most intensely in the military recruitment center condition.

1. *EI inversion*

Relatively egalitarian individualist subjects, we surmised, would form anti-demonstrator fact perceptions in the abortion clinic condition but pro-demonstrator perceptions in the recruitment center condition. Egalitarian individualists are morally opposed both to social stratification, such as that associated with traditional gender roles, and to institutional rankings, such as those that pervade the military.[76] Accordingly, we anticipated that egalitarian indi-

75. Membership in the Democratic or Republican Party and possession of "liberal" or "conservative" political views are likely to generate motivated cognition too. *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). We chose to use the cultural-cognition worldview scales instead for several reasons. One is that the study hypotheses contemplated divisions simultaneously along two dimensions, effects that could not be captured by one-dimensional party-affiliation or ideology scales. In addition, previous research has established that the cultural worldview scales have greater predictive power for individuals of low to moderate political sophistication, *see* Gastil et al., *supra* note 52, at 712-13, many of whom identify themselves as unaffiliated with either major party and disclaim either a liberal or conservative orientation. Finally, use of the cultural-cognition scales facilitated continuity between the present study and numerous others examining the contribution the specified worldviews make to political conflict over policy and legally relevant facts.

76. *See, e.g.*, Gastil et al., *supra* note 52, at 713 (finding that egalitarian individualism predicts pro-gay rights and antimilitary policy preferences); Kahan et al., *supra* note 46, at 480 (noting egalitarian individualist predisposition to form fact perceptions supportive of egalitarian gender norms).

vidualists would likely be hostile to protestors in the abortion clinic condition and sympathetic to those in the recruitment center condition. We also expected that egalitarian individualist subjects would feel their worldviews were being affirmed and threatened, respectively, by the abortion clinic and military recruitment center "free access" ordinances. We therefore predicted these subjects would be inclined to perceive that the protestors had engaged in prohibited conduct in the abortion clinic condition but protected speech in the recruitment center condition.

2. *HC inversion*

We predicted that relatively hierarchical and communitarian subjects, by contrast, would form pro-demonstrator fact perceptions in the abortion clinic condition but anti-demonstrator perceptions in the recruitment center condition. Hierarchical communitarians are strongly supportive of traditional gender norms, and as a result attach a negative social meaning to abortion rights, which to them denigrate the status properly afforded women for successful mastery of female domestic roles centering on maternity.[77] We anticipated that they would therefore find the ordinance securing free access to abortion clinics particularly repugnant. In contrast, they attach positive meanings to the military as an institution that is characterized by stratified internal orderings that subordinate the individual to the collective, and as a setting in which men, in particular, can occupy roles that display the virtue of patriotism.[78] These resonances, we predicted, would create identity-protective pressure on hierarchical communitarian subjects to perceive the antiabortion demonstrators engaged in protected speech and the antimilitary demonstrators engaged in obstruction, intimidation, and similar prohibited "conduct."

3. *HI bias*

We anticipated that subjects holding relatively hierarchical and individualistic values would form strong anti-demonstrator fact perceptions in the recruitment center condition, but more muted anti-demonstrator perceptions in the abortion clinic condition. Virtues such as courage, honor, and martial prowess figure conspicuously in this way of life and are status-conferring for men in particular.[79] We expected, then, that hierarchical individualists would be morally hostile to the aims of the protestors in the recruitment center condition, and

77. *See* Dake, *supra* note 45, at 72 (finding that hierarchy is associated with the perception that social deviance generates harm); Kahan et al., *supra* note 46, at 475, 489-90 (noting hierarchical communitarian predisposition to form fact perceptions supportive of hierarchical gender norms).

78. *See* Gastil et al., *supra* note 52, at 713 (finding hierarchical communitarian disposition to be associated with pro-military policy preferences).

79. *See* Kahan et al., *supra* note 46, at 474.

hence form fact perceptions consistent with the finding that they engaged in prohibited conduct rather than protected speech. We anticipated that hierarchical individualists would be unlikely to take offense at the message of the antiabortion protestors. Nevertheless, abortion rights do not bear a meaning nearly as threatening to hierarchical individualists as they do to hierarchical communitarians; in addition, hierarchical individualists tend to place a high value on social order generally.[80] We anticipated, then, that hierarchical individualists would form less strong pro-demonstrator perceptions in the abortion clinic condition than would hierarchical communitarians.

4. *EC bias*

We hypothesized that relatively egalitarian communitarian subjects would form strong pro-demonstrator fact perceptions in the recruitment center condition and modestly anti-demonstrator fact perceptions in the abortion clinic condition. Egalitarian communitarians see the imposition of legal disabilities on gays and lesbians as a symbol of institutionalized patriarchy. They strongly support gay marriage and gay parenting, the social meanings of which enable alternative, nonpatriarchal forms of community and shared commitment.[81] We anticipated that similar sensibilities would make them supportive of lifting restrictions on military service by openly gay and lesbian citizens, and hence trigger culturally motivated cognition supportive of the recruitment center protestors. We also expected that egalitarian communitarians would be offended by the anti-gender equality resonances of the abortion clinic protestors. Nevertheless, abortion rights also bear individualistic meanings that egalitarian communitarians resist.[82] Accordingly, we anticipated that egalitarian communications in the abortion clinic condition would feel less impelled than egalitarian individualists in that condition to perceive the demonstrators as engaged in prohibited conduct rather than protected speech.

5. *EI/HC polarization*

The final two hypotheses relate to the expected intensity and character of the disagreement between subjects of opposing cultural identities. We hypothesized that in both conditions there would be strong, mirror-image forms of polarization between relatively egalitarian and individualistic subjects, on the one

80. *See id.* at 469, 480-81.

81. *See* THE CULTURAL COGNITION PROJECT, THE CULTURAL COGNITION OF GAY AND LESBIAN PARENTING: SUMMARY OF FIRST ROUND DATA COLLECTION 10 (2010), *available at* http://www.culturalcognition.net/browse-papers/first-report-on-gay-and-lesbian-parenting.html.

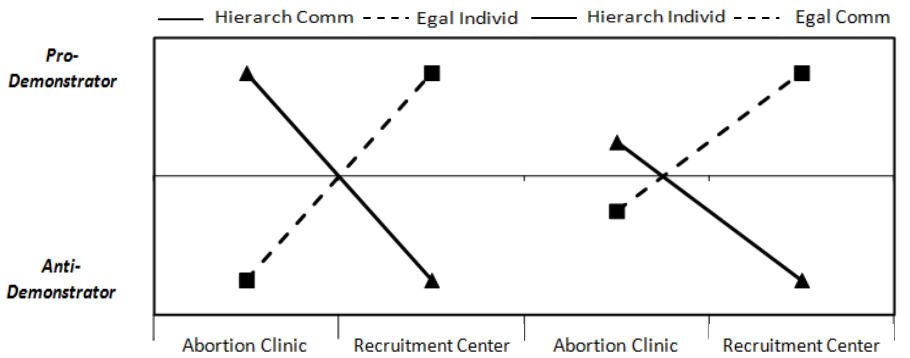
82. *See* Kahan et al., *supra* note 46, at 489-90 (finding egalitarian communitarians to be ambivalent on harm from abortion).

hand, and relatively hierarchical communitarian ones, on the other. This prediction was simply a logical implication of the EI and HC inversion hypotheses.

6. *EC/HI semipolarization*

Consistent with the HI and EC bias hypotheses, we predicted that disagreement between egalitarian and communitarian subjects, on the one hand, and hierarchical and individualistic ones, on the other, would be less symmetric. We expected the two to be strongly polarized in the recruitment center condition, in which the cultural meaning of the protestors' cause would exert diametrically opposing forces on their respective perceptions. However, because abortion rights bear more equivocal meanings within the worldviews of both of these groups, we anticipated that their disagreement in the abortion clinic condition would likely be more moderate.

FIGURE 1
Summary of Hypotheses



Based on their predispositions, subjects with opposing cultural values were expected to disagree with each other within each experimental condition, while those with the same values were expected to disagree with one another between experimental conditions. The EI/HC polarization hypothesis predicted that egalitarian individualists and hierarchical communitarians would form diametrically opposed perceptions in both conditions. The EC/HI semipolarization hypothesis predicted that egalitarian communitarians and hierarchical individualists would polarize most intensely in the military recruitment center condition.

B. *Design and Methods*

1. *Sample*

The subjects for the study consisted of 202 American adults. They were selected randomly from a stratified national sample by Polimetrix, Inc.,[83] and participated in the study through Polimetrix's online testing facilities. Forty-six percent of the sample were female. Seventy-two percent were white, and nine percent African American. The median level of education was between "some" college and "two years" of college. The median annual income was between $40,000 and $49,999. The average age was forty-six.

2. *Cultural worldviews*

Subjects' cultural worldviews were measured in advance of the study with the hierarchy-egalitarianism and individualism-communitarianism scales used in previous studies of cultural cognition.[84] The scales consisted of twelve statements expressing attitudes characteristic of one or the other worldview dimension (e.g., "Society as a whole has become too soft and feminine"; "The government interferes far too much in our everyday lives"), and subjects indicated agreement or disagreement on a six-point scale. Each six-item scale was highly reliable,[85] and the twelve items loaded appropriately on two separate factors, Hierarchy and Individualism, which were used as continuous predictors

83. Polimetrix is a public opinion research firm that conducts online surveys and experiments on behalf of academic and governmental researchers and commercial customers (including political campaigns). It maintains a panel of over one million Americans that it uses to construct representative study samples. For more information, see DOUGLAS RIVERS, SAMPLING FOR WEB SURVEYS (2007), *available at* https://s3.amazonaws.com/yg-public/Scientific/Sample+Matching_JSM.pdf.

84. *See, e.g.*, Kahan et al., *supra* note 42, at 151. For a full discussion of the complete and short-form versions of the scales and of their psychometric properties, see Kahan, *supra* note 74.

85. The factor Hierarchy had a Cronbach's α of 0.87, while the factor Individualism had a Cronbach's α of 0.81. Cronbach's α is a statistic for measuring the internal validity of attitudinal scales. By computing the degree of intercorrelation that exists among various items within a scale, it can be used to assess whether the items can properly be treated as common indicators of a latent attitude or trait (i.e., one that cannot be directly observed and measured). *See generally* Jose M. Cortina, *What Is Coefficient Alpha? An Examination of Theory and Applications*, 78 J. APPLIED PSYCHOL. 98 (1993). Composite scales of this sort are desirable not only because they facilitate measurement of unobservable dispositions but also because the measurements they enable are necessarily more precise than ones based on any of the individual indicators alone, each of which can be seen as an imperfect or "noisy" approximation of the phenomenon being studied. *See generally* J. Philippe Rushton et al., *Behavioral Development and Construct Validity: The Principle of Aggregation*, 94 PSYCHOL. BULL. 18 (1983). Generally, $\alpha \geq .70$ suggests scale validity (i.e., that the measures when aggregated furnish a reliable measure of the latent trait or attitude). *See* Cortina, *supra*, at 101.

for multivariate testing of the study hypotheses.[86] In addition, to enable illustrative analyses, we designated each subject as either a "hierarchical individualist," a "hierarchical communitarian," an "egalitarian individualist," or an "egalitarian communitarian" based on his or her scores in relation to the sample medians on each scale.

3. *Stimulus*

Subjects were randomly assigned to either the abortion clinic condition or the recruitment center condition. They were then assigned to read a vignette and view an accompanying video.[87]

a. *Vignette*

The vignette described the background of a lawsuit by political protestors against individual police officers and the police department. Depending on the condition, the protestors were described either as "members of a group that opposes permitting doctors and nurses to perform abortions at the request of pregnant women" or as "members of a group that opposes the ban on allowing openly gay and lesbian citizens to join the military." The protestors' complaint, the vignette stated, alleged that the police had "violated their rights by ordering them to end their protest at" either "an abortion clinic" or "a college campus recruitment center on the day the Army was scheduled to interview students who were considering enlisting."

Subjects were told that the defendants claimed halting the protest was justified by a law entitled the "Freedom to Exercise Reproductive Rights Law," in one condition, or the "Freedom to Serve with Honor Law," in the other. The law, enacted after a previous judicial ruling found that police lacked "clear guidelines" for halting such protests, made it illegal for "any person to intentionally *(1) interfere with*, *(2) obstruct*, *(3) intimidate*, or *(4) threaten* any person who is seeking to enter, exit, or remain lawfully on premises of" either "any hospital or medical clinic that is licensed to perform abortions" or "any facility in which the U.S. military is engaged in recruitment activity." This text was patterned on the Federal Freedom of Access to Clinic Entrances Act

86. Treating Hierarchy and Individualism as continuous predictors maximizes statistical power and avoids the bias that can be introduced by splitting them at the mean or other selected points in order to transform them into discrete, categorical measures. *See* JAMES JACCARD & ROBERT TURRISI, INTERACTION EFFECTS IN MULTIPLE REGRESSION 86 (2d ed. 2003).

87. The study instrument, including the vignette and response instruments, is reproduced in Appendix A. The videos can be viewed online. *See* videoreview12, *Abortion Clinic 11 22 2010*, YOUTUBE (Jan. 6, 2011), http://www.youtube.com/watch?v=k8ru-FE2v_8; videoreview12, *Recruit_Center_11192010*, YOUTUBE (Jan. 6, 2011), http://www.youtube.com/watch?v=X3PJACpL53k.

(FACE),[88] enacted in response to demonstration activity perceived to be intended to impede operation of abortion facilities, and the Freedom to Serve Act of 2008 bill,[89] which would have created a similar provision relating to military recruitment facilities.[90] Each version also authorized officers to order protestors to cease and leave the vicinity upon "observ[ing] or [being] furnished with reliable evidence" that the law was being violated. The protestors, according to the vignette, alleged that they had been "only expressing their views, in a manner that did not violate the law."

Subjects were advised that both parties agreed that a "video of the protest" furnished an "accurate impression of the nature of the protestors' conduct" and thus represented "the key evidence" in the case. However, the parties were described as

> disagree[ing] about whose position the video most supports: the position of the police officers, who assert that the protestors were "intimidating, interfering, obstructing or threatening" people trying to enter the abortion clinic campus recruitment center; or the position of the protestors, who say they were merely expressing their views in a lawful manner.

"Deciding who is right is the task for you as a member of the jury," the vignette stated. Subjects were then instructed to view the video.

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88. Section 248 of the Act provides:

> (a) Prohibited Activities.—Whoever—
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services [is subject to criminal and civil penalties].

18 U.S.C. § 248(a)(1) (2006).

89. The Freedom to Serve Act of 2008 bill read:

> (a) Whoever—
>
> (1) by force or threat of force or by physical obstruction, injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been providing Federal or State military recruiting service.

H.R. 6023, 110th Cong. § 3(a) (2008) (internal quotation marks omitted).

90. In *Hill v. Colorado*, 530 U.S. 703 (2000), all nine Justices, including three dissenters who would have invalidated the statute on other grounds, endorsed the constitutionality of language similar to that in our vignettes. *See id.* at 707-08, 735 (describing the statute in question and finding it valid); *id.* at 754-55 (Scalia, J., dissenting) (arguing that the portion of the law that subjects to liability "any person who 'knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility'" is "narrowly tailored to serve" the state's asserted interest in securing access to such a facility and would not have been reinforced with additional provisions had the state not also been interested in stifling abortion clinic protestors in particular); *id.* at 777 (Kennedy, J., dissenting) (same). Lower courts have rejected constitutional challenges to FACE. *See, e.g.*, United States v. Soderna, 82 F.3d 1370, 1375 (7th Cir. 1996) ("To persuade and to blockade are importantly different forms of action.").

b. *Video*

Approximately three and one-half minutes in length, the video depicts an actual political demonstration that occurred in Cambridge, Massachusetts, in March 2009. The protestors included approximately half a dozen members of the Westboro Baptist Church, a Kansas-based group whose members conduct demonstrations condemning homosexuality.[91] Also present were approximately two hundred counter-demonstrators, although the video was designed to create the impression that they and the church members formed a single mass of protestors. The video consists of five distinct scenes showing both the Westboro Baptist Church members and the counter-demonstrators congregated near the entrance of a building. The video also contains numerous shots of helmeted police officers who were present to direct traffic and control the crowd in the vicinity of the protest. In certain scenes, pedestrians (all college-aged males and females) are shown either veering away from the protestors gathered near the entrance of the building or walking in the opposite direction of the entrance while looking over their shoulders at the crowd.

A screen of explanatory text appears before each scene.[92] Described as "based on witness statements the parties agree are accurate," the text relates what the next scene will show in a deliberately bland manner meant to avoid expressing a position on any disputed issue (e.g., "Outside [the reproductive health clinic/campus recruitment center] 15 minutes before it was scheduled to open"). The text indicates that the pedestrians—described as either clinic "patients" and "staff" or "students" scheduled for interviews—did not enter the facility but did not state a reason. ("Scene at the entrance of [clinic/campus recruitment center]. [Patient/student] approaches but does not enter.") In two scenes, the text identifies a middle-aged man conversing with a police officer as the "director" of either the "clinic" or "recruitment center" and describes him as urging the police to halt the demonstration.

91. *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011). The Supreme Court granted certiorari in *Phelps* approximately one year after the Cambridge demonstration featured in the study videotape. At issue in *Phelps* was an award of damages against the Westboro Baptist Church members for intentional infliction of emotional distress. *See id.* at 1214. The basis of the award was a protest that the group conducted at the funeral of a soldier, whose death, the group asserted, was an act of retaliation by God for the United States' tolerance of homosexuality. *See id.* at 1213. Applying the teleological conception of speech, the Court held that the award of damages to the soldier's father violated the First Amendment. *See id.* at 1218-20 (noting 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," and suggesting that the state would be free to prohibit protest behavior that was "unruly" or "violen[t]," or that "interfere[d] with the funeral itself").

92. *See infra* Figure 3.

FIGURE 2
Video



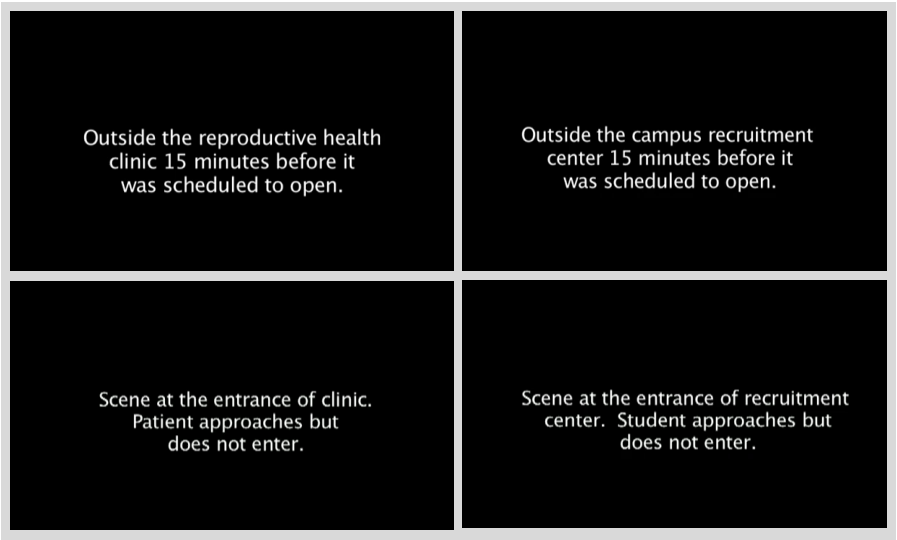
Subjects in each condition viewed a video of a political demonstration. Wording of the signs was blurred to prevent identification of the actual subject matter of the protest. Subjects were instructed that the court had ordered the blurring to prevent jurors from being influenced by the messages they contained.

The film was also altered to prevent subjects from identifying the actual positions of either the Westboro Baptist Church members or the counter-demonstrators. The words printed on the groups' respective signs were blurred; subjects were instructed that the court had ordered the blurring to "assure that th[e] messages did not affect the jury one way or the other" because "the U.S. Constitution prohibits the police from breaking up a protest based on the *messages* the protestors are trying to communicate." In addition, generic crowd noise, consisting primarily of a cacophony of shouts and chants, was added as a sound track.

A pretest conducted on a group of approximately one hundred judges and lawyers confirmed that the tape could be plausibly identified as either an abortion clinic or recruitment center protest. None of the participants in the pretest recognized the protestors. Debriefing feedback for the study suggested that only one subject identified the protestors as members of the Westboro Baptist Church. That subject's responses were therefore excluded from analysis.

The intent of both the filming and editing was to create grounds for opposing conclusions about the key facts. At no point in the film is there physical contact between the protestors or counter-demonstrators and the pedestrians identified as not entering the facility. Nevertheless, the proximity of the protestors to the pedestrians and to the entrance would have furnished a basis for inferring that the protestors either obstructed or intimidated the pedestrians. So would the passionate behavior of the demonstrators, including in particular one female protestor who is shown at various points yelling and appearing to gesture in the direction of those intent on entering the facility. Yet it could also have been inferred that pedestrians avoided entering either because they were persuaded by the protestors' message, were averse to being obliged to listen to the protestors, or were anxious not to be publicly condemned for their behavior. Members of the lawyer-judge pretest panel were close to evenly divided on these matters and thus on whether the police had cause for ordering a cessation of the protest.[93]

FIGURE 3
Video Text Screens



Each of the five scenes in the video was introduced by a text screen. The text screens contained minor variations to fit the experimental condition but were otherwise identical in both conditions.

93. In reality, the police did not halt the protest, which terminated without incident after approximately forty-five minutes.

4. *Response measures*

After watching the video, subjects were asked to indicate on a six-point scale their level of disagreement or agreement with twenty-one response items. The first seventeen items related to various facts relevant to application of the standard set forth in the Freedom to Exercise Reproductive Rights Law and the Freedom to Serve with Honor Law. Some of the items indicated that the police acted on grounds that would justify treating the protest activity as prohibited "conduct" under prevailing First Amendment doctrine (e.g., "The protestors obstructed individuals seeking to enter, exit, or remain lawfully on the premises of the [abortion clinic/campus recruitment center]"; "There was a risk that the protestors might resort to violence if anyone tried to enter").[94] Others, in contrast, suggested the protestors were engaged in lawful speech and that the motivation for ordering a halt to the demonstration was speech-related and hence impermissible (e.g., "The protestors intended only to persuade people not to go into the [abortion clinic/campus recruitment center], not to physically interfere with, intimidate, obstruct, or threaten anybody"; "It is more likely the director asked the police to break up the protest because the director and others found dealing with the protestors annoying than because the protestors were interfering with, intimidating, obstructing, or threatening anyone").[95] Some items attributed actions to the protestors' behavior that clearly did not occur—that they "shoved" prospective facility users and "spit" at them, for example—but most of the facts were matters of interpretation and inference.

The last four items related to the proper disposition of the case. These included the appropriateness of an award of damages and entry of an injunction against future police "interfer[ence] with protests under conditions like the ones shown in the video."

The fact- and case-disposition items formed a highly reliable[96] composite scale. Designated Pro_Protest, the scale furnished a continuous measure (standardized by *z*-score transformation) of each subject's relative inclination to form pro-demonstrator fact perceptions and case-disposition judgments.[97]

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94. The necessity of finding facts such as these, which parallel ones that the Supreme Court has indicated supply permissible grounds for restricting protest activity, *see supra* Part I.C, has been emphasized by lower courts that have rejected constitutional challenges to FACE. *See, e.g.*, United States v. Scott, 958 F. Supp. 761, 774-75 (D. Conn. 1997), *aff'd sub nom.* United States v. Vazquez, 145 F.3d 74 (2d Cir. 1998). The court in *Scott* found that one defendant protestor had violated FACE by "physically obstructing and threatening persons seeking to enter and exit . . . in order to intimidate and interfere," *id.* at 770, but that a second had not because "her intent in sidewalk counseling and leafleting [was] to persuade women to consider alternatives to abortion," *id.* at 770-71.

95. *Cf.* Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

96. Reliability measured using Cronbach's α was 0.95.

97. Pro_Protest was constructed as a conventional composite Likert scale: items expressing a pro-police fact perception or outcome judgment were reverse coded to reflect a pro-protestor valence; scores on all response items were then normalized (via *z*-score transformation) and added to form a composite score, which was itself normalized (via *z*-score

5. *Analytic strategy*

Multivariate regression furnishes an appropriate and straightforward procedure for testing the study hypotheses.[98] Because Pro_Protest supplies a more precise measure of the latent disposition to form pro-plaintiff reactions than do the individual items, the scale furnishes the most reliable outcome variable for testing the study hypotheses.[99] The predictors in our study include the experimental manipulation, which we denote by the variable Recruitment (abortion clinic = 0; recruitment center = 1); and subjects' worldviews, represented by the variables Hierarchy and Individualism, which reflect their scores on the hierarchy-egalitarianism and individualism-communitarianism scales respectively. To enable testing of hypotheses relating to the varying impact of subjects' cultural worldviews in the two experimental conditions, we constructed product-interaction terms: Hierarchy × Recruitment and Individualism × Recruitment, which measure any difference that an increasing disposition toward hierarchy or individualism, respectively, has on subjects' fact- and case-disposition responses in the recruitment center as opposed to the abortion clinic condition.[100] Three subjects failed to respond to one or more items. They were therefore omitted from the multivariate regression analysis.

C. *Results*

The study results appear in the regression analyses reported in Table 1. Predictors and cross-product interaction terms are entered in steps to promote interpretation of the contribution that the various predictors make to variance in reactions to the video, as measured by Pro_Protest. Model 3 incorporates all of the predictor and cross-product interaction terms that bear on the study hypotheses.[101]

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transformation). *See* Eliot R. Smith, *Research Design*, *in* HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 17, 31 (Harry T. Reis & Charles M. Judd eds., 2000).

98. Charles M. Judd, *Everyday Data Analysis in Social Psychology: Comparisons of Linear Models*, *in* HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY, *supra* note 97, at 370, 371-72 (outlining use of multivariate regression for analysis of experimental results and explaining advantages over ANOVA).

99. *See supra* note 85.

100. *See generally* JACOB COHEN ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 375-83 (3d ed. 2003) (outlining and explaining the use of cross-product interaction terms in multivariate regression to model and test the hypothesis that the effect of a continuous predictor will vary across the levels of a categorical one).

101. The underlying regression equation in Model 3 is:

$$Y = b1 \times Recruitment + b2 \times Hierarchy + b3 \times Individualism + b4 \times Hierarchy \times Recruitment + b5 \times Individualism \times Recruitment + constant$$

where Y is the score on Pro_Protest, and $b1$-$b5$ are the coefficients for the specified predictors and cross-product interaction variables.

Putting aside subjects' cultural worldviews, the impact of being assigned to one experimental condition or another is negligible. The coefficient for Recruitment indicates the impact of being assigned to the recruitment center as opposed to the abortion clinic condition. In Model 1, in which experimental assignment is the only predictor, the coefficient for Recruitment is close to zero and is statistically nonsignificant.

Aggregate impressions not only were comparable between the two conditions but were also closely divided within each. This conclusion is reflected clearly in the raw data.[102] In the abortion clinic condition, 49% of the subjects indicated that they agreed (either "slightly," "moderately," or "strongly") that the police should be found liable for ordering the protestors to cease the demonstration. In the recruitment center condition, 45% of the subjects agreed the police should be found liable.[103] Comparable proportions supported the proposition that the police should be enjoined from halting protests "under conditions like the ones shown in the video" (recruitment center, 46%; abortion clinic, 45%). The proportion who agreed that the protestors should be awarded damages was smaller, 25% in each condition.

TABLE 1

Multivariate Regression Analysis

	Model 1		Model 2		Model 3	
Recruitment	-0.01	(0.14)	-0.01	(0.14)	-0.01	(0.13)
Hierarchy			-0.07	(0.07)	**0.32**	(0.09)
Individualism			-0.06	(0.07)	**-0.26**	(0.09)
Hierarchy x Recruitment					**-0.82**	(0.13)
Individualism x Recruitment					**0.30**	(0.13)
Constant	0.00	(0.10)	0.02	(0.10)	0.04	(0.09)
R^2	0.00		0.01		0.19	
ΔF			0.83		**21.72**	

$N = 196$. Dependent variable is Pro_Protest, the composite response-item scale transformed to a *z*-score with a mean of 0. Predictor effects are measured with unstandardized linear (ordinary least squares) regression coefficients. Standard errors are in parentheses. Bold type indicates that the predictor coefficient or change in F statistic is significant at $p < 0.05$.

Considered apart from the experimental manipulation, cultural worldviews likewise appear to have no meaningful effect on reactions to the video. The coefficients for Hierarchy and Individualism in Model 2 indicate the impact of subjects' scores on the indicated worldview variables averaged across the two conditions. Again, both coefficients are close to zero and are statistically

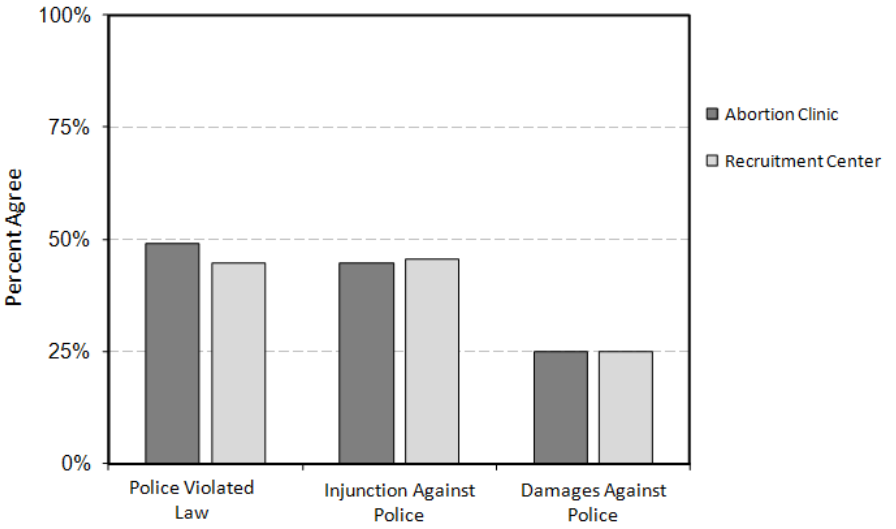
102. *See infra* Figure 6.

103. *See infra* Figure 6.

nonsignificant. There is no evidence, then, that being inclined either toward hierarchy or egalitarianism, toward individualism or communitarianism, or toward any combination of the two disposes individuals toward pro- or anti-demonstrator reactions irrespective of what subjects believe about the political cause of the demonstrators.

When cultural worldviews and experimental conditions are considered *together*, however, it becomes clear that who saw what did depend critically on the relationship between the demonstrators' causes and the subjects' own values. The nature of these influences, moreover, was consistent with study hypotheses.

FIGURE 4
Main Effects



Bars indicate the percentage of subjects who agreed (either "slightly," "moderately," or "strongly") with items proposing the indicated dispositions.

The condition-specific effect of each worldview is reflected in Model 3.[104] Their impacts in the abortion clinic condition are indicated by the coefficient for Hierarchy, which is positive and significant, and by the coefficient for Individualism, which is negative and significant.[105] These results indicate that sub-

104. In Model 3, the coefficient for Recruitment and the constant are the effects of being assigned either to the military recruitment center condition or to the abortion clinic condition, respectively, when the cultural worldviews are equal to zero or their mean values. Again, they are close to zero and statistically nonsignificant. One can thus conclude that the "culturally average" subject would react comparably in both conditions.

105. The coefficients for each worldview predictor indicate the impact of the specified worldview scale when all other predictors equal zero, *see* LEONA S. AIKEN ET AL., MULTIPLE REGRESSION: TESTING AND INTERPRETING INTERACTIONS 123-25 (1991), which will be true

jects in the abortion clinic condition formed progressively more *pro*-demonstrator fact perceptions and case-disposition preferences as their values became either more hierarchical or more communitarian; by the same token, they formed progressively more *anti*-demonstrator perceptions and preferences as their values became either more egalitarian or more individualistic. These relationships are reversed in the recruitment center condition: the negative coefficients for Hierarchy × Recruitment and the positive ones for Individualism × Recruitment indicate that in that condition pro-demonstrator reactions dissipated as subjects become either more hierarchical or communitarian but grew as subjects become either more egalitarian or individualistic.[106] It follows that subjects who were simultaneously more egalitarian and individualistic tended to form relatively extreme anti-demonstrator impressions in the abortion clinic condition and pro-demonstrator impressions in the recruitment center condition. Subjects who were simultaneously more hierarchical and communitarian tended to form exactly the opposite impressions. These results thus confirm the EI inversion and HC inversion hypotheses, and hence the EI/HC polarization hypothesis as well.

It is more difficult to assess the remaining hypotheses by simply scrutinizing the regression outputs. Because Hierarchy and Individualism have opposite signs from each other in both conditions (and for each outcome variable), disagreement between subjects who are more hierarchical and individualistic, on the one hand, and those who are more egalitarian and communitarian, on the other, will necessarily be less extreme. This is consistent with the EC/HI semipolarization hypothesis, but cannot be determined to support either it or the EC bias and HI bias hypotheses unless the magnitudes of offsetting effects are estimated and compared in each condition.

Those effects are plotted in Figure 5. Consistent with the EI and HC inversion hypotheses, the estimated scores for egalitarian individualists and for hierarchical communitarians scales flip across conditions.[107] It is also evident from the estimates that egalitarian communitarians are significantly more pro-demonstrator and hierarchical individualists significantly more anti-demonstrator in the recruitment center condition than in the abortion clinic condition. Whereas the difference between egalitarian individualists and hierarchical communitarians is significant in both conditions, the difference between egalitarian communitarians and hierarchical individualists is significant *only* in the recruitment center condition. This result fits the EC/HI semipolarization

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when a subject is assigned to the abortion clinic condition (Recruitment = 0) and has the mean score on the other worldview scale.

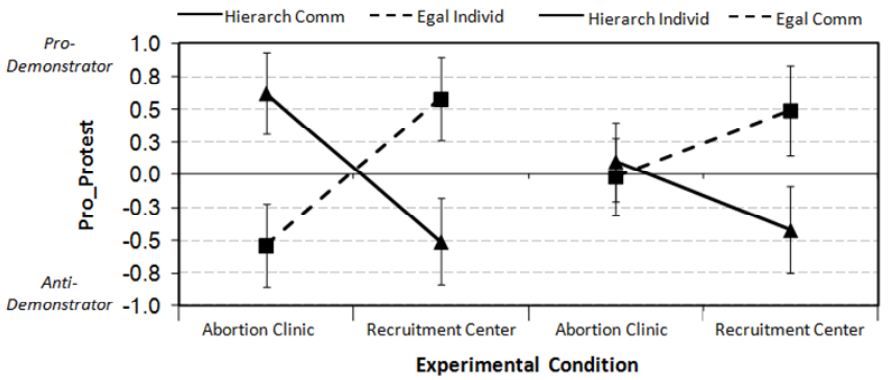
106. The coefficient for each cross-product interaction variable indicates the unique incremental effect associated with the indicated worldview in the recruitment center condition. *See id.*

107. For purposes of these estimates, the values for the cultural worldview predictors were both set one standard deviation from their means in the directions necessary to form the specified worldview combinations. *See* AIKEN ET AL., *supra* note 105, at 13.

hypothesis, although we had not anticipated that there would in fact be no meaningful difference between egalitarian communitarian and hierarchical individualist subjects in the abortion clinic condition.

The practical impact of these effects is readily illustrated by examining the responses for individual items. Subjects characterized (on the basis of their mean scores on the worldview scales) as egalitarian individualists and hierarchical communitarians reacted in strong and opposite ways to the experimental manipulation. In the abortion clinic condition, 70% of the hierarchical communitarians found that the police had violated the demonstrators' rights. Yet in the recruitment center condition, only 16% did. Matters were the other way around for egalitarian individualists: 76% of them concluded that the police had violated the rights of the protestors in the military recruitment condition, yet only 28% of them took that position in the abortion clinic condition.[108] These patterns fit the EI Inversion, HC Inversion, and EI/HC polarization hypotheses.

FIGURE 5
Multivariate Regression Estimates



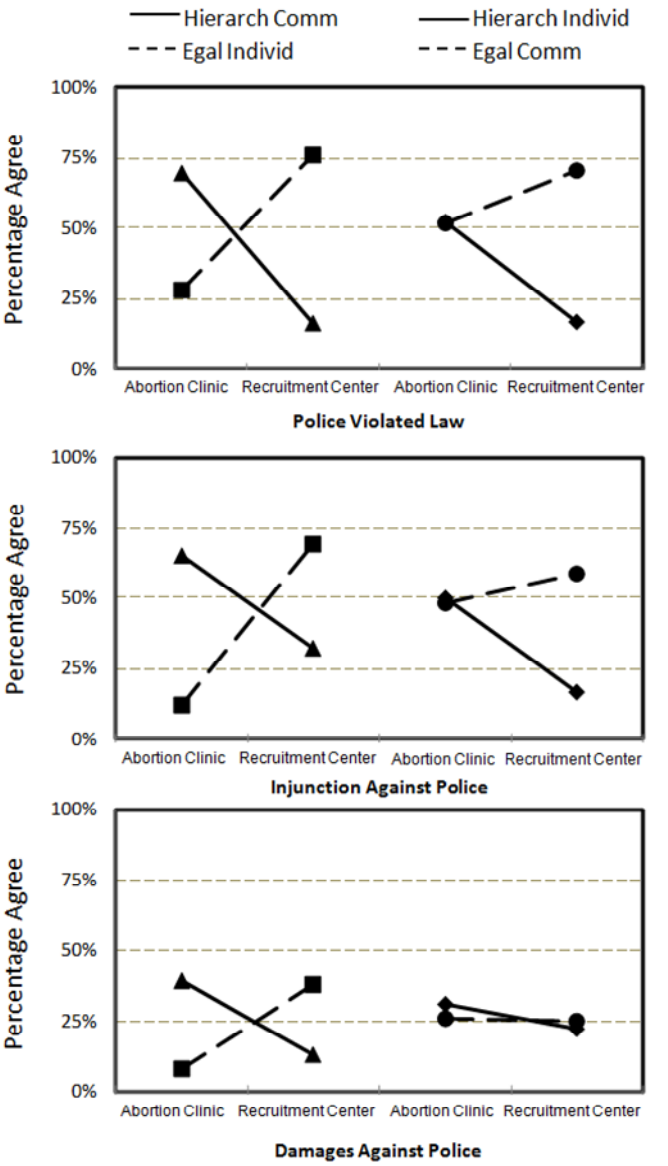
Graphs display the impact of culture-condition interactions tested in the multivariate regression analyses.[109] Group estimates were formed by setting values for Hierarchy and Individualism at one standard deviation above and below the mean in the specified directions. Confidence intervals reflect 0.95 level of confidence. Change in each group's score between conditions is significant at $p < 0.05$.[110]

108. *See infra* Figure 6.

109. *See supra* Table 1.

110. The statistical significance of the difference between any group's estimated score in one condition and its estimated score in another, and of the difference between any two groups' estimated scores within a condition, must be determined by calculation. However, a rough visual heuristic is to consider whether the 0.95 confidence interval of one estimate overlaps with the point estimate of another (not the latter's confidence interval, as is sometimes mistakenly stated). *See generally* Sarah Belia et al., *Researchers Misunderstand Confidence Intervals and Standard Error Bars*, 10 PSYCHOL. METHODS 389, 393 (2005); Geoff Cumming & Sue Finch, *Inference by Eye: Confidence Intervals and How to Read Pictures of Data*, 60 AM. PSYCHOL. 170 (2005); Nathaniel Schenker & Jane F. Gentleman, *On Judging*

FIGURE 6
Case-Outcome Measures, by Cultural Group

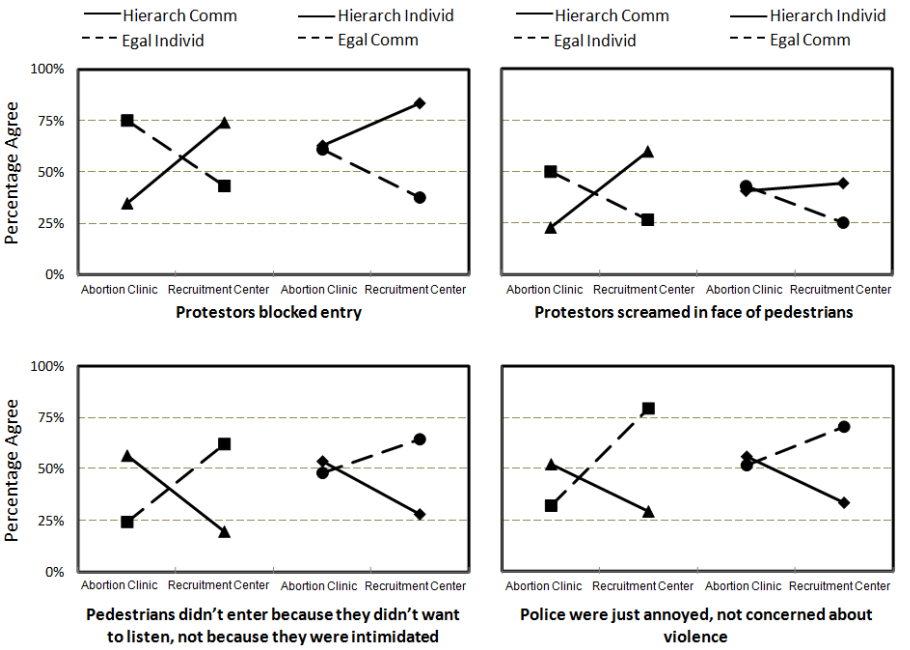


Lines connect points indicating the percentage of subjects within each of the specified cultural groups who agreed (either "slightly," "moderately," or "strongly") with items proposing the indicated dispositions.

the Significance of Differences by Examining the Overlap Between Confidence Intervals, 55 AM. STATISTICIAN 182 (2001).

Egalitarian communitarians and hierarchical individualists also reacted as predicted. In the abortion clinic condition, 52% of both egalitarian communitarians and hierarchical individualists found that the police abridged the protestors' right to free speech. In the recruitment center condition, the proportion of egalitarian communitarians who found a constitutional violation jumped to 71%, while the proportion of hierarchical individualists who did fell to just 17%.[111] This pattern fits the EC and HI bias hypotheses, as well as the EC/HI semipolarization hypothesis.

FIGURE 7
Fact-Perception Responses, by Cultural Group



Lines connect points indicating the percentage of subjects within each of the specified cultural groups who agreed (either "slightly," "moderately," or "strongly") with items proposing the indicated dispositions.

There was comparable cultural dissensus over remedies. Majorities of egalitarian individualists (69%) and egalitarian communitarians (59%) favored enjoining the police in the recruitment center condition, whereas only minorities of these subjects (egalitarian individualists, 12%; egalitarian communitarians, 48%) did in the abortion clinic condition. Minorities of both hierarchical communitarians (32%) and hierarchical individualists (17%) favored issuing an injunction against the police in the recruitment center condition; in the abortion

111. *See supra* Figure 6.

clinic condition, the proportion of hierarchical communitarians who supported an injunction rose to 65%, and the proportion of hierarchical individualists to an even 50%.[112]

Consistent with the sample-wide outcome, support among subjects of all worldviews was lower for damages than for injunctive relief. Nevertheless, for hierarchical communitarians and egalitarian individualists, in particular, the proportions supporting damages shifted within and between conditions in patterns identical to the shifts on the other outcome measures.[113]

As one would expect, these differences in case-disposition judgments are mirrored in the subjects' responses to the fact-perception items. Whereas only 39% of the hierarchical communitarians perceived that the protestors were *blocking* the pedestrians in the abortion clinic condition, for example, 74% of them saw blocking in the recruitment center condition.[114] Only 45% of egalitarian individualists, in contrast, saw blocking in the recruitment center condition, whereas in the abortion clinic condition 76% of them did.[115] Fully 83% of hierarchical individualists saw blocking in the recruitment center condition, up from 62% in the abortion clinic condition; a 56% majority of egalitarian communitarians saw blocking in that condition, yet only 35% saw such conduct in the recruitment center condition.[116] Responses on other items—such as whether the protestors "screamed in the face" of pedestrians—displayed similar patterns.

Relatively few subjects reported observing "spitting" (18%) or "shoving" (16%) by the protestors or "physical contact" (20%) between the protestors and the pedestrians.[117] There was also no meaningful cultural variation with respect to these items. This result suggests that the influence of values was confined to facts on which there was at least modest room for interpretation. It also helps to confirm that the subjects were not responding in a consciously biased manner in general.

III. ANALYZING, APPRAISING, AND ADVOCATING

A. *Summary of Results*

The theoretical aim of the study was to test the hypothesis that culturally motivated cognition would influence individuals' perceptions of facts essential to distinguishing "speech" from "conduct" for purposes of the First Amendment. The results strongly supported this hypothesis. Our subjects all viewed

112. *See supra* Figure 6.
113. *See supra* Figure 6.
114. *See supra* Figure 7.
115. *See supra* Figure 7.
116. *See supra* Figure 7.
117. *See supra* Figure 7.

the same video. But what they *saw*—earnest voicing of dissent intended only to persuade, or physical intimidation calculated to interfere with the freedom of others—depended on the congruence of the protestors' positions with the subjects' own cultural values.

Motivated cognition not only polarized individuals of diverse cultural outlooks but also generated contradictions in what subjects of a shared orientation reported seeing. Relatively hierarchical and communitarian subjects rejected the proposition, credited by relatively egalitarian and individualistic ones, that demonstrators were blocking access to a facility represented to be an abortion clinic; yet when hierarchical communitarians understood the demonstrators to be objecting to the exclusion of openly gay and lesbian citizens from the military, they agreed the protestors were blocking access to the same building—a claim that egalitarian individualists overwhelmingly dismissed. Subjects subscribing to a hierarchical individualistic outlook, as well as those adhering to an egalitarian communitarian one, exhibited similar shifts in perception.

We focused on our subjects' cultural worldviews because of the demonstrated role of these outlooks in shaping perceptions of risk and related facts relevant to policy and law.[118] Our results thus suggest the utility of cultural-

118. It is reasonable to surmise that the controversies featured in this study would divide subjects along other lines in addition to cultural outlooks as we measure them. For example, women (55%) were more likely than men (37%) to agree that the police should be enjoined from halting future demonstrations. The proportions of both male and female subjects who supported this outcome, however, did not differ meaningfully across conditions. Thus, cultural variance obviously cannot be attributed or reduced to gender variance. Political party affiliation *did* register sensitivity to the experimental manipulation: in the abortion clinic condition, the majority of Democrats (57%) opposed an injunctive remedy, and a majority of Republicans (62%) favored it; in the recruitment center condition, a majority of Republicans (67%) opposed and a majority of Democrats (61%) favored such an outcome. Of course, this simple partisan inversion of impressions is necessarily less nuanced than the cross-cutting shifts observed when members of the sample were classified simultaneously along the two cultural dimensions. Moreover, among the one-third of the sample that did not identify themselves as either Democrats or Republicans, there was again no difference between the abortion clinic and military recruitment conditions. We are eager to add, however, that we regard the question "What has the biggest impact—culture, gender, political ideology, race, etc.?" as ill-posed. Cultural worldviews tend to cohere with other characteristics—including political affiliation, gender, race, and class—in patterns that indicate the same latent predispositions that the cultural worldviews by themselves measure. *See* Kahan, *supra* note 74, at 740-42. When forced to choose—as one often is, by sample size—cultural worldviews can be expected to be more discerning indicators of these predispositions, and hence stronger predictors of cultural variance in cognition, than these other characteristics. *See* Kahan et al., *supra* note 41, at 505 n.5. Ideally, however, nonlinear scaling and classification techniques, such as grade-of-membership modeling and latent-class analysis, could be used to form even more discerning and hence even more predictive measures of cultural predispositions based on appropriate combinations of cultural worldviews and related identifying characteristics. *See generally* Kenneth G. Manton et al., *The Use of Grade-of-Membership Techniques to Estimate Regression Relationships*, 22 SOC. METHODOLOGY 321 (1992); Richard F. Potthoff et al., *Dirichlet Generalizations of Latent-Class Models*, 17 J. CLASSIFICATION 315 (2000). Such an analysis would likely add resolution and detail to the

cognition theory for measuring the impact and explaining the sources of motivated reasoning in constitutional decisionmaking as well.[119]

B. *Cognitive Illiberalism and the Constitution*

The practical motivation for this study was to focus attention on the danger that cognitive illiberalism can pose to constitutional law. We use this term to refer to the vulnerability of political and legal decisionmakers to betray their commitment to liberal neutrality by unconsciously fitting their perceptions of risk and related facts to their sectarian understandings of the good life. This is the dynamic, we believe, that transforms seemingly empirical debates over how to protect the environment, promote public health, and secure the nation from external threats into occasions for divisive group-based status competition.[120] Our study results show how readily constitutional decisionmaking can become infected by this pathology.

In our subjects, cognitive illiberalism eviscerated the line between "speech" and "conduct." The speech-conduct distinction can be seen as one doctrinal device courts employ to test whether a regulation conforms to liberal prohibitions on governmental promotion of a moral or political orthodoxy: by requiring that a regulation be shown to promote a governmental interest independent of hostility to any particular idea, the teleological conception of the speech-conduct divide assures that law is used to pursue secular goods of value to all citizens regardless of their cultural outlooks.[121] Enforcing this test, however, necessarily requires decisionmakers to make critical determinations of *fact*: in the case of a mass demonstration, for example, did the protestors intend to *intimidate* or only *persuade*? Were the protestors simply expressing impassioned dissent, or did they impose themselves on members of the public in an

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picture of motivated cognition that our data reveal. But it would still be culturally motivated cognition that is being observed.

119. We used a video to elicit evidence of cultural cognition because of the utility of a visual stimulus for the experimental design and because of the prevalence of video proof in real-world cases that involve First Amendment challenges to restrictions on protest activity. *See supra* note 71 and accompanying text. Our results reinforce the concerns and cautions of authors who have emphasized the risk that judges and jurors will invest video proofs, which are becoming increasingly common, with more weight than they are due. *See* NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 1-17 (2009); Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 17-32 (2008); Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of* Scott v. Harris, 91 JUDICATURE J. 180, 180-84 (2008). Nevertheless, the impact of cultural cognition is by no means limited to visual perception. *See, e.g.*, Kahan et al., *supra* note 40, at 87-88 (showing the biased assimilation of evidence in written materials). Nor is there any reason to believe that videos are a form of trial proof uniquely vulnerable to the effects of culturally motivated cognition. *See* Kahan et al., *supra* note 5, at 900-01.

120. *See* Kahan, *supra* note 7, at 127-28.

121. *See* Rubenfeld, *supra* note 12, at 818-19; *see also supra* Part I.A.

assaultive or invasive manner (e.g., "screaming in their faces")? Were onlookers genuinely frightened of physical assault, or merely angry, offended, or possibly even ashamed by exposure to the protestors' message? Did law enforcement actors intervene to preempt incitement to violence or only to quell a public backlash propelled by animosity toward the demonstrators' point of view? For our subjects, the answers were decisively shaped by the congruence between the protestors' message and the subjects' own cultural worldviews. As a result, in the course of certifying that the law was free of culturally partisan influence, they ended up infusing it with exactly that.

Other First Amendment doctrines also seem vulnerable to this type of subversion. Like the speech-conduct distinction, the so-called "time, place, manner" doctrine requires that regulations be justified on the basis of an "interest . . . unrelated to the suppression of free speech."[122] It thus requires the same sort of factfinding, subject to the same danger of motivated cognition and the same dangers of polarization.[123]

In addition, valid "time, place, manner" restrictions must be "content neutral"—that is, applicable without regard to speakers' topics or points of view.[124] Regulators might try to evade this requirement by resorting to seemingly general regulations (say, that marchers acquire liability insurance for a particular level of damages) that, in practice, meaningfully limit only a disfavored point of view (Ku Klux Klan members proposing to march in a predominantly Jewish community).[125] Or regulators might apply a facially neutral provision (e.g., on the number of groups that will be issued permits to march on a given day) in a selective manner that reflects their animosity toward a particular message or idea ("Irish gay pride," on St. Patrick's Day).[126] We expect searching First Amendment review to give the lie to such stratagems.[127] But if legal

122. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293-94 (1984).

123. *Cf. id.* at 298 (stating that the "four-factor standard . . . for validating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions").

124. *See* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980).

125. *Cf.* Collin v. Smith, 578 F.2d 1197, 1209 (7th Cir. 1978) ("[T]he Village has flatly prohibited First Amendment activity, not itself directly productive of the feared injury, by those too controversial to obtain commercial insurance.").

126. *Cf.* Olivieri v. Ward, 637 F. Supp. 851, 876 (S.D.N.Y.), *aff'd in part, rev'd in part*, 801 F.2d 602 (2d Cir. 1986) (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). *But cf.* Irish Lesbian & Gay Org. v. Giuliani, 918 F. Supp. 732, 742-43 (S.D.N.Y. 1996) (upholding reliance on content-neutral criteria involving traffic disruption and public safety to deny marching permit to gay and lesbian group).

127. *See* 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."); Kagan, *supra* note 9, at

decisionmakers cannot shake the influence of culturally motivated cognition, how can we be confident that they themselves will reliably *perceive* that a regulator is defying the content-neutrality requirement in one of these ways? Why shouldn't we expect those decisionmakers to *be perceived* by those who see things otherwise as having fit their conclusions to their values?

The same dynamics inhere in First Amendment standards relating to "unprotected" and "low value" categories of speech. Authorities can ban obscenity but not pornography, fighting words but not dissent; yet contested cultural meanings might well be exactly what a legal decisionmaker is perceiving when she distinguishes members of the protected categories of one (a woman depicted as enjoying adulterous sex;[128] the burning of a flag[129]) from members of the unprotected ones (a woman depicted as enjoying forced sex;[130] the burning of a cross[131]). The First Amendment demands proof when regulators invoke "secondary effects"—traffic congestion, disruption of commerce, increased incidence of crime, and the like—to justify zoning restrictions on strip clubs and other forms of "low value" speech.[132] But if legal decisionmakers' own ability to weigh the proffered evidence is affected by motivated cognition, they will do a poor, or at least a suspect, job of distinguishing pretext from truth.

Indeed, we suspect this point can be generalized to constitutional theory as a whole. As discussed, the First Amendment can be integrated into a general theory that reads the Constitution as implementing the liberal prohibition on state endorsement of partisan conceptions of the good life.[133] Like the First Amendment, the Equal Protection and Due Process Clauses require courts to "strictly scrutinize" proffered secular rationales—public health, deterrence of criminal violence, national security, and the like—to "flush out" the impact, conscious or unconscious, of regulators' animosity toward those whose identity or values defy dominant norms.[134] But if legal decisionmakers, like everyone

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454 ("[T]he strict scrutiny test operates as a measure of governmental motive."); Rubenfeld, *supra* note 12, at 786 (stating that the First Amendment strict scrutiny test can be conceived of as "a device for smoking out impermissible purposes").

128. *Cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

129. *Cf.* Texas v. Johnson, 491 U.S. 397, 438 (1989) (Stevens, J., dissenting) ("Th[is] case has nothing to do with 'disagreeable ideas.' It involves disagreeable conduct . . . ." (citation omitted)).

130. *Cf.* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331-33 (7th Cir. 1985).

131. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 416 (1992) (Stevens, J., concurring in the judgment) (explaining that cross-burning has "communicative content—a message of racial, religious, or gender hostility").

132. *See generally* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 438-39 (2002) (plurality opinion) (explaining that governing authority must furnish "evidence . . . [to] support its rationale" and cannot "get away with shoddy data or reasoning").

133. *See supra* Part I.A.

134. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 473 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("The discreteness and insularity warranting a 'more searching judicial inquiry' must . . . be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for

else, are unconsciously motivated by their cultural affiliations, then they—like everyone else—are more or less likely to see challenged laws as contributing to the attainment of secular ends depending on whether those laws affirm or denigrate their own cultural commitments. Angry denunciations of judges who have thrown their lot in with one or the another of the belligerents in the American "culture wars" is itself a form of status conflict characteristic of cognitive illiberalism.[135]

Some legal commentators[136] (and historically certain jurists[137]) have criticized constitutional standards that "balance" constitutional liberties against "compelling interests," such as national security, public order, and diversity. The phenomenon of culturally motivated cognition vindicates their anxiety that such "tests inevitably become intertwined with the ideological predispositions of those doing the balancing."[138] But our study results suggest that these commentators are too quick to assume that their preferred alternative to balancing—such as the "teleological conception" of the speech-conduct distinction, the "anticaste" principle,[139] the liberal "harm" criterion,[140] and the like—will necessarily avoid such entanglement. The primary implication of our study—the main message we are trying to get across—is that constitutional theorists have paid too much attention to explicating the normative content of various free speech standards and too little to the psychology of enforcing them.

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the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community." (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938))). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980) (stating that strict scrutiny "flushes out" illicit motivation in equal protection analysis); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 436-37 (1997) (same).

135. *See generally* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2320 (1997) (examining dynamics by which Supreme Court decisions become a focus for status competition among competing cultural groups).

136. *See, e.g.*, Rubenfeld, *supra* note 134, at 441-43 (arguing against interest balancing in equal protection analysis); Rubenfeld, *supra* note 12, at 778-93 (arguing against interest balancing in free speech analysis).

137. *See* Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.").

138. Ely, *supra* note 13, at 1501.

139. *See generally* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

140. *See generally* Paul M. Secunda, Lawrence*'s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117 (2005); Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After* Lawrence v. Texas, 54 DEPAUL L. REV. 671 (2005).

C. *Judges, Jurors, and Citizens*

We have been assessing the potential impact and implications of culturally motivated cognition on constitutional decisionmaking. It should not be assumed, however, that all constitutional factfinders think in the same way. The design and sample we used in this study furnish evidence of how members of the public might be influenced by cultural cognition as jurors called upon to make findings of fact pertinent to the speech-conduct distinction and related doctrines.[141] But oftentimes—when protestors seek a preliminary injunction against police interference with a planned rally or march, for example—*judges* will make these sorts of findings. Indeed, how likely such determinations are to be made by judges rather than jurors can be influenced by appropriate adjustments in the standards used to decide threshold motions or to review findings of fact on appeal. Do the study results furnish insight on how factfinding and related decisionmaking tasks should be allocated between judges and jurors?

We addressed a similar question in a previous article. In it, we examined the impact of cultural cognition on perceptions of a high-speed car chase that came to an end when the police deliberately rammed the fleeing motorist's vehicle, causing a fiery crash that left the driver paralyzed.[142] The Supreme Court (in an 8-1 opinion) had held that "no reasonable jury" whose members viewed a videotape of the chase shot from inside the pursuing police cruisers could side with the motorist on the "factual issue whether [he] was driving in such fashion as to endanger human life."[143] Yet when we showed the video to a representative sample of over a thousand members of the public, we found significant levels of disagreement between cultural groups on exactly that. We thus concluded that judges' own perceptions of fact can sometimes furnish them with unreliable guidance on what "reasonable" but culturally diverse people are likely to perceive,[144] a position since forcefully amplified by critics of Supreme

141. Studies suggest that mock jurors' reactions to detailed trial vignettes are strongly predictive of how they respond to more vivid forms of proof, including the testimony of live witnesses. *See* Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75, 81-83 (1999). In addition, the views of individual jurors after consideration of the evidence are generally thought to be predictive of how they'll vote at the conclusion of deliberations. *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690-92 (2001). Once the relationship between individual cultural worldviews and first-ballot votes is established, computer simulations can furnish additional insight into the probability of final verdicts in various kinds of cases conditional on the worldviews (and other characteristics) of the individuals on any particular jury. *See* Maggie Wittlin, The Results of Deliberation 15-20 (June 14, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865031.

142. Kahan et al., *supra* note 5.

143. Scott v. Harris, 550 U.S. 372, 380 (2007).

144. *See* Kahan et al., *supra* note 5.

Court decisions that expand the power of judges to grant motions for dismissal or for summary judgment.[145]

The results of the present study might be understood to furnish even more support for such a critique. Those results reinforce our previous study with experimental evidence that what people *see* in trial proof will often turn on who they *are*. If one thinks that adjudication will be more accurate or more legitimate if informed by a diversity of culturally grounded perceptions, then the law should be fashioned and applied in a manner that fortifies the central role of the jury in determining the facts.

But we can also see how, in the context of this study in particular, one might draw exactly the opposite conclusion. After all, one might well think that the point of constitutional review is to insulate the law (or at least certain aspects of it) from the influence of—and conflict over—partisan worldviews. Indeed, our finding that the same individual might well see the facts differently depending on her evaluation of protestors' messages seems to involve exactly the sort of content-based discrimination that the First Amendment is understood to prohibit. In this and similar types of cases, then, one might advocate enlarging the role of courts in factfinding through a relatively aggressive exercise of summary adjudication powers or through more penetrating forms of appellate review—procedures that both have foundation in the Court's First Amendment precedents.[146]

Such a position, though, assumes that judges are less prone to culturally motivated cognition than jurors. There is in fact convincing evidence that judges, when engaged in certain tasks distinctive of their professional role, are better able to resist various forms of at least some cognitive biases than are lay

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145. *See Has the Supreme Court Limited Americans' Access to Courts? Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 96-97 (2009) (statement of Stephen B. Burbank) (arguing that Supreme Court's "judicial experience and common sense" standard for judging a motion to dismiss complaint is "an invitation to 'cognitive illiberalism'"); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 25-26 & n.90 (2010) (citing study to critique newly announced "plausibility" standard used to judge sufficiency of a claim); Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1465-66 & n.119 (2010) (citing study to critique liberal summary judgment standards); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1313 n.121 (2010) (arguing on the basis of study results that courts' judgments on the factual "plausibility" of allegations in complaints are unreliable).

146. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) (requiring plaintiffs to show malice with clear and convincing evidence at the summary judgment state of litigation); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 514 (1984) (authorizing appellate courts to "conduct an independent review of the evidence" in First Amendment cases). *See generally* 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KAYNE, FEDERAL PRACTICE AND PROCEDURE § 2730, at 15 (3d ed. 1998) ("[S]ummary adjudication may be thought of as a useful procedural tool" to reduce litigation cost incident to asserting First Amendment rights); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (discussing use of more searching appellate review in constitutional cases).

people under similar circumstances.[147] So the proposition that judges might be more successful than ordinary jurors in checking the influence of cultural cognition is a plausible enough conjecture.

Nevertheless, what judges themselves *say* about what they see in cases like the ones featured in our study makes a contrary hypothesis plausible, too.[148] To begin, they report observing different things. In the 1965 decision of *Cox v. Louisiana*, for example, the Supreme Court found no support for the finding of a trial court judge that civil rights protestors were on the verge of a violent rampage when arrested:

> Our conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous is confirmed by a film of the events taken by a television news photographer, which was offered in evidence as a state exhibit. We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout.[149]

Thirty years later, in *Madsen v. Women's Health Center, Inc.*, it was Justice Scalia, joined in dissent by Justices Kennedy and Thomas, who took issue with trial court findings on the basis of a film, this time a videotape put into evidence by parties seeking to enjoin an abortion clinic protest.[150] Justice Scalia described the tape as "show[ing] . . . a great many forms of expression" including "chanting, . . . shouting, . . . peaceful picketing, . . . [and] efforts to persuade individuals not to have abortions," but no "suggestion of violence near the clinic" or "any attempt to prevent entry or exit."[151]

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147. *See* 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); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE J. 44, 50 (2002) (identifying means by which judges can minimize effects of cognitive illusions in deciding cases); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221-25 (2009) (finding that judges are able to resist implicit racial bias when motivated to do so).

148. *See* Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 139-40 (2010) (attributing judicial conflict over employment law decisions to cultural cognition); *cf.* RICHARD A. POSNER, HOW JUDGES THINK 116 (2008) (concluding that cultural cognition influences judges but "only when empirical claims cannot be verified or falsified by objective data").

149. Cox v. Louisiana, 379 U.S. 536, 547 (1965) (footnote omitted). *Compare* Edwards v. South Carolina, 372 U.S. 229, 234-36 (1963) (overturning based on "independent examination of the whole record" a trial court finding that civil rights protestors' behavior was "likely to produce violence," as required under state criminal breach-of-peace statute (quoting State v. Edwards, 123 S.E.2d 247, 249 (S.C. 1961))), *with id.* at 244 (Clark, J., dissenting) ("The imminence of that danger has been emphasized at every stage of this proceeding . . . . This record . . . shows no steps backward from a standard of 'clear and present danger.'").

150. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 784-90 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

151. *Id.* at 790.

Judges not only report seeing different things when they make and review findings of fact akin to those in our study; they also attribute disagreements with their own views to *bad faith* on the part of their colleagues. Intimating an ideological double standard, Justice Scalia in *Madsen* asserted that anyone "who is familiar with run-of-the-mine labor picketing, not to mention some other social protests," would "be aghast at" the Court's rulings after viewing the abortion clinic protest videotape.[152] Dissenting in *Cox* decades earlier, Justice Clark had made a similar charge of political favoritism: rebuking the Court for turning a blind eye to "an effort to influence and intimidate" through "the staging of a modern Donnybrook Fair" by a "mob of young Negroes" outside the local courthouse, Justice Clark stated, "I have always been taught that this Nation was dedicated to freedom *under law* not under mobs, whether they be integrationists or white supremacists."[153] Reactions such as these are at least suggestive of naive realism—the simultaneous apprehension of motivated reasoning in others and blindness to it in oneself, a dynamic that reinforces the power of empirical debates to spark illiberal status competition in democratic political life generally.[154]

Indeed, how *ordinary citizens* perceive judges' findings of "constitutional fact" is as important as the impact of cultural cognition, if any, on judges. For decisions to be legitimate—for them to gain assent and to justify expectations of obedience[155]—it isn't enough that the law rely on decisionmakers who are psychologically capable of resisting motivated reasoning; it must also succeed in *assuring* citizens that those decisionmakers' findings are genuinely untainted by cultural partisanship.[156] Supreme Court decisions applying the speech-conduct distinction fail to furnish such assurance. On the contrary, echoing the Court's own dissenters, citizens of one or another cultural outlook routinely accuse the Court of bias.[157] Citizens who hold a rival outlook reciprocate, de-

152. *Id.* at 786.

153. Cox v. Louisiana, 379 U.S. 559, 585-89 (Clark, J., concurring and dissenting); *see also id.* at 584 (Black, J., concurring and dissenting) ("Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket in the streets whenever they choose, *in order to advance what they think to be a just and noble end,* do no service to those minority groups, their cause, or their country." (emphasis added)).

154. *See supra* Part I.B.

155. *See* Kahan et al., *supra* note 5, at 884-85.

156. *See* 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, 708 (1994).

157. *See, e.g.*, Ann Coulter, *The Abortion Exception: The Left v. the Constitution*, NAT'L REV. ONLINE (Apr. 19, 2001), http://old.nationalreview.com/coulter/coulterprint041901.html (describing the Court's decisions upholding restrictions on abortion clinic demonstrations as the "abortion exception to the Flynt Amendment"); Richard L. Hasen, *Crush Democracy but Save the Kittens*, SLATE (Apr. 30, 2010), http://www.slate.com/id/2252536 (arguing that Justice Alito is guilty of an "indefensible double standard when it comes to free speech" because he purports to see "a sufficiently important govern-

nouncing the Court's critics for flouting the authority of the law. Far from quieting illiberal status competition, constitutional decisions by the Supreme Court (in this area and in others) thus become just another impetus to it.[158]

Ironically, one of the remedies the law prescribes for treating anxiety over partisan decisionmaking is the jury. Perhaps "from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life," jurors will enjoy advantages over a single judge, whose "habits and course of life" are necessarily peculiar, in ascertaining the truth when facts are disputed.[159] But wholly apart from enhanced accuracy, the law also hopes that conspicuously including representatives of as many diverse perspectives as possible in the decisionmaking process will vouch for the impartiality and fairness of the result, particularly in the minds of those citizens who might have the most reason to be suspicious of or disappointed by it.[160] When judges offer their views of the "facts" in cases like *Madsen* and *Cox*—"protesters continued to impede access to the clinic" and forced patients and staff "to run . . . a gauntlet" to enter;[161]—the order to disperse by "the Chief of Police ar[ose] from the laudable motive to avoid violence and possible bloodshed"[162]—citizens understand them to be proclaiming whose group and whose way of seeing the world are virtuous and honorable and whose vicious and corrupt.[163] The hope is that if citizens see instead that those facts were cer-

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ment interest" in animal torture videos but is "blind to the strong governmental interests at play" in "prevent[ing] corruption" in corporate campaign donations).

158. *See generally* Balkin, *supra* note 135 (highlighting the importance of understanding status competition in society to achieving democratic ideals in constitutional interpretation).

159. Maher v. People, 10 Mich. 212, 222 (1862). Or perhaps not. *See* Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 327 (2007) (finding judges in the study to incorrectly convict more often than juries, but to incorrectly acquit less often).

160. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

161. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 758 (1994).

162. Cox v. Louisiana, 379 U.S. 559, 585 (1965) (Clark, J., concurring and dissenting).

163. At least some (likely all) of the Justices know that when the Court characterizes the behavior of such parties as unprotected conduct rather than protected speech, they are effectively saying that those citizens' moral vision is so utterly unworthy of respect that the law needn't afford them the dignity of being able to make it the basis of public appeals to others:

> The vital principle of [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)] was that in defined instances the woman's decision whether to abort her child was in its essence a moral one, a choice the State could not dictate. . . . [T]hose who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance. It in effect tells us the moral debate is not so important after all . . . .
>
> . . . The Court tears away from the protestors the guarantees of the First Amendment when they most need it. So committed is the Court to its course that it denies these protestors, in the face of what they consider to be one of life's gravest moral crises, even the opportunity

tified by a jury whose members included individuals who share those citizens' experiences and outlooks, then citizens will see the findings of fact—*this* group, on *this* occasion, did or did not cross the line from persuasion to intimidation—as simply that.[164]

Although we suspect that jury factfinding does indeed at least sometimes perform this valuable function, we think it is implausible to believe that it invariably does. In the sort of cases we have featured in this study (and in many others),[165] the perception that jury factfinding, too, is pervaded by partisan worldviews is widespread. Indeed, the anxiety that jurors *won't* or *can't* put their values aside in such cases is the reason thoughtful judges and lawmakers—in doctrines that enlarge the scope of summary adjudication or the depth of appellate review in First Amendment cases,[166] in statutes like the 1964 Civil Rights Act,[167] and in decisions denying criminal defendants a jury trial in criminal prosecutions under FACE[168]—often steer constitutional factfinding to judges. As our study suggests, their worries are by no means groundless.

Of course, more research is necessary on the impact of cultural cognition on both judges and jurors. But to think that what such investigation will disclose is that cognitive illiberalism is simply not a problem for constitutional law strikes us as objectionably naive. Identifying effective strategies aimed at counteracting its impact, both on constitutional decisionmakers' perceptions of facts and on ordinary citizens' perceptions of constitutional decisionmaking, should be one of the central aims of future empirical inquiry.

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to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law.

Hill v. Colorado, 530 U.S. 703, 791-92 (2000) (Kennedy, J., dissenting).

164. *See generally* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 248-49 (1986) (describing the role of the jury in promoting public acceptance of legal determinations).

165. *See* Kahan & Braman, *supra* note 5 (identifying cultural cognition in citizens' perceptions of facts in controversial self-defense cases as a source of high-profile political conflict over particular verdicts).

166. *See supra* note 145.

167. *See* Note, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167 (1969).

168. *See, e.g.*, United States v. Unterburger, 97 F.3d 1413, 1415-16 (11th Cir. 1996) (finding a six-month maximum prison term and maximum $10,000 fine for a first offense under FACE was insufficiently severe to entitle defendant to jury trial); United States v. Soderna, 82 F.3d 1370, 1378-79 (7th Cir. 1996) (same).

D. *Debiasing*[169]

What sorts of solutions might there be to the problem of culturally motivated reasoning in constitutional law? As we have indicated, the empirical work necessary for a complete answer is yet to be done. Nevertheless, extrapolating from what is known, we offer some reflections that we hope might be useful both to other scholars interested in investigating this issue and to decisionmakers committed to doing the best they can in the meantime.[170]

1. *Affirmation and jury selection*

The foundation of culturally motivated cognition is "identity threat." An individual who comes to see behavior important to his cultural group as detrimental to society risks estrangement from those on whom he depends for material and emotional support. If the behavior is a source of status for the individual or for the group, then the prospect that others might form such a belief can diminish an individual's social standing generally. The mechanisms that cultural cognition comprises—from biased assimilation to selective attention and recall to skewed perceptions of expert credibility—all derive from the impulse to dismiss evidence that has these identity-threatening consequences.[171]

But this dynamic can be reversed. When information is presented under conditions that effectively *affirm* an individual's identity, that individual is far less likely simply to dismiss evidence and arguments that challenge a belief

169. We use the concept of "debiasing" here without apology but subject to a proviso that we want to make emphatically clear. We reject the idea that the perceptions informed by cultural cognition are invariably unworthy of moral respect. *Cf.* Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110 (2006). Such perceptions are different from judgments attributable to "base rate neglect," the "gambler's fallacy," "hindsight bias," and other manifestations of bounded rationality. They are not a consequence of limitations on our ability to process information pertinent to estimating the utility of one or another course of action; they are a reflection of *values* integral to our identities and our ties to others. In some settings, we might regard perceptions informed by cultural cognition as regrettable miscues that we should take precautions to avoid or correct. But in many contexts we will view them as furnishing reliable and unique insight into how we, as people of particular defining commitments, should orient ourselves toward some contingency: just as we are enabled to experience a valued form of shared identity by genuinely seeing things in the way a fan of *this* team, or as a parent of *this* child, characteristically would, so we reliably affirm our commitment to shared ways of life by attending appropriately to societal risks and opportunities that bear certain special meanings. *See* Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 760-65 (2008). In sum, we believe cultural cognition can be either a faculty of moral perception or a cognitive bias depending on whether its effect on judgment promotes or frustrates ends that are morally appropriate to the settings and roles we inhabit.

170. In the same spirit of pragmatic conjecture, Paul Secunda offers a thoughtful set of techniques for counteracting cultural cognition in Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1777104.

171. *See generally* Sherman & Cohen, *supra* note 43, at 187-89.

characteristic of his defining group. By securing the individual's sense of self-worth, affirmation supplies a buffer against the psychic cost associated with giving open-minded evaluation to threatening information. This dynamic has been demonstrated experimentally in connection with a variety of issues, from abortion to capital punishment to cancer risks.[172]

We surmise that affirmation strategies could be used to counteract cultural cognition in jurors. In the laboratory, researchers induce affirmation by instructing subjects to identify positive characteristics of themselves or their groups and thereafter complete a writing exercise or survey that focuses subjects' attention on the importance of that characteristic.[173] We believe such a technique could be used with prospective jurors when the venire is assembled. Administered at that stage, the affirmation stimulus would likely strike jurors as an element of the jury selection process rather than as a device intended to enhance open-minded appraisal of the evidence—a perception that could negate the technique's effectiveness. In addition, the benefit of affirmation in promoting open-mindedness on the part of the selected jurors would continue throughout the presentation of evidence.

2. *Deliberative depolarization*

Jurors, as well as judges on multimember appellate courts, engage in group decisionmaking. Counteracting culturally motivated reasoning in constitutional law thus requires attention to how deliberation interacts with the mechanisms cultural cognition comprises.

Research on deliberation in general suggests that it can both accentuate and mitigate group polarization.[174] Which outcome occurs is likely to depend on how the interaction shapes the participants' sense of the relationship between the issue for determination and their group identities. Initial evidence that corroborates expectations of stark group divisions is likely to feed on itself because of the tendency of individuals to credit the arguments of those who share their identities and because of the motivation of individuals to protect their connection to their group. Unexpected indications of moderation or equivocation *within* groups, however, can trigger convergence: the willingness of others in her group to express uncertainty conveys to a person that the identity cost of entertaining the opposing view is lower than she might otherwise have be-

172. *See* Geoffrey L. Cohen et al., *When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1151, 1162-63 (2000); David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 119, 120-22 (2002).

173. *See* Amy McQueen & William M.P. Klein, *Experimental Manipulations of Self-Affirmation: A Systematic Review*, 5 SELF & IDENTITY 289, 295-97 (2006).

174. *See generally* JOHN GASTIL, POLITICAL COMMUNICATION AND DELIBERATION 60-62 (2008).

lieved; in addition, the expression of openness or ambivalence by those in the opposing group dispels the animosity associated with naive realism and generates instead a reciprocal motivation to display cooperative open-mindedness.[175]

Experimental work also suggests a procedure that might promote this effect: obliging each participant to speak in turn and to identify not only his or her own position but also the strongest counterargument to it. People tend to overestimate how uniformly and intensely members of their own and the other group hold their respective views. Eager to avoid estranging themselves from their peers, those who are equivocal are likely to keep silent or even misrepresent their impressions. Strategic reticence of this sort tends to reinforce individuals' overestimation of how sharply they are divided and to increase self-reinforcing signals of group division early on.[176] The aim of obliging everyone to acknowledge counterarguments is to puncture this bubble of shared misunderstanding. This device creates a form of procedural immunity for the expression of equivocation. Nevertheless, speakers afforded this protection are likely to succeed in communicating the force and genuineness of their ambivalence. Thus, not only are dynamics that generate overstated signals of dissent preempted, but existing reservoirs of equivocation are forced to the surface, where their positive effects in generating deliberative give-and-take can be felt.[177]

This technique could be used with jurors. It would be a simple matter for judges to instruct jurors to make each member's expression of both his or her views and the strongest counterarguments the first order of business when they commence deliberations. There is also likely to be synergy between this procedure and the use of identity affirmation at the jury-selection stage since affirmation increases the likelihood that individuals will in fact have given sympathetic attention to evidence contrary to their cultural predispositions.

It's also possible that this device could be used with appellate judges. There is at least some evidence that the quantity and quality of deliberations breaks down ideological voting patterns on multimember appellate panels.[178] We hypothesize that courts that enjoy a better deliberative culture might in fact be ones whose members have cultivated the norm of acknowledging equivocation and doubt when they deliberate.

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175. *See generally* David K. Sherman et al., *Naïve Realism and Affirmative Action: Adversaries Are More Similar than They Think*, 25 BASIC & APPLIED SOC. PSYCHOL. 275, 286-87 (2003).

176. *See generally* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1996).

177. *See* Sherman et al., *supra* note 175, at 287.

178. *See generally* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1963-66 (2009).

3. *Judicial aporia*

As we have indicated, how citizens of diverse outlooks react to the perceptions of constitutional decisionmakers is as important as what those decisionmakers actually see. Much like the subjects in our experiment, ordinary citizens draw culturally congenial inferences from salient snippets of evidence and conclude that decisionmakers who purport to see things differently are engaged in partisan rationalization.

In the domain of constitutional law, we believe this effect is actually magnified by the way in which judges typically justify their decisions. Even in the Supreme Court, in which cases tend to be selected on the basis of divisions among lower courts, judicial opinions rarely admit of the slightest doubt. This holds true even in the face of dissents that profess a similar degree of confidence, often combined with outrage. Professional norms likely contribute to this style of presentation. Dan Simon is also likely right to see in it the influence of "coherence-based reasoning"—a process in which the decisionmaker continuously revisits and revises her assessments of equivocal pieces of evidence to match her assessments of unequivocal ones, until any trace of doubt is vanquished.[179] But whatever its cause, this style of writing is part of what makes Supreme Court decisions themselves an incitement to illiberal status competition. Like the scenarios featured in our study, constitutional cases tend to be culturally fraught. The dogmatic certitude with which the Justices express their views—and the tone of indignant incredulity they adopt in the face of disagreement—make those who see things differently view the Court as partisan.[180] Predictably, they say so, typically in terms that reciprocate the Court's own stridency and provoke still more acrimony in the public realm.

So our recommendation here is that judges throttle back. In place of the muscular self-confidence that now dominates opinion writing, we propose an idiom of aporia in which judges acknowledge the difficulty of the controversies before them.[181] This isn't to say judges should be dishonest; on the contrary, it is to say that they should endeavor to avoid misleading either themselves or others when they are dealing with genuinely difficult cases, as is nearly always true in the Supreme Court. A style of justification that acknowledges rather than abjures doubt, we predict, would likely have salutary effects comparable to the ones observed in experiments in which members of opposing groups are obliged to begin their deliberations by identifying the feature of the other side's

179. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 544-45 (2004).

180. *See* Secunda, *supra* note 148, at 142.

181. "Aporia" refers to a distinctive mode of argumentative engagement that recognizes—both in the substance and form of the analysis—the intrinsic complexity of the issue at hand. *See generally* Nicholas Rescher, *Aporetic Method in Philosophy*, 41 REV. METAPHYSICS 283 (1987). For a more detailed defense of aporetic reasoning in judicial opinions, see Kahan, *Neutral Principles*, *supra* note 5, at 59-66.

case that gives them the most pause. Such a gesture would be especially valuable in cases where judges can predict that their decisions will give rise to culturally oriented conflict. By confirming that judges actually see the complexity of such cases, the use of a more judicious idiom of explanation would enable defeated parties to see that judges are not blinded by partisanship, and spare citizens who share the losing side's perspective from the insult of being accused (implicitly or explicitly) of bias themselves.[182] Those citizens would then have less reason to attribute bad faith to the judges—and citizens who share those judges' points of view would in turn have less reason to strike back in kind. Citizens generally would thus be less likely to form an exaggerated perception of cultural polarization surrounding such decisions. And without that perception, judicial determinations would simply be less symbolic of the triumph of one side's or the other's worldview.[183]

CONCLUSION

In the competitive jurisprudence of visual-sense impressions, Justice Scalia has a record of one and one. In *Madsen v. Women's Health Center*, he was on the losing side of a 6-3 decision that upheld (most elements of) an injunction against abortion clinic protestors the majority found to have "interfered with ingress to and egress from the clinic."[184] Writing in dissent, Justice Scalia implored "[a]nyone seriously interested in what this case was about" to watch a videotape of the demonstrators' behavior, predicting that doing so would leave any fair-minded viewer "aghast at" the Court's complicity in stifling "run-of-the-mine" forms of persuasive speech.[185] In *Scott v. Harris*, Justice Scalia wrote for the eight-Justice majority that put decisive weight on a video to support its conclusion that "no reasonable jury" could find a citizen fleeing the po-

182. Lawyers might conceivably find this reasoning style less persuasive, or at least less aesthetically pleasing, than would ordinary citizens. But what sort of argumentation lawyers find compelling is no doubt shaped by what courts, by example, condition them to regard as such. Indeed, the likely impact of an idiom of judicial aporia on the legal professional culture (including the teaching of law) could magnify its contribution to reducing cultural status conflict in law and politics generally.

183. Tom Tyler's work on procedural justice also furnishes support for the hypothesis that an idiom of humility would enhance the legitimacy of constitutional decisionmaking. Tyler has amassed a large body of empirical data showing that the public's willingness to assent to and abide by legal directives is influenced much more by citizens' perceptions that they have been treated fairly than by their agreement with the substance of those directives. *See generally* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 49-57 (2002); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990). In a study conducted with Gregory Mitchell, Tyler has found that citizens are more likely to see Supreme Court decisions as legitimate, in particular, when they believe the Justices have given careful and respectful attention to rejected arguments. *See* Tyler & Mitchell, *supra* note 156, at 770-72, 774-77.

184. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 771 (1994).

185. *Id.* at 786 (Scalia, J., concurring in part and dissenting in part).

lice "was driving in such fashion as to endanger human life."[186] Justice Scalia took the lone dissenter, Justice Stevens (who joined the relevant portion of the majority opinion in *Madsen*), to be implying that the Court's "reaction to the videotape is somehow idiosyncratic" and that the Court was "misrepresenting its contents."[187] In response, Justice Scalia announced that "[w]e are happy to allow the videotape to speak for itself" and took the unprecedented step of ordering the Clerk of the Court to post a link to it on the Supreme Court's website.[188]

We don't mean to suggest that Justice Scalia's perceptions were faulty in either case, that he was misreporting his impressions, or that he was guilty of any sort of inconsistency. Rather, we draw attention to his reactions toward the Justices who purported to see things differently to help us summarize the major themes of this paper.

One is that what people see will often be a reflection of what they value. In *Madsen*, Justice Scalia pulled no punches in attributing the majority's decision to partisanship.[189] We obviously have no idea what the majority saw or why. But the results of our experiment confirm that people who have different cultural worldviews will often disagree with each other about whether political protestors are engaged in conduct—blocking, obstructing, intimidating—or speech—impassioned advocacy intended only to persuade. Indeed, whether individuals of any particular worldview see one thing or the other, we found, depends on whether they have been led to believe the demonstrators' cause is one that defies or affirms their own values. In a previous study, we found that individuals' cultural identities also predicted whether they would agree or disagree with the Court's perception of the *Scott* video.[190] Contrary to what Justice Scalia suggests in *Madsen*, however, the influence of values on perceptions in such cases is not smoking-gun evidence of bad faith. Rather it is the signature of culturally motivated cognition, a normally unconscious process.

A second point is that the ability to recognize the effect of values on fact perceptions typically involves a signature asymmetry. Like Justice Scalia, we all readily discern this dynamic in others, yet we tend to be completely oblivious to it in ourselves. In fact, much like Justice Scalia, we treat the contradiction between what we plainly see and what others say they see as confirmation that our antagonists are biased, not that we ourselves are vulnerable to distortions of perception. Known as naive realism, this dynamic is integral to cultural cognition.

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186. Scott v. Harris, 550 U.S. 372, 380 (2007).

187. *Id.* at 378 n.5.

188. *Id.*

189. *See* 512 U.S. at 785 (Scalia, J., concurring in the judgment in part and dissenting in part) ("Today the ad hoc nullification machine [that drives the Court's abortion jurisprudence] claims its latest, greatest, and most surprising victim: the First Amendment.").

190. *See* Kahan et al., *supra* note 5, at 903-04.

Still another point illustrated by Justice Scalia's reactions is the ubiquity of cultural cognition. The disposition to form perceptions of fact congenial to one's values isn't a pathological personality trait[191] or a style of reasoning integral to a distinctive, and distinctively malign, ideology.[192] (Indeed, the appeal of those sorts of surmises could themselves be seen as evidence of the disposition to form culturally congenial perceptions of how the world works.) Precisely because cultural cognition doesn't discriminate on the basis of worldview, members of all groups can anticipate that as a result of it they, like Justice Scalia, will likely find themselves members of a disappointed minority in some empirical or factual debates and a member of the incredulous majority in others.

Finally, the setting for Justice Scalia's reactions—constitutional adjudication—underscores the danger that culturally motivated cognition can pose to the realization of liberal political ideals. The quieting of struggles between rival sects to impose their contested visions of the good life by violent means (with or without the law) is the signal achievement of liberal democratic culture.[193] Yet despite widespread consensus that the legitimate object of law is attainment of prosperity, security, health, and other secular goods, cultural polarization persists because of the contribution that values make to citizens' perceptions of policy-relevant facts. Seemingly empirical debates thus become infused with partisan meanings, triggering symbolic status competition among groups intent on securing policy choices that affirm rather than denigrate their ideals. We expect the Constitution to repel threats to pluralism whether they arise from the conscious and willful designs of tyrannical governors or from the chaotic and spontaneous dynamics of popular self-rule. But if jurors and judges are as vulnerable to cultural cognition as are lawmakers, law enforcers, and ordinary citizens—if their worldviews, too, are perceived to exert a decisive influence on how they see the world—then constitutional decisionmaking will not dispel cognitive illiberalism. On the contrary, it will just amplify it.

Our goal in conducting this study has been to awaken constitutional theory to this dilemma. The traditional focus of constitutional theorists has been the fit between constitutional norms and the doctrines used to implement them. The fit—or lack thereof—between those doctrines and the psychological dispositions of constitutional decisionmakers has been almost entirely neglected. As a result, constitutional theory stands mute in the face of the persistent failure of constitutional adjudication to achieve its most fundamental objectives.

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191. *But cf.* T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950) (proposing that right-wing values reflect a personality trait).

192. *But cf.* John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339 (2003) (suggesting that motivated reasoning is uniquely associated with conservative ideology).

193. *See generally* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH (1977) (identifying the power of commercial institutions to pacify violent sectarian rivalries as one of the historical bases of the affinity between liberal political theory and classical liberal economics).

Demonstrating the impact of cultural cognition on the speech-conduct distinction is admittedly only a modest first step toward remedying this deficiency. But by using the compass of psychological realism to orient our inquiry, we hope we've at least clarified the direction constitutional theory needs to go.

APPENDIX: STUDY INSTRUMENT

This Appendix reproduces the text of the materials used to perform our study. Headings have been added for the reader's convenience.

I. CULTURAL WORLDVIEW ITEMS

A. *Individualism*

People in our society often disagree about how far to let individuals go in making decisions for themselves. How strongly do you agree or disagree with each of these statements? [Possible responses: strongly disagree, moderately disagree, slightly disagree, slightly agree, moderately agree, strongly agree]

1. IINTRSTS. The government interferes far too much in our everyday lives.
2. SHARM. Sometimes the government needs to make laws that keep people from hurting themselves.
3. IPROTECT. It's not the government's business to try to protect people from themselves.
4. IPRIVACY. The government should stop telling people how to live their lives.
5. SPROTECT. The government should do more to advance society's goals, even if that means limiting the freedom and choices of individuals.
6. SLIMCHOI. Government should put limits on the choices individuals can make so they don't get in the way of what's good for society.

B. *Hierarchy*

People in our society often disagree about issues of equality and discrimination. How strongly do you agree or disagree with each of these statements? [Possible responses: strongly disagree, moderately disagree, slightly disagree, slightly agree, moderately agree, strongly agree]

1. HEQUAL. We have gone too far in pushing equal rights in this country.
2. EWEALTH. Our society would be better off if the distribution of wealth was more equal.
3. ERADEQ. We need to dramatically reduce inequalities between the rich and the poor, whites and people of color, and men and women.
4. EDISCRIM. Discrimination against minorities is still a very serious problem in our society.

5. HREVDIS2. It seems like blacks, women, homosexuals and other groups don't want equal rights, they want special rights just for them.
6. HFEMININ. Society as a whole has become too soft and feminine.

II. VIGNETTE

INTRO1. In this study, we want you to imagine you are on a jury in a civil trial. The facts are based on an actual case.

In the case, protestors are suing police officers and the police department. The protestors are members of a group that opposes [permitting doctors and nurses to perform abortions at the request of pregnant women/the ban on allowing openly gay and lesbian citizens to join the military]. The protestors allege that the police violated their rights by ordering them to end their protest at [an abortion clinic/a college campus recruitment center the day the Army was scheduled to interview students who were considering enlisting]. The protestors are asking the court to issue an opinion that (1) declares that the police violated their rights and (2) orders the police *not to interfere with future protests* similar to this one. They also seek *monetary damages of $10,000* from the police department.

It is not disputed that the protestors had a permit to conduct a "lawful protest," and that the police stopped the protest by ordering the protestors to leave the vicinity of the [abortion clinic/campus recruitment center] 30 minutes after the protest started.

What is disputed is whether the protestors were conducting the demonstration in a manner that violated a local ordinance known as the [Freedom to Exercise Reproductive Rights Law/Freedom to Serve with Honor Law].

The [Freedom to Exercise Reproductive Rights Law/Freedom to Serve with Honor Law] was passed by the city council after a court found that the city's police could not stop protests at [abortion clinics/military recruitment sites] without clear guidelines. The law makes it illegal for

> any person to *intentionally (1) interfere with*, *(2) obstruct*, *(3) intimidate*, or *(4) threaten* any person who is seeking to enter, exit, or remain lawfully on premises of any [hospital or medical clinic that is licensed to perform abortions/facility in which the U.S. military is engaged in recruitment activity].

If a police officer "observes or is furnished with reliable evidence" that a person or group is violating the [Freedom to Exercise Reproductive Rights Law/Freedom to Serve with Honor Law], the police can order the person or group to stop and leave the area around the [abortion clinic/recruitment facility]. Courts have found the guidelines in the new law to be sufficiently clear, and otherwise lawful.

The only question in this case is whether the police properly used their authority under the [Freedom to Exercise Reproductive Rights Law/Freedom to Serve with Honor Law] to end the protest. The police assert that they ordered the protestors to stop and leave because the protestors were violating the [Free-

dom to Exercise Reproductive Rights Law/Freedom to Serve with Honor Law]. The protestors assert that they were only expressing their views, in a manner that did not violate the law.

The key evidence in the case is a video of the protest. The parties agree the video gives an accurate impression of the nature of the protestors' conduct and conditions near the entrance of the [abortion clinic/campus recruitment center]. But they disagree about whose position the video most supports: the position of the police officers, who assert that the protestors were "intimidating, interfering, obstructing or threatening" people trying to enter the [abortion clinic/campus recruitment center]; or the position of the protestors, who say they were merely expressing their views in a lawful manner. Deciding who is right is the task for you as a member of the jury.

Note: The video contains introductory and transitional text based on witness statements. The parties agree the text is accurate. Because the U.S. Constitution prohibits the police from breaking up a protest based on the *messages* the protestors are trying to communicate, the parties agreed that the messages on signs of the protestors should be visually blurred to assure that those messages did not affect the jury's decision one way or the other.

Please view the video.

III. VIDEOS

The abortion clinic condition is available at videoreview12, *Abortion Clinic 11 22 2010*, YOUTUBE (Jan. 6, 2011), http://www.youtube.com/watch?v=k8ru-FE2v_8.

The recruitment center condition is available at videoreview12, *Recruit_Center_11192010.m4v*, YOUTUBE (Jan. 6, 2011), http://www.youtube.com/watch?v=X3PJACpL53k.

IV. RESPONSE MEASURES

INTRO2. Now we'd like you to indicate your view of the facts. Below are factual assertions made by parties in the case. Please indicate how strongly you disagree or agree with these factual assertions. [Possible responses: strongly disagree, moderately disagree, slightly disagree, slightly agree, moderately agree, strongly agree]

1. DTHREAT. The protestors *threatened* individuals seeking to enter, exit, or remain lawfully on the premises of the [abortion clinic/campus recruitment center].
2. DINTIMIDATE. The protestors *intimidated* individuals seeking to enter, exit, or remain lawfully on the premises of the [abortion clinic/campus recruitment center].

3. DOBSTRUCT. The protestors *obstructed* individuals seeking to enter, exit, or remain lawfully on the premises of the [abortion clinic/campus recruitment center].
4. DINTERFERE. The protestors *interfered with* individuals seeking to enter, exit, or remain lawfully on the premises of the [abortion clinic/campus recruitment center].
5. PINTENDED. The protestors *intended only to persuade* people not to go into the [abortion clinic/campus recruitment center], not to physically interfere with, intimidate, obstruct, or threaten anybody.
6. PDIRECTOR. It is more likely the director asked the police to break up the protest because the director and others found dealing with the protestors annoying than because the protestors were interfering with, intimidating, obstructing, or threatening anyone.
7. PLISTEN. The people who decided not to enter the [abortion clinic/campus recruitment center] did *not* feel threatened or intimidated; they just didn't want to have to listen to what the protestors were saying.
8. DBLOCK. The police had reasonable evidence to believe the protestors were obstructing, intimidating, assaulting, or threatening people trying to enter the [abortion clinic/campus recruitment center].
9. PANNOY. It is more likely the police broke up the protest because they found dealing with the entire situation annoying or inconvenient than because they believed the protestors were violating the law.
10. DVIOLENCE. There was a risk that the protestors might resort to violence if anyone tried to enter.
11. DSPIT. One or more of the protestors spat at someone who wanted to enter the building.
12. DSHOVE. One or more of the protestors attempted to shove people trying to enter.
13. DCONTACT. The protestors touched one or more of the people trying to enter.
14. PPERSUADE. It is likely that at least some people who were going to enter the [abortion clinic/campus recruitment center] changed their mind because they found the protestors' message convincing.
15. DDIRECTOR. The director was in a better position than the police to see everything that was going on, so it made sense for the police to stop the protest when he told them the protestors were interfering with or intimidating people trying to enter the [abortion clinic/campus recruitment center].
16. DHELP. People trying to enter asked the police to help them.
17. DSCREAM. One or more of the protestors screamed in the faces of people who wanted to enter the [abortion clinic/campus recruitment center].

INTRO3. Now we would like to know how you would vote to decide the case. Your decision should be based on your view of the facts and on the law, which is displayed on the right-hand side of your screen. Please indicate how

strongly you agree or disagree with these statements. [Possible responses: strongly disagree, moderately disagree, slightly disagree, slightly agree, moderately agree, strongly agree]

Freedom to Exercise Reproductive Rights Law

Section 1. Prohibited Conduct. It is against the law for any person to intentionally *(1) interfere with, (2) obstruct, (3) intimidate, or (4) threaten* any person who is seeking to enter, exit, or remain lawfully on premises of any hospital or medical clinic that is licensed to perform abortions.

Section 2. Order to Desist. If a law enforcement officer observes or is furnished with reliable evidence that any person is engaged in behavior in violation of section 1, the officer may order such person to desist and to leave the immediate vicinity.

Freedom to Serve with Honor Law

Section 1. Prohibited Conduct. It is against the law for any person to intentionally *(1) interfere with, (2) obstruct, (3) intimidate, or (4) threaten* any person who is seeking to enter, exit, or remain lawfully on premises of any facility in which the U.S. military is engaged in recruitment activity.

Section 2. Order to Desist. If a law enforcement officer observes or is furnished with reliable evidence that any person is engaged in behavior in violation of section 1, the officer may order such person to desist and to leave the immediate vicinity.

18. LIABILITY. I would vote to find the police did *not* have the evidence necessary to stop the protest under the [Freedom to Exercise Reproductive Rights Law/Freedom to Serve with Honor Law].
19. NOLIABILITY. I would vote to find the protestors were violating the [Freedom to Exercise Reproductive Rights Law/Freedom to Serve with Honor Law].
20. DAMAGES. I would vote to order the police to pay damages to the protestors.
21. ORDER. I would vote to order the police not to interfere with protests under conditions like the ones shown in the video.

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