Common Law Judging

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6 Conclusion

[T]he danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them. It seems to me that a far greater danger exists if they do not.¹

—Judith Kaye

The Ideal Judge?

We need to move beyond thinking of the ideal judge as someone who suspends her own personal experiences and values and perspectives so that she can judge from a place of abstract neutrality and objectivity. We need to move beyond a place where judges say things like these at their confirmation hearings so that they can navigate through the political process of being appointed:

Judges are like umpires. Umpires don’t make the rules, they apply them.²

[M]y fundamental commitment, if I am confirmed, will be to the greatest extent possible to totally disregard my own personal belief.³

Common law judges are not umpires. It is neither possible nor desirable for judges to disregard their beliefs when they are judging. These statements assume that a judge’s role is to apply the law without regard to what the judge may believe about the law and that the content of the law exists wholly apart from what a judge may believe about it. This is the view I have called strong objectivism.

Strong objectivism, which I have also called “mind-independence,” is
the idea that an object exists and has meaning in the world apart from our beliefs about that object. For instance, the fact that people used to believe that the Earth is flat did not make the Earth flat; the fact of this planet’s shape exists apart from what people may think or say about it. I refer to this form of objectivism as “mind-independence.” Applied to law, strong objectivism requires the meaning of law to exist apart from what we may believe about the law. Applied to judging, strong objectivism means that the role of judges is to find (or make their best effort to find) the true meaning of the law and to apply it in the cases they are asked to decide. This view of law and judging also means that a judge should decide cases on the basis of the objective law rather than the judge’s subjective values or perspectives. This view is found frequently in public and political comments about the courts: “judges should not legislate from the bench,” “judges should not impose their own values in place of the law,” and so on.

But judges disagree about how certain cases should be decided. In part, this is because who a judge is as an individual—that person’s experiences, values, and perspectives—influences that judge’s response to a case and understanding of the law. The recognition that different judges may decide the same case in different ways, in part because of their different perspectives and values, has led some people to claim that the law does not genuinely determine judicial decision making at all. On this view, judging is simply the projection of a judge’s subjective preferences into a judicial decision (followed by the camouflaging of those subjective preferences in the language of legal reasoning). I have called this view subjectivism. Subjectivism is commonly known today as legal realism, and it is found in comments like: “[J]udges pick and choose among these facts and the precedents they support in order to produce a decision most compatible with their policy preferences, while asserting—of course—that the chosen ones most accord with the facts of the case for decision.”

Subjectivism and strong objectivism are typically taken to be the opposite of one another, and we can see why. Strong objectivism means that judicial decisions should be determined only according to the law rather than a judge’s subjective beliefs. Subjectivism means that judicial decisions are determined only by a judge’s subjective beliefs rather than the law. This book offers a response and an alternative to these views. I began by explaining the inadequacy and inaccuracy of strong objectivism and subjectivism as approaches for attempting to understand law and judging. My argument is not that objectivity is irrelevant to an accurate conception of the judicial process. My argument is that strong objectivism cannot help us understand the
law or the judicial process because the law and the judicial process are human creations, not natural objects. The meaning of the law simply cannot be perceived in the same manner as the shape of the Earth and cannot properly be understood according to the same mode of objectivism that may apply to the natural world. Similarly, the meaning of the judicial process should not be conceived as an endeavor to locate a legal truth. As with strong objectivism as mind-independence, this notion of legal truth is misplaced. There is a meaningful understanding of truth that applies to the judicial process, but it is a legal truth that is produced through that process rather than an objective truth that is discovered by that process.

Strong objectivism and subjectivism are equally inaccurate and implausible visions of law and judging. Once we have moved past them, we can begin to focus on alternative conceptions of objectivity that more accurately cohere with the common law tradition. I considered two of these alternative conceptions of objectivism, minimal and modest, and suggested another form, which I called mediated objectivism. The common law creates additional complexities for these accounts of objectivism, however, because whichever conception of objectivism we prefer, we are still left with an unavoidable distinction between our conception of the objectivity of law and our conception of objectivity in judging. As Connie Rosati has explained, thinking of law as minimally objective entails a conception of judging that she calls judicial majoritarianism (the law is what the majority of judges say it is). But as Rosati observes, that view is reductive and distorts critical distinctions between existing law and adjudicated law. Minimal objectivism also seems to gloss over the relationship between judges who issue judgments as members of a community and the community that then evaluates and instantiates the judgment’s full meaning. Minimal objectivism does not seem to address the process of determining the “legal facts” in a jurisdiction, which consist of existing legal sources but are not fully determined by them.

This leads to a further point about the dynamics of a judge and a community in presenting and evaluating judgments. As I discussed in the introduction, the core concern about subjectivity in judging—and the concomitant effort to argue for objectivity as the ideal of law and judging—is that judges will substitute their personal values for preexisting legal rules. I explained in chapter 2 that this concern is motivated by a mistaken conception of objectivity in law that has generated a false dichotomy between the subjective values of judges and the objective qualities of law. I argued that we need a more precise understanding of legal objectivity, and we need to dis-
tinguish objectivity from impartiality, so that we can arrive at a more accurate notion of legal validity.

As an alternative to the conventional approach, I argued for an understanding of judging that emphasizes the dynamics of an individual judicial response to a case that is communicated through recognized forms of legal argument to a larger community, which then evaluates and validates the judgment. To explain this dynamic, I drew parallels in chapter 3 between judging law in the common law tradition and judging art in Kantian aesthetic theory and argued for replacing the concepts of objectivity and truth with intersubjectivity and validity. I focused on four elements of Kant’s theory: judgment, communication, community, and disinterestedness. As with Kant’s aesthetic theory, common law judging involves a subjective and an intersubjective aspect. Common law judgments are an individual judge’s considered assessment of the law’s meaning and are claimed by that judge to be correct, not in the abstract sense of objective truth, but in the functional sense of shared modes of reasoning and expression that will lead other judges to the same conclusion. The judge who issues the judgment cannot make that determination for other judges, however. The judge communicates the judgment to the community and the community determines the judgment’s meaning and status as a legal source through an intersubjective process of evaluation and validation.

Once we stop seeing subjectivity and objectivity as opposed to one another and instead begin to understand the relationship of a subject to an object, we can see that the process of judgment requires a judge’s communication of a judgment of art or law to a community that shares the capacity to respond similarly. The judgment is a statement about the object being judged that must be communicated so that the community can evaluate the judgment. That process of intersubjective communication and evaluation is what determines the meaning of the judgment over time.

For example, we perceive this intersubjective process when a judge and a community begin to view a judgment that invalidates a law precluding two people of different races from marrying as a legal basis for a judgment that invalidates a law preventing two people of the same sex from marrying. As Justice Kennedy explained in his Obergefell judgment, a judge’s understanding of a constitutional right cannot be entirely excised or abstracted from his community’s understanding of what it means to be denied that right:

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the
fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter. . . . If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. [R]ights come not from ancient sources alone. They arise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.\footnote{13}

And judges occasionally acknowledge, as Kennedy did in \textit{Obergefell}, the evolution of legal meaning that informs their judgments through their own responses, and the responses of other judges, to this evolution:

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time. . . . Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process. This dynamic can be seen in the Nation’s experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. . . . In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.\footnote{14}

The point here is not that proper judging (or judges) would require holding these observations in abeyance while making legal rulings. The point is that their legal judgments about concepts such as equal protection or due process (or, as I discussed in chapter 4, fair dealing or racial discrimination or marital relationships\footnote{15}) cannot possibly be reached in the absence of their subjective responses to the operation of these principles in the lives of litigants through
the facts of the cases they decide. Indeed, one of the best demonstrations of this may be found in the fact that other judges who disagree with the interpretation or extension of these principles were able to anticipate the arc that the law would take through their courts’ judgments. Justice Scalia’s dissent in *Lawrence v. Texas* is perhaps the clearest prediction of the law’s development on this point.\(^\text{16}\)

To be sure, some judges believe that their favored approach to judging permits the courts to maintain their ostensibly proper role “of assuring, as neutral observer, that the democratic rules of engagement are observed.”\(^\text{17}\) My argument is not that judges should always simply follow an evolving understanding of social issues. My argument is that judges cannot reach judgments that do not involve a response, in one fashion or another, to that evolving understanding and to the law’s operation in relation to it. In other words, Justice Kennedy and Justice Scalia are both incorporating their own understanding of the law’s proper operation in regulating the intimate lives of certain individuals, regardless of whether they believe the Constitution prohibits or permits differentiating and disadvantaging people on the basis of their sexual orientation or gender expression. And Scalia, like Kennedy, incorporated into his judgments his assessment of broader social views toward the legal regulation of the intimate lives of gay people.\(^\text{18}\)

The meaning of liberty and equality in constitutional law does not exist apart from what judges and their community understand these principles to mean in their application to the lives of those governed by these principles. Their meaning is developed through the process of judges communicating their understanding of these concepts in reasoned legal judgments and the community’s evaluation and reception of these judgments. As I discussed in chapter 3, this process of communication and validation is dynamic and collaborative. Rather than viewing this process as an effort to locate the objective truth about constitutional principles, we need to recognize that the meaning of judgments in the common law tradition is developed through this interactive and intersubjective process. Together, judges and their communities determine the substantive content of judgments that explicate the fundamental legal principles that govern their lives and their society.\(^\text{19}\)

**The Subject and Object of Judging: Affirmative Action in Life and Law**

The expectation that the ideal judge is one who eliminates her personal experiences and beliefs from her judging is, in fact, a claim that we can view the world without a viewpoint. As I have argued, even if this were possible,
we should not desire it of our judges. More to the point, though, I have argued that Kant’s theory of aesthetic judgment and the common law’s process of legal judgment help us to understand—as individual judges or as members of a community that validates judgments through a shared capacity to judge—the relationship between our world and our worldview. Our understanding of the object (art or law) we are judging cannot exist apart from ourselves or the object; we help to determine the object’s meaning, and the object helps us, through the process of reflective judgment, to understand ourselves. The concepts, terms, experiences, and perceptions that are invoked by the individual who judges are shared, in some important sense, by the community that evaluates the judgment. These frames help to constitute the objects for us as individuals and our community’s shared understanding of them. The subject and the object, or the subjective and the objective, should be understood in their relationship to one another, rather than in opposition. Through this intersubjective process of judgment, communication, and validation, we construct the meaning of law or art and the standards according to which those judgments may properly be made, communicated, and validated.

Comparing the experiences and judgments of Clarence Thomas and Sonia Sotomayor with regard to affirmative action will help us to explore this process of judgment as it operates in the decision making of judges. Justice Thomas has expressed his explicit disapproval of affirmative action in higher education admissions. His goal at Yale Law School, he wrote, was “to vanquish the perception that [he] was somehow inferior to his white classmates. . . . But it was futile for [him] to suppose that [he] could escape the stigmatizing effects of racial preference, and [he] began to fear that it would be used forever after to discount [his] achievements.” And Justice Thomas’s concerns that affirmative action may reinforce stereotypes and undermine the achievements of minority students who benefit from the program are shared by others.

Justice Thomas’s personal experience with affirmative action has influenced his legal judgments. In his *Grutter* opinion, Thomas expresses the theme of the previous passage that affirmative action actually harms those it is meant to help: “The Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right. And this mismatch crisis is not restricted to elite institutions.”

Thomas went on in *Grutter* to discuss his concern about affirmative ac-
tion’s possible stigmatizing effects in a passage that presages the thought expressed in his memoir:

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.26

Thomas’s view that affirmative action actually injures minorities through entrenched stigmatization of their abilities and achievements runs through his *Grutter* opinion, his other affirmative action opinions, and his extra-curial writing.27 Justice Thomas reiterated these same concerns in his concurring opinion in *Fisher*:

[T]he University’s discrimination ‘stamp[s] [blacks and Hispanics] with a badge of inferiority.’ It taints the accomplishments of all those who are admitted as a result of racial discrimination. And, it taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission. . . . Although cloaked in good intentions, the University’s racial tinkering harms the very people it claims to be helping.28

Like Justice Thomas, Justice Sotomayor graduated from Yale Law School.29 Like Thomas, Sotomayor acknowledges that her admission to Yale (and to Princeton for her undergraduate education) was due in part to affirmative action.30 Like Thomas, Sotomayor describes an experience of sometimes
feeling out of place at elite schools due to her less-privileged background. Like Thomas, Sotomayor felt less well-prepared academically for the educational environment in which she found herself. Like Thomas, Sotomayor was confronted with others’ assumption that her admission was not earned and with her own anxiety that she might not succeed:

*The Daily Princetonian* routinely published letters to the editor lamenting the presence on campus of “affirmative action students,” each one of whom had presumably displaced a far more deserving affluent white male and could rightly be expected to crash into the gutter built of her own unrealistic aspirations. . . . The pressure to succeed was relentless, even if self-imposed out of fear and insecurity. For we all felt that if we did fail, we would be proving the critics right. And like Justice Thomas, Justice Sotomayor was confronted in her professional life with people who discounted her accomplishments by attributing them solely to affirmative action. In fact, they describe remarkably similar experiences in this regard.

Nevertheless, Justice Sotomayor’s view of affirmative action is entirely different from Justice Thomas’s. Where Thomas sees an inescapable badge of inferiority, Sotomayor sees a worthwhile window of opportunity:

I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run. I had been admitted to the Ivy League through a special door, and I had more ground than most to make up before I was competing with my classmates on an equal footing. But I worked relentlessly to reach that point.

Informed by her experiences, the view of affirmative action Justice Sotomayor expresses in her memoir is echoed in her judicial opinions on the subject and is most evident in her dissenting opinion in *Schuette v. Coalition to Defend Affirmative Action*. After the Court’s *Grutter* decision, a majority of voters in Michigan approved an amendment to the state constitution that prohibited, among other things, any public college or university in Michigan from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national
origin.” This provision was challenged as an equal protection violation under the United States Constitution.

In *Schuette*, the majority of the Court upheld the amendment to the Michigan constitution. In his opinion for a plurality of the Court, Justice Kennedy emphasized that *Schuette* was “not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. . . . The question here concerns . . . whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”

With that qualification, the Court ruled that the US Constitution did not prohibit voters from setting policy parameters in this fashion, provided that the political process is not used “to encourage infliction of injury by reason of race.” The Court did not view the electoral preclusion of affirmative action to be an injury.

Justice Sotomayor dissented. Joined by Justice Ginsburg, she drew upon the political-process doctrine established in *Hunter v. Erickson* and *Washington v. Seattle School Dist. No. 1*. As developed in *Hunter* and *Seattle*, the political-process doctrine prevents states not just from excluding or restricting the participation of racial minorities in the political process, but also from acting in a manner that will effectively “suppress the minority’s right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority,’ and (2) alters the political process in a manner that uniquely burdens racial minorities’ ability to achieve their goals through that process.”

In Sotomayor’s view, both prongs of the political-process doctrine were met in *Schuette*. First, the amendment to the Michigan constitution has a racial focus that is evident in the text itself. Second, the amendment “establishes a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity.” The amendment therefore violates the political-process doctrine and denies equal protection to racial minorities in Michigan. To explain the practical effect of the amendment’s alteration of the political process in Michigan, Sotomayor compares the relative advantages that (white) legacy applicants have in the admissions process to the relative challenges faced by other (minority) applicants who ask to have their racial diversity considered. The effective result of the amendment is “that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the
board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.” In violation of Hunter and Seattle, the amendment “subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.” As things stand in Michigan, the only way for advocates of race-sensitive admissions to achieve their goal through the political process is an amendment of the state constitution.

Justices Sotomayor and Thomas have explained their experiences with affirmative action and the divergent perspectives toward affirmative action that these experiences engendered. As a result of these experiences and perspectives, they disagree in their legal judgment regarding the constitutionality of affirmative action. Justice Sotomayor begins with “the common-sense reality that race-sensitive admissions policies benefit minorities.” This reality matters to her constitutional judgment because all state-implemented racial differentiations must satisfy strict scrutiny to be upheld as constitutional, and increasing racial diversity among students at institutions of higher education has been held to satisfy the compelling state interest requirement of this test. As a result of the Court’s precedent with respect to determining the constitutionality of race-sensitive admissions processes, Justice Sotomayor’s understanding of the benefits of affirmative action is linked to her judgment of its constitutionality. According to the Court’s judgment in Grutter, affirmative action benefits the minority students who have the opportunity to attend a particular college or university as well as the white students who attend that college or university. Applying the Court’s precedent in light of her own experience, Sotomayor concludes that the benefits of diversity justify the race-sensitive admissions practice and satisfy the strict scrutiny standard: “race-sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, which necessarily benefits minority groups.”

Justice Thomas does not share Justice Sotomayor’s reality. He disagrees with her about the benefits of race-sensitive admissions for minorities. In Thomas’s view, as he expressed in his Fisher and Grutter opinions, affirmative action actually harms minority students by undermining the achievements of those students who would be admitted in the absence of the admissions
program and by placing unprepared students in a competitive academic environment in which they are unable to succeed:

I must contest the notion that the Law School’s discrimination benefits those admitted as a result of it. . . . [N]owhere in any of the filings in this Court is any evidence that the purported “beneficiaries” of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences. . . . The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.54

Just as Sotomayor’s application of the political-process doctrine in Schuette derives from her belief in the benefits of affirmative action as a result of her personal experiences and values, Thomas’s conclusion in Grutter and Fisher that affirmative action is unconstitutional derives from his belief in the harms of affirmative action as a result of his personal experiences and values.

In relation to this book’s argument, the disagreement between Justice Sotomayor and Justice Thomas concerning affirmative action usefully illuminates the relationship between a judge’s personal experiences and legal judgments. Justices Sotomayor and Thomas have developed different and defensible understandings of the constitutional principle of equal protection as a result of their experiences as racial minorities in the United States. Broadly speaking, Sotomayor regards the principal value of equal protection as antisuordination, while Thomas sees the principal value of equal protection as anticlassification.55 Rather than fixate upon the experiences that inform their judgments, or valorize a conception of judging that is abstracted from personal experiences and values, we should instead recognize that the judgments themselves are their contribution to the law’s meaning and development. These varying understandings of the underlying value of equal protection are translated through Thomas’s judgments in Grutter and Fisher and through Sotomayor’s judgment in Schuette. And the merits of their respective judgments can be determined only after their evaluation and reception by a larger community. As I mentioned in chapter 3, the intersubjective validity of a judgment ultimately depends upon a judge’s ability to claim that others will agree with her reasoning and share her assessment. As a considered articulation of a legal conclusion, a judge who bases her ruling on
personal biases rather than on careful reasoning cannot reasonably claim the assent of other judges and has thereby preemptively sacrificed her own ability to contribute to our shared understanding of our law. At the same time, the recognition that the subject who authors a judgment must draw upon her experiences and values in articulating the judgment does not defeat the object of producing a judgment that can be evaluated and validated as an abiding contribution to our community’s law.

Reading Judges and Reading Judgments

The same is true for the community that evaluates and validates the judgment. It must be evaluated in accordance with the concepts, terms, and processes of reasoning of the relevant legal tradition and culture and not the prejudices or biases of particular members of the community. Again, Justices Thomas and Sotomayor provide useful examples. Just as the black community (or the politically conservative community) does not think with one mind or in one way about racially charged issues, Justice Thomas’s views of these constitutional questions cannot simply be itemized and categorized. He opposes affirmative action. He also views cross burning as a form of racial intimidation that is not protected by the First Amendment. His understanding of these legal issues cannot be disconnected completely from his experiences and values.

During her time on the United States Court of Appeals for the Second Circuit, Justice Sotomayor decided a case involving a claim that a promotion test administered by the New Haven Fire Department had a disparate negative impact on black firefighters. In that case, Ricci v. DeStefano, Sotomayor joined two colleagues in upholding the District Court’s ruling that the promotion exam “results showed a racially adverse impact on African-American candidates for both the Lieutenant and Captain positions.” Ricci became a flashpoint during Sotomayor’s confirmation hearings before the Senate Judiciary Committee. The allegation at those hearings was that as a Latina, Sotomayor was partial to the African American firefighters because they were racial minorities. Here are Senator Jeff Sessions’ comments at the hearings on the Ricci case:

[A]s a lower court judge, our nominee has made some troubling rulings. I am concerned by Ricci, the New Haven Firefighters case—recently reversed by the Supreme Court—where she agreed with the City of New Haven’s
decision to change the promotion rules in the middle of the game. Incredibly, her opinion consisted of just one substantive paragraph of analysis. Judge Sotomayor has said that she accepts that her opinions, sympathies, and prejudices will affect her rulings. Could it be that her time as a leader in the Puerto Rican Legal Defense and Education Fund, a fine organization, provides a clue to her decision against the firefighters? . . . It seems to me that in *Ricci*, Judge Sotomayor’s empathy for one group of firefighters turned out to be prejudice against another.60

What Senator Sessions chose to overlook, and what was far less widely discussed during Justice Sotomayor’s hearings, was that Sotomayor wound up ruling against a Latino firefighter in *Ricci*.61 And, of course, Sotomayor’s legal judgment was shared by the other two judges on the Second Circuit panel, the District Judge whose opinion they upheld, the other six Second Circuit judges who voted to deny an *en banc* rehearing of the case, and the four Supreme Court justices who would have upheld the Second Circuit ruling. Moreover, one of the judges who voted with Justice Sotomayor against the *en banc* rehearing in *Ricci*, Barrington Parker Jr., is black and was nominated to the Second Circuit by President George W. Bush,62 and one of the judges who voted to rehear the case as an *en banc* panel, José Cabranes, is Latino and was nominated by President Bill Clinton (and is regarded by Justice Sotomayor as “the first person [she] can describe as a true mentor”).63

In the introduction, I explored Justice Sotomayor’s now familiar “wise Latina” comment and the intense reaction and discussion it provoked during her confirmation hearings before the Senate Judiciary Committee. Justice Sotomayor recognized that who she is as a person would influence who she is as a judge. Controversial as her comment may be, it is true of every judge. As I explained in chapter 2, it is true of Justice Ginsburg, and as I explained here, it is just as true of Justice Thomas as it is of Justice Sotomayor. Justice Thomas’s personal experiences and values have led to his broader perspective as a politically conservative black man,64 and this perspective informs his view of the constitutionality of affirmative action. The same is true of Justice Sotomayor’s experiences and values as a Latina informing her view of affirmative action. Their experiences have been translated into individual perspectives and opinions concerning the meaning and scope of equal protection under the law of the Constitution. Counting judges’ votes, or categorizing their race, are inadequate means of attempting to understand fully the judges or their votes. We would be better served by carefully analyzing their judgments.
Common Law Judgment

Discussions of objectivity in law and judging ultimately result in efforts to place law, judging, and judges in some designated category rather than to help us understand the relationship of a judge to the law in the process of formulating a judgment. The preoccupation with identifying the correct form of objectivity for law assumes there is only one form that is correct, and it fails to account for the distinction between the existing sources of law and the law that is made through judicial interpretation and application of these sources. The law that exists at the start of the adjudicative process and the law that is made, interpreted, or applied through that process are determined, in part, by the judge’s subjective beliefs, values, and perspectives toward the law as expressed to a community through the form of a legal judgment. The meaning of that legal judgment is then constructed by the community through a process of evaluation and reception. Objectivity is not the best concept for attempting to capture this dynamic, because the law’s meaning cannot be identified without reference to the judge’s values and the community’s evaluation.

Attempting to fit law into a form of objectivity leads us to ask whether the meaning of law is “judgment-dependent” (minimal or modest objectivism) or “judgment-independent” (strong objectivism). Inevitably, this requires us to debate the meanings of objectivity rather than the meaning of law or the process of judging. Moreover, framing the debate in these “either-or” terms has led people for generations to ask whether the meaning of the judgment is “law-dependent” (formalism) or “law-independent” (realism). And the well-worn path of this debate quickly brings us back around to the strong objectivism of formalism and the subjectivism of realism.

In arguing for an understanding of common law adjudication through a process of intersubjective communication and validation, this book challenges the paired views that objectivity is the goal of judging and that subjectivity threatens the integrity of the judicial process. Rather than assume that judges should disengage or disregard their personal values and perspectives when they write their judgments, I have argued that a subjective element in common law judging is inescapable and is in fact one of the central values of a legal tradition that expects its judges to contribute to the law’s development. We need to see that the meaning of the law depends upon the identifiable content of the legal sources and upon the meaning of those sources to judges who bring different experiences, values, and perspectives to their reading and application of the sources. The content of the law is neither determined by the judge’s values alone nor can it be fully understood as
sequestered entirely from those values. Likewise, the meaning of a judgment is neither fully determined apart from the content of the existing law nor can it be fully understood in the absence of its communication to and evaluation by a larger legal and political and social community.

We need to consider the difference between the law that a judge considers in formulating her judgment and the law that is made through the process of issuing her judgment. Judges occupy the unique institutional and individual position in the common law tradition of defining the law in the course of reaching their judgments and making or altering the law once their judgments are expressed. Indeed, the common law process does not end with the issuance of the judgment to the community. The community constitutes itself as a community governed by law through an intersubjective process of evaluating the judgment and determining its lasting validity as a legal source. The rule-of-law values of the common law tradition require that a legal system’s constitutional principles are never wholly encompassed by a constitution, even if that constitution is written.

The common law attempts to protect the constitutional values of its tradition by protecting the institutional and individual independence of its judges. The common law tradition of judicial independence ensures that judges may determine for themselves what the law means and how it should be applied, which also necessitates that a judge’s values and perspectives will influence what she understands the law to mean and how she believes it should be applied. I argued in chapter 5 that the institutional independence of the judiciary exists to ensure this individual independence of judges in determining for themselves which sources they will consider in rendering their judgments, and I examined some judgments that changed and developed the law in the United States and the United Kingdom. In developing property, tort, criminal, and constitutional law, these cases serve as concrete examples of legal judgments that express the individual responses of the judges who decided them.

Whatever a judge’s experiences may be, as a wise Latina or as a black man who was raised by his grandfather in Georgia or as a Jewish woman who lived through World War II, those experiences will influence the way that judge understands the facts and the law of any case. Every judge’s values are created by means of experiences that inform the perspective through which that judge understands the law. We should therefore select our judges carefully. But we should not deny the cumulative value of these experiences in the judicial process by which judges contribute to a shared understanding of the legal values that help to constitute our community and the standards by which we govern ourselves.