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Cultural Cognition Insights Into Judicial Decisionmaking in Employee Benefits Cases

Paul M. Secunda

CULTURAL COGNITION INSIGHTS INTO JUDICIAL DECISIONMAKING IN EMPLOYEE BENEFITS CASES

PAUL M. SECUNDA*

People make mistakes. Even administrators of ERISA plans.[1]

I. INTRODUCTION

This article examines the theory of cultural cognition in a specialized context with implications for judicial decisionmaking.[2] It seeks to investigate how opinion-writing and institutional judicial debiasing strategies may work in practice in the particularly arcane and maddeningly

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* Associate Professor of Law, Marquette University Law School. I dedicate this article to my wife, Mindy Young-Secunda, without whose love and support I would be unable to focus on, and complete, my many legal academic projects. I must make two disclosures at the outset of this article. First, there is the distinct possibility that the writings contained herein are filled with the same culturally-motivated cognition and cognitive illiberalism that I seek to eliminate in future ERISA cases. Second, part of this bias might inevitably flow from the fact that I co-authored an *amicus* brief in support of the losing side in the *Conkright* case. *See Brief of Law Professors as Amici Curiae in Support of Respondents*, Conkright v. Frommert, 130 S. Ct. 1640 (2010) (No. 08-810), 2009 WL 4074863 (filed with Donald Bogan). Finally, although all views contained herein are mine alone, I would like to thank Nancy Levit, Brendan Maher, Peter Stris, Andrew Stumpff, Donald Bogan, John Langbein, and Michael Duff, for their helpful comments and insights on earlier drafts of this paper.

[1] Conkright v. Frommert, 130 S. Ct. 1640, 1644 (2010) (Robert, J.).

[2] Culturally-motivated cognition is "the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires." Dan M. Kahan et al., *'They Saw a Protest': Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853 (2012) [hereinafter *They Saw a Protest*]. Professor Kahan and other members of Yale Law School's Cultural Cognition Project have methodically applied culture cognition theory to various disputed matters in different areas of the law. *See* THE CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, http://www.culturalcognition.net (last visited Feb. 28, 2013). The Project is made up of "a group of scholars interested in studying how cultural values shape public risk perceptions and related policy beliefs." *Id.*

complex area of employee benefits law,[3] under the Employee Retirement Income Security Act of 1974 (ERISA).[4] The proposal advanced here is to professionalize the judicial corps through the establishment of a specialized ERISA court based on the existing bankruptcy court model.[5] This approach will promote opinion-writing, debiasing techniques that reduce the amount of cognitive illiberalism in employee benefits law opinions.[6]

The establishment of ERISA courts in necessary to counteract the increasing phenomenon of decisionmaking hubris with cognitive origins, which is prevalent today in many labor and employment law cases in the United States.[7] Anthropological and psychological explanations, based on

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[3] The U.S. Supreme Court recognized the huge interpretive challenges ERISA poses recently in *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010): "[T]he Employee Retirement Income Security Act of 1974 is 'an enormously complex and detailed statute,' and the plans that administrators must construe can be lengthy and complicated." 130 S. Ct. at 1644 (quoting, in part, Mertens v. Hewitt Associates, 508 U.S. 248, 262 (1993)); *see also* Andrew W. Stumpff, *The Law is a Fractal: The Attempt to Anticipate Everything*, LOY. U. CHI. L.J. (forthcoming 2013), *available at* http://ssm.com/abstract=2157804 (discussing ERISA as having "maze-like complexity" and being "borne of the attempt to be specific about every possible fact situation.").

[4] 29 U.S.C. § 1001-1416 (2011). Following the practice of other ERISA scholarship, this article utilizes the original section numbers as enacted by Congress, rather than the United States Code Section numbers.

[5] I am not the first one to advance the idea of specialized ERISA courts, but I am the first one to do so in quite some time and based on lessons learned from cultural cognition theory. John Langbein wrote, in 1990:

> If the Court is bored with the detail of supervising complex bodies of statutory law, thought should be given to having that job done by a court that would take it seriously. The solution long familiar on the Continent is to have separate courts of last resort superintend such fields. A supreme court specializing in ERISA matters, and probably in Social Security and tax law as well, would treat these subjects with respect, which is more than can be said for the U.S. Supreme Court in [*Firestone Tire & Rubber Co. v.*] *Bruch* [489 U.S. 101 (1989)] . . . .

ERISA is an ideal field for experimenting with specialized courts: It is complex, it is important, and it is relatively well delimited from other fields. The evidence from *Bruch* is that this is a sphere of subject matter jurisdiction that the Supreme Court would scarcely miss. *See* John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 229 (1990); *see also* LAWRENCE BAUM, SPECIALIZING THE COURTS 5 (2011) (maintaining that many courts in the United States are already more specialized than most observers realize).

[6] Cognitive Illiberalism is an interpretative method that "incur[s a] cost to democratic legitimacy associated with labeling the perspective of persons who share a particular cultural identity 'unreasonable' and, hence, unworthy of consideration in the adjudicatory process." Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. K. REV. 837, 842 (2009) [hereinafter *Whose Eyes Are You Going to Believe*].

[7] *See id.* (contending that Justice Scalia's opinion for the majority in *Scott v. Harris*, 550 U.S. 372 (2007), constituted "a type of decisionmaking hubris that has cognitive

cultural cognition theory, help in providing meaningful insights into some of the more controversial of these decisions.[8] Indeed, cultural cognition robustly explains how Justices' cultural background values in labor and employment law cases may unconsciously lead to different perceptions of legally-consequential facts in such cases.[9]

The resulting opinions by the Justices in these labor and employment cases can suffer from cognitive illiberalism, which too readily discounts the views of dissenters in favor of the majority's views of the case. Yet, social science has been shown to hold out promise for ridding legal decisions of this form of delegitimizing bias while simultaneously making these judicial opinions more acceptable to a larger segment of society.[10] More specifically, opinion-writing debiasing methods, including utilizing humility as a judicial habit of mind and writing in an expressively over-deterministic way, may make labor and employment decisions less polarizing.[11]

In addition to opinion-writing debiasing strategies, cognitive illiberalism may be susceptible to certain institutional debiasing strategies that may help to constrain some of the more potent forms of this type of bias.[12] Although there are advantages and disadvantages that come with specialized courts and judges,[13] "the promise of opacity" and expertise in judicial decisionmaking that accompany specialized courts nevertheless make them an attractive alternative to more traditional models.[14] Judges on

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origins and that had deleterious consequences that extend far beyond the Court's decision in *Scott*.").

[8] *See* Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 111 (2010) [hereinafter *Cultural Cognition at Work*].

[9] *See id.* at 121-148 (analyzing, through the lens of cultural cognition theory, the cases of NLRB v. Curtin Matheson, 494 U.S. 775, 793 (1990) and Engquist v. Oregon Dep't of Agric., 552 U.S. 591, 594 (2008)).

[10] *See generally* DAVID W. ROHDE AND HAROLD SPAETH, SUPREME COURT DECISIONMAKING (1976). *But see* Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, Speech at Loyola Law School, Los Angeles (March 19, 1993), *available at* http://notabug.com/kozinski/breakfast (noting that although judges do have considerable discretion in certain aspects of their decisions, "[t]hey simply can't do anything they well please.").

[11] *See* ROHDE & SPAETH, *supra* note 10, at 140-48.

[12] *See* Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 392-406 (2012) [hereinafter *Cognitive Illiberalism*] (examining four different institutional models, including: magistrate model, bankruptcy court model, Article III appellate court model, and British employment tribunal model).

[13] For advantages, *see* BAUM, *supra* note 5, at 4 (describing "neutral virtues" of judicial specialization as "quality of decisions, efficiency, and uniformity in the law."). For disadvantages, *see id.* at 2 ("Specialization leads people to take narrow perspectives that limits and biases their understanding of matters they address. Further, specialization makes judges more susceptible to external control or 'capture.'").

[14] *See Cognitive Illiberalism*, *supra* note 12, at 410-414.

such specialized courts simultaneously have familiarity with complex subject matters and are relatively shielded from the normal partisan politics surrounding high-stakes, judicial decisionmaking. Although no system of judicial decisionmaking will be completely free of the effects of cultural cognition,[15] such debiasing strategies could lead to employee benefit decisions more likely based upon widely accepted perceptions of fact and evaluations of legal arguments rather than upon the unconscious cultural biases of the sitting judge.[16]

This article proceeds in three parts. The first part summarizes the basic principles behind the phenomena of cultural cognition and cognitive illiberalism.[17] The second part of the paper then considers – in substantial detail – a possible example of the operation of these phenomena in the recent U.S. Supreme Court ERISA case of *Conkright v. Frommert*.[18] Lastly, the third part illustrates how combining opinion-writing and institutional debiasing strategies through the establishment of federal ERISA courts could potentially provide a psychologically realistic mechanism for counteracting cognitively illiberal reasoning in future ERISA cases.[19]

II. A BRIEF OVERVIEW ON CULTURAL COGNITION THEORY AND THE CONCEPT OF COGNITIVE ILLIBERALISM

This Part provides a brief synopsis of cultural cognition theory and presents the concept of cognitive illiberalism in judicial decisionmaking. The first section describes the social science bases of cultural cognition and the manner in which judges' values unconsciously affect their decisionmaking, especially in fields like ERISA where there is a high degree of complexity and indeterminacy in the law.[20] The second section discusses the problems associated with cognitive illiberalism, which causes judges to ignore or downplay the views of dissenters in favor of their own

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[15] *See id.* at 111 n. 15 ("[S]ome forms of judicial bias in judicial opinions are desirable. Judges should generally evaluate situations in a way that embodies a stance toward phenomena in the world that accurately expresses what they . . . care about."). This article merely seeks to reign in decisionmaking which exhibits "overconfidence in the unassailable correctness of the factual perceptions [that judges] hold in common with [their] confederates." *Id.* (citing *Whose Eyes Are You Going to Believe*, *supra* note 6, at 843).

[16] *See* BAUM, *supra* note 5, at 32 ("The propositions that specialists can do more than generalists and that they can do their work better seems self-evident to most people.").

[17] *See infra* at pp. 3-10

[18] 130 S. Ct. 1640 (2010); *see infra* at pp. 10-18.

[19] *See infra* pp. 18-25.

[20] *See generally* Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433 (2010) (offering a theoretical overview of uncertainty in ERISA legal rules and the judicial reaction thereto). Interestingly enough, Stris and Maher represented the plaintiffs in *Conkright*.

views in a case.[21] Part III will then turn to a case study of an ERISA decision that exhibits signs of both cultural cognition and cognitive illiberalism.[22]

A. Cultural Cognition Theory: New Legal Realism Meets Anthropology and Psychology

As an initial matter, cultural cognition, also sometimes referred to as culturally-motivated cognition, can be thought of as an anthropologically and psychologically-based type of New Legal Realism.[23] That is, this legal approach has been advanced as an antidote to the prevailing neoclassical economic view of the law that has dominated legal discourse in the academy over the last few decades.[24] As Professors Nourse and Shaffer have recently commented in discussing this intellectual movement, the challenge for New Legal Realism scholars is to promote:

> a framework of law strongly enough to restrain human weakness and irrationality but supple enough to allow people to govern themselves, a framework supported by a scholarly agenda that provides new analytic and theoretical tools to understand a world in which we have come to see ourselves as both highly vulnerable to institutional collapse and yet capable of effecting change.[25]

Cultural cognition theory fits squarely into this legal framework by both seeking to construct a framework of law to understand human irrationality, while simultaneously providing analytical and theoretical tools for preventing future conflicts among individuals over legally

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[21] *See infra* pp. 9-10.

[22] *See infra* pp. 10-18.

[23] Other scholars have developed and discussed various forms of "New Legal Realism." *See, e.g.*, Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 64-65 (2009) (surveying the scholarship and arguing that "'new legal realism' is a response to a 'new formalism' – that derived from neoclassical law and economics."); *see also* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be*," 2005 WIS. L. REV. 365, 387 (2005); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2004) (citing Karl N. Llewellyn, *Some Realism about Realism – Responding to Dean Proud*, 44 HARV. L. REV. 1222 (1931)).

[24] What these approaches have in common is that they seek to respond to recent world events, which "highlight in dramatic fashion how the formal assumptions of neoclassical [economic] theory failed to predict or prevent a massive world economic collapse, not to mention massive political mobilization and a historic election [in 2008]." Nourse & Shaffer, *supra* note 23, at 65.

[25] *Id.* at 64.

consequential facts.[26] These conflicts especially arise when individuals must make sense of uncertain and inherently ambiguous facts in the many areas of our increasingly complex legal landscape.[27]

Cultural cognition theory has its roots in both anthropology and social psychology. Anthropologically, it relies on studies that explore the relationship between risk perceptions and cultural worldviews.[28] These worldviews "are the filters through which a person views the world – how it is and how it should be – that profoundly influence peoples' attitudes."[29] A number of scholars have developed a typology of cultural worldviews which categorizes people based on their ideas about the relationship of the individual to the group (individualistic versus communitarian orientations) and based on their views on the nature of society (hierarchical versus egalitarian orientations).[30] As far as the relationship of the individual to the group, one is considered "low group" if they favor individualistic social orders, and one is considered "high group" if they support solidaristic or communitarian social orders.[31] On the other hand, as to views about the nature of society, one is "low grid" if they favor individualistic social orders, and one is "high grid" if they believe in a society with hierarchies.[32]

By combining the group and grid characteristics described above, one finds the various forms of prototypical cultural worldviews in modern society. For instance, members of the Democratic Party and people of color tend to be high group/low grid (communitarians/egalitarians), while members of the Republican Party and politically-conservative, white males are broadly seen as low group/high grid (individualistic and hierarchical). These anthropological characterizations help us understand, while are highly predictive of the ways in which different populations vary in their factual perceptions about the important legal and political issues of the

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[26] *See supra* note 2 and accompanying text ("The [Cultural Cognition] Project also has an explicit normative objective: to identify processes of democratic decisionmaking by which society can resolve culturally grounded differences in belief in a manner that is both congenial to persons of diverse cultural outlooks and consistent with sound public policymaking.").

[27] *See* Nourse & Shaffer, *supra* note 23, at 128-129.

[28] *See* MARY DOUGLAS, NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY 54-68 (1970).

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

[30] *See Cultural Cognition at Work*, *supra* note 8, at 113 (citing Komhauser, *supra* note 29, at 258).

[31] *See id.* (citing Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 156-57 (2006) [hereinafter *Cultural Cognition and Public Policy*]).

[32] *Id.*

day.[33]

For the most part, social psychology provides important insights into the *mechanisms* (cognitive-dissonance avoidance, affect, biased assimilation, and group polarization) that help explain the significant role cultural values play in assisting individuals in determining which state of affairs promote their interests. The upshot is that individuals seek to: (1) avoid conflict between new ideas and preexisting beliefs, (2) reject ideas that evoke emotions such as fear or anger, (3) accept new information only if consistent with their prior beliefs, and (4) rely only on others whom they trust to tell them which new information to believe and which to discount.[34] Taken together, these psychological mechanisms explain that because individuals, in many situations, do not have access to the necessary factual information to form their own opinions on issues, they tend to fall back on their own preexisting beliefs, "gut" feelings, or other individuals in whom they already have confidence.[35] The consequence of this dynamic is that, "[s]tates of persistent group polarization are . . . inevitable – almost mathematically so – as beliefs feed on themselves within cultural groups, whose members stubbornly dismiss as unworthy insights originating outside the group.[36]

Relying on these anthropological and social insights, cultural cognition theory posits that cultural worldviews have an unconscious, but significant, influence on the perception of fact.[37] In the realm of judicial decisionmaking, cultural values can be seen as acting as an unconscious

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[33] *See* Dan M. Kahan et al., *Cultural and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465 (2007) (illustrating that cultural worldviews more powerfully explain differences of risk perception and legally-consequential facts than do other individual characteristics).

[34] *See Cultural Cognition at Work*, *supra* note 8, at 115-17.

[35] *See id.* at 116.

[36] *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 125 (2007). Indeed, various empirical studies conducted by Kahan and his colleagues have established that persons with individualist, hierarchical values tend to be skeptical about facts and arguments that support a more communitarian or egalitarian social model because endorsing those arguments would work counter too their culturally-identified group. *See, e.g.*, *Whose Eyes Are You Going to Believe*, *supra* note 6 (linking individual views on whether police used excessive force in the U.S. Supreme Court case of *Scott v. Harris*, involving a high-speed car chase, to a person's cultural worldviews and their perceptions of the legally-consequential facts in the *Harris* case); *see also They Saw a Protest*, *supra* note 2 (establishing that cultural cognition theory provides important insights into how individuals perceive facts in a hypothetical protest scenario and how they distinguish between constitutionally protected speech and unprotected conduct).

[37] *See* Dan M. Kahan, *Foreword: neutral Principles, Motivated Cognition, and Some Problems For Constitutional Law*, 125 HARV. L. REV. 1, 23 (2011) [hereinafter *Foreword: Neutral Principles*] ("Cultural cognition refers to the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews.").

influence on judicial cognition.[38] In other words, what the legally consequential facts say to a judge largely depends upon to whom the facts are speaking.[39]

The cultural world views of judges unavoidably influence them, especially where judges have gaps in their legal knowledge or are encountering new types of information for the first time.[40] The resulting legal opinions are written in a manner that is congenial to their preexisting cultural values.[41] This decisionmaking dynamic appears to be at work in some general labor and employment law cases,[42] so it would appear to equally exist in the employee benefit law context where legal uncertainty and ambiguity especially reign.[43]

One need only consider the most common type of ERISA claim,[44] the denial-of-benefit claim under ERISA section 502(a)(1)(B), to see that this area is rife with ambiguities.[45] These cases concern the entitlement of an

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[38] *See Cultural Cognition and Public Policy*, *supra* note 31, at 157-58; *see also* Dan M. Kahan, *"Ideology In" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 421 (2009) (maintaining that same cultural cognition dynamic affects judges in deciding cases as affects individuals when they interpret ambiguous facts).

[39] *See Cognitive Illiberalism*, *supra* note 12, at 381; *see also Whose Eyes Are You Going to Believe*, *supra* note 6, at 891 ("The [U.S. Supreme] Court's failure to recognize the culturally partial view of social reality that its conclusion embodies is symptomatic of a kind of cognitive bias that is endemic to legal . . . decisionmaking and that needlessly magnifies cultural conflict over and discontent with the law.").

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

[41] *See Cultural Cognition at Work*, *supra* note 8, at 108, 111. This means that most judges end up not being the ideological partisans they are sometimes made out to be. Rather, they are disagreeing fundamentally about the legally consequential facts upon which case outcomes turn

[42] *See id.* at 113-14; *see also Cognitive Illiberalism*, *supra* note 12, at 384 ("In this regard, one need only consider recent, heated debates between management and labor interests concerning gender discrimination against women in the American workplace, the need for vital private and public sector unions in the American workplace, and the debate over whether the employment at will doctrine should be discarded into the dustbin of history.").

[43] For a more evocative view of ERISA's complexity, *see* DeFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 454 n. 1 (3d Cir. 2003) (quoting John Milton, *Paradise Lost*, bk. 2, 11 592-94 (1667), *in* 1 NORTON ANTHOLOGY OF LITERATURE 1445, 48 (M.H. Abrams ed., 5th ed. 1986)) (describing ERISA as a "gulf profound as the Serbonian bog/Betwixt Damiata and Mount Casius old/Where armies whole have sunk.").

[44] *See* RICHARD A. BALES, JEFFREY M. HIRSCH & PAUL M. SECUNDA, UNDERSTANDING EMPLOYMENT LAW 226 (2007) ("Claims for benefits are by far the most common types of claims under ERISA.").

[45] *See, e.g.*, John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trial of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317,

individual to pension or welfare benefits based on their employer-provided benefit plans.[46] Cultural cognition theory would explain that hierarchical and individualistic-oriented judges tend to favor employers and plan administrators in their interpretation of the plan language in order to ensure plan predictability, uniformity, and low administrative costs.[47] On the other hand, judges with a communitarian and egalitarian bent would tend to see facts in a way that would allow participants and beneficiaries to recover contested benefits since the "primary purpose" of ERISA is to ensure employees receive promised benefits.[48] The discussion of *Conkright v. Frommert* in Part III below illustrates this dynamic a play in such a U.S. Supreme Court denial-of-benefit case.[49]

For now, however, it suffices to say that in the employee benefits law context, as in other complex areas of law, cultural cognition provides a robust explanation of how judicial values impact legal decisions and how disagreements come to exist between judges in highly-charged cases.[50] Indeed, cultural cognition theory's emphasis on judicial disagreements about legally consequential facts over which there is some speculation helps to explain why decisions in these cases tend to be infused with cognitive illiberalism.

B. Cognitive Illiberalism and Its Impact on Neutral Judicial Decisionmaking

Cognitive illiberalism is "the vulnerability of . . . legal decisionmakers to betray their commitment to liberal neutrality by unconsciously fitting their perceptions of risk and related facts to their sectarian understanding of the good life."[51] Cognitive illiberalism is primarily problematic in the judicial decisionmaking context because it threatens neutral

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1320 (2003).

[46] *See* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 146-48 (2009) [hereinafter *Sorry, No Remedy*] (describing the nature of benefit denial remedy and the standard for federal court review of these plan administrator decisions).

[47] *See, e.g.*, *id.* at 134 (noting that "the Court has . . . emphasized a subsidiary policy of containing employee benefits plan costs . . . to ensure that employers continue to voluntarily adopt ERISA plans."). Indeed, Supreme Court Justices can be readily divided by their ERISA interpretative philosophies into two camps: "literalists" and "remedialists." *See id.* at 159-65. Broadly speaking, literalists tend to be judges with hierarchical and individualistic tendencies, while remedialists tend to the communitarian and egalitarian in their orientation.

[48] *Id.* at 133 ("[P]rimary purpose of ERISA is clearly stated in [statute] to be the protection of employees' benefits."); *see also* S.R. No. 93-127 (1973); H.R. Rep. No. 93-533 (1973).

[49] *See infra* at pp. 12-21.

[50] *See Cultural Cognition at Work*, *supra* note 8, at 109.

[51] *Id.* at 383.

decisionmaking.[52] So, whereas the phenomenon of cultural cognition explains how values unconsciously inform judicial decisionmaking, cognitive illiberalism explains why judges write legal opinions that "tend selectively to credit empirical information in patterns congenial to their cultural values."[53] This phenomenon causes judges to discount the views of groups with different cultural outlooks and to, subsequently, alienate those opposing groups.[54]

As discussed above, in the ERISA context, this dynamic transforms everyday debates on how to protect employee pension and welfare benefits into instances of legal competition between employers and their employees.[55] There is also a competition between judges as far as deciding what facts really matter in these cases. Literalist Justices tend to credit empirical information in their opinions which leads to legal outcomes that favor hierarchical and individualistic notions of management rights, including giving employers and plan administrators substantial discretion in interpreting benefit plan language to deny employee benefits claims.[56] Remedialist Justices, for their part, focus on legally consequential facts that tend to favor an egalitarian or communitarian orientation, which in turn calls for a less restrictive reading of statutory language so that employees may receive their pension or welfare benefits in contested cases.[57] Although there are assuredly disagreements over the appropriate legal standards in many ERISA cases, I contend that what explains many ERISA case outcomes is disagreement over the meaning of legally consequential facts.

In short, decisionmaking that drifts toward a prevailing judge's cultural worldview leads to cognitively illiberal judicial opinions that endanger judicial legitimacy. Such opinion writing, many times with the judge being

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[52] *See id.* at 380 ("The judicial role in society is popularly understood by its principle purpose of providing a fair adjudication of disputes by a neutral decisionmaker – the judge or the jury."); *see also* BAUM, *supra* note 5, at 50 ("Neutrality is inherent to most people's conceptions of what courts should be.").

[53] *See They Saw a Protest*, *supra* note 2, at 859.

[54] The social psychology literature refers to this dynamic as naïve realism. *See generally* Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCH. 404, 405 (1995) ("It speaks to the individual's unshakable conviction that he or she is somehow privy to an invariant, knowable, objective reality – a reality that other will also perceive faithfully . . . [and] that others are apt to misperceive . . . .").

[55] *See Cultural Cognition at Work*, *supra* note 8, at 110.

[56] As will be discussed in more detail in Part III below, the Court's decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), which provide substantial latitude for benefit plan administrators to deny benefits under an "arbitrary and capricious" review standard, are emblematic of literalist Justices' decisionmaking.

[57] Remedialist reasoning is grounded in "the common law of trust and remedial nature of ERISA." *Cultural Cognition at Work*, *supra* note 8, at 159.

unaware of this dynamic, unnecessarily maligns other cultural groups' perceptions of what "really" happened in the case. The thwarted cultural group will not surprisingly react negatively to such judicial decisionmaking, and their confidence will be eroded in the judiciary's neutrality.

To show the dangers inherent in producing opinions filled with this form of delegitimizing bias, this paper turns to a case study of a recent ERISA U.S. Supreme Court decision. Because, as discussed above, ERISA is filled with complex statutory and regulatory terms governing benefit plan operation, it provides an ideal example of how culturally-motivated cognition operates in such an opinion and illustrates how background cultural values come to play a prominent role in judicial decisionmaking. This case also provides an example of how a judicial opinion may engender unnecessary cognitive illiberalism among the communities that are impacted by the decision as they credit one side's view of the legally consequential facts and simultaneously discounting or ignoring the view of rival parties.

III. AN EMPLOYEE BENEFITS CASE STUDY: "DUDE, WHERE'S MY PENSION?"

The 2010 case of *Conkright v. Frommert*[58] appears to be an example of the Supreme Court majority opinion unnecessarily placing its institutional legitimacy at risk by neither understanding its susceptibility to culturally-motivated cognition nor the cognitive illiberalism that such forms of decisionmaking engender in the larger society.[59] The first section of this Part described the holding of the Court's majority and focuses on the language the court utilizes in coming to that holding.[60] The second section investigates the factual underpinnings of the Court's holding.[61] The third section then seeks to view the *Conkright* decision through the lens of cultural cognition theory and comes to understand the decision as a cognitively illiberal one.[62]

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[58] 130 S. Ct. 1640 (2010).

[59] A cautionary note:

> I do not seek to psychoanalyze the Justices or analyze the motives of any judge. It makes no sense to look at a particular individual and say that a particular perception on his or her part involves 'cultural cognition,' as the theory is best understood as a phenomenon of collective decisionmaking. Rather, this Article offers an account of how we, as observers of judges' decisions, make sense of what's going on in those decisions. Yet, to avoid awkwardness in exposition in the analysis below, the Article frequently talks about the Justices' reasoning as if we could see cultural cognition operating in judges' minds.

Cultural Cognition at Work, *supra* note 8, at 121 n.76.

[60] *See infra* at Part III.A.

[61] *See infra* at Part III.B.

[62] *See infra* at Part III.C.

A. "Man Does Not Live by Words Alone"

It is the rare Supreme Court case where a three-word, first sentence of an opinion tells you everything you need to know about how the case will be decided. It is even rarer in an ERISA case.[63]

But, that is exactly what occurred in *Conkright*, where the majority opinion's first sentence is: "People make mistakes."[64] The second sentence – "Even administrators of ERISA plans" – furthers the reasonable reader's view that the plan administrator would, under no circumstances, be held liable under ERISA for their "single honest mistake."[65]

Conkright dealt with a dispute over the calculation of pension benefits between Xerox and a group of retired employees.[66] The "single honest mistake" in question involved an important pension calculation – the so-called phantom account offset method – with, literally, millions of dollars in pension money hanging in the balance for the retirees.[67] Although ERISA contains a well-defined process for disputing denial of benefits under a plan,[68] the law had been previously silent when the plan administrator initially interpreted the plan initially interpreted the plan in a way that a court deemed "arbitrary and capricious."[69]

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[63] *See* Conkright v. Frommert, 130 S. Ct. 1640, 1644 (2010) (quoting Mertens v. Hewitt Associates, 508 U.S. 248, 262 (1993)) (observing that ERISA is "an enormously complex and detailed statute."); *see also* DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 454 n. 1 (3d Cir. 2003) (comparing ERISA to a Serbonian bog).

[64] *See Conkright*, 130 S. Ct. at 1644.

[65] *Id.* Indeed, the United States Supreme Court reversed (5-3), with Justice Sotomayor not participating, holding that the district court should have applied a deferential standard of review to the plan administrator's new interpretation of the pension plan, even after the administrator's plan interpretation had been deemed "arbitrary and capricious" by the lower federal courts. *See id.* at 1651-52 (quoting Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989)).

[66] *See id.* at 1644-45.

[67] *See id.* at 1645 (noting that the dispute stemmed from the fact that Xerox failed to engage in a reasonable interpretation of its pension plan and that the plaintiffs never received proper notice that Xerox would be using the phantom account offset technique in calculating pension benefits).

[68] Before bringing a Section 502(a)(1)(B) claim under ERISA in state and federal court, a plan participant must exhaust his or her internal claims procedures. 29 C.F.R. § 2560.503-1. Once the internal claims procedures have been exhausted, and the participant has filed the claim in state or federal court, the issue becomes under what standard of review courts should review such benefit determinations. *See supra* note 43 and accompanying text.

[69] *See Conkright*, 130 S. Ct. at 1657 (Breyer, J., dissenting) ("Which of these cases says that, after the trustee has abused its discretion, a district court *must* still defer to the trustee? *None of them do*. I repeat: Not a single case cited y the Scott treatise writers supports the majority's reading of the treatise.") (emphasis in original).

One might think, therefore, that some significant legal issue or principle would come to determine this type of employee benefits case. For example, perhaps the Supreme Court would decide that the common law of trusts, which often informs ERISA decisions, needed to be applied to the case in one manner or another in the employee benefits law context.[70] But, after considering and finding existing trust authorities to be ambiguous on the question, the majority opinion in *Conkright* expressly concluded that trust law did not provide a definitive answer.[71]

Perhaps, then, the Court's decision would be a reconsideration of the *Firestone* standard of review in denial-of-benefit cases,[72] which, since 1989, had permitted benefit plans to place discretion in their plan administrators and have their claim decisions reviewed under a highly deferential "arbitrary and capricious" standard.[73] But, instead, the majority in *Conkright* concluded that *Firestone*, and the more recent and related case of *Metropolitan Life Insurance Company v. Glenn*,[74] continued to provide the appropriate standard of deferential review for federal district courts reviewing previously-determined, "arbitrary and capricious" denial of benefit claims.[75]

There was even a thought among some *amici*, based on past labor and employment law cases, that this case would come down under a new application of existing administrative law principles.[76] The new legal

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[70] *See* Varity Corp. v. Howe, 516 U.S. 489, 496 (1995) ("[W]e recognize that these [ERISA] fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment."); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law.").

[71] *See Conkright*, 130 S. Ct. at 1648 ("Here trust law does not resolve the specific issue before us").

[72] *Firestone*, 489 U.S. at 101.

[73] At first, the Supreme Court in *Firestone* stated that the benefit decision was to be reviewed *de novo* by the Court. *Id.* at 115. However, the Court then indicated that if the benefit plan contains language vesting the plan administrator with discretionary authority, the benefit determination decision is reviewed under a deferential, arbitrary and capricious standard. *Id.* Unsurprisingly, the *Firestone* decision has led most employers to design plans with language investing its plan administrators with the necessary discretionary authority in order to take advantage of the more favorable review standard. *See* COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 532 (3d ed. 2011).

[74] 554 U.S. 105 (2008) (affirming that a deferential standard of review is appropriate when the plan grants the plan administrator discretionary authority to determine eligibility in a case where the plan administer operates under a structural conflict of interest).

[75] *See Conkright*, 130 S. Ct. at 1646-47.

[76] *See* Brief of Law Professors as Amici Curiae in Support of Respondents, *Conkright v. Frommert*, 130 S. Ct. 1640 (2010) (No. 08-810) (citing Mead v. Tilley, 490 U.S. 714, 722 (1989)) (arguing that "[b]ecause the Second Circuit previously rejected Petitioners' interpretation of the operative pre-1998 Plan documents under the

theory would effectively say that whereas district courts must generally defer to the interpretation of the plan by administrators in the first instance, such deference is no longer required once the plan has already been found to have interpreted plan language in an "arbitrary and capricious" way.[77] But the majority opinion in *Conkright* does not discuss, at any time, how administrative law principles might apply in the case's factual scenario.

No, it appears that once the majority decided, *as a factual matter*, that Xerox, in interpreting its own pension plan, had made a "single honest mistake," the outcome of the case was preordained.[78] Plaintiff retirees had to know they had lost the case. How can you blame someone for messing up "in good faith," after all?[79]

Because once the Court determined that Xerox's behavior had been merely mistaken and not an intentional violation of ERISA, it was clear that the Court would give Xerox a second chance to reinterpret its pension plan in a non-arbitrary and capricious manner. Indeed, the case was sent back to the district court with instructions to properly defer, under the

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Firestone trust law-based deferential review standard as being unreasonable, the only new deference theory Petitioners' can be advancing here is an administrative law-based deference, where courts may respect or credit an agency's advocacy position.").

[77] *See id.* at 11 (arguing that "[l]ower federal courts applying *Firestone* have confused deference in ERISA claims with the kind of deference courts extend to administrative agencies.").

[78] Indeed, the *Conkright* majority used the phrase – "single honest mistake" – three times in its opinion. *See Conkright*, 130 S. Ct. at 1644 ("The question here is whether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan."); *id.* at 1647 ("If, as we held in *Glenn*, a systemic conflict of interest does not strip a plan administrator of deference, . . . it is difficult to see why a single honest mistake would require a different result."); *id.* at 1649 ("But the interests in efficiency, predictability, and uniformity – and the manner in which they are promoted by deference to reasonable plan construction by administrators – do not suddenly disappear simply because a plan administrator has made a single honest mistake."); *see also* Frommert v. Conkright, 825 F. Supp. 2d 433, 442 (W.D.N.Y. 2011) ("The issue before me at this point . . . is not whether the *plaintiffs* have offered a reasonable interpretation of the Plan, but whether the Plan Administrator has. The Supreme Court made it quite clear that this Court should defer to the Administrator's views in this manner, which means that the Court should accept his approach, unless it is patently unreasonable.") (emphasis in original). Justice Breyer, in his *Conkright* dissent, disagreed with this single-honest-mistake approach of the majority: "[T]he majority's absolute 'one free honest mistake' rule is impractical, for it requires courts to determine what is 'honest,' encourages appeals on the point, and threatens to delay further proceedings that already take too long." *Conkright*, 130 S. Ct. at 1659 (Breyer, J., dissenting). Breyer did not, however, undertake to show, based on the record evidence in the case, why Xerox's actions with regard to the retirees did not, in fact, amount to a "single honest mistake."

[79] *See Conkright*, 130 S. Ct. at 1647 ("[I]f the settler who creates a trust grants discretion to the trustee, it seems doubtful that the settler would want the trustee divested entirely of that discretion simply because of *one good-faith mistake*.") (emphasis added).

Firestone standard, to Xerox's second interpretation of the plan.[80] Unremarkably, this second interpretation deprived plaintiff retirees of a substantial sum of retirement income. Additionally, many future ERISA plaintiffs will now have to continue to fight a difficult, uphill battle to get their benefit denial claims overturned by a reviewing court, even if the first plan interpretation is admittedly "arbitrary and capricious."[81]

So, because the majority in *Conkright* made the *legally-consequential, factual determination* that Xerox really had not meant to do what it did with regard to the phantom account offset calculation, the Court said thrice that "a single honest mistake" should not change the basic rules of ERISA plan interpretation by administrators.[82] And because it was just a "single honest mistake," the *Conkright* majority agreed with Xerox that stripping plan administrators of deferential court review once they made such a mistake would upset the uniform and predictable administration of ERISA plans.[83]

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[80] *See id.* at 1652. This deference to Xerox's second interpretation occurred in the district court's opinion on remand. There, the district court deferred to the Xerox's plan administration's new interpretation of the plan, stating: "Having reviewed the voluminous submissions in this case, I conclude that the Administrator's proposed interpretation of the Plan is reasonable, and, guided by the Supreme Court's admonitions, I accepted that interpretation." *See* Frommert v. Conkright, 825 F. Supp. 2d 433, 440 (W.D.N.Y. 2011). The district court's opinion is currently being appealed by the plaintiffs, *see Frommert v. Conkright*, Case No. 12-0067-cv (2d Cir. 2012) (focusing on issues of notice to plan participants of plan changes, as opposed to issues of plan interpretation already decided by Supreme Court), with the *Conkright* plaintiffs being supported by the United States as an amicus. *See* Brief of the United States Department of Labor in Support of Petitioners, *Frommert v. Conkright*, Case No. 12-0067-cv (2d Cir. 2012). Perhaps, unsurprisingly, the Business Roundtable, the Chamber of Commerce, and other business groups supported Xerox as amici. *See* Brief of Business Roundtable, Chamber of Commerce, & American Benefits Council as Amici Curiae Supporting Respondents, *Frommert v. Conkright*, Case No. 12-0067-cv (2d Cir. 2012).

[81] *See* Meredith Z. Maresca, *Lawyers at ABA Meeting Discuss* Conkright, *Say Case Doesn't Change Review Standard*, BNA PENSION & BENEFITS DAILY (Feb. 18, 2011) ("The U.S. Supreme Court's decision last year in *Conkright* has had little impact on the standard of review used in evaluating denied benefit claims under the Employee Retirement Income Security Act, panelist said . . . .").

[82] The dissent in *Conkright* argued, however, that "trust law . . . leaves to the supervising court the decision as to how much weight to give to a plan administrator's remedial opinion." *See Conkright*, 130 S. Ct. at 1659-60 (Breyer, J., dissenting). This focus on trust law is a classic remedialist Justice move, *see supra* note 47 and accompanying text, and one consistent with Breyer's general communitarian and egalitarian bents as one of the more progressive Supreme Court Justices.

[83] *See id.* at 1643 ("Respondents claim that deference is less important once a plan administrator's interpretation has been found unreasonable, but the interests in efficiency, predictability, and uniformity do not suddenly disappear simply because of a single honest mistake, as illustrated by this case.").

B. "They Know Not What They Do"

So, on what basis did the Justices in the *Conkright* majority conclude, as a factual matter, that Xerox had made a "single honest mistake?" The retirees had put this evidence in the record, as detailed in their brief to the Court:

> This lawsuit, however, is not about the legality of the phantom offset. That is so because, in 1989, as part of a major benefits redesign, *Xerox admittedly removed the phantom offset from its plan*. For the next five years, Xerox sent documents to respondents indicating that the company would deduct from their pensions only the *actual* monies they had previously received. In 1995, however, Xerox did an about-face. It informed respondents that the company would use the phantom offset to eliminate (or dramatically reduce) their pensions. Respondents objected, and after administrative resolution of the dispute proved unsuccessful, this lawsuit was filed . . . .
>
> Xerox had provided respondents, *for five years*, with personalized documents indicating that the offset would be limited to the monies that respondents had *actually received*.[84]

The Justices in the *Conkright* majority did not mention this evidence in their opinion. Instead, they appear[85] to have taken their cue from Xerox's Supreme Court brief:

> [D]eference to plan administrators is not restricted to initial claims determinations. A hair-trigger rule that strips plan administrators of deference based on a *good-faith mistake* in the administration of a plan is not supported by ERISA or this Court's decisions, and would thrust federal courts into the role of making difficult and discretionary decisions under ERISA plans.[86]

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[84] *See* Respondent's Brief in Opposition at 2-3, *Conkright v. Frommert*, 2009 WL 5240210 (2009) (emphasis in original).

[85] I advisedly use the word "appears" here. It is simply impossible to know with any certainty what any of the Justices were thinking based on how they explain themselves in any case. Or even whether the language that shows up in the final opinion is the work of one Justice or compromise language fashioned by many Justices. As indicated above, "this Article [merely] offers an account of how we, as observers of judges' decisions, make sense of what's going on in those decisions." *See Cultural Cognition at Work*, *supra* note 8, at 121 n. 76.

[86] Brief for the Petitioner at 2, *Conkright v. Frommert*, 2009 WL 2954165 (2009) (emphasis added).

When there are two conflicting stories of what happened in a case, it is not unusual for a court to consider that evidence and side with one party or the other. What is remarkable about the *Conkright* decision, however, is that the majority opinion puts the proverbial rabbit in the hat. Without discussing why one story of the events make more sense than another, the majority Justices start their opinion by framing the relevant question as: "[W]hether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan."[87] Of course, it does not, if the mistake was an honest one, and the Court so holds.[88] But, the majority opinion does not even bother to explain how it came to believe Xerox's version of the underlying dispute.

There is, in fact, little to no discussion of the facts in the majority opinion. All we are told by way of explanation is that such a mistake "should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is 'an enormously complex and detailed statute;'" "the plans that administrators must construe can be lengthy and complicated . . . ([t]he one at issue here runs to eighty-one pages, with 139 sections);" and "[f]ortunately, most of the factual details are unnecessary to the legal issues before us, so we cover them only in broad strokes."[89] Not only did the retirees present evidence that Xerox had acted intentionally in misleading them about their benefit rights and then denying them the requested pension benefits,[90] even Xerox itself never used the language of a "single honest mistake" in its own briefing. Xerox insisted throughout the case that it did nothing wrong and made no mistakes. It is completely the *Conkright* majority's factual characterization of how Xerox acted towards these retirees that ended up determining the outcome in *Conkright*.

C. "If the Facts Don't Fit the Theory, Change the Facts

It is clear that one could make the argument that the majority Justices decided they wanted to decide for Xerox and, then, found the reasoning to get there. Yet, I do not believe, and this is perhaps the most provocative party of cultural cognition theory, that the majority Justices engaged in self-conscious, ideological, activist, or outcome-derivative decisionmaking in *Conkright*.[91] I do not accuse any of the Justices in the *Conkright* majority of intellectual dishonesty in this paper. Indeed, if asked, I would

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[87] *Conkright*, 130 S. Ct. at 1644.
[88] *See id.*
[89] *Id.*
[90] *See id.* at 1643.
[91] *Accord* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1964 (2009) ("There may be some judges who care little about their colleagues' views and who are determined not to engage in collegial interactions. However, they are not in the majority.").

suspect that they would say that the law and the facts could only compel one, proper result given applicable law under ERISA and the facts of this case.

I want to contend here that the five Justices who sided with Xerox simply were not psychologically able to characterize Xerox as dishonest or acting in bad faith in the interpretation of its own pension plan. Using the same matrix to define different worldviews held by individuals that Kahan and his co-authors have used in past cultural cognition studies, it is at least conceivable to maintain that most of the five-justice majority in *Conkright* hold worldviews best described as "hierarchy individualism."[92]

These types of individuals "can be viewed as individuals . . . tend to embrace values such a liberty, market freedom, autonomy, and self-reliance. In the workplace context, these individuals dislike legal regulations because they undermine their vision of how to run their businesses.[93] Notice that the opinion for the majority consistently focuses on the complexity of ERISA, the need for efficiency and predictability in the workplace when it comes to employee benefits, and the problems associated with interpreting ERISA that would, in any way, increase employer costs or lead to more litigation.[94]

Complexity, inefficiency, and unpredictability, all cause much concern for individuals who "tend to place a high value on social order generally."[95] So, perhaps, what the majority saw depended on the congruence of the parties' positions in *Conkright* with the majority's own cultural values.[96] In other words, *Conkright* provides a plausible example of culturally-motivated cognition and a decision which contains many examples of cognitive illiberalism. Indeed, a similar conclusion might also exist with regard to the dissenting Justices' opinion in *Conkright* but, this time, with

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[92] The first, hierarchy-egalitarianism measures the subjects' orientations towards social orderings that either feature or eschew stratified roles and forms of authority. The second, individualism-communitarianism, measures their orientations toward orderings that emphasize individual autonomy and self-sufficiency, on the one hand, and those that emphasize collective responsibilities and prerogatives, on the other. *See, e.g.*, *They Saw a Protest*, *supra* note 2, at 864-67.

[93] *Cultural Cognition at Work*, *supra* note 8, at 864-67.

[94] *See, e.g.*, *Conkright*, 130 S. Ct. at 1644 ("[W]e refused to create such an exception to *Firestone* deference in *Glenn*, recognizing that ERISA law was already complicated enough without adding 'special procedural or evidentiary rules' to the mix."); *id.* at 1649 ("Deference promoted efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review.").

[95] *See They Saw a Protest*, *supra* note 2, at 867.

[96] *See id.* at 859 ("'Cultural cognition' is a species of motivated reasoning that promotes congruence between a person's defining group commitments, one the one hands, and his or her perceptions of risk and related facts, on the other.").

the "egalitarian communitarian" label affixed. In short, such motivated cognition exists equally among both groups of Justices in *Conkright*.

James Atleson provides theoretical reasoning for why the Justices might break down along these lines in labor and employment law decisions in *Values and Assumptions in American Labor Law*: "Whereas management efficiency is seen in terms of the lowest per-unit cost of production, worker perceptions of fairness and justice is quite different."[97] Inevitably, then, the legal decision comes down to a choice among conflicting cultural norms. The majority in *Conkright* selected those norms that place emphasis on the importance of employer authority in the workplace and on the need to keep the costs of doing business down to a minimum.[98] Under this view, the Justices in the majority unconsciously applied, in a factually-uncertain environment, a perception that gave preference to an outcome congenial to their favored way of seeing the world. As a result, the Xerox retirees and other, like-minded citizens, who adhere to a now disfavored view of how the courts should interpret pension plans in this type of case, now question the legitimacy of the Court as a neutral decisionmaker because they view the Court's opinion as an exercise in cognitive illiberalism.[99]

The most significant consequence of this type of legal decisionmaking is the generation of needless cultural conflict between groups with different ideas of workplace fairness with regard to the granting of retirement benefits. Those who sympathize with the losing retirees in *Conkright* now feel discontent with the employee benefits law, while those who identify with the Court majority feel vindicated that their preexisting biases were accurate. The Court could have avoided much of this illiberal reasoning by using psychologically-realistic methods to nip such judicial bias in the bud.

The next section considers specific opinion-writing and institutional debiasing techniques that could assist in counteracting in future ERISA cases culturally-motivated cognition and the production of cognitively illiberal legal opinions.

IV. THE ARGUMENT FOR ERISA COURTS UTILIZING OPINION-WRITING DEBIASING STRATEGIES

Although psychologically-based conflicts in factual perception - like the ones just described in *Conkright* - threaten democratic pluralism by

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[97] JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 65 (1983).

[98] *Conkright*, 130 S. Ct. at 1644.

[99] *See They Saw a Protest*, *supra* note 2, at 853 ("Just as the integrity of a sporting contest would be undermined by unconscious favoritism on the part of the referee, so the legitimacy of the law would likewise be compromised if legal decisionmakers, as a result of motivated cognition, unwittingly formed perceptions of facts that promoted the interests and value of groups with whom they had an affinity.").

setting in opposition cultural subgroups, the good news is that there are techniques that exist to counteract judges' susceptibility to this form of culturally-biased decisionmaking. So, cultural cognition theory not only provides a working theory about how judges may interpret legally-consequential facts in environments of factual uncertainty and how this dynamic fosters cognitive illiberalism throughout society, but it also suggests that such biased decisionmaking is predisposed to various debiasing strategies. This is because cultural cognition theory maintains that judges are not fighting over ideology but just over legally-consequential facts. Therefore, there is reason to believe that judges will embrace educational and institutional attempts to rid themselves of this form of bias.[100]

It is therefore necessary to consider a number of institutional reforms to counteract these phenomena in the employee benefits law context. I focus on the idea of creating specialized ERISA courts based on the current bankruptcy court model.[101] The first section of this Part considers whether a group of professionalized ERISA judges, protected by opacity in their selection and decisionmaking, would provide an attractive model for generating culturally-neutral ERISA decisions.[102] Because I conclude that ERISA courts could assist in ridding decisions like *Conkright* of their delegitimizing partiality, the second section of this Part briefly expounds upon how such ERISA judges could utilize opinion-writing debiasing techniques to reduce instances of cognitive illiberalism in their legal decisions.[103]

A. ERISA Courts

To begin with, it should be conceded at the outset that as a practical matter, there is not much likelihood that Congress will enact legislation in the near future to create ERISA courts, or even specialized administrative tribunals, to hear ERISA cases.[104] Nevertheless, it is still valuable to

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[100] *See Whose Eyes Are You Going to Believe*, *supra* note 6, at 898 ("[J]ust like the rest of us, [judges] are perfectly capable of understanding that these dynamics exist and can adversely affect the quality of their decisionmaking."). Of course, there may be opportunistic reasons that politicians or even some judges may resist such "educational and institutional" attempts. I do not deny that; I merely suggest that the audience for cultural cognition reform might be less hostile than one might first think.

[101] *See Cognitive Illiberalism*, *supra* note 12, 395-96; *see also id.* at 400-06 (exploring various other institutional debiasing strategies including: magistrate judge models, specialized Article III appellate courts (like the Federal Circuit), and British employment tribunals).

[102] *See infra* at pp. 20-24.

[103] *See infra* at pp. 24-27.

[104] The current political environment, where politicians seek to outdo one another in their calls to cut the size of the federal government and the amount of federal spending, would strongly suggest that any call for further specialization of the federal judiciary

consider, as a thought experiment (or as a "pragmatic conjecture"), the potential benefits of having, one day, a professionalized group of judges to hear ERISA cases. I, therefore, again take out my "analytical toolbox,"[105] considering the possibility of developing an Article I ERISA court in the style of the federal bankruptcy courts.[106]

The whole idea behind the creation of ERISA courts would be to create a "method for debiasing judges . . . through making them more familiar with legal doctrine in [a given] area of law."[107] Familiarity with such a complex area of law would, in turn, make it less likely that judges would need to decide cases by falling back on culturally-motivated ideas of how best to interpret ambiguous facts commonly found in such cases.[108] At the end of the day, then, with the addition of some of the opinion-writing debiasing strategies discussed in the next section, the hope would be that fewer cognitively illiberal decisions like *Conkright* would be produced.[109]

In many ways, ERISA cases would be ideally suited for bankruptcy court-style adjudication. First, ERISA courts would not interfere with any existing employee benefit law adjudicatory framework because there does not exist any federal or state administrative agency with primary or initial authority to consider such cases.[110] Second, the expansive nature of ERISA

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would likely fall on deaf ears. *See* BAUM, *supra* note 5, at 205 (commenting that one "reason for the dearth of specialized courts is the difficulty of securing major changes in judicial structure that require legislation."). It should also be pointed out that Congress considered, during the enactment, the idea of creating an alternative dispute resolution system to adjudicate ERISA claims, and Congress rejected these ideas at least three separate times during that Congress.

[105] *See Cognitive Illiberalism*, *supra* note 12, at 414 (advancing "spectrum of debiasing strategies to provide an analytical toolbox for legislators and other policymakers to consider in bolstering the legitimacy of the law.").

[106] Whereas the federal Constitution establishes the U.S. Supreme Court and gives the power to Congress to establish lower federal courts in Article III of the Constitution, *see* U.S. CONST. art. III, § 1, bankruptcy courts were established under Congress' Article I Inferior Tribunal Clause Power, U.S. CONST. art. I, § 8, cl. 9, in the Bankruptcy Act of 1978. *See generally* Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978: Part One, Outside Looking In*, 81 AM. BANKR. L.J. 1 (1985) ("[T]he Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts.").

[107] *See Cognitive Illiberalism*, *supra* note 12, at 392 ("Judges who specialize in a narrow range of policy become immersed in the subject matter of the case on which they focus."); *see* BAUM, *supra* note 5, at 35.

[108] *See* BAUM, *supra* note 5, at 35 ("When commentators speak of judicial expertise as something more than a source of efficiency, what they really mean is that expert judges will produce higher-quality decisions than nonexperts.").

[109] *See Cognitive Illiberalism*, *supra* note 12, at 394 (contending that with introduction of specialized labor courts, "cognitive illiberalism will be diminished when more evenhandedly decided cases are processed by 'losers' in the politico-legal wars.").

[110] One of the potential concerns with establishing more broadly-based "labor and

preemption would mean that there would not be federalism concerns over interfering with state sovereign authority to regulate in this area.[111] Third, federal district trial courts would be relieved of cases which are increasingly taking over space on their crowded dockets and also taking a relatively long time to resolve.[112] Fourth, specialized judges, with enhanced knowledge of their subject area, would be more likely to produce consistent adjudicative outcomes which, in turn, would assist parties in planning their future conduct and predicting the legality of their conduct in the employee benefits law context.[113]

Other advantages supporting a bankruptcy court model for ERISA cases include the selective manner in which the federal court of appeals would pick such judges[114] and the relative autonomy such judges would have from political pressures.[115] As far as the autonomy advantage, the

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employment law" courts would be that such courts might inadvertently interfere with existing federal administrative schemes, and the primary jurisdiction of such agencies as the National Labor Relations Board and the Equal Employment Opportunity Commission. *See id.* at 396 n. 129. Because ERISA cases may generally be brought directly to federal court, and internal administrative exhaustion is only a temporary obstacle in Section 502(a)(1)(B) benefit denial cases there would be no similar concern. *See Cultural Cognition at Work*, *supra* note 8 and accompanying text.

[111] *See Sorry, No Remedy*, *supra* note 46, at 13 (describing how "[c]ourts broadly interpret the preemption provisions of ERISA, [under Section 514,] to invalidate employee benefits-related state laws.").

[112] *See Cognitive Illiberalism*, *supra* note 12, at 393 ("[R]eflecting the growing complexity of labor law cases, the number of actions pending for three years or more increased by 69.25 percent during the . . . period [from 2000 to 2009]."). ERISA cases make up more than half of labor law cases pending for more than three years during this same period. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2009, Table S-11, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S11Sep09.pdf.

[113] *See Cognitive Illiberalism*, *supra* note 12, at 406-08; *see generally* Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267 (2005) (noting how the German Federal Constitutional Court and its "rapporteur" system might provide an appropriate balance between the benefits of generalist judges and the need for judicial expertise as law).

[114] *See Cognitive Illiberalism*, *supra* note 12, at 397-98 (describing the selective manner in which bankruptcy court judges are selected and specifically setting forth the procedure in the Ninth Circuit Court of Appeals).

[115] *See id.* at 398 (pointing out that although bankruptcy judges do not have the life tenure and secure compensation of Article III judges, "[t]he selection process of bankruptcy judges by the courts of appeals encourages merit-based selection of bankruptcy judges based on their professional credentials rather than their political leanings."). Of course, the lack of Senate confirmation proceedings for such judges would make their appointment easier and less politically sensitive. *See id.* at 399 ("This is a significant advantage given the highly partisan nature of labor and employment disputes between union and management or between employer and employee.").

selection of ERISA court judges by Article III judges, hidden to a substantial degree from public notice and comment, might provide the protection of opacity for such selection processes.[116] Finally, if the ERISA bar had the same input into the selection of ERISA court judges as the current bankruptcy bar does with regard to bankruptcy trial courts, that dynamic could lead to both judge and attorney groups working together to promote a professional judiciary that places a high value on pragmatic solutions to the problems specific to the employee benefits law community.[117]

Of course, there would also be plenty of objections to the creation of ERISA courts. First and foremost, one could reasonably object that there is nothing that is much more difficult to understand about ERISA than other areas of law, or more susceptible to culturally-motivated cognition, such that there is a special need for Article I courts.[118] Yet, a number of commentators have noted the particular complexity of labor and employment law generally.[119] If anything, and as the Supreme Court readily admits in many cases like *Conkright*, ERISA is even more complex.[120] Perhaps, it is sufficient to say at this juncture that ERISA appears sufficiently complex to most knowledgeable observers to merit specialized court consideration.[121]

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[116] *See generally* Rafael I. Pardo, *The Utility of Opacity in Judicial Selection*, 64 N.Y.U. ANN. SURV. AM. L. 633 (2009). "The term 'opacity' is used by Pardo to describe candidate selection processes that are closed in nature, or opaque, in contrast to transparent selection processes that are open to the public." *Cognitive Illiberalism*, *supra* note 12, at 412 n. 13.

[117] *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 798 (2010) (stating that the bankruptcy bar recognizes bankruptcy judges "for creative and energetic management of cases," "corralling difficult cases and bringing them to a conclusion efficiently").

[118] In some real sense, the answer to this important question is unknowable to someone like me who is not an expert in these other areas of law and will likely never plunge headlong into their fathomless depths. I can only say with any certainty that ERISA is a comparatively complex area of the law based on its judicial reputation and based on the time it takes to adjudicate an average case. *See supra* notes 43 and 110 and accompanying text.

[119] *See Cognitive Illiberalism*, *supra* note 12, at 393-94 n. 115; *see also* BAUM, *supra* note 5, at 219 ("Advocates of specialized courts argue that concentration of judges enhances expertise and thus the quality of decisions. The argument is made with the greatest force in fields in which the law or case facts are unusually complex, such as patents and taxes.").

[120] *See, e.g.*, *supra* notes15, 48, and 99 and accompanying text; *see also* Maher & Stris, *supra* note 20, at 453-54 (explaining that the increasing complexity of benefit promises under ERISA "militates in favor of increased protection" because it "increases expectation uncertainty on the part of employees . . ."). *But see* Stumpff, *supra* note 3 (suggesting ERISA's complexity may render it inaccessible).

[121] *See* Langbein, *supra* note 5, at 229 ("ERISA is an ideal field for experimenting with specialized courts: It is complex, it is important, and it is relatively well delimited

Nevertheless, there are a number of admittedly additional disadvantages that come with specialized courts. Such disadvantages include: "1) judicial 'tunnel vision,' 2) the risk of judicial capture by special interests, and 3) excessive judicial bias rooted in familiarity with the subject matter."[122] Additionally, there might be concern that even if ERISA courts have judges more versed in employee benefits law and less likely to reflexively fall back on cultural background norms, such cases will nevertheless make their way through the lower federal courts and, perhaps, all the way to the Supreme Court with the same culturally-biased decisionmaking still possible.

In response to this first set of three traditional concerns about specialized courts, one can just note in passing that these concerns exist for all specialized courts, and ERISA courts would not necessarily entail greater problems in this regard.[123] On the second point concerning the continuing unmitigated nature of cognitively-biased appellate review, perhaps ERISA judges would do a better job of laying out the contested factual issues in such cases, understanding the importance of such record evidence to the outcome of these cases. In turn, appellate courts, by dint of established standards of appellate review, would have no choice but to consider the ERISA court's factual record under deferential standards.[124]

In all, although there are indeed concerns with the creation of yet another specialized court to hear another class of complex legal cases, on balance, and for the reasons discussed above, a future Congress should explore creating ERISA courts. These courts hold the promise of providing "increased uniformity, enhanced decisional quality, greater systemic efficiency, and decisions free from culturally-motivated cognition and the associated societal problems of cognitive illiberalism."[125]

B. ERISA Courts and the Utilization of Opinion-Writing Debiasing Strategies

ERISA courts can start the project of counteracting cognitive illiberalism in their judicial opinions by "divest[ing] the law of culturally partisan overtones that detract from the law's legitimacy" through opinion-

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from other fields.").

[122] *See* Damle, *supra* note 113, at 1269; *see also Cognitive Illiberalism*, *supra* note 12, at 408-09 (elaborating on each of these disadvantages of specialization).

[123] *See generally* BAUM, *supra* note 5.

[124] *See* Ronald J. Krotowszynski, Jr., *Cooperative Federalism, the New Formalism and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1619 n. 93 (2012) ("In 'core proceedings,' a district court can review the bankruptcy court's findings of fact only 'under traditional appellate standards,' [i.e., clearly erroneous standard,] rather than *de novo*.").

[125] *See Cognitive Illiberalism*, *supra* note 12, at 410.

writing debiasing strategies.[126] Such approaches might keep cases like *Conkright* from reoccurring. These strategies, which will be considered seriatim, are: (1) judicial humility and aporetic engagement; (2) expressive over-determination and self-affirmation; and (3) trimming.[127]

First, one of the primary impacts of cognitive illiberalism is that it leads judges to believe in the unassailable correctness of their version of facts and events. You often hear such judges use phrases like "no reasonable person could disagree," or "there is only one possible conclusion to draw." Such conclusive language, while vindicating those who agree with the case outcome, unnecessarily alienates those who disagree. Developing habits of judicial humility means developing a state of mind that recognizes that even judges can misjudge facts in a case,[128] especially in cases like *Conkright*, which elicit a substantial volume of community outrage.[129] For instance, rather than just assuming, without discussion, that Xerox had made a "single honest mistake" in plan interpretation without much discussion of the facts leading to that conclusion, the *Conkright* majority should have set out the various factual stories advanced by the parties, examined them, and then used aporetic language to acknowledge the complexities of the case before it.[130] So, whereas "[h]umility connotes consciousness of one's *own* limits in solving a problem; *aporia* emphasizes the limited amenability of the *problem* to a satisfactory solution, along with the apprehension of the same."[131] These qualities will permit judges in future ERISA cases to draft opinions without the appearance of ideologically-driven reasoning and without the need to denigrate the views of the losing side.[132] Although such an approach may not lead to a different case outcome in a case like *Conkright*, the resulting opinion will be less likely to fan the flames of partisanship.

The second technique is expressive over-determination, and it involves the related idea of self-affirmation. This approach is very much related to habits of judicial humility and aporetic engagement. It encourages "judges

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[126] *See id.* at 375.

[127] *See* Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1053 (2009) [hereinafter *Trimming*] (describing "trimming" as an approach that "squarely rejects not only rights fundamentalism and democratic primacy but also minimalism . . . on the ground that the Court should settle a large area of the law and should not leave the fundamental questions undecided.").

[128] *See Cultural Cognition at Work*, *supra* note 8, at 140-41.

[129] *See id.* at 143.

[130] "Judicial idioms of aporia," refers t a type of argument which acknowledges the complexity of a subject under discussion. *See They Saw a Protest*, *supra* note 2, at 898.

[131] *See Foreword: Neutral Principles*, *supra* note 37, at 67 n. 347.

[132] *See Cognitive Illiberalism*, *supra* note 12, at 389-90 ("[T]he practices of humility and writing opinions in an aporetic manner encourages judges to self-reflect on how culturally motivated cognition may color their view of legally consequential facts and, thereafter, avoid basing decisions on those biases.").

to interpret laws in a manner that seeks to accommodate competing worldviews."[133] Having left behind one's unequivocal pronouncements under the former approach, legal opinions can now be written in a way that allows different cultural worldviews to find constructive meaning in the court's language and, thereby, to self-affirm their own identity. The trick here is to use language in a way that allows different groups to conjure up a "plurality of meanings" from the court's decisional language. Again, although this approach may not change the outcome of the case, it will allow opposing groups to accept the legitimacy of the court's reasoning more readily. Consider, in this regard, if the Court in *Conkright* had utilized language which permitted Xerox a second chance to reinterpret its pension plan but had also more forthrightly chastised the company for its past practices as far as communicating with plan participants. This tactic would have made clear that the Court would not tolerate such sharp practices from Xerox or from other employers in similar circumstances in the future.

Finally, "trimming," the last examined, opinion-writing debiasing strategy, is a technique that might actually lead to a different case outcome in cases like *Conkright*. It involves a judicial decisionmaking method of "reject[ing[the extremes and . . . borrow[ing] ideas from both sides of intense social controversies."[134] As already indicated, without Xerox even briefing the point, the *Conkright* majority concluded that Xerox's conduct in the case *clearly* amounted to a single honest mistake of plan interpretation. The plaintiffs believed, of course, that this was a concerted effort on Xerox's part to deprive them of their earned pension monies. So what would an ERISA court judge engaged in trimming do?

Well, according to Professor Sunstein, a judicial trimmer would "tend to eng up between the extremes, in a way that makes both [sides] believe that they have gained, or not lost, something of importance."[135] This approach ensures judges identify "what is deepest and most appealing in competing positions" so as to safeguard against, "to the extent possible, [that] no one is, or feels, rejected or repudiated."[136] In *Conkright*, "captur[ing] the most plausible convictions of the adversaries" might have meant coming to a decision that recognized the importance of judicial deference to plan administrators in most *Firestone* and *Glenn*-type cases under ERISA Section 502(a)(1)(B) but recognizing that the facts in *Conkright* did not suggest this was an everyday case of that variety.

In fact, given the long duration of the litigation (close to ten years) and

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[133] *See id.* at 390 (describing expressive overdetermination as a technique that seeks to allow "each community" to "find meanings in a decision that affirms some of its worldviews.").

[134] *See Trimming*, *supra* note 127, at 1053-54.

[135] *Id.* at 1054.

[136] *Id.* at 1058-59.

the amount of success plaintiffs had enjoyed in the lower federal courts,[137] the *Conkright* court could have fashioned a trimmed decision in favor of plaintiffs that would have "show[n] respect for all views while avoiding [a] decision[] based on their own culturally biased motivations."[138] For instance, a specific example of a trimmed decision in *Conkright* could have stated:

> Plaintiffs prevailed in this case because the rule henceforth will be that in the aftermath of an unreasonable act by the plan administrator, a judge can choose, or choose not, to defer. Here, the Second Circuit chose not to defer, and that decision makes sense given the facts of this case. In other circumstances, a judge might have been wise to defer again, such as in cases in which the administrator made a single and timely-corrected mistake.

In all, then, specialized ERISA courts utilizing these opinion-writing debiasing techniques would be more likely to generate legal opinions that "communicate [their] commitment to using [judicial interpretation] methods impartially."[139] They would also avoid being "unwittingly impelled to form perceptions of fact, interpretation of doctrine, and evaluations of legal arguments congenial to their own worldviews."[140] In short, these ERISA courts would have the analytical tools to circumvent cognitively illiberal outcomes like the one in *Conkright v. Frommert*.

V. CONCLUSION

The goal of this article has been to put into practice institutional and opinion-writing debiasing strategies in the ERISA context to counteract culturally-motivated cognition and the problems associated with cognitive illiberalism. My contention is that not only does the development of a professionalized group of ERISA judges hold out the promise of minimizing needless discontent with employee benefits law, but ERISA courts will more likely generate efficiency, uniformity, and predictability in their legal decisions, based on their familiarity with this complex area of law.

Because ERISA court judges would also end up being better

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[137] *See* Respondents' Brief in Opposition at 1, *Conkright v. Frommert*, 2009 WL 226500 (2009) ("Since this case was filed nearly ten years ago, three decisions of the Second Circuit have conclusively established that Xerox cannot properly use a 'phantom account.'").

[138] *See Cognitive Illiberalism*, *supra* note 12, at 392 (citing *Trimmings*, *supra* note 127 at 1070).

[139] *See Foreword: Neutral Principles*, *supr*a note 37, at 59.

[140] *Id.* at 27-28.

informed, legal decisionmakers, they will also be less likely to have to fill gaps in their legal knowledge by engaging in culturally-motivated cognition. To the extent that cultural cognition still ends up inevitably playing some role in their decisionmaking processes, these judges will be readily able to use opinion-writing debiasing strategies to assist them in living up to their neutrality commitment to decide cases in a manner free from the taint of cognitive illiberalism.