A Cultural Theory of Judicial Decision Making
Among United States Supreme Court Justices

Joshua R. Bruce

Advisor: Dr. Eileen Braman
Professor of Political Science, Indiana University

Second Reader: Timothy Lemper, J.D.
Professor of Business Law and Ethics, Indiana University
Abstract

Potential Supreme Court justices notoriously avoid questions during confirmation hearings that try to expose their true opinions on issues likely to come before the Court. Tangentially, Senators are charged with determining whether or not nominees share their and their electorates’ ideals. Political scientists, legal scholars, and a host of commentators add to the fray with fevered attempts at predicting judicial behavior. I apply Cultural Theory here as a means of examining the Rehnquist 7 Natural Court, looking at judicial behavior and making predictions for case outcomes based on Justices’ Cultural Theory categorization. Editorial analysis and Cultural Theory were combined to test an alternative approach to predicting judicial behavior without leaving personal values as exogenous or relying on the traditional liberal/conservative dichotomy.
# TABLE OF CONTENTS

INTRODUCTION .....................................................................................................................5  
REVIEW OF JUDICIAL DECISION-MAKING THEORIES.......................................................8  
  LEGAL FORMALISM ..............................................................................................................8  
  LEGAL REALISM ................................................................................................................10  
  LEGAL PRAGMATISM ...........................................................................................................11  
  RATIONAL CHOICE THEORIES ..........................................................................................16  
  THE ATTITUDINAL MODEL ................................................................................................18  
  IDEOLOGY: A NECESSARY DISCUSSION ..........................................................................20  
  FROM THESE THEORIES, ONWARD ...............................................................................21  
INTRODUCTION TO CULTURAL THEORY ......................................................................22  
  GRID AND GROUP .............................................................................................................23  
  CULTURAL BIASES ............................................................................................................25  
  VIEWS OF NATURE ............................................................................................................28  
  PLURAL RATIONALITIES AND LEARNED CULTURAL BIASES .........................................30  
  CULTURAL COGNITION .....................................................................................................33  
HYPOTHESES .....................................................................................................................38  
  HYPOTHESIS 1: THREE BIASES PRESENT .......................................................................38  
  HYPOTHESIS 2: COMPLEMENTARITY OF JUSTICES WITH PRESIDENTS .........................39  
  HYPOTHESIS 3: CONSERVATIVE DIFFERENTIATION BY CULTURAL BIAS .....................39  
  HYPOTHESIS 4: ECONOMIC AND ENVIRONMENTAL REGULATION AND CT ...............40  
METHODOLOGY ................................................................................................................41  
  DETERMINING CULTURAL BIASES OF SUPREME COURT JUSTICES ...............................41  
CODED CHARACTERISTICS ...............................................................................................44  
  View of Government ..........................................................................................................45  
  Economic Growth ..............................................................................................................46  
  Competition .......................................................................................................................47  
  Scarcity and the Environment ...........................................................................................48  
  Ideal Judiciary ..................................................................................................................49  
  Likely Careers, Affiliated Groups, and Government Experiences ....................................50  
  Personality Characteristics ...............................................................................................51
Because behavior is motivated by desire, we must consider what judges want.


Efforts to compare and reconcile other general political theories with CT

[Cultural Theory] should be extended to comparing and reconciling variants of

CT. So, if you want to try applying CT, I would suggest you choose a variant that

makes sense for the topics on which you work, apply it, and then, having applied

it, see if you like the results.

-- Brendon Swedlow (2011, 707)

INTRODUCTION

The question of how Supreme Court justices decide cases has been the

object of scholarly inquiry for well over a century in American legal scholarship

(Langevoort 1998), and since the 1940s in political science (Lee and Epstein

1998, 9). Understanding how and why justices on the Court reach their decisions

is integral to understanding how American democracy works. The judicial branch

represents one-third of the U.S. government, and understanding its underlying

mechanisms sheds light on the efficacy of the entire democratic system. How are

justices’ goals and preferences formed? Is there a way to assess likely rulings

from justices without asking them questions they will invariably dodge during
confirmation hearings? These and other fundamental questions are addressed in this paper.

This paper focuses on the application of Cultural Theory to the realm of judicial decision-making. Cultural Theory (CT) has been developing since the 1970s, when anthropologist Mary Douglas first began writing on it. CT is a structural functionalist* approach to understanding human relations, and has been applied to topics such as federal budgeting, organizational behavior, and risk analysis (Selle 1991). Recently, social scientists have begun applying CT to politics and policy analysis to better understand political behavior and policy preferences through a non-liberal/conservative model (e.g., Mamadouh 1997; Grendstad 2000; Hoppe 2007; Ripberger et al. 2011). As discussed below, Cultural Theory incorporates elements of liberalism and conservatism, while also providing additional worldviews to help explain variations in human behavior. It is my belief and the prediction of established Cultural Theorists (e.g., Wildavsky 1987) that CT offers not only a different lens through which we can understand human behavior, but also a more accurate description of the worldviews held by

* Structural functionalism originated with sociologist Herbert Spencer’s work, in which he described the interdependency of social structures and the microcosmic functions of their constituent entities. In other words, the multiple functions of a society coalesce in such a way to continually reproduce the society (Thompson, Ellis, and Wildavsky 1990, 116).
important political figures, such as Supreme Court justices, currently missing in widely accepted models of human values and interactions.

The narrower purpose of this paper is to test the application of CT to judicial decision-making through editorial analysis, per Brendon Swedlow’s quote above, to see if the results are indeed likeable. In past research (Segal and Cover 1989; Segal et al. 1995), newspaper editorials were examined for liberal and conservative elements to determine justices’ political ideology. Here, I examine editorials for Cultural Theory elements, which are outlined in depth below. I rely predominantly on core CT assumptions as elaborated in Thompson, Ellis, and Wildavsky (1990), the seminal work on Cultural Theory since Mary Douglas’s foundational literature, and Dixon (2003), a review of CT research spanning from the 1970s to the early 2000s.

After analyzing nine Supreme Court Justices from this perspective, I critique my findings in light of more recent research (predominantly Swedlow and Wyckoff 2009), and comment on issues specific to this type of qualitative analysis not addressed in any current literature. While I continue to believe Cultural Theory offers a viable (and potentially superior) alternative to the dominant liberal/conservative model of political ideology, my results indicate some difficulties researchers may have in applying Cultural Theory outside of experimental conditions. These difficulties aside, there are gains to be realized
from CT, discussed at the end of this paper. Before delving into Cultural Theory, it is necessary to describe current theories of judicial behavior.

**REVIEW OF JUDICIAL DECISION-MAKING THEORIES**

There are several prominent schools of thought on judicial decision-making. It is necessary to review these schools of thought in order to understand how Cultural Theory fits among these more widespread theories and to grasp what it contributes to scholarly insights on judicial decision-making. I begin with the two earliest schools, Legal Formalism and Realism. More recent scholarship on Legal Pragmatism has sought to counter shortcomings in prior legal scholarship, while the Legalists continue to carry the Formalist banner. In political science, the Attitudinal Model and Rational Choice theories are the two dominant bodies of theory. These six schools form the theoretical basis of judicial decision-making, and serve as a foil against which the benefits of Cultural Theory can be more fully visualized and measured. Each theory offers an explanation of how judges decide cases, but none of these theories offers a convincing theoretical basis from which to analyze the formation of preferences among judges, which is precisely what Cultural Theory seeks to do.

**Legal Formalism**

Legal Formalism at its most extreme views judges as meticulous, by-the-book adjudication machines (Neuborne 1992, 420-421). Testimony, evidence,
and impartiality are fed in one direction, laws and precedent in another, and rulings are produced from this combination without any personal preferences from the judge.† Copious efforts have been expended finding the shortcomings of Legal Formalism (see, e.g., Posner 1986; Posner 2006; Guthrie, Rachlinski, and Wistrich 2007; Neuborne 1992; Songer and Lindquist 1996; Simon 2004). If judges acted as purely mechanical beings, capable of leaving every personal belief at the courtroom door, judicial decisions would not consistently differ along political lines. Traditional Formalism fails to admit that judges are susceptible to personal preferences, and “has not been broadly embraced by the judiciary for many decades, if ever” (Edwards and Livermore 2009, 1915).

Traditional Formalism has continued to be supported in recent scholarship under the title of Legalism. As with Formalism, Legalism is considered an inadequate theory of judicial decision-making (e.g., Posner 2008, 41-56), as it refuses to admit that anything other than the law impacts judicial decision-making, a claim numerous scholars have argued over (see, e.g., Edwards and Livermore 2009; Songer and Lindquist 1996; Tamanaha 2009, 694, discussing the “myth of mechanical jurisprudence”; Tamanaha 2010). Furthermore, judges

† For the purposes of this paper, I adhere to Neuborne’s (1992) conception of Legal Formalism. Further noteworthy discussion on how to define Formalism can be found in Posner 1986 and Schauer 1988.
themselves have conceded that “‘personal views of justice’ are ‘very important’
determinants of case outcomes” (Braman and Kahan 2007, 107-108). While the
law undoubtedly impacts judicial behavior, creating the structure through which
judges must operate, the manifold evidence against the claims of Legalists is
significant.

**Legal Realism**

Opposed to Legal Formalism and Legalism, Legal Realism views judges
and justices as human beings who are captive to their personal beliefs and
opinions (Hutcheson 1928, 277-279). Thus, their decisions are impacted by and
contain elements of those beliefs, and are susceptible to personal whims, rather
than devoid of them, to such an extent that only personal preferences and
individual politics matter in legal decision-making. While some cases are
undoubtedly decided on political grounds, Legal Realism gives far too little credit
to judges’ ability to evaluate facts and determine case outcomes without letting
personal beliefs completely sway their decisions. There are numerous cases
decided unanimously by the Supreme Court, which would not be expected if
Legal Realism held true for every case (Posner 2008, 49-50; Posner 2011, 580).

Today’s Legal Realism looks quite different from early twentieth century
Legal Realism. While “old” Realism viewed judicial decision-making as a
largely ambiguous activity (Hutcheson 1928), “new” Realism seeks empirical
evidence for its claims and draws heavily from social science techniques (Miles and Sunstein 2008, 832-835). In the most extreme vein of Legal Realism, judges are viewed as wantonly using their positions to influence law and policy. While a few judges may rule based solely on politics, I and others do not support this view of Legal Realism (see, e.g., Edwards 1998) any more than Legalism. There are visible disconnects between these theories and reality. Justices are capable of putting aside their personal interests and interpreting many cases simply on the merits and the law, as evidenced by the percentage of cases decided unanimously. However, as the evidence discussed next clearly illustrates, some degree of judges’ core philosophies are bound to impact their decision-making. Determining the exact degree of influence is the central question of modern Legal Realism, to which Cultural Theory offers an answer.

**Legal Pragmatism**

A newer school of thought in legal academia has sought to more accurately describe how judges make decisions. Judge Richard Posner’s conception of judicial decision-making, known as Legal Pragmatism,\(^\ddagger\) traces its origins to the scholarship of Justice Oliver Wendell Holmes and philosopher John Dewey, among others (Posner 2008, 232). A core tenet of Legal Pragmatism is

\(^\ddagger\) For a critical assessment of Posner (specifically 2008), see Levi 2009 or Sutton 2010.
that judges and justices have a “heightened judicial concern for consequences [of their rulings] and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities” (238). Posner differentiates between “shortsighted pragmatists” (239) who focus only on the consequences of the case at hand, and “sensible legal pragmatists” who focus on “systemic, including institutional, consequences as well as consequences of the decision in the case at hand” (238). In other words, Posner views “sensible” judges as actors who pursue outcomes in their decisions that have long-term impacts on the legal and political structure of the country that comport with their concept of the good society, i.e., their values.

Posner concludes that Legalists are a subset of Legal Pragmatists who base their observance of strict rules and literal interpretations on their desire to have rigidly consistent laws and highly predictable case outcomes (Posner 2008, 239-240). In this way, Legal Pragmatism incorporates Legalists, who consider only “cases, statutes, administrative regulations, and constitutional provisions” (Posner 1996, 4). Legalists draw their conclusions from these limited sources of authority in an effort “to find the result in the present case that would promote or cohere with the best interpretation of the legal background as a whole” (5). Their preferred outcome (predictable legal continuity) thus dictates their particular style of decision-making.
This may sound like the idealized (and often publicly touted) form of adjudication. Posner agrees with this, saying that Legalistic thinking is “a component of actual judicial behavior because they [Pragmatists] regard it as realistic to expect that judges will decide most cases legalistically” (Posner 2011, 579). Justices resort to non-Legalistic decision-making in cases where the limited methods of literal interpretation and adherence to precedent yield unacceptable results, or are insufficient to even reach results. “Whatever judges think they are doing when they decide a case whose outcome cannot be deduced from the orthodox legal materials of legislated text and judicial precedent, they are not deciding it legalistically” (581).

For all types of adjudicators, preferences for specific styles of interpretation and outcomes determine how judges will interpret the law and decide cases. According to Pragmatism, these preferences come from political ideologies and “other extralegal factors, such as the judge’s personal characteristics and personal and professional experiences, which may shape his political preferences or operate directly in his response to a case” (Posner 2008, 8). These “political and personal factors create preconceptions” through which judges analyze laws and cases (11, italics omitted). Preconceptions condition how judges decide cases, impacting both the desired outcome in a case and the methodology a judge will employ.
To analyze the extent to which preconceptions affect judicial decision-making, Posner examined constraints on judicial decision-making by constructing a “judicial utility function” (Posner 1993, 31-39). He looked at factors impacting judicial behavior, including time spent judging, leisure time, financial compensation, the prestige of being a judge, popularity, and avoiding reversal (31, 35). Posner concluded “the conditions of judicial employment enable and induce judges to vote their personal convictions and policy preferences – or in a word their values” (40). Posner also found “almost the whole thrust of the rules governing . . . judicial employment is to divorce judicial action from incentives—to take away the carrots and sticks, the different benefits and costs associated with different behavior” (2). As economic incentives lose importance, the impact of personal preferences grows. Posner has also specifically described the U.S. Supreme Court as a “political” court where “political preferences are likely to determine how [justices] vote” (Posner 2008, 272), “especially when it is deciding constitutional cases” (14). Given these two conclusions, it is logical to conclude that the Supreme Court’s structure gives justices enormous freedom to decide cases based on their values.

Understanding justices’ values is thus all the more important if we are to understand decision-making by the Supreme Court. Legal Pragmatism makes three very important claims about how Supreme Court justices decide cases: (1) justices interpret law and decide cases based on desired outcomes, whether they
are aware of it or not; (2) the structure of the judiciary, especially the Supreme Court, enables judges to decide cases based foremost on their values; and (3) these values are informed by life experiences, political ideologies, and even personalities.

Legal Pragmatism recognizing their existence and importance of values and ideology, but it does not provide a means of further examining where they come from or how they are formed. Similarly, there is no Pragmatist framework for classifying ideologies, leaving ideology open to interpretation (most commonly through the traditional liberal/conservative framework). As discussed below, Cultural Theory offers a more nuanced understanding of the nature, source, and impact of ideology on judicial decision-making. The three claims of Legal Pragmatism outlined in the preceding paragraph are consistent with Cultural Theory. They offer an institutional and motivational framework through which ideology manifests and affects judicial behavior. My argument is that Cultural Theory informs the Pragmatist model by filling the ideological holes with a finite number of ideologies, each with a unique behavioral repertoire, and consequently a discrete and discernible number of possible outcomes for judges to prefer.
Rational Choice Theories

There are several prominent examples of Rational Choice theories of judicial decision-making, such as the Extralegal model (George and Epstein 1992), the Separation-of-Powers model (Segal and Spaeth 2002, 103-110 and 326-356), and the Rational-Attitudinal Model (Hammond, Bonneau, and Sheehan 2005). One leading theory, known as the “strategic account of judicial decision making,” is based on three central concepts: “justices’ actions are directed toward the attainment of goals; justices are strategic; and institutions structure justices’ interactions” (Epstein and Knight 1998, 10-11). Hammond, Bonneau, and Sheehan (2005) take this list of assumptions a step further, incorporating such assumptions as justices having one paramount preference regarding the range of possible outcomes in a case (81) and justices having perfect information regarding every other justices’ preferences (90).

An important aspect of Rational Choice theories is their recognition that preferences play a central role in judicial decision-making. While some scholars doubt the explanatory accuracy of Rational Choice theories (e.g., Segal and Spaeth 2002, 351), the empirical success of these theories is not my central concern. Rather, Rational Choice theories lack a fundamental piece of the puzzle by leaving judges’ preferences as exogenous to their explanation of judicial behavior. “Preferences” are incorporated in much of Rational Choice literature to
represent judges’ goals, i.e., the priorities they pursue when deciding cases.
Cultural Theory contends that preferences are the manifestation of fundamental
cultural biases) derived in Cultural Theory explain where
judges’ core ideologies. A common criticism of Rational Choice theories is that
they “are compatible with any . . . goal-oriented theory of judicial motivation”
(Posner 2008, 30; see also Segal and Spaeth 2002, 111). As with Legal
Pragmatism, I contend that Cultural Theory fills the preferential void of Rational
Choice theories by providing a limited, testable range of possible preferences,
each with a unique set of attenuating policy positions that are observable in
judicial behavior.

Cultural Theory agrees with two key elements of the strategic account:
strategic decision-making and the role of institutions. CT shares the assumption
that judges pursue avenues most likely to lead to desired outcomes, including in
their deliberations with other justices (i.e., judges act strategically). It predicts
that judges will work to achieve the maximum degree of possible success in
implementing their preferences. CT also incorporates the role of institutions into
judicial preferences. According to CT, one component of individual ideology is
the individual’s desired role for institutions in society. The stronger a judge’s
desired role for institutions in government, the more likely the judge is to act
according to the established rules governing his or her post, and to act in accordance with the established hierarchy. Although this paper examines the Supreme Court (where adhering to a higher court’s judgment is not an issue), the practice of *stare decisis* (upholding precedent) is an issue. The types of core philosophies and their corresponding desired role for institutions are discussed below.

**The Attitudinal Model**

Segal and Spaeth (1993; 2002) are devoted to elaborating and defending the attitudinal model of judicial decision-making on the United States Supreme Court. The attitudinal model is a relatively simple structure, formulated out of several different schools of thought. The attitudinal model begins with the original legal realists (2002, 87) and incorporates elements of behavioralism (88), psychology (89), and economics (92). The model claims that Supreme Court justices decide cases based on their policy preferences and values, and are not swayed significantly by any other factors in the decision-making process, such as prestige or concern for reversal (Songer and Link 2010). Justices are able to do this according to Attitudinalists because (1) “legal rules governing decision making (e.g., precedent, plain meaning)” do not limit the Court’s discretion; (2) justices do not “respond to public opinion, Congress, or the President;” and (3) the Court is the final arbiter of the constitutionality of all laws in the United States.
The Attitudinal Model is thus opposed to Rational Choice theories because it discounts institutional factors and the reactions of other justices in explaining judicial behavior.

Unlike Rational Choice theories, the Attitudinal Model offers a narrower take on judicial preferences. According to the Attitudinal Model, justices are viewed as pursuing either liberal or conservative policy preferences. “Attitudinalists believe the structure of the American political system virtually always allows the justices to engage in rationally sincere behavior on the merits” (Segal and Spaeth 2002, 114). In other words, institutional constraints do not impact justices’ pursuits of preferences. Like Rational Choice theories, Cultural Theory rejects this claim and instead predicts that judges’ desired role for institutions plays a significant part in assessing judicial preferences.

More fundamentally, Cultural Theory seeks to replace the liberal/conservative dialogue with a more complete and nuanced picture of possible values. Like most other political scientists, Segal and Spaeth (2002) do not offer a reason for their use of the traditional liberal/conservative paradigm. They merely accept the duality and consider the behavior of justices according to it. As with all of the theories discussed above, the Attitudinal literature lacks any meaningful discussion about how judges’ values are formed and how those values translate into policy preferences (or respect for institutional deference, likelihood of adhering to precedent, or other possible “preferences” that a judge might have
for any type of outcome in a given case). Likewise, it does not address the
tension between judicial activism and restraint (429), something CT does address,
as discussed below.

**Ideology: A Necessary Discussion**

Given all the batting around of the term “ideology,” it is necessary to
discuss what it is in this context and why the definition and use of ideology in Cultural Theory contributes meaningfully to the discussion of judicial decision-making. The assumption that ideology can be accurately used to describe judicial behavior is not without detractors (e.g., Edwards and Livermore 2009), generally because conceptions of ideology are quite fuzzy or “crude” (1900). One of the contributions Cultural Theory can make to the study of judicial decision-making is its clear definition of ideology.

For the purposes of this paper, preferences are the outcomes an individual wishes to see take place. In the case of judges, a preference is the outcome of a case that a judge wishes to see realized. These outcomes are not limited to the immediate implications of a case (who wins and who loses), but also to the potentially vast ramifications that a decision may have for lower court behavior, past and future precedent, and even the very structure of American law and politics. Values describe the ideals that an individual holds as important. These are judgments about both what is “good” and what is “bad.”
As explained below, Cultural Theory encompasses four main ideologies, known as “cultural biases.” Ideology and cultural bias are essentially interchangeable in this context, each meaning the holistic amalgamation of values and preferences held by an individual, i.e., her worldview. Cultural bias is the term originated in Thompson, Ellis, and Wildavsky (1990), the seminal work on Cultural Theory, and is used here in keeping with this foundational work. There are a limited number of cultural biases, and each one has its own set of values and preferences with clear implications for judicial behavior, such as preferences for the role of institutions in human affairs and the distribution of power in society.

**From These Theories, Onward**

Cultural Theory draws from each of the theories elaborated above in some way. CT agrees with Legal Pragmatism’s claim that judges act primarily according to their values, and with the Attitudinal Model’s claim that judges pursue preferred outcomes in cases. Likewise, CT acknowledges several different possible preferences as well, consistent with Rational Choice theories that claims judges have a range of preferences about public policy, *stare decisis*, institutional deference, and a host of other possible “preferences.” None of the literature on these theories offers even a basic discussion of where policy (or other) preferences come from, instead merely accepting them as exogenous. This is CT’s major contribution to a very important yet insufficiently examined aspect of
judicial decision-making: Where justices get their values, and how they are formed. To understand how, we must first explain what Cultural Theory is and how it informs our conception of judicial behavior.

INTRODUCTION TO CULTURAL THEORY

Cultural Theory evolved from work initiated by Mary Douglas (1970; 1978) and greatly expounded upon by Aaron Wildavsky (1987; see also Thomson, Ellis, and Wildavsky 1990). “Cultural theory is based on the axiom that what matters most to people is their relationships with other people and other people’s relationships with them” (5-6). People’s interpersonal relationships are codified in terms of grid and group, with four possible combinations. Each of these combinations is expressed as a fundamental mindset, known as a cultural bias in CT parlance. Each of the four cultural biases has its own fundamental characteristics and its own unique view of the extant world. Some individuals have strong associations with one cultural bias, while others may exhibit qualities of more than one bias. Biases can differ depending on the issue at hand, making a deep examination of the individual necessary to grasp their true cultural

§ There is a fifth cultural bias, which exists outside the grid/group system, known as the hermit. The hermit eschews all social interaction, and is thus epistemically incapable of achieving the position of Supreme Court justice.
preferences. It is also possible for individuals to experience changes in their cultural biases over their lifetimes (Thompson, Ellis, and Wildavsky 1990).

**Grid and Group**

Grid and group “are based on answers to two questions: Who am I? and What shall I do?” (Wildavsky 1987, 6). The manner in which one interacts with other individuals and groups is the source of the grid/group system. *Grid* denotes the “rules that relate one person to others on an ego-center basis” (viii). It is a means of quantifying personal freedom among *individuals*, “whether within or without membership of a group” (Gross and Rayner 1985, 6). Low grid corresponds to a high level of interpersonal freedom. Conversely, high grid denotes clear, enforced interpersonal restrictions on behavior.

An example of a high-grid (i.e., highly regulated interpersonal relations) situation can be found on a school playground where bullying takes place. While every child in each grade is “equal” regarding their standing within the institution (by virtue of all being in the same grade), the biggest, toughest kid on the playground rules the roost. People act according to their relative stature and abilities. *The grid element captures this experience.*

**This example may seem to connote a negative view of grid, as bullying is generally viewed as a bad thing. This is not my intention; the example simply presents a clear depiction of how grid can be experienced in the physical world.*
Group seeks to quantify “the experience of a bounded social unit” (Wildavsky 1987, viii). Group “represents the extent to which people are restricted in thought and action by their commitment to a social unit larger than the individual” (Gross and Rayner 1985, 5). High group corresponds to predominantly group-influenced social experiences, where “persons spend . . . their time interacting with others within a group with clear and strong boundaries” (Caulkins 1999, 112). If a person’s choices depend very little on group opinion and he holds no strong allegiance to a particular social unit, he experiences a low-group life. In contrast, Catholic monks and nuns are subject to a very high group social experience, as the group they belong to—the Catholic Church—dictates their social interactions. John Wayne’s behavior in Western movies typifies a low-group individual: he did whatever he pleased, even if it contradicted the wishes of the group.

The questions “Who am I?” and “What shall I do?” are answered by the degree of grid and group in an individual’s life. Every individual experiences both group and grid to some extent. They are not two sides to the same coin but rather complimentary elements that describe a person’s social experience. The easiest way to conceptualize this model is as a Cartesian plane, with the x-axis representing group and the y-axis representing grid. The positive directions for each axis represent increasingly higher levels of grid and group, while the negative directions correspond to decreasing levels of grid and group. As
expected, this yields four different combinations of grid and group, which are graphically depicted in Figure 1.

![Figure 1](Thompson, Ellis, and Wildavsky 1990, 8)

**Cultural Biases**

Corresponding to each of the four grid/group combinations are four cultural biases (Thompson, Ellis, and Wildavsky 1990, 5-11). The biases take the grid-group abstraction and bring it to life, describing the degree of grid and group in a person’s life in terms of distinct behaviors and relationships. Most important to this paper’s argument is the belief that once an individual’s cultural bias has been determined, it holds explanatory and predictive power for that individual’s actions. Specifically, once a justice’s cultural bias has been established, it should explain and predict his or her rulings on numerous issues.
The first cultural bias, egalitarianism, is composed of a high group and low grid combination. Egalitarianism is characterized by high group affiliation and differentiation between group members and external society, but minimal social structure within the group. Egalitarians are generally free to do as they please within their specific unit, but are defined as members of their group, rather than as individuals. Members of a self-sufficient anarchist commune typify egalitarianism. The group is clearly separated from the general population, and its members see themselves as members of the commune over members of general society. Within the group, there are few restrictions on who can do what, with the same rights bestowed on every member and decisions made in a consensus building style (Dixon 2003).

Individualism is the second bias, and is familiar to many. Individualists are subject to both low grid and group. Between individuals, there are few social prescriptions, and the individualist is free to interact with as many or few social networks as he or she chooses. However, this “does not mean the person is not engaged in exerting control over others” (Thompson, Ellis, and Wildavky 1990, 7). Individualists are free from restrictions by groups or other individuals, but are perfectly free to restrict the freedoms of others, and are “often measured by the size of the following” they can attract (ibid.). An individualistic entrepreneur who starts his own business (outside the control of other people or groups), and acts in
any manner he sees fit (rather than following the prescriptions of a group or restrictions based on social hierarchy) would be classified as an individualist.

Hierarchism, the third bias, is the grid/group opposite of individualism. A combination of high group and grid, hierarchism brings together both a bounded social unit and highly prescribed interpersonal relationships. Individuals in hierarchical societies are both defined by group membership and subject to restrictions on behavior related to their position in society. A devout Hindu in India is a good example of a hierarchist. He is defined by his group affiliation (which he adheres to strongly as a “devout” practitioner), and is subject to the strictures of the caste system, which clearly prescribe certain responsibilities and freedoms based on different levels in Hindu society.

The fourth bias, fatalism, has a high grid, low group composition. Fatalists live socially prescribed roles without a group identity. A nonunionized, impoverished factory worker in Victorian England would likely be a fatalist. He had no say in nor identified with any group, but was subject to restrictions associated with his place in society, relative to those around him. This cultural bias is highly unlikely to appear in a judge or justice, as people who have become a judge or justice must have expended a significant amount of effort and have considerable confidence in their own ability to reach and maintain such a position.
Views of Nature

Just as each of grid/group combination is associated with a cultural bias, each bias is associated with a unique view of the world. Thompson, Ellis, and Wildavsky (1990) calls these views “myths of nature.” Myths of nature explain how individuals think about the world, and what each bias holds as the ideal means of societal organization. As in the theories discusses above, the role of preferences is paramount to understanding how justices make their decisions. The myths of nature spell out the views of the world for each cultural bias. From these worldviews, we can begin to understand how justices’ preferences manifest and how votes on specific issues should emerge based on CT.

The first myth of nature is *nature ephemeral*, in which the world is viewed as being on the brink of some disaster, and the “managing institution must treat the ecosystem with great care” (Thompson, Ellis, and Wildavsky 1990, 26). Holders of this viewpoint see the role of government as a caretaker. Egalitarians view nature as ephemeral, and thus place a strong emphasis on the role of government in protecting humanity and the natural world.

The second myth, *nature benign*, is essentially the opposite of nature ephemeral. Nature is viewed as resilient and forgiving of human actions. In this myth, the managing institutions are laissez-faire, due to the resilience of nature. Individualists view nature as benign and do not worry about taking care of
humanity or nature. Instead, they promote an Ayn Randian rugged individualist approach to every aspect of life.

*Nature perverse/tolerant* appears as a hybrid of these two, in which nature is generally resilient, but an event of the right magnitude can knock nature askew. Thus, “the managing institution must . . . regulate against unusual occurrences” (26). Hierarchists hold this view, which comports with their emphasis on government as the ultimate managing institution. While certain events are allowed to go unchecked, the governing institution must be there to oppose and correct broad mistakes, which are generally made by the actors at the bottom of the hierarchy according to the elites at the top of the hierarchy (59).

The final myth is that of *nature capricious*, which envisions “a random world” (26-27). Managing institutions in this myth “do not really manage or learn: They just cope with erratic events” (27). Fatalists hold this view, which is derived from their experience of ineffective attempts at governing their personal affairs. Figure 2 illustrates the four myths, along with their grid/group quadrant location and a brief description of the mindset encapsulated in each.
Thompson, Ellis, and Wildavsky (1990) addresses the myriad array of issues associated with such a limited number of cultural biases (1-5), and pays special attention to the notion of limited options among worldviews (13-15). CT specifically revolves around the notion that all cultural biases exist simultaneously, reinforcing themselves against others (39-53) and enabling individuals to experience changes in their biases after enough evidence is presented that another bias is more in line with their personal experiences (69-81).

**Plural Rationalities and Learned Cultural Biases**

Integral to CT is the concept of *plural rationalities*. “The myths of nature . . . are both true and false . . . . Each myth is a partial representation of reality”
(Thompson, Ellis, and Wildavsky 1990, 26). Depending on an individual’s circumstances, it may be perfectly reasonable to adhere to any one of the biases and its attenuating myth of nature. Cultural biases are developed out of lived experiences, which build a person’s worldview.

In other words, people learn their cultural bias. If a person expects a certain outcome from a specific behavior, and that outcome occurs with consistent regularity, then the individual learns to expect the outcome. Expectation followed by affirmation instills trust in the belief structure. Contrastingly, if a person is consistently confronted with a surprising outcome, they will moderate their expectations until the outcome matches their expectations (assuming the person is sane).

This is precisely how CT explains the development of cultural biases (Thomson, Ellis, and Wildavsky 1990, 69-81). For example, if one expects to do well by striking out on their own in business, eschewing care for institutional structures and environmental impact, and they are consistently rewarded with material gains, they will develop an individualist cultural bias. Should this same individual, however, discover that it is necessary to follow the institutionalized chain of command to achieve results, rather than forging ahead alone, he will learn that his expectations are wrong, and—if the process of repeats itself consistently for long enough—he will develop a hierarchical cultural bias. The process can lead in any direction, affirming or contradictory, depending on an
individual’s life. This is how multiple cultural biases and views of the natural world come into existence. They are either reinforced or contradicted by lived experiences, pushing people into one of the biases.

Cultural Theory is a dynamic model of human interactions, preferences, and decision-making mechanisms, capable of explaining both changes in worldviews, and the likely characteristics of each way of life. If a person has lived a hierarchical lifestyle for the first twenty years of his life but suddenly finds themselves in an egalitarian environment for the next twenty years, his cultural bias is liable to shift.

“Blame, opportunity, risk, control, nature, and human agency are all conceived differently” among the four biases, giving each bias unique predictive and explanatory power (Caulkins 1999). If accurate, CT will be incredibly useful in understanding judicial decision-making. Each of the biases acts as a lens through which events are observed and analyzed. Depending on an individual’s cultural bias, a simple fact pattern may resonate in very different ways. It is particularly on issues of heightened sensitivity that the predictive powers of cultural theory shine the brightest, as they especially draw out an individual’s cultural proclivities. For instance, matters of fact and arithmetic are far less likely to draw contention among individuals with differing cultural biases than debates over the appropriate level of government restrictions on personal liberties, which
are bound to foment disagreement among individuals with different cultural biases.

**Cultural Cognition**

The psychological processes that undergird Cultural Theory, and thus much of human decision-making, are encapsulated in the theory of cultural cognition. Each of the four cultural biases explained above are generated, reinforced, and/or altered by the forces of cultural cognition. There has been significant empirical research into the aspects of cultural cognition, but relatively little specifically applied to judicial decision-making (Braman & Kahan 2007, 107-108). Belief formation and retention, under the mantel of cultural cognition, is a product of several psychological phenomena (98-99).

Cognitive dissonance-avoidance is a well-documented cognitive process whereby individuals favor information presented to them which is in agreement with previously held beliefs, while “applying more stringent criteria to evidence with less favorable implications to the self” (Kunda 1987, 636). People, in general, give preference to facts and opinions in-line with their beliefs. Francis Bacon adroitly expressed this reality in 1620:

> The human understanding when it has once adopted an opinion . . . draws all things else to support and agree with it. And though there be a greater number
and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects; in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate (Bacon 1620, 56).

Cognitive-dissonance avoidance offers a highly perceptible application of utility maximization in the realm of cultural cognition (Gilad, Kaish, and Loeb 1987). While economics and other “rational” theories of decision-making generally assume that man is a completely rational actor, significant evidence exists illustrating that man is often systematically irrational (Kahneman and Tversky 1979; Kahneman, Slovic, and Tversky 1982). Individuals are rational in that they maximize their perceived utility, whether or not this utility is derived from a perfect weighing of the relevant information (Gilad, Kaish, and Loeb 1987, 67).

Commitment to a belief that has been made public can also “interfere directly with potentially [changing one’s] attitude” (Wicklund and Brehm 1976). Judges may feel this pressure to a higher degree than the average individual, as essentially all of their decisions are made public, and some are widely circulated and discussed. To compound this phenomenon further, once opinions are made
public, related “private opinions [tend to become] more extreme” (Jellison and Mills 1969, 340).

Cognitive-dissonance avoidance heavily influences the weighing of information in decision-making, generating distortions in “expected” outcomes. This influence is a source of plural rationalities; certain outcomes have different utility values among individuals. Cultural biases serve as the preference framework against which new information is weighted. Information in agreement with held beliefs is thus supported, and cognitive-dissonance avoidance compels individuals to discredit information contradictory to their cultural bias.

Affect, another component of cultural cognition, “shapes the visceral reactions individuals have to many objects and acts” (Braman and Kahan 2007, 98). Affect is quite important, as essentially every object, person and idea is subject to affective preference formation. Affective preferences are formed before substantive cognition occurs, and, once formed, affective preferences are not easily altered (Zajonc 1980, 154-160). However much distance the structure of courts tries to put between affect and judicial decision making, the two will never be completely separate, just as man cannot be completely separated from his emotions. Affect also plays into cognitive-dissonance avoidance, as it is a source of dissonant feelings (i.e. having a negative emotion towards something is a form of cognitive dissonance).
Interpersonal trust is another important part of cultural cognition, and manifests in several ways. Judges tend to trust others “who share their worldviews,” likely due to “forces . . . [of] cognitive-dissonance avoidance and affect” (Braman, Kahan, and Grimmelmann 2005). Given that those same forces are present in all preference formation, interpersonal trust amplifies the effects of cognitive-dissonance avoidance and affect. Observation of judicial decisions have shown interpersonal trust can either “amplify” or “dampen” a judge’s reliance on ideology in making rulings (Miles and Sunstein 2008, 838-839). When a Republican judge sits with two Democratic judges, his or her rulings tend to be more liberal, and vice versa for Democratic judges sitting with two Republicans. However, on issues of considerable ideological disagreement, such as abortion and capital punishment, judges seem impervious to the composition of the panel they sit on (Miles and Sunstein 2008, 839). Interpersonal trust only goes so far in influencing a judge’s ideology.

Once cultural biases are formed, they are difficult to change. Biased assimilation inhibits people from adequately considering information that contradicts their beliefs, while accepting information that seems to support prior conclusions (Lord, Ross, and Lepper 1979). “Biased assimilation is likely to be especially significant when new information challenges a belief that is related to one’s cultural identity and values because this is where cognitive-dissonance
avoidance and affect . . . are particularly pronounced” (Braman and Kahan 2007, 99).

Coherence-based reasoning also keeps individuals from changing their closely held beliefs. Studies have shown how the mind takes complex cognitive tasks and breaks them down into relatively simple choices, “ultimately leading to a seemingly straightforward choice between a compelling alternative and a weak one” (Simon 2004, 513). Coherence-based reasoning enables simple decision making, without the “lingering suspicion that [the decision maker] may be wrong” (Braman and Kahan 2007, 99). Naïve realism and reactive devaluation are two further cognitive mechanisms, which work to subconsciously discredit ideologically contradictory individuals and their evidence.

The gist of cultural cognition is quite simple: the mind eschews complex decisions in favor of simple choices between a culturally reassuring choice and a weaker option, lacking cultural resonance. Much of this process takes place outside of conscious cognition, much as emotions arise without effort – but then are given cognitive importance, without thought as to where they originated. Despite a judge’s best efforts, it is quite difficult to avoid the sway of cultural cognition. “[J]udges will be steered in culturally biased and conflicting directions . . . notwithstanding judges’ genuine efforts to be impartial” (106). Knowing now what Cultural Theory is and what its cognitive underpinnings are, it is time to
elaborate on how Cultural Theory maps onto judicial behavior in a concrete context.

HYPOTHESES

Hypothesis 1: Three Biases Present

A pillar of Cultural Theory, known as the “requisite variety condition,” states that every cultural bias must be present in a society, though not necessarily in equal proportions (Thompson, Ellis, and Wildavsky 1990, 4, 51, 86-87). Based on this requirement alone, it would seem that each of the four biases should manifest among Supreme Court justices. However, given the nature of the Court, it is highly unlikely that a fatalist would reach the rank of Supreme Court justice. Thompson, Ellis, and Wildavsky tells us, “fatalists regard the political [sphere] with nothing but fear and dread” (1990, 217). This indicates fatalists are unlikely to show up in my examination of the Court, and if they do, this would actually run contrary to the expectations of Cultural Theory. Thus, my first hypothesis is that fatalists will not appear among the justices, but the other three cultural biases (individualism, hierarchism, and egalitarianism) will appear in some combination among the justices.
Hypothesis 2: Complementarity of Justices with Presidents

Previous research has indicated that conservatives generally support individualism and hierarchism, while liberals primarily support egalitarianism, with correlations that are “huge by the standard of survey research” (Wildavsky and Dake 1990, 50). As such, my second hypothesis is that Republican Presidents will overwhelmingly nominate individualistic or hierarchical judges, while Democratic Presidents will overwhelmingly nominate egalitarian judges.

Hypothesis 3: Conservative Differentiation by Cultural Bias

One purported gain Cultural Theory offers over conventional liberal/conservative models is a higher degree of differentiation among conservatives. According to CT, conservatives are not one homogenous group, but instead contain at least two distinct varieties: those dominated by hierarchical thinking, and those dominated by individualistic thinking. Swedlow (2008) identifies two types of conservatives in his research, which he calls libertarians (i.e., individualists) and conservatives (i.e., hierarchists). My third hypothesis is that both of these typologies will be visible among conservative justices, and will be differentiable based on the characteristics of hierarchism and individualism.
**Hypothesis 4: Economic and Environmental Regulation and CT**

Once the justices’ cultural biases are established, it will be possible to evaluate whether or not their rulings positively correlate with their cultural biases. Based on recent research, economic regulation and environmental regulation are two areas of law with a fairly detailed array of expected behavior for each bias. Jones (2011) outlines the current debate over climate change in Cultural Theoretic terms, while Lockhart (2001) enumerates the expected behavior of individualists (263-264), egalitarians (264), and hierarchists (264-265) regarding environmental regulation. Lodge and Wegrich (2011) frame the current debate around financial regulation in the wake of the 2007 recession vis-à-vis Cultural Theory, listing expectations for each bias (727). Judicial opinions for one or both of these issue areas can be analyzed in a manner similar to the content analysis used for coding the editorials, instead coding opinions in Cultural Theory terms, thus determining the cultural bias espoused in the rulings. My fourth hypothesis is that these opinions would reflect the same cultural bias(es) as the justices were determined to have in the editorial analysis.
METHODOLOGY

Determining Cultural Biases of Supreme Court Justices

The task of determining justices’ cultural biases is the primary issue in this paper. There is limited but high-quality literature on determining judicial preferences (e.g., Baum 1989; Brace, Langer, and Hall 2000; Tate 1981). Segal and Cover (1989) conducted the first notable, non-rulings-based ideological evaluation for Supreme Court justices. In their evaluations, justices were assigned liberal or conservative characterizations based on newspaper editorials written between justices’ nominations and confirmations. Editorials were drawn from the New York Times, Washington Post, Los Angeles Times, and Chicago Tribune. A liberal or conservative ideology was conferred based on statements in the editorials regarding issues such as gender and racial equality, individual rights and government power in First Amendment cases, and others.

One problem this method of analysis seeks to address is the determination of judicial preferences by past rulings. Many studies determine judicial preferences from rulings, and then use those preferences to examine other rulings. This inherently adds a layer of hypothetical reasoning to the equation, as the preferences are both derived from and used to examine rulings. The only thing this methodology achieves is a measure of consistency in rulings, not a source of the ideology behind the rulings. By drawing preferences from outside the
courtroom, and only from editorials before a justice’s confirmation, this method seeks to avoid the circular reasoning issue.

Based on the methodology of Segal and Cover (1989), I analyzed editorials from the New York Times and the Washington Post between the dates of nomination and Senate confirmation for each of the nine justices sitting on the Court from 1994 – 2005, known as the Rehnquist 7 “natural court,” during which time no justices left or entered the Court. General information for the justices, including the dates of nomination and confirmation and the appointing President, can be found in Appendix I. These editorials were coded not in liberal/conservative terms, but instead according to Cultural Theory terms. I looked for statements that could be characterized as hierarchical, fatalistic, egalitarian, or individualistic. In order to code a statement, it had to clearly illustrate at least one characteristic of a cultural bias, which includes the characteristics described above and a more context-specific list of characteristics discussed below.

It is prudent to note that the methodology I employ here has never been used to determine individual cultural biases. There are several examples of surveys used to determine cultural bias (e.g., Dake 1991; Sjöberg 1998; Swedlow and Wyckoff 2009), but to the best of my knowledge, no one has used editorial analysis to gauge an individual’s cultural bias. Given the lack of prior operationalization in this particular format, I constructed an original framework of
prototypical ideals and behaviors for each cultural bias, discussed below and organized in Appendix II, that I thought likely to be found in newspaper editorials. This is not necessarily an exhaustive list, but includes a sufficiently broad array of categories to encompass many possible statements. In order to avoid potentially delusory post hoc additions to the coding scheme, I did not add to the scheme once I had begun coding justices, with the exception of Justice Kennedy, for whom I read four editorials prior to completing the scheme. After the scheme was completed, I added four additional editorials for Justice Kennedy.

After coding all possible statements in each editorial, the totals for each cultural bias were tabulated for each justice. Most statements were clearly classifiable into one of the biases. On occasion, when a statement could belong to two biases but there was insufficient explanation to determine which bias was appropriate, the statement was counted as half a statement for each bias possible. For instance, a statement in support of strong rule of law, without sufficient context, could be hierarchical or individualistic. Such a statement would be counted as half a statement for each, rather than a whole statement for one or the other. The total number of statements for each bias per justice can be found in Table 1, as well as the percentage of statements per bias. The dominant bias for each justice is shaded in grey.
Coded Characteristics

As mentioned above, editorials were coded statement-by-statement. Statements could relate to a variety of topics, as justices’ cultural biases can manifest themselves in unique ways. To systematically categorize statements, a rubric was developed, which highlighted key issues areas, such as view of government and the judiciary, and each bias’s view on that issue. Below is an overview of principles held by each bias that was used as the schema to analyze the editorials. These same principles are also enumerated in Appendix II, where each coded characteristic is associated with a label depending on its location within the rubric. For instance, a statement that reflected an individualistic view of personal liberty would be coded as A3, where A corresponds to individualism, and 3 corresponds to Personal Choice/Individual Freedom on the coding rubric.

In the discussion of each justice below, statements are followed by their citation and a separate letter/number pair enclosed in brackets, which corresponds to a specific area of the coding rubric relevant to the content of the statement. To see an example of all statements coded for a single justice, see Appendix III, which lists the statements coded for Justice O’Connor and their respective label according to the schema developed here.
"That government is best which governs least" would be an apt motto for individualists. They view government as intrusive and unnecessarily coercive, and as such, do not support an active government. The one function of government they do appreciate is enforcement of contracts, for without this, their beloved free market would devolve to chaos (Dixon 2003, 143-144). Egalitarians have a skeptical view of government, as it often leads to corrupting people and polluting society. However, government is necessary to ensure the group is secure and to redistribute resources throughout the group, thus ensuring equality of condition. Egalitarians appreciate a government that does these things, but are quick to cast blame on a government that coerces individuals beyond these goals (138-141). Hierarchists are the strongest supporters of government. They believe in government as a means of keeping society together, and they fully support using coercive measures to achieve their desired results. Heavily structured and top-down governments, with an emphasis on expertise and specialization, are the favored institutions of hierarchists (136-138). Fatalists do not worry about government structure, and view government as just another voice to obey. They are often situated at the bottom of an oppressive government, and simply view this as their lot in life (141-143).
**Personal Choice and Individual Freedom**

Individualists are focused on maintaining the highest degree of personal freedom possible. The only coercion they support is to hold people to their word. Freedom to contract with both groups and individuals is paramount for individualists (Dixon 2003, 49-50; Harris 2006, 134-135). Egalitarians are concerned with maintaining the highest level of freedom possible for members of the group, but support curtailing freedoms that may disrupt group harmony or in any way coerce another member of the group. Group wellbeing comes before individual liberty (Dixon 2003, 34; Harris 2006, 136). Hierarchists are willing to curtail personal freedoms to ensure the values of the hierarchy are maintained. Individuals can be coerced by the governing institution and by those individuals who are higher up the hierarchy (Dixon 2003, 24; Harris 2006, 136). Fatalists have little personal freedoms, as much of their decisions are made for them. They might like the idea of greater freedom, but it hardly matters because fate decides whether they will prosper or fail (Dixon 2003, 42; Harris 2006, 135-136).

**Economic Growth**

Individualists view all economic growth as generated by individuals, and as such theirs to keep, no matter how it is distributed. There are bound to be economic winners and losers, and that is fully accepted (Dixon 2003, 51; Thompson, Ellis, and Wildavsky 1990, 61-62). Equal distribution of goods and
resources is the primary concern of egalitarians. Growth is only appreciated as a means of achieving equality (Dixon 2003, 35; Thompson, Ellis, and Wildavsky 1990, 61). “Rising tides lift all boats” is an accepted principle for hierarchists. While gains are concentrated at the top, hierarchists will engage in modest redistribution if they feel the hierarchy is threatened by internal discontent (Dixon 2003, 25-26; Thompson, Ellis, and Wildavsky 1990, 61). Wealth is desirable to fatalists, but they believe personal efforts have no effect in generating wealth. Only Lady Luck can bring them good fortune (Dixon 2003, 42-42; Thompson, Ellis, and Wildavsky 1990, 62).

**Competition**

Individualists view competition as the ultimate means of sustenance. Competition is necessary, because it rewards people according to their efforts and skills. Individualists dislike anything that inhibits competition or attempts to negate the effects of competition (Thompson, Ellis, and Wildavsky 1990, 256). Egalitarians distrust competition, as it creates divisions between people and their livelihoods. While some people may earn more than others, the end result should be equalized through some kind of institutional mechanism, such as income transfers through taxation. Hierarchists appreciate competition if that is how a hierarchy is built. For instance, if the hierarchy lauds itself as a pure meritocracy, then stratification would be based on competitive achievements. However, if the
hierarchy is related to other factors, such as birth or ethnicity, then no amount of competition will override that prevailing influence on where one ends up in the hierarchy. Fatalists, yet again, have no appreciation for competition. As fate is the sole arbiter of who succeeds and who does not, competition will not get them anywhere (Thompson, Rayner, and Ney 1998, 331).

**Scarcity and the Environment**

Individualists do not worry over scarcity, as that would imply a potential risk to transacting. They view man as capable of adapting and succeeding no matter what, thus rendering scarcity unimportant. They believe resourceful individuals should use up resources as they become available. As such, individualists are not worried about environmental degradation or climate change; industrious and creative individuals will solve these problems later if there is a profit to be made. Egalitarians view natural resources as scarce and in need of protection from a malfeasant “system” that robs people of their fair share. They see resources as jointly owned in equal share by all members of their select group. Resources should be preserved as long as possible, with great care. Egalitarians worry considerably about the environment, and they believe that environmental stewardship is a necessary activity. Hierarchists use scarcity as a justification for resource allocation. The governing institution knows best how to allocate resources, and so it shall. This view leads to environmental management, but not
necessarily to much effect. Hierarchies respond to issues they feel threaten by, and generally ignore seemingly benevolent issues. Fatalists, as above, have no concern for scarcity. Everything is allocated to them on a basis of luck, so it does not matter whether or not resources are scarce. Fatalists are already convinced that their efforts have no effect on the world's course of development, so environmental concerns are of little worry to them (Thompson, Ellis, and Wildavsky 1990, 10-11 and 62).

_Ideal Judiciary_

Individualists see the courts as an enforcer of property rights and law and order. They work to prevent shocks or interferences with the market. Judges should use judicial review to protect freedoms and expose government inefficiencies. Individualist courts should keep government information open to public, limit government power over the private sector, and protect the secrecy of private sector information (Dixon 2003, 144). Egalitarians see the courts as the enforcer of human rights laws. They maintain law and order in accordance with group ideals, and use judicial review to protect freedoms and fill policy vacuums. They should make public and private sector information widely available to expose inefficiencies and inequities. Hierarchists see the courts as an enforcer of property rights and keeper of law and order. They believe in limited judicial oversight of executive and legislative branches, restricted access to public
Hierarchical courts should uphold government power over private sector and enforce business regulations, and uphold statutory rights of access to private sector information (136-137). Fatalists seek a judiciary that protects the oppressed and limits their exploitation by the public and private sectors through judicial review, enforcement of statutory market regulation, and protecting property rights (142).

**Likely Careers, Affiliated Groups, and Government Experiences**

Individualists are likely to have been entrepreneurs, self-employed, or business owners. They might associate with limited government and/or pro-business groups such as the U.S. Chamber of Commerce, Club for Growth, or The Federalist Society. Individualists are like to relate to the government through anti-regulation efforts, possibly as business lobbyists. They emphasize individual liberty, not secured by government protection but by government not being involved in issues at all. Egalitarians may have been humanitarians or rights activists, and are likely to be involved with organizations such as the NAACP, ACLU, or human rights groups. Their government interaction would likely include efforts to expand government protection to those not sufficiently protected. Hierarchists would have experience climbing an internal ladder, such as in the military or a highly structure organization, like the federal government. Emphasis here is on climbing through the ranks, not simply being appointed to a
leadership position, which would be more indicative of an individualist.

Hierarchists are naturally keen on stratified organizations such as governments, the Catholic Church, or groups with an exclusionary element. Fatalists would have no group relations, and only a limited set of interactions with the government, likely in the form of receiving welfare. Their careers would be random and not successful.

**Personality Characteristics**

A final gauge of the Justices’ cultural biases can be found in descriptions of their temperament. Both theorizing and survey research have posited and found links between certain personality traits and the four cultural biases (see Dixon 2003; Douglas 1978; Wildavsky 1990; Swedlow and Wyckoff 2009). Individualists are characterized by an independent and resourceful nature, often coupled with strong-willed refusal to accept anything less than pure independence. Egalitarians focus on being inclusive of all opinion, value collaboration, and try to be empathetic to all people, especially those they view as disadvantaged. Hierarchists are orderly, regimented people who value structure in both personal and professional life. They value conservative, cautious approaches to big decisions, evaluating information carefully and in light of structural requirements surrounding them. Fatalists are typically exhibit morose or
downtrodden behavior, resigned as they are to a life of little self-determination over their lives.

RESULTS OF EDITORIAL CODING

Having determined the justices’ biases, it is clearer for some than for others where they fall on the Cultural Theory map. Justices Breyer, Ginsburg, O’Connor, Rehnquist, Scalia, Stevens, and Thomas were all predominantly in one category. Justices Kennedy and Souter were not as strongly classified. Of the statements coded for these two justices, no cultural bias had more than 50 percent of all statements. Table 1 summarizes the total number of statements for each cultural bias per justice, and the percentage of statements for each bias per justice. Two asterisks (**) follow Justices Kennedy and Souter’s names in Table 1 to indicate the ambiguity in their coding. The lack of clarity represents several possible phenomena. Justices may experience two competing ideologies in their own lives with one bias on certain issues and another bias on other issues. For example, a justice who appears individualistic because of his or her preference for unfetter market capitalism may also appear hierarchical because of their support for traditional values and an ordered society. It is also possible this methodology does not give the most accurate picture of a justice’s cultural bias.
Table 1: Summation of Coded Statements for Justices

<table>
<thead>
<tr>
<th>Number of Statements Per Bias</th>
<th>Hierarchism</th>
<th>Individualism</th>
<th>Egalitarianism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breyer</td>
<td>7.5</td>
<td>16.5</td>
<td>8.5</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>5.5</td>
<td>5.5</td>
<td>14</td>
</tr>
<tr>
<td>Kennedy**</td>
<td>13</td>
<td>3.5</td>
<td>15.5</td>
</tr>
<tr>
<td>O'Connor</td>
<td>10</td>
<td>2.5</td>
<td>1</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>41.5</td>
<td>6</td>
<td>0.5</td>
</tr>
<tr>
<td>Scalia</td>
<td>10.5</td>
<td>6.5</td>
<td>3.5</td>
</tr>
<tr>
<td>Souter**</td>
<td>19</td>
<td>15</td>
<td>25.5</td>
</tr>
<tr>
<td>Stevens</td>
<td>31.5</td>
<td>7</td>
<td>6.5</td>
</tr>
<tr>
<td>Thomas</td>
<td>13.5</td>
<td>21</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Percentage of Statements Per Bias</th>
<th>Hierarchism</th>
<th>Individualism</th>
<th>Egalitarianism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breyer</td>
<td>23%</td>
<td>51%</td>
<td>26%</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>22%</td>
<td>22%</td>
<td>56%</td>
</tr>
<tr>
<td>Kennedy**</td>
<td>41%</td>
<td>11%</td>
<td>48%</td>
</tr>
<tr>
<td>O'Connor</td>
<td>74%</td>
<td>19%</td>
<td>7%</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>86%</td>
<td>13%</td>
<td>1%</td>
</tr>
<tr>
<td>Scalia</td>
<td>51%</td>
<td>32%</td>
<td>17%</td>
</tr>
<tr>
<td>Souter**</td>
<td>32%</td>
<td>25%</td>
<td>43%</td>
</tr>
<tr>
<td>Stevens</td>
<td>70%</td>
<td>16%</td>
<td>14%</td>
</tr>
<tr>
<td>Thomas</td>
<td>37%</td>
<td>58%</td>
<td>5%</td>
</tr>
</tbody>
</table>

The Individualists

Justice Breyer falls into the individualist camp. His individualistic preference for avoiding market regulation can be found in statements such as:

“Judge Breyer has been strongly influenced by the Chicago School [of
economics]” (Passell 1994) [A1], and “Judge Breyer’s consistent pro-business views” (Lewis 1994a) [A1]. Breyer is not only described as pro-business, but also as pro-market (Pitofsky 1994) [A1], which is a decidedly individualistic preference (Dixon 2003, 151). His opposition to several government restraints on individual freedoms, including “restraints on travel to Cuba” [A3] and a “gag rule against abortion advice” [A3] (New York Times 1994) illustrate his individualist stance against government intervention in personal decision-making. Justice Breyer’s respect for law and order supports both individualism and hierarchism (see, e.g., Lewis 1994b, describing his support for the death penalty and respect for the law) [A6/C6].

Justice Thomas was also found to be an individualist. His history of making it on his own and promoting hard work as a means of success (Lewis 1991d; Suro 1991) [A1/A7/A10], numerous descriptions as a “fiercely independent” thinker (Lewis 1991b) [A3/A10], and distaste for racial preference through affirmative action programs (Lewis 1991d) [A5] all point toward individualism. His derision of “his own sister for becoming dependent on welfare when she had once been forced onto welfare by an illness in the family” illustrates his strong individualist temperament regarding government benefits (New York Times 1991) [A4]. Though he later distanced himself from the comments (Lewis 1991e), Justice Thomas once said that he “favored banning abortion as a violation of natural law” (Lewis 1991c) [A4], which would is generally understood to be an
individualistic worldview (Ellis 1992). He was also described as finding “attractive’ the idea of an activist Supreme Court that would strike down laws restricting property rights” (Lewis 1991c) [A1/A4], an unmistakably individualistic premise. Opposed to these individualistic statements were several hierarchical views, including a preference for “judicial restraint” [C6] and a willingness to “look to a law’s legislative history . . . in trying to understand Congressional intent [behind the law]” (Greenhouse 1991) [C6]. He stated the “burden is on those who would change a precedent to show more than simply that they disagree with the underlying opinion,” (Lewis 1991a) [C6].

**The Egalitarian(s)**

Justice Ginsburg’s egalitarian classification stems from strong statements regarding human equality, such as her statement that “I think rank discrimination against anyone is . . . to be deplored’” (Lewis 1993b) [B4], regardless of race or gender. Her willingness to use the Supreme Court to fill policy vacuums (Lewis 1993c) [B6] is further support of her egalitarian philosophy, as Dixon (2003, 140) predicts that only egalitarians will hold this particular view of courts. Her view that, as a Supreme Court justice, she would have “an opportunity beyond any other . . . to serve society” (Lewis 1993d) [B6/B7] further emphasizes her commitment to societal wellbeing, a concern primarily held by egalitarians. Her preference for consensus building also exposes her egalitarian bias (Lewis 1993a;
Washington Post 1993) [B4]. Finally, her “own admission [to being] a late-blooming feminist” (Margolick 1993) [B7] and her role as “director of the Women’s Rights Project of the American Civil Liberties Union” (Lewis 1994e) [B7] clearly depict an egalitarian individual.

Although Justice Kennedy was predominantly described in egalitarian terms, he also had a large quantity of hierarchical statements. His statements were seemingly contradictory, but in totality present a clearer picture. He was critical of insufficient government actions to protect victims of crime (New York Times 1987a) [B4], as egalitarians often are. He was also very concerned with individual freedom and indicated a willingness to use law to protect people, stating, “‘there is a zone of liberty, of protection, where the individual can tell the government there is a line beyond which you cannot go’” (Goodman 1987) [B4/B6]. He admitted even the venerable Bill of Rights could not contain “every right that should be the right of the free people” (Greenhouse 1987) [B4], indicating a broader view of personal liberties than currently enumerated in law. Nonetheless, he viewed laws a necessary, quoting James Madison as saying: “If men were angels, we wouldn’t need a constitution” (Taylor 1987) [C3/C4]. Justice Kennedy also emphasized the need “to defer to the political process” (New York Times 1987b) [C7], and “played . . . a role infused with judicial restraint” during his confirmation hearings (Goodman 1987) [C7], both hierarchical statements. He exhibited yet another hierarchical characteristic when described as
“plac[ing] far more confidence and authority in the hands of institutions than is warranted” (Goodman 1987) [C4]. The interplay of Justice Kennedy’s egalitarian and hierarchical tendencies is discussed in-depth below.

Justice Souter presented another combination of hierarchism and egalitarianism similar to that of Justice Kennedy. His ability “to understand and sympathize with the dilemmas of modern life and ordinary people” (Greenhouse 1990a) [B10], and a statement specifically mentioning the Court’s “responsibility to act” in policy “‘vacuum[s]’” left by the legislature (Greenhouse 1990b) [B6] support egalitarianism (Dixon 2003, 140). He was concerned with the impact of his judging on “people ‘whose lives will be affected by [his] stewardship’” of the Constitution (Washington Post 1990a) [B4/B6/B10]. Justice Souter also supported finding additional rights where they are not always clearly spelled out (Greenhouse 1990a) [B4], and said the Court has a duty to protect individual rights (Greenhouse 1990c) [B6], both statements promoting egalitarianism. “He had high praise for William Brennan, the quintessential ‘activist’ he would succeed” (Washington Post 1990b) [A6/B6], illustrating either egalitarianism or individualism.

Justice Souter also had a number of statements espousing clearly hierarchical principles, such as regulating business (Feder 1990) [C1], respecting precedent (Feder 1990; Greenhouse 1990b) [C6], and obeying institutional authority even though he later claimed he only defended state policies because he
was Attorney General (Lewis 1990) [C4]. Additionally, he was skeptical of the Supreme Court’s ability in determining just outcomes for complex commercial lawsuits [A1], and was “especially inclined to support precedents in the commercial context” (Feder 1990) [C6]. Justice Souter, like Justice Kennedy, appears to be an egalitarian who views the government as a necessary tool to implement his ideology. Justices Kennedy and Souter are discussed further in the Discussion section (Section B), as their combinations of egalitarianism and hierarchism have been found in other studies with pertinent implications for this paper.

**The Hierarchists**

Justice O’Connor presented a clear picture of a hierarchist. Her trust in government was evident in her support for the “good faith exception” to evidentiary law, which allows the admission of evidence illegally obtained by police if a judge believes it was acquired in “good faith” (Greenhouse 1981a) [C4]. Her statements against judicial activism (Greenhouse 1981b; New York Times 1981; Washington Post 1981) [C6] and willingness to allow abortions within government-described categories (Greenhouse 1981b) [C3] also point toward hierarchism. Although judicial activism may seem like a hierarchical activity, Dixon (2003, 138) makes clear that judicial hierarchists defer to the authority of Congress or the President rather than supporting judge-made law.
This principle of judicial deference is made abundantly clear in her statement that “the separation of powers principle . . . requires judges to avoid substituting their own views on what is desirable . . . for those of the legislature” (New York Times 1981) [C4/C6].

Justice Rehnquist was an abundantly evident hierarchist. His trust in government on criminal matters was illustrated in his support for “undeclared ‘qualified martial law,’” in which numerous citizens were arrested and “held without opportunity to make bail” (Graham 1971b; see also Clawson 1971) [C6]. Hierarchism was clearly visible in a statement claiming that he “vigorously opposed any legislation that would restrict the Government’s ability to gather information about citizens” (Rosenbaum 1971) [C4]. His belief in curtailing civil disobedience and belief that “when the issue at stake [is] . . . the Government’s efforts to regulate society and preserve order, . . . individual rights must give way” (Graham 1971b) [C3] further indicate hierarchism. No one other than a hierarchist would support the “common theme” “running through many of . . . [Rehnquist’s prior] legal opinions and statements . . . of expanded government powers, centered in the executive” (Miller 1971) [C4]. His history of opposition to civil rights legislation is yet another example of hierarchical thinking (Waldron 1971) [C5].

Leading up to the landmark Brown v. Board of Education case, which desegregated public schools, Rehnquist wrote a memorandum on behalf of then-
Supreme Court Justice Robert Jackson, for whom he was serving as a clerk, claiming, “*Plessey v. Ferguson* was right and should be re-affirmed” (Graham 1971a) [C6]. During his confirmation hearings, Rehnquist said the memo was “not an accurate statement of my views” (ibid.). For the purpose of gauging Justice Rehnquist’s cultural bias, whether or not he supported *Plessey* does not matter. Either he obeyed his superior, whom he disagreed with, in writing the memo, or he believed in *Plessey*. Either situation supports the hierarchical bias assigned herein. The only substantive reason to not consider Justice Rehnquist a complete hierarchist comes from his characterization as an activist justice (Graham 1971b; Wicker 1971) [A6/B6], which runs contrary to Dixon’s (2003, 138) depiction of hierarchical justices as avoiding judicial activism.

Justice Scalia presented a somewhat different picture of a hierarchical justice, as he garnered a significant number of individualistic statements in addition to his hierarchical majority. He was consistently described as against judicial activism (Lewis 1986; Taylor 1986) [C6], a hierarchical principle. In prior remarks he stated, “the Supreme Court had no business striking down anti-abortion laws” (Taylor 1986) [C6]. He also viewed the President as deservingly powerful, and was described as “ready to enforce the constitutional separation of powers vigorously when he [saw] an infringement on Presidential power” (Lewis 1986) [C4]. He was critical of the Freedom of Information Act (Taylor 1986) [C4] and claimed the Supreme Court had “‘gone too far’” in “carving out new
rights in areas such as abortion, school bussing and affirmative action,” (Kurtz and Kamen 1986) [C3/C6] all hierarchical sentiments. Justice Scalia also claimed a “‘desire to implement to the utmost the requirements of the First Amendment,’” [A3/B3] and was opposed to discrimination, saying, “There should be no doubt . . . [regarding his] commitment to a society without discrimination”’ (Taylor 1986) [B10]. He was also leery of excessive government power, describing the legislative process as “‘cumbersome and inefficient’” [A4/B4] so that it might “protect the public from undue government power” (Lewis 1986) [B4], which indicates either individualism or egalitarianism.

Justice Stevens shared Justice Rehnquist’s strong adherence to hierarchism. His emphasis on following procedure was ever-present in editorials (Lewis 1975; New York Times 1975; Oelsner 1975a; Oelsner 1975b) [C6], and he was even referred to as a “legal technician” (MacKenzie 1975) [C6/C10]. Stevens’ unwillingness to limit surveillance by the government in criminal cases indicated his trust in government (New York Times 1975) [C4], a clearly hierarchical view. He also held a belief in limited judicial activity, stating that “judges should restrict themselves to ‘deciding no more than the specific controversy’ presented by the case before them” (Oelsner 1975c) [C6], which further supported his hierarchical bias. He was described as having “deep respect for precedent” and “trust in the legal system, in judges and in lawyers” (Oelsner 1975b) [C4/C6]. His time as a circuit court judge was characterized by staying
“within the bounds of precedents” (Washington Post 1975) [C6/C9]. Finally, Justice Stevens “placed a ‘very high value on the First Amendment,’” but admitted “‘there are occasions when restrictions [on the press] are justified,’” (Oelsner 1975c) [C3/C4], yet another hierarchical statement (Dixon 2003, 138).

**ANSWERS TO HYPOTHESES**

**Hypothesis 1: Three Biases Present**

The first hypothesis, that there would be at least one justice for individualism, hierarchism, and egalitarianism and no fatalistic justices, was upheld. As graphically represented in Table 1, there were two individualistic justices (Breyer and Thomas), one solidly egalitarian (Ginsburg) and two mostly egalitarian justices (Kennedy and Souter), and four hierarchical justices (O’Connor, Rehnquist, Scalia, and Stevens). The lack of fatalistic *statements*, while not necessarily contradictory to Cultural Theory, is nonetheless something of a surprise. This is discussed further in the Discussion section.

**Hypothesis 2: Complementarity of Justices and Presidents**

The second hypothesis (i.e., justices’ cultural biases are complimentary to the party of the appointing President) appears to hold up. As Swedlow and Wyckoff (2009) and Wildavsky and Dake (1990) indicate, Republicans generally associate with hierarchical or individualistic cultural biases, while Democrats tend
to be egalitarians. Table 2 lists the justices, their cultural bias(es), the Presidents who nominated them, and the Presidents’ political parties. Six of the nine justices meet the affiliation expectation between political party and cultural bias. Given the small N in this example, it is difficult to gauge the true accuracy of this particular finding. Justice Breyer, an individualist appointed by a Democrat, and Justices Kennedy and Souter, both egalitarians appointed by Republicans, do not meet this expectation.

<table>
<thead>
<tr>
<th>Justice</th>
<th>Appointing President</th>
<th>Cultural Bias</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breyer, Stephen G.</td>
<td>Clinton (D)</td>
<td>I</td>
</tr>
<tr>
<td>Ginsburg, Ruth Bader</td>
<td>Clinton (D)</td>
<td>E</td>
</tr>
<tr>
<td>Kennedy, Anthony M.</td>
<td>Reagan (R)</td>
<td>E (H)</td>
</tr>
<tr>
<td>O'Connor, Sandra Day</td>
<td>Reagan (R)</td>
<td>H</td>
</tr>
<tr>
<td>Rehnquist, William</td>
<td>Nixon (R)</td>
<td>H</td>
</tr>
<tr>
<td>Scalia, Antonin</td>
<td>Reagan (R)</td>
<td>H</td>
</tr>
<tr>
<td>Souter, David H.</td>
<td>G.H.W. Bush (R)</td>
<td>E (H)</td>
</tr>
<tr>
<td>Stevens, John Paul</td>
<td>Ford (R)</td>
<td>H</td>
</tr>
<tr>
<td>Thomas, Clarence</td>
<td>G.H.W. Bush (R)</td>
<td>I</td>
</tr>
</tbody>
</table>

Theoretically, it is not difficult to imagine President Clinton harboring individualistic ideals. President Clinton clearly held some strong individualistic values, as evidenced by his signing of the North American Free Trade Agreement and reducing the amount of U.S. welfare spending (Carcasson 2006). A large component of Democratic and egalitarian association is based on a shared preference that government not limit individual freedoms (Swedlow and Wyckoff 2009, 1049-1050), a preference also held by individualists. Without further
examining President Clinton’s policy preferences in Cultural Theory terms, I cannot say conclusively that this is why a Democratic President appointed an individualistic justice. However, this illustrates the possible relationships we may find by delving deeper into the context behind our conventional political labels (one of CT’s key aims).

Regarding Presidents Bush and Reagan appointing egalitarians, it is important to note Justices Kennedy and Souter were also coded as significantly hierarchical, not solely egalitarian. As stated above, Republicans are generally expected to adhere to either individualism or hierarchism. The strong presence of hierarchism in these justices’ editorials indicates possible commonalities in the ideology of justices and their appointing Presidents. The results are inconclusive, but the possibility of overlapping elements between judicial and presidential ideologies draws attention to the understanding CT may make possible.

**Hypothesis 3: Conservative Differentiation by Cultural Bias**

The third hypothesis, which stated there should be clear differentiation among conservative justices divided as hierarchists and individualists, was partially upheld. To test this hypothesis, it is first necessary to know who is a “conservative” justice. The easiest way to determine this is by assuming the political party of the appointing President, which is listed in Appendix I, also
represents the political affiliation of the justice. By this measure, all justices except Breyer and Ginsburg should be considered conservative.

A second means of determining which justices are conservative is the same source I modeled my own analysis on: Segal and Cover (1989) and Segal et al. (1995). Figure 3 depicts the degrees of conservatism found among the Rehnquist 7 justices according to Segal et al. (1995, 816), with a possible range from completely liberal (a score of +1) to completely conservative (a score of -1). The justices are listed from left to right following the convention that the most liberal are on the left.

Figure 3: Segal et al. Liberal to Conservative Scores

[Diagram showing degrees of liberalism and conservatism for justices]
Segal et al. (1995) indicates that all justices other than Ginsburg are conservative. For the purpose of analyzing conservatives, Justice Breyer is excluded, as he was appointed by a Democratic President and was weakly conservative according to Segal et al. From here, the remaining justices can be broken into two groups: moderately conservative justices (O’Connor, Kennedy, and Souter), and significantly conservative justices (Stevens, Thomas, Rehnquist, and Scalia; i.e., those with conservative scores of -.50 or lower).

The justices in the moderately conservative group included two egalitarians (Kennedy and Souter) and one hierarchist (O’Connor). Quite frankly, the presence of these egalitarians came as a surprise, and is discussed at length in the Discussion section. Justice O’Connor’s hierarchical ranking and conservative label appear appropriate at first, but when one considers that she and Justices Rehnquist and Stevens had very similar percentages of hierarchical statements, it becomes clear that the relationship between these three must somehow differ in ways not readily apparent.

Amongst the full-fledged conservatives (Rehnquist, Scalia, Stevens, and Thomas), there are three hierarchists (Rehnquist, Scalia, and Stevens) and one individualist (Thomas). It is noteworthy that Justice Scalia was the most weakly hierarchical by the percentage of statements coded. While the general disposition of the justices broke down along expected lines, thus upholding hypothesis three to an extent, the position of the justices along the liberal-conservative continuum
tells us little in relation to their CT scores. The information gleaned from the justices is discussed much further below.

**Hypothesis 4: Economic and Environmental Regulation and CT**

Based on the conclusions reached above regarding the justices’ cultural biases, the next phase of this research is to construct a coding scheme for judicial opinions and apply it to opinions for these justices in the areas of economic and environmental regulation. Unfortunately, time and resources did not permit that to happen thus far in my research. The contents of this paper are intended to serve as a basis for just such a project, which is necessary to truly evaluate the explanatory capacity of Cultural Theory.

**DISCUSSION OF RESULTS**

The answers provided in response to each hypothesis directly state whether or not the hypotheses were upheld, or to what degree they were upheld if there was a degree of ambiguity, which was the case for most of the hypotheses. In this section, I will discuss possible reasons for these ambiguities, lessons learned from the broader experiment that is this paper, and make a few suggestions for subsequent research based on my findings and running of this experiment.
Fatalists: Missing In Action, or Never There to Begin With?

As discussed early on in this paper, fatalists are not the type of people expected to show up on the Supreme Court. They have been trodden down by the world and have learned, through adjusting their expectations according to experienced events, to never expect success. While the lack of fatalists on the Court was predicted, the lack of fatalistic statements is something of a quandary. It could be that Senators, in their questioning during confirmation hearings, never framed a question in such a way as to allow a fatalistic response to emerge. Likewise, assuming the justices wanted the seats they were nominated for, they may have carefully avoided responses that seemed to indicate weakness, as fatalistic responses would seem to other biases.

It is also possible though unlikely the editorialists never had anything fatalistic to report about the justices. I consider this unlikely, as many people at one time or another in their lives often have fatalistic thoughts. Perhaps the most plausible reason for the lack of fatalistic statements is that the justices, through the course of their written statements, speeches, legal opinions, and journal articles, never expressed fatalistic sentiments. Giving voice to such ideas would certainly not be advantageous in the often dog-eat-dog worlds of law and academia; weaknesses would instead be minimized. This is something for future research to remain aware of and seek to explain.
A Case of Competing Biases: Justices Kennedy and Souter

Cultural Theory is premised on the fact that people hold numerous values, which they rank in a discrete order. Hierarchists value order, individualists value liberty, and egalitarians value equality (Swedlow 2008, 165, listed below in List 1). This thesis attempts to ascertain the order the nine justices place their values in, which is codified as their cultural biases. Justices Kennedy and Souter had a high number of statements for two biases, reflecting the tension of multiple concerns, in this case the competition between equality and order. Both were described as predominantly egalitarian but with numerous hierarchical statements as well. Segal et al. (1995) also coded them as conservatives. What does this indicate?

Egalitarianism and hierarchism are both located on the high group side of the traditional CT plane, indicating a common affiliation to collective undertakings. The difference is the degree to which hierarchists and egalitarians are willing to trade off order for equality, and vice versa. For better or worse, when egalitarians are faced with the impossibility of implementing their goals without some government-imposed order, they frequently turn to hierarchism (Dixon 2003, 217). Ordered government is necessary to facilitate communication of social desires and the implementation of those desires. This is why elements of hierarchism appear among otherwise egalitarian statements. In a large, complex
society like the United States, it would be impossible to imagine face-to-face communication as a means of reaching consensus on social preferences. Some degree of structure is necessary, lest the egalitarians’ objectives never come to fruition.

Order of Values by Cultural Bias

- Hierarchists: Order > Freedom > Caring/Equality
- Egalitarians: Caring/Equality > Freedom > Order
- Individualists: Freedom > Order > Caring/Equality

In addition to the practical constraints placed on egalitarians, there is evidence that hybrid egalitarian/hierarchical individuals exist in the broader public. Swedlow and Wyckoff (2009) conducted a national survey (N = 678), in which 27 percent of respondents were characterized as “communitarians” (1063). The characteristics of communitarians, also labeled humanitarians in previous research (e.g., Feldman and Steenbergen 2001), are essentially analogous to the characteristics described above regarding Justices Kennedy and Souter: a greater willingness to use order as a means of ensuring society is taken care of than purist egalitarians would accept (Swedlow and Wyckoff 2009, 1067). The existence of communitarians on the Supreme Court should come as no surprise, given their prevalence among the American population. If Kennedy and Souter are in fact communitarians, as their editorial descriptions suggest, 22 percent of the
Rehnquist 7 Court was communitarian, which is fairly representative of the nation. Although Thompson, Ellis, and Wildavsky (1990) did not include communitarians in the original theory, it is compatible with the foundational assumptions of Cultural Theory (as elaborated in Dixon 2003), and has both theoretical and observed support.

One-Dimensional versus Two-Dimensional Models

The critical question of whether or not Cultural Theory provides a deeper level of explanation than the traditional liberal/conservative duality still stands. There are several examples illustrating the inadequacy of one-dimensional models and the success of a two-dimensional model in explaining the political attitudes of the American public (Gastil et al. 2005; Kahan et al. 2007; Ripberger et al. 2011; Swedlow and Wyckoff 2009).

Theoretically, Cultural Theory offers considerable advantages to the standard one-dimensional model. Conservatives are generally though to oppose economic regulation but support socially coercive policies, while liberals are the opposite, opposing social policymaking but supporting economic intervention to promote equality of outcome for citizens. One of Cultural Theory’s greatest potential contributions is in helping to understand the different types of conservatives. Under the mantle of “conservatism,” there are individuals who support social regulation and economic intervention, who CT would label
hierarchists. There are also libertarians, people generally opposed to either social or economic intervention from the state, which CT would call individualism. Lastly, there are those who fit the traditional understanding of conservative thought, those opposed to economic regulation but supportive of social regulation. It is as yet unclear where these people fit in Cultural Theory. Liberals can also be individualists, though they are most likely to be egalitarians, supportive of economic intervention but eschewing socially coercive policies.

**Irresoluble Contradictions or Complementary Findings?**

The two-dimensional model used in Swedlow and Wyckoff (2009) (and models they base their research on, e.g., Jacoby 2006; Rokeach 1973) contains elements similar to Cultural Theory, with one important caveat: these models do not include fatalists, but instead include the aforementioned communitarians (or humanitarians). Most other survey-tested models contain fatalism and have achieved statistically supported results (e.g., Chai, Liu, and Kim 2009; Kahan et al. 2007).

Communitarians and humanitarians are, in my view, best understood as a compromise between hierarchists and egalitarians. As elaborated in the discussion of Justices Kennedy and Souter, they seek similar goals, just to different degrees and with different levels of compromise between principles. From my editorial analysis, it appears that Justices Kennedy and Souter are
communitarians. Whether or not this is truly the case will require further
examination, wherein these “compassionate conservatives” are scrutinized in
relation to egalitarians, hierarchists, and even fatalists. If further evidence unveils
a picture of communitarians as simply wanting a benevolent government that
structures their lives and takes care of them, but not actually creating one
themselves, they would potentially be a type of fatalist, resigned but hopeful that
fate will smile on them. If they are hybrids of egalitarianism and hierarchism, as I
suspect, they would be worth studying as potential guides to ideological
compromise.

If Justices Kennedy and Souter are in fact located between egalitarianism
and hierarchism it may explain why both justices were rated as moderate
conservatives in Segal et al. (1995, 816) and were appointed by Republican
Presidents (Ronald Reagan and George H. W. Bush, respectively), but fell into
egalitarian territory, generally thought to be the purview of liberals. Swedlow
(2008) and Swedlow and Wyckoff (2009) consider liberals essentially analogous
to egalitarians and conservatives analogous to hierarchists, though the CT terms
have broader implications for behavior and interests.

Methodological Suggestions

The entire project of analyzing judicial behavior, or any behavior for that
matter, is predicated on first correctly establishing the cultural bias(es) of the
person or group under examination. The issue of determining cultural biases among Supreme Court justices by examining newspaper editorials was thus far an untested methodology. As such, there were bound to be difficulties involved in constructing the analytical framework, as well as unforeseen ambiguities in the editorials themselves. However, as Sam Harris points out in his own attempt to break with an institutionalized paradigm, it is a mistake to confuse a lack of answers in practice with a lack of answers in principle (Harris 2010). Operating under that mentality, I acknowledge the shortcomings of this project, but nonetheless believe that, through careful application and revision, the methodology used here can be a source of learning and a furthering point along the trajectory of Cultural Theory.

As with most scientific endeavors, the larger the N, the more statistically reliable the results are. In this study, the N is not very large, given limitations on a single newspaper to publish a finite number of editorials per justice and my limited amount of time. Table 3 below summarizes the number of articles coded for each justice. The variety of newspapers is also more limited here than in Segal and Cover’s 1989 research. By increasing the number and variety of newspapers, the cultural biases could be stated with greater assurance. Furthermore, it is imperative to compare these results with actual opinions written by the justices to determine the strength of the relationship between derived cultural biases and the justices’ actual work, which was discussed in Hypothesis.
4. Another issue in the results examined here is the lack of a common denominator for the coded statements. Ideally, I would have divided the number of statements in each article by the article’s word count. Unfortunately, word counts were not available for every article.

<table>
<thead>
<tr>
<th>Justice</th>
<th>NYTimes</th>
<th>WashPost</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breyer</td>
<td>8</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>8</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Kennedy</td>
<td>8</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>O'Connor</td>
<td>4</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>6</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Scalia</td>
<td>6</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Souter</td>
<td>11</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>Stevens</td>
<td>6</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Thomas</td>
<td>8</td>
<td>4</td>
<td>12</td>
</tr>
</tbody>
</table>

There is, with every project such as this, a limitation on the scope of sources inferences can be drawn from. In this case, it was the number of editorials published by the New York Times and Washington Post. Given more time, a fuller analysis of each justice would include an examination of their early biographies. Life events, as mentioned above, are bound to impact justices’ cultural bias. The experiences undergone in each of their unique lives, the opinions they have expressed in written and spoken statements, and other such informal communications prior to the justices’ time on the Supreme Court, ought to be analyzed to give the richest depiction of each justice’s cultural bias.
CONCLUDING THOUGHTS

My undertaking here was to examine the application of Cultural Theory to editorial analysis as a means of gauging Supreme Court justices’ ideologies. Having done that, I then asked whether or not the results offered any greater understanding than what we currently have in looking at judicial behavior. Acknowledging its shortcomings, I believe this vein of study has offered, and will continue to provide, a deeper insight into swing-vote justices than the current liberal/conservative dichotomy. Justices Anthony Kennedy and David Souter are not an anomaly in their difficulty to pin down, and they will not be the last of the particular stripe to sit on the Court. When it comes to understanding this particular type of person, both on and off the bench, Cultural Theory truly shines in explaining their behavior comparable to liberal or conservative terminology.

As I mentioned in the review of theories of judicial decision-making, none of them, with the exception of the Attitudinal Model, makes more than cursory remarks regarding the origin of judicial preferences, and even the Attitudinal Model has a very limited discussion of that origin, as it merely adopts the liberal/conservative terminology, apparently by default. What I have attempted to do here is illustrate how a general theory of human behavior (Cultural Theory) can be adapted to fit the model of judicial behavior specifically. In response to Brendon Swedlow’s quote at the beginning of the paper, it is less than clear how
much I like the results. There are obvious improvements to be made, especially regarding methodology. However, when it comes to fitting Cultural Theory into other theories of judicial behavior, I believe a successful hybridization is underway. While this paper says little about the accuracy of those theories, there is almost no reason Cultural Theory could not be used as the basis for judicial preferences, so ubiquitous yet unclearly defined in all of the major theories of judicial decision-making.

When Aaron Wildavsky and his colleagues began developing Culturally Theory, they recognized its strength and implications. It is up to today’s scholars to realize the fruits of Wildavsky’s efforts. It is also our responsibility to learn as much as we can about any theory seeking to explain how and why our society functions as it does. Cultural Theory at its most basic level is a means of understanding our society and others. Understanding judicial decision-making is one element furthering that broad humanistic goal, and an integral piece of understanding the puzzle that is American democracy. As the Supreme Court takes on an ever-more-active role in America’s governance, it will be of utmost importance to understand this body’s workings, and to test whether or not the Court is serving the American people as it was designed to. Cultural Theory, as I have tried to illustrate here, is one means of answering these and other necessary questions.
## Rehnquist 7 Natural Court: August 03, 1994 - September 28, 2005

<table>
<thead>
<tr>
<th>Justice</th>
<th>Date of Nomination</th>
<th>Date of Confirmation</th>
<th>Appointing President</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breyer, Stephen G.</td>
<td>May 17, 1994</td>
<td>July 29, 1994</td>
<td>Clinton (D)</td>
</tr>
<tr>
<td>Ginsburg, Ruth Bader</td>
<td>June 14, 1993</td>
<td>August 3, 1993</td>
<td>Clinton (D)</td>
</tr>
<tr>
<td>Kennedy, Anthony M.</td>
<td>November 30, 1987</td>
<td>February 3, 1988</td>
<td>Reagan (R)</td>
</tr>
<tr>
<td>Rehnquist, Willam</td>
<td>October 22, 1971</td>
<td>December 10, 1971</td>
<td>Nixon (R)</td>
</tr>
<tr>
<td>Scalia, Antonin</td>
<td>June 24, 1986</td>
<td>September 17, 1986</td>
<td>Reagan (R)</td>
</tr>
<tr>
<td>Stevens, John Paul</td>
<td>November 28, 1975</td>
<td>December 17, 1975</td>
<td>Ford (R)</td>
</tr>
<tr>
<td>A</td>
<td>B</td>
<td>C</td>
<td>D</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Economic Growth/Benefits</strong></td>
<td>Individualist</td>
<td>Egalitarian</td>
<td>Hierarchist</td>
</tr>
<tr>
<td>The individualist views all economic growth as generated by individuals, and as such, theirs to keep, no matter how it is distributed. There are bound to be economic winners and losers, and that is fully accepted. Individualists view business as a good thing, and the market as the most just form of distributing economic goods.</td>
<td>Equal distribution of goods and resources is the primary concern of egalitarians. Growth is only appreciated as a means of achieving equality.</td>
<td>“Rising tides lift all boats” is an accepted principle for hierarchists. While gains are concentrated at the top, hierarchists will engage in modest redistribution if they feel the hierarchy is threatened by internal discontent.</td>
<td>Wealth is nice to fatalists, but they believe their personal efforts will have no bearing in generating it for themselves. Only Lady Luck can bring them good fortune.</td>
</tr>
<tr>
<td><strong>Scarcity Resources/Environmental Issues</strong></td>
<td>Individualists tend to not worry over scarcity, as they would as long as potential risk to transacting. They also view man as capable of adapting and succeeding no matter what, thus rendering scarcity unimportant. They believe resourceful individuals should use up resources as they become available. As this explains, individualists are not worried about environmental degradation or climate change. Industrious and creative individuals will solve these problems later if there is a profit to be made.</td>
<td>Egalitarians view resources as scarce and in need of protection from a mean-spirited “system” that robs people of their fair share. They see resources as jointly owned in equal share by all members of their select group. Resources should be preserved as long as possible, with great care. Egalitarians worry considerably about the environment, and they believe that environmental stewardship is a necessary activity. Man is capable of corruption, in both his own actions and in the realm of nature.</td>
<td>Hierarchists use scarcity as a justification for resource allocation. The governing institution knows best how to allocate resources, and so it shall. This view leads to environmental management, but not necessarily to a heightened degree. Hierarchists respond to issues they feel threaten by, and generally ignore those issues that seem benevolent.</td>
</tr>
<tr>
<td><strong>Personal Choice/Individual Freedom</strong></td>
<td>Individualists are focused on maintaining the highest degree of personal freedom possible. The only coercion they support is to hold people to their word. Freedom to contract with both groups and individuals is paramount for individualists.</td>
<td>Egalitarians are concerned with maintaining the highest level of freedom possible for members of the group, but supports curtailing freedoms that may disrupt group harmony or in any way coerce another member of the group. Group wellbeing comes before individual liberty.</td>
<td>Hierarchists are willing to curtail personal freedoms to ensure the values of the hierarchy are maintained. Individuals can be coerced by both the governing institution and by those individuals who are higher up the hierarchy.</td>
</tr>
<tr>
<td><strong>View of Government</strong></td>
<td>&quot;That government is best which governs least&quot; would be an apt motto for individualists. They view government as intrusive and unnecessarily coercive, and as such, do not support an active government. The one function of government they do appreciate is enforcement of contracts, for without this, their beloved free market would devolve to chaos.</td>
<td>Egalitarians have a skeptical view of government, as it often leads to corrupting people and purifying society. However, government is necessary to ensure the group is secure and to redistribute resources throughout the group, thus ensuring equality of condition. Egalitarians appreciate a government that does these things, but are quick to cast blame on a government that coerces individuals beyond these goals. The best government decisions are those reached by consensus, as they draw on every member of the society equally.</td>
<td>Hierarchists are the strongest supporters of government. They believe in government as a means of keeping society together, and they fully support using coercive measures to achieve their desired results. Heavily structured and top-down governments, with an emphasis on expertise and specialization, are the favored institutions of hierarchists.</td>
</tr>
</tbody>
</table>
## Appendix II: Coding Scheme

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competition</td>
<td>Individualists view competition as the ultimate means of sustenance. Competition is necessary, because it rewards people according to their efforts and skills. Individualists dislike anything that hinders competition or attempts to mitigate the effects of competition.</td>
<td>Egalitarians distrust competition, as it creates divisions between people and their livelihoods. While some people may earn more than others, the end result should be equalized through some kind of institutional mechanism, such as income transfers through taxation.</td>
<td>Hierarchists appreciate competition if that is how hierarchy is built. For instance, if the hierarchy leads itself as a pure meritocracy, then stratification would be based on competitive achievements. However, if the hierarchy is related to other factors, such as birth or ethnicity, then no amount of competition will override the prevailing influence of where one ends up in the hierarchy.</td>
</tr>
<tr>
<td>Ideal Judiciary</td>
<td>Enforcer of property rights and law and order - don’t allow shocks or interference with the market; use judicial review to protect freedoms and expose government inefficiencies; keep government information open to public; limit government power over the private sector; protect the secrecy of private sector information.</td>
<td>Enforcer of human rights laws; maintain law and order in accordance with group ideals; use judicial review to protect freedoms and fill policy vacuums; make public and private sector information widely available to expose inefficiencies and inequities.</td>
<td>Enforcer of property rights and law and order; limited judicial oversight of executive and legislative branches; limited judicial review; restricted access to public information; limit judicial policy-making, uphold government power over private sector and enforce business regulations, uphold statutory right of access to private sector information.</td>
</tr>
<tr>
<td>Career Experience(s)</td>
<td>Entrepreneur, self-employed, business owner</td>
<td>Humanitarian, rights activist</td>
<td>Experience with climbing through a hierarchy. Starting at the bottom and working to the top</td>
</tr>
<tr>
<td>Experience(s) with Government</td>
<td>Anti-regulation, possibly a business lobbyist, emphasis on individual liberty, not by government protection, but by government not being involved in the issue at all</td>
<td>Efforts to expand government protection to those not protected. Individual liberty is important, but government should ensure protections for the people</td>
<td>Working their way up through the government over extended time, military experience</td>
</tr>
<tr>
<td>Key Group Affiliation(s)</td>
<td>U.S. Chamber of Commerce, Club for Growth, Federalist Society anti-regulation groups</td>
<td>NAACP, ACLU, civil rights organizations</td>
<td>Catholic Church, groups that exclude based on individual characteristics, military experience</td>
</tr>
<tr>
<td>Personality</td>
<td>Strong-willed, independent, resourceful, hard working</td>
<td>Empathetic, worried about human nature and equality, inclusive, fair to all</td>
<td>Structured, regimented, rule-abiding, cautious when making decisions rather than rushing to conclusion, incremental policy change</td>
</tr>
<tr>
<td>Cultural Bias Description</td>
<td>Individualists are subject to both low grid and group. Between individuals, there are few social prescriptions, and the individualist is free to interact with as many or few social networks as he or she chooses. However, this does not mean the person is not engaged in exerting control over others. Individualists are free from restrictions by groups or other individuals, but are perfectly free to restrict the freedoms of others, and are often measured by the size of the following they can attract.</td>
<td>Egalitarianism is characterized by high group affiliation and differentiation between group members and external society but minimal social structure within the group. Egalitarians are generally free to do as they please within their specific unit, but are defined as members of their group, rather than as individuals.</td>
<td></td>
</tr>
</tbody>
</table>

**Factualists**, yet again, have no appreciation for competition. As fate is the sole arbiter of who succeeds and who does not, competition will not get them anywhere.
**APPENDIX III: CODED STATEMENTS FOR JUSTICE O'CONNOR**

<table>
<thead>
<tr>
<th>Statement</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>In a statement to the committee, Mrs. O’Connor said that she supported a limited role for the Federal courts, and was “keenly aware of the problems associated with judicial activism.”</td>
<td>C6</td>
</tr>
<tr>
<td>“The separation of powers principle requires judges to avoid substituting their own views of what is desirable in a particular case for those of the legislature,” she wrote, adding that judges were “ill-equipped” to substitute their views for the executive or legislative branches, which she said were more “attuned to the public will” and more “politically accountable.”</td>
<td>C4/C6</td>
</tr>
<tr>
<td>She said she had worked for equal rights for women by seeking repeal of “a number of outmoded Arizona statutes,” including one that barred women from working more than eight hours a day. She said she had also developed model legislation to allow women to jointly manage property held with their husbands.</td>
<td>Egal. A1/B5</td>
</tr>
<tr>
<td>“[T]he proper role of the judiciary is one of interpreting and applying the law, not making it.”</td>
<td>C6</td>
</tr>
<tr>
<td>The subject of abortion, she continued, “is a valid one for legislative action, subject to any constitutional restraint or limitation.”</td>
<td>C4</td>
</tr>
<tr>
<td>In 1974, she voted against a resolution calling for an anti-abortion amendment because, she said, the measure had not received “proper reflection or consideration.”</td>
<td>C10</td>
</tr>
<tr>
<td>She expressed doubts about court-ordered busing for integration and about the exclusionary rule, which bars the use at trial of illegally obtained evidence.</td>
<td>C11/C4</td>
</tr>
<tr>
<td>Her comments hinted at support for the so-called “good faith exception” to the exclusionary rule… under which evidence is admissible if acquired by the police in a mistaken by “good faith” belief that their procedures were correct.</td>
<td>C4</td>
</tr>
<tr>
<td>Judge O’Connor said she supported Arizona’s death penalty statute</td>
<td>A6/C6</td>
</tr>
</tbody>
</table>
Judge O’Connor said she… believed that women should not fight in battlefield combat

<table>
<thead>
<tr>
<th>Judge O’Connor said she… did not object to the presence of cameras in the courtroom.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiv./ Egal. A4/B4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Asked whether judges should belong to private clubs that discriminate in membership, she said she belonged to three all-female organizations from which she did not plan to resign.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Egal./ Hierarch. B11/C11</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>On the Court, though, she is likely to be independent, often unpredictable, as any Justice should be.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiv. A10</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Judge O’Connor told the senators that, in her view, the proper job of a Supreme Court justice is “interpreting and apply the law, not making it.”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hierarch. C6</td>
</tr>
</tbody>
</table>
REFERENCES


Supreme Court Database (object name SCDB_2011_03; accessed December 4, 2011). http://supremecourtdatabase.org/index.php


