Common Law Judging

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Notes

Chapter 1


3. The question whether empathy is a quality we should seek or avoid in our judges was triggered by President Obama’s comment concerning the individual he would wish to appoint to replace Justice Souter: “I view that quality of empathy, of understanding and identifying with people’s hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes.” For the full text of President Obama’s comment, see David Jackson, “Obama’s Friday Remarks on Souter and the Court,” *USA Today*, May 1, 2009. For an interesting discussion and defense of a role for empathy in judicial decision making, see Lucia Corso, *Should Empathy Play Any Role in the Interpretation of Constitutional Rights?*, 27 Ratio Juris 94 (2014). Corso differentiates an “epistemic view” of empathy from a “moral view,” explains that genuine empathy requires an individual who is neither indifferent to the experiences of others nor overly emotional about them, and concludes that “empathy may be seen as a quality of good judgment, for it allows a more profound understanding of the needs put forward in the legal claims and hence a better insight into the factual/legal issues [of a case].” *Id.* at 100.

4. Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009) [Sotomayor Hearings], 16–17, 18.

5. *See, e.g.*, *Id.* at 8 (Sen. Jeff Sessions: “Judge Sotomayor has said that she accepts that her opinions, sympathies, and prejudices will affect her rulings.”); *Id.* at 13 (Sen. Orrin Hatch: “Must judges set aside or may judges consider their personal feelings in deciding cases? Is judicial impartiality a duty or an option? Does the fact that judicial decisions affect so many people’s lives require judges to be objective and impartial? Or does it allow them to be subjective and sympathetic?”); *Id.* at 23 (Sen. Jon Kyl: “Judge Sotomayor clearly rejected the notion that judges should strive for an impartial brand of justice. She has already accepted that her gender and Latina heritage will affect the outcome of her cases.”); *Id.* at 39 (Sen. Tom Coburn: “[I]t shouldn’t matter which judge you get. It should matter what the law is and the facts are. . . . And if we disregard objective consideration of facts, then all rulings are subjective. . . . [Y]our questioning of whether the application of impartiality in judging, including transcending personal sympathies and prejudices, is possible in most cases or is even desirable is extremely
troubling to me.”). Senators Coburn, Grassley, Hatch, Kyl, and Sessions voted against confirming Justice Sotomayor.

6. See, e.g., Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006), 475 (“[W]hen a case comes before me involving, let’s say, someone who is an immigrant, and we get an awful lot of immigration cases and naturalization cases, I can’t help but think of my own ancestors because it wasn’t that long ago when they were in that position. And so it’s my job to apply the law. It’s not my job to change the law or to bend the law to achieve any results, but I have to, when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time and they were people who came to this country. When I have cases involving children, I can’t help but think of my own children and think about my children being treated in the way that children may be treated in the case that’s before me. And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who’s been subjected to discrimination because of disability, I have to think of people who I’ve known and admired very greatly who had disabilities and I’ve watched them struggle to overcome the barriers that society puts up, often just because it doesn’t think of what it’s doing, the barriers that it puts up to them. So those are some of the experiences that have shaped me as a person.”) Justice Alito was responding to this question from Senator Coburn: “This booklet is design to protect the weak, to give equality to those who might not be able to do it themselves, to protect the frail, to make sure that there is equal justice under the law. . . . Can you comment just about Sam Alito and what he cares about and let us see a little bit of your heart and what is important to you and why?”). Id. at 474–75. Senators Coburn, Grassley, Hatch, Kyl, and Sessions voted in favor of confirming Justice Alito.

7. Sotomayor Hearings, 545, 546 (Statement of Professor Neomi Rao).


9. A statement by Justice Sotomayor (which was joined by Justice Breyer) serves as an example of what I mean here. Justice Sotomayor joined a unanimous vote of the Supreme Court to deny certiorari, despite racially inflammatory comments made by a federal prosecutor during cross-examination of a defendant, because the defendant’s attorney did not challenge those comments at trial and then failed to raise the issue on appeal. Justice Sotomayor agreed that given the posture in which the case was presented to the Court, the Court could not properly review (or reverse) the outcome, due to the proceedings in the lower courts. But she still wrote separately “to dispel any doubt whether the Court’s denial of certiorari should be understood to signal our tolerance of a federal prosecutor’s racially charged remark” and to reaffirm that a prosecutor may not “attempt to substitute racial stereotype for evidence, and racial prejudice for reason.” Calhoun v. United States, 133 S. Ct. 1136, 1136, 1137 (2013).

10. See Richard A. Posner, How Judges Think (Harvard University Press, 2008), 106 (“Indignation at a wrong is consistent with corrective justice; sympathy for a litigant
is not. The character of an emotional reaction . . . does not make emotion always an illegitimate or even a bad ground for a judicial decision. . . . Emotion can be a form of thought, though compressed and inarticulate. It is triggered by, and more often than not produces rational responses to, information.”). Judge Posner’s comments are helpful in seeing the difference between improper bias toward an individual litigant and appropriate individual responses to the facts and issues raised in a case. See also Martha C. Nussbaum, Emotion in the Language of Judging, 70 St. John’s L. Rev. 23, 30 (1996) (“[E]motion that is tethered to the evidence and free from reference to one’s own personal goals and situation is not only acceptable, but actually essential to public judgment.”).

11. See Matthew H. Kramer, Objectivity and the Rule of Law (Cambridge University Press, 2007), 38–41. See also H. L. A. Hart, The Concept of Law (3rd ed.) (Oxford University Press, 2012), 161 (“[T]o apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice.”).

12. See, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 646 (1990) (“[J]udicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened.”) (Eskridge is characterizing formalism). As I will explain in more detail in the next chapter, the notion that the objective meaning of a law is determined by its written language is a point that is easily misunderstood. Many people assume that the writing of the law must constrain its meaning (which it often does). But as Tara Smith has explained, the writing of the law also allows the law to function as an external constraint precisely because its linguistic meaning is open-ended. See Tara Smith, Originalism’s Misplaced Fidelity: “Original” Meaning Is Not Objective, 26 Const. Comment. 1, 34, 35 (2009) (“I would readily agree that the fact that our constitution is written, as well as what is written, must constrain contemporary judges. Given the objective character of concepts, however, we must interpret the written law accordingly. The point of writing law is to make the law knowable to all. That purpose could not be achieved if the written words were understood subjectively, as, in effect, a private code that referred only to the contents of particular individuals’ heads. . . . [I]n applying the law, we do not employ subjective criteria of meaning. Laws do not govern only those people who share the exact same experiences and beliefs as the authors of a law. My misunderstanding of a particular law neither exempts me from the obligation to obey that law nor alters what it is that I must obey. In practice, that is, we routinely recognize that the written law’s meaning is objective. Indeed, it is the objective, open-ended character of concepts that enables the law to govern prospectively. The application of a law written in the 18th century to disputes in the 21st rests on the premise that language refers to a greater number of instances than a law’s authors may have experienced or imagined. Far from posing a threat to the objectivity of law . . . the open-endedness of concepts is what allows the law to be applied objectively.”).

13. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). It is no small irony that this canonical statement of Anglo-American rule-of-law values, which is so often quoted as countervailing unbridled judicial authority, appears in the most seminal claim of judicial authority by a judge in a judicial opinion in Anglo-American legal
history. It is also worth noting that all governments of laws are also governments of men and women, because all human laws are made by human beings. See, e.g., John Gardner, Law as a Leap of Faith: Essays on Law in General (Oxford University Press, 2012), 85, 86 (“All three of the types of law I discussed here are types of positive law. They are all made by somebody and we know that they count as law only when we know who made them. Legislated law is made by legislators. Case law is made by judges. Customary law is made by (official or non-official) populations. . . . [T]here is no such thing as non-positive law. There are no legal norms that come into existence without being brought into existence by someone.”); Thomas Aquinas, The Treatise on Law (R. J. Henle, ed.) (University of Notre Dame Press, 1993), 38 (“Positive law (variously called ‘human law,’ ‘man-made law,’ ‘civil law,’ ‘municipal law’) is the law produced by human legal institutions.”) (this quote is from Henle, not from Aquinas himself).

14. See, e.g., Joseph Isenbergh, Activists Vote Twice, 70 U. Chi. L. Rev. 159, 160 (2003) (“By judicial activism I mean the decision of cases according to the judges’ preferences. Its opposite, for present purposes, is adjudication according to neutral principles without regard for preference. An activist judge, in other words, gives effect to preference over the objective meaning of the law when they conflict.”)

15. See, e.g., John W. Salmond, ed., The Science of Legal Method (Macmillan, 1921), lxxv (“[T]he law presents itself primarily and essentially as a system of rigid rules in accordance with which justice is administered . . . to the exclusion of the unrestricted judicial discretion of the judges . . .”).

16. See, e.g., Laura Kalman, The Strange Career of Legal Liberalism (Yale University Press, 1996), 5 (“Once the legal realists had questioned the existence of principled decision making, academic lawyers spent the rest of the twentieth century searching for criteria that would enable them to identify objectivity in judicial decisions.”).


18. See, e.g., Michael J. Gerhardt, The Power of Precedent (Oxford University Press, 2008), 80 (“[A]ttitudinalists and rational choice theorists generally claim the Court primarily functions as a cipher for justices’ expressions of their individual preferences.”).

19. See, e.g., Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 863, 864 (1989) (“Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. . . . Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).


23. See generally W. Preston Warren, Modes of Objectivity, 39 Phil. & Phenomenological Res. 74, 77–78 (1978) ("[S]tructure is a mode of objectivity. . . . Social structures are diversely institutional. . . . Social structures afford clear examples of two modes of existential objectivity. They are communally transindividual, and they are in certain ways, directly functional. . . . Communication indeed can be primarily suggestive, inducing feeling tones and appropriate responses but also inducing what intelligence discovers to be very inappropriate responses. . . . But the process of feedback may soon bring correction. Here we have the basis for intersubjectivity but through objective channels grounded in other objective conditions."). I explain in chapters 2 and 3 that the objective conditions and channels of the judicial institution create the constraints within which the individual judge’s decision is communicated and received. And I explore the ways these objective conditions and channels create and constrain the intersubjective process of evaluating the individual judgment.

24. See Nicos Stavropoulos, Objectivity in Law (Oxford University Press, 1996), 6 ("The central questions of jurisprudence are domain-specific, not global. Arguments against the possibility of objectivity in law are not to do with the concept of truth in abstracto, but with the nature of law in particular. . . . I shall argue for a kind of objectivity that is consistent with the anti-realist slogan that ‘meaning depends on use’, and that needs no fact in virtue of which a judgment that a concept applies to a case is true, other than the ordinary theoretical support such a judgment must rely on.").

25. Barbara Herrnstein Smith, Belief and Resistance: Dynamics of Contemporary Intellectual Controversy (Harvard University Press, 1997), 22. Smith discusses legal judgment specifically, although her arguments range far more broadly. For my purposes, however, I mean to limit my reference to her work to a legal context.


30. I address this point in detail in chapter 4.

31. See Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75 Colum. L. Rev. 359 (1975) (discussing and debunking critiques of judicial legislation).

32. See below at 77–78.


34. The German Federal Constitutional Court is probably the best-known example of a court in a civil law nation that was created to employ broader powers of legal interpretation and exposition. See generally Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3rd ed.) (Duke Uni-

35. See Merryman and Pérez-Perdomo, The Civil Law Tradition, 36–37. As Merryman and Pérez-Perdomo indicate, the traditional understanding of the civil law judicial function is incomplete but pervasive. See id. at 46–47.


37. I do not want to oversimplify what is not overly simple even within the civil law tradition. For example, the German Civil Code emphasizes exactitude and certainty while the French Code was meant to permit some space for judicial interpretation. See Zweigert and Kötz, Introduction to Comparative Law, 89–93, 262–63.

38. See Merryman and Pérez-Perdomo, The Civil Law Tradition, 62–65. An element of this feature of the civil law tradition, as it evolved in Germany, was the effort to locate the law’s political morality wholly within the law’s text and proper application. Judicial decisions were meant to be validated solely by reference to the posited content of the law. As it happened, however, this may have resulted in the substitution of judicial values that are, by definition, external to the law’s content in place of (and contrary to) the scientifically derived meaning of the law. See Roger Berkowitz, The Gift of Science: Leibniz and the Modern Legal Tradition (Harvard University Press, 2005), 156–57 (“Against all previous scientific codes that sought to actualize an ideal of reasoned justice, the BGB offers a wholly technical Recht in the service of equally allotted social and economic values. . . . Recht is not, as it was for Leibniz and Savigny, a product of necessary scientific knowing of the ethical world. And yet Recht continues to be known as a product of science. . . . Recht, in other words, is the means for the achievement of the ends adopted by the jurists who form and administer the scientifically constructed legal order.”). See also id. at 107–8. In Berkowitz’s view, the “relentless pursuit of truth” envisioned by thinking of law as science ultimately leads to the submission of law to political ends. See id. at 158. In terms of the argument of this book, we might say that the truth in the law’s application through judicial reasoning cannot be located beyond the communication and validation of the judgment itself as a source of law. Put differently, in creating space for judicial values within a process of legal reasoning we allow for a method of legal development through legal judgments that engage the dynamics of political morality along with the distinctive authority of legal sources.


41. See Freckmann and Wegerich, The German Legal System, 97–98.

42. See Kommers and Miller, The Constitutional Jurisprudence of the Federal Republic of Germany, 46–47.

43. See, e.g., Glenn, Legal Traditions of the World, 238 (“The only avenue for a Norman legal order, common to the realm, was through a loyal judiciary. This immediately marks off a common law tradition from all others.”).

45. See below at 29–30.
46. See R. C. van Caenegem, European Law in the Past and the Future: Unity and Diversity over Two Millennia (Cambridge University Press, 2002), 44–45. Of course, some judges rely on their clerks to draft their opinions. These opinions also reflect their author’s personality.
47. See generally Jeffrey A. Segal, Harold J. Spaeth, and Sara C. Benesh, The Supreme Court in the American Legal System (Cambridge University Press, 2005), 16 (“Given (1) that different courts and judges do not reach a common decision about a given case, (2) that appellate court decisions—especially those of the Supreme Court—commonly contain dissents, and (3) that a change in a court’s membership not atypically produces a different result, why do so many persist in believing that judicial decisions are objective, dispassionate, and impartial?”).
49. See generally Jeffrey A. Segal, Harold J. Spaeth, and Sara C. Benesh, The Supreme Court in the American Legal System (Cambridge University Press, 2005), 16 (“Given (1) that different courts and judges do not reach a common decision about a given case, (2) that appellate court decisions—especially those of the Supreme Court—commonly contain dissents, and (3) that a change in a court’s membership not atypically produces a different result, why do so many persist in believing that judicial decisions are objective, dispassionate, and impartial?”).
50. For an early statement of this point by an individual who truly appreciated its importance, see Edward Coke, “Preface to Part Nine of the Reports,” in 1 The Selected Writings of Sir Edward Coke, ed. Steve Sheppard (Liberty Fund, 2003), 307 (“For it is one amongst others of the great honours of the Common Laws, that Cases of great difficulty are never adjudged or resolved in tenebris [in darkness] or sub silentio suppressis rationibus [in silence suppressing the reasons]; but in open Court, and there upon solemn and elaborate Arguments, first at the Bar by the Counsel learned of either party . . . and after at the Bench by the Judges . . . declaring at large the authorities, reasons and causes of their Judgments and Resolutions in every such particular Case.”) (footnote omitted).
51. See, e.g., Lewis F. Powell, Jr., “What Really Goes On at the Supreme Court,” in David M. O’Brien, ed., Judges on Judging: Views from the Bench (4th ed.) (CQ Press, 2013), 129 (“It is fortunate that our system, unlike that in many other countries, invites and respects the function of dissenting opinions. The very process of dissent assures a rigorous testing of the majority view within the Court itself, and reduces the chance of arbitrary decision making . . . the forceful dissent of today may attract a majority vote in some future year.”); Benjamin N. Cardozo, The Nature of the Judicial Process (Yale University Press, 1921), 79 (“It is the dissenting opinion of Justice Holmes [in Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905)], which men will turn to in the future as the beginning of an era. In the instance, it was the voice of a minority. In principle, it has become the voice of a new dispensation, which has written itself into law.”). See below at 172–73n198, 186n68, 187n77.
53. And any judge might get something wrong. See Buck v. Bell, 274 U.S. 200, 207 (1927) (“We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those
concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”) (Holmes, J.) (footnote and citation omitted).

54. See, e.g., Benjamin N. Cardozo, Law and Literature and Other Essays and Addresses (Harcourt, Brace and Co., 1931), 36 (“More truly characteristic of dissent is a dignity, an elevation, of mood and thought and phrase. Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost. The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.”).


56. See Coleman and Leiter, Determinacy, Objectivity, and Authority, 607–21.

57. See, e.g., John Bell, “The Acceptability of Legal Arguments,” in Neil MacCormick and Peter Birks, eds., The Legal Mind: Essays for Tony Honoré (Oxford University Press, 1986), 51–57 (discussing the use of “a set of criteria against which the acceptability of legal arguments can be judged,” which Bell calls a canon, and describing the “legal audience” or a smaller “sub-group of the legal profession” as the community that ultimately determines the acceptability and meaning of legal judgments); Dennis Patterson, Normativity and Objectivity in Law, 43 Wm. & Mary L. Rev. 325, 328–29 (2001) (“I want to replace the conventional understanding of objectivity with an account of the notion that grows out of the actual practice of law. My claim is that the normativity and objectivity of legal judgment is a function not of the way the world is, but is forged in community agreement over time. . . . Law exhibits an argumentative framework employed by participants in legal practice to show the truth of legal propositions. . . . Objectivity is a product of the recursive use of this argumentative framework.”). See also Kramer, Objectivity and the Rule of Law, 123 (“[T]he clarity of legal language is not to be gauged principally by reference to an ordinary person’s understanding and knowledge. . . . Instead, the chief touchstone for the understandability of the formulations of legal norms is the competent legal expert’s comprehen-

58. See Brian Leiter, Objectivity and the Problems of Jurisprudence, 72 Tex. L. Rev. 187, 194–95 (1993). See also Kramer, Objectivity and the Rule of Law, 47 (“[E]pistemic objectivity . . . is a scalar property rather than an all-or-nothing property. Things partake of it to varying degrees. An area of enquiry can be epistemically more objective or less objective than any number of other areas of enquiry.”).

59. See, e.g., S. L. Hurley, Natural Reasons: Personality and Polity (Oxford University Press, 1989), 14–15 (“Of all the possible objectivist positions available in the logical space left by the denial of subjectivism, [strong objectivity] is one of the least tempting. Hardly anyone holds it, there is little point in arguing against it, and there is not very much to say about it. Any subjectivists who take it to be their most serious opposition are wasting their time on a straw man, and underestimated the strength of their objectivist opposition.”).

61. Moore, A Natural Law Theory of Interpretation, 300–301.


64. I use the term “legal realist” to refer to a contemporary view and a conventional understanding, but I should mention, as Brian Tamanaha has meticulously demonstrated, that this subjectivist view of law was not the view of the first scholars and judges who called themselves realists. See Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (Princeton University Press, 2010), chaps. 5–6. In addition to Tamanaha’s careful historical dismantling of the current version of realism, H. L. A. Hart offered a powerful theoretical criticism of the view (which he called rule-skepticism). See above at 136n22.


66. See, e.g., Segal, Spaeth, and Benesh, The Supreme Court in the American Legal System, 96 (“[T]he rules governing civil procedure—as with those applicable to legal fields generally—not only do not admit of mathematical precision, but do not even bear a modicum of objectivity. . . . [T]he eye of the beholder determines their applicability. The fact that many of the law’s rules and tests are labeled objective no more evinces their truth, or their correspondence with reality, than it does the figments of one’s imagination. . . . [W]ords mean what courts, judges, and attorneys choose them to mean.”) (emphasis in original).

67. It is worth noting that legal realists (as they actually thought and wrote and not as they have been appropriated and caricatured) usually accepted this. Steven Winter explains this in his discussion of Karl Llewellyn. See Steven L. Winter, A Clearing in the Forest: Law, Life, and Mind (University of Chicago Press, 2001), 221 (“His [Llewellyn’s] reconception of legal certainty captures a profound truth about the social and operational reality of law. . . . Law functions most of the time because it has a ‘this-is-how-these-things-are-done’ quality to it. If it did not, no legal system could survive without the constant exercise of raw, repressive power. . . . A legal rule that is motivated—i.e., that embodies situation-sense—will seem ‘natural’ or ‘right’ to those governed by it because they will see the rule as a reflection of the objective qualities of the social world in which they live. The operational success of a legal system (as distinct from its justice or legitimacy) depends upon the institutionalized meaning that precedes the promulgation of the rule.”) For a concise discussion of this point, see Tamanaha, Beyond the Formalist-Realist Divide, 6–7, 87–98. For a reasonably brief and reasonably clear exposition by Llewellyn of his own view, see “Appellate Judging as a


69. See Barry Friedman and Andrew D. Martin, “Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-making,” in Charles Gardner Geyh, ed., *What’s Law Got To Do With It?: What Judges Do, Why They Do It, and What’s at Stake* (Stanford University Press, 2011), 157–65; Owen Fiss, *The Law as It Could Be* (New York University Press, 2003), 154–55 (“The disciplining rules may vary from text to text. . . . Even within the law, there may be different rules depending on the text—those for contractual interpretation vary from statutory interpretation, and both vary from those used in constitutional interpretation. Though the particular content of disciplining rules varies . . . they furnish the standards by which the correctness of the interpretation can be judged. These rules are not simply standards or principles held by individual judges but, instead, constitute the institution (the profession) in which judges find themselves and through which they act.”).

70. Friedman and Martin, “Looking for Law in All the Wrong Places,” in Geyh, *What’s Law Got To Do With It?*, 163, 164. See also Linda Meyer, “Nothing We Say Matters”: Teague and New Rules, 61 U. Chi. L. Rev. 423, 424 (1994) (“[I]n the common law tradition, the Court has declined to limit the ‘holding’ of a precedent to any explicit statement of a rule in the language of that case. Instead, a holding includes the ‘material’ facts and result of the prior case, and the appropriate level of generality at which to capture and to describe those material facts is not predetermined by anything the prior court has said.”); Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 Oxford J. Leg. Stud. 215, 252 (1987).


75. As I indicated a few paragraphs ago, my argument against subjectivist views of judging takes legal realism as the most prominent expression of that view. Not all subjectivists are legal realists, however, where theoretical analysis of judging is concerned. For a thoughtful subjectivist defense of judicial authority, see Dale Smith, *Can Anti-Objectivists Support Judicial Review?*, 31 Austl. J. Leg. Phil. 50, 62 (2006) (“Even if we view our moral beliefs as simply reflecting our preferences, we may regard those preferences as sufficiently important that we would want to act on (some of) them even if this meant overriding the majority’s preferences. The recognition that our moral beliefs are not objectively correct need not—indeed, is unlikely to—lead us to cease attaching importance to those beliefs.”) (emphasis in original). For purposes of my argument against legal realism, Smith helpfully explains that the view of moral principles (or legal rules) as lacking objective truth or reality need not commit someone to a view of judging as morally or legally unconstrained or illegitimate.
76. Some might claim that the account of judging I will develop and defend here incorporates a form of “crypto-solipsism.” See F. C. S. Schiller, *Solipsism*, 18 Mind 169, 171 (1909). According to Schiller, the label crypto-solipsism may be applied “to any view which needs Solipsism for its logical completion.” *Id.* Given that I will argue for the indispensable component of subjective response in common law judging, and to the extent that this form of subjective response depends on the individuated response of particular judges, Schiller’s charge that this view is “crypto-solipsistic” may be unavoidable. In fact, though, I do not believe this label applies accurately to my argument, because of the relationship (which I will explain in detail in chapter 3) between subjectivity and intersubjectivity. As a result of this relationship, a common law judge cannot avoid asking “himself how his perceptions accord with those of others” and he cannot “suppress the opinions of those who disagree with him.” *Id.* at 174, 178. Indeed, as I will explain in chapter 3, the validity of a common law judge’s judgment actually depends upon the perceptions and possible disagreements of others.

77. See Patterson, *Normativity and Objectivity in Law*, 345–47 (explaining that a solo actor cannot usefully be said to apply a norm correctly or incorrectly because there is no social practice by which his action can be evaluated as correct or incorrect).

78. See John McDowell, *Mind, Value, and Reality* (Harvard University Press, 1998), 203–12, esp. 208–9. *Cf. Poe v. Ullman*, 367 U.S. 497, 542 (1961) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.”) (Harlan, J., dissenting).

79. *Cf.* Cass R. Sunstein, “Incommensurability and Kinds of Valuation: Some Applications in Law,” in Ruth Chang, ed., *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, 1997), 244–45. As I indicate in the text, the goal here is not to defend a particular approach to evaluation or a preferred normative content for legal rules. But as Sunstein explains in his essay, the “expressive function of law” necessitates that law reach conclusions in disputed areas of valuation. And my argument here attempts to underscore the relationship between the judicial process of evaluation and legal conclusions about valuation.

80. *See generally* Tara Smith, *Judicial Review in an Objective Legal System* (Cambridge University Press, 2015), 241 (“The law is a body of conceptual instruction; as such, it is not reducible to a list of concrete commands that can be heard and followed with no intervening thought on the part of the person following it. . . . [T]he subject must act and contribute to the conclusion in a way that is not fully scripted by the material that he attempts to understand. . . . [T]o recognize the inescapable role of the subject in a process of thinking does not license subjectivism. The fact that the activity of judgment is performed by a subject does not render it subjectivist, for it does not entail that
the *standard* employed must be the subject’s belief or preference.”) (internal punctuation deleted) (emphasis in original).

81. See Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006), 242 (“The sophisticated modern recognition that judges’ background views subconsciously influence their interpretation of the law at some deep level is correct. . . . Too often, however, a leap is made from these points to the conclusion that, therefore, judges are deluded, naïve, or lying when they claim that their decisions are determined by the law. To the extent that a judge is consciously rule-bound when engaging in judging, the judge is correct in claiming to be rule-bound *in the only sense that this phrase can be humanly achieved.* Since judging is a human practice, it is absurd to evaluate the decision-making of judges by reference to a standard that is impossible to achieve, inevitably finding them wanting.”) (emphasis in original). Tamanaha illustrates this point with his contrast of a “Consciously [Rule-] Bound judge” and a “Consciously Ends-Oriented judge.”) See *id.* at 241–45. This is also an “either-or” conception of judging (“either judges are rule-bound or ends-oriented”) that may be slightly misleading. But I do not want this minor reservation to distract or detract from the force of Tamanaha’s larger point, with which I entirely agree.

82. See Patterson, *Normativity and Objectivity in Law*, 327–28 (“Objectivity is often theorized as a relationship between an assertion and some state of affairs in virtue of which the assertion is ‘objectively true.’ The nub of the argument is that assertions or beliefs are true in virtue of the way things are (i.e., facts). Facts make assertions and beliefs true, and objectively so, for facts are not mere matters of mind: they are a function of the way things are. By conceptualizing objectivity in terms of a connection between a belief or assertion and a mind-independent state of affairs, proponents of objectivity all but guarantee creation of objectivism’s opposite, subjectivism. Subjectivists deny the efficacy of the objectivist account of the relation between mind and world, locating the seat of truth and belief in the individual subject. The debate is intractable. I argue that the choice between objectivism and subjectivism is false. Just because we are free to describe a situation in a variety of ways (rejecting objectivism) does not dictate the conclusion that, within each vocabulary, there are no standards for correct and incorrect assertion (rejecting subjectivism). I propose to approach objectivity from the point of view of normativity. By ‘normativity’ I mean to identify the ways in which speakers of a language appraise assertoric utterances in terms of ‘correct’ and ‘incorrect’ or ‘true’ and ‘false.’”).


87. See, e.g., *Fifth Third Bank of Western Ohio v. United States*, 402 F.3d 1221, 1225 (Fed. Cir. 2005) (“[T]he parties do not dispute basic issues of offer, acceptance, and
consideration, the essentials of contract formation.”). In fact, of course, enforceable contracts require more than just these three elements.

88. In a metaphysically or epistemologically objective or realist sense.

89. What I have in mind here is the tradition of describing facts established to the satisfaction of the legal fact-finder as “legal truth.” See Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), 72 (“In effect, legal fact-finding processes transform brute facts into institutional facts. Whatever may have happened in the world, a jury’s determination that a hit b on the head and caused b’s death makes that count as a legal truth, a proposition counted as true in a certain legal process.”); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. Crim. L. & Criminology 118, 129–30 (1987) (“[L]aw is just one of a number of kinds of discourse about the world. As a discourse, the law has its own concepts, categories of thought, and ways of perceiving and processing information. Legal discourse may, in some respects, track the world in the same way that other kinds of discourse do, while in other respects it may not.”).

90. See Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford University Press, 2014), 65–71. As Constable explains, a legal judgment is both a “locutionary act” in its stating of the law and an “illocutionary act” as a statement of law that is evaluated by a community. See *id.* at 29, 68. At this point, I am discussing the locutionary function of the judgment. I discuss its illocutionary aspects in chapter 3.

91. See below at 26–30, 60–62.

92. This point may be easier to see in certain tort cases, for example, where the physical evidence does not typically exist in the same way. In other words, there never is “negligence in the air.” *Palsgraf v. Long Island R.R. Co.*, 248 N. Y. 339, 341 (1928) (Cardozo, J.) (quoting Frederick Pollock, *The Law of Torts* (11th ed.) (Stevens & Sons, 1920), 455).


94. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 463–64 (1897) (“Nothing is more certain than that the parties may be bound by a contract to things which neither of them intended. . . . The parties are bound by the contract as it is interpreted by the court, yet neither of them [may have] meant what the court declares that they have said.”); *Restatement (Second) of Contracts* § 21 (“Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract.”).

95. See below at 78–80, 82, 85, 87–89.

96. For an example of this sort of understanding of objectivity, see below at 66–71.

97. See, e.g., Barry Stroud, *The Quest for Reality: Subjectivism and the Metaphysics of Colour* (Oxford University Press, 1999), 12 (“In all these theories, there is a conception of the world or reality as being a certain way independently of the responses of any sentient beings. . . . Although this conception of reality and of the project of separating the ‘subjective’ from the ‘objective’ is a very old idea, it is by no means a thing of
the past."); Patricia Marino, What Should A Correspondence Theory Be and Do?, 127 Phil. Stud. 415, 419 (2006) (“objectivity ... [is the idea] that snow is white is a fact independently of what we believe, how we see the world, and so on.”). Objectivity and mind-independence are sometimes discussed in relation to the reference or correspondence theory of truth, according to which factually true statements accurately refer or correspond to mind-independent objects in the world.

98. See, e.g., Greenawalt, Law and Objectivity, 12–13, 34–53; Kramer, Objectivity and the Rule of Law, 14–25. A related connection between objectivity and the rule of law is the idea that the answers to legal questions can be found in recognized legal sources, so the law meaningfully (though perhaps not entirely) determines the outcome of legal disputes (rather than mere judicial discretion).

99. Mind-independence itself can take various forms in relation to objectivity. The use of mind-independence in my argument is a weak form. See Kramer, Objectivity and the Rule of Law, 6 (“That most general legal norms are at least weakly mind-independent is quite evident. The existence of those norms does not stand or fall on the basis of each individual’s mental activity.”).

100. This is not limited to the legal positivist notion that a rule of recognition circumscribes the limited domain of authoritative legal sources. Natural law and interpretivist theories also recognize the distinctive function of legal sources in legal reasoning. See Hart, The Concept of Law, 94–95; Joseph Raz, The Authority of Law: Essays on Law and Morality (2nd ed.) (Oxford University Press, 2009), 47–52; John Finnis, Natural Law and Natural Rights (2nd ed.) (Oxford University Press, 2011), 319–20; John Finnis, “Natural Law and Legal Reasoning,” in Robert P. George, ed., Natural Law Theory: Contemporary Essays (Oxford University Press, 1992), 142, 151; Ronald Dworkin, Justice in Robes (Harvard University Press, 2006), 6; Ronald Dworkin, Law’s Empire (Harvard University Press, 1986), 88, 98–99. Of course, theorists who identify with one or another of these schools of thought may disagree about whether legal sources are the exclusive basis for legal reasoning and judicial decision making, or whether morality may (or must) be incorporated as a condition of validity when identifying sources of law. For the most part, I cannot engage these debates here. Since it bears directly on the discussion in the text, however, I should note that Dworkin is sometimes accused of denying the sources thesis. See, e.g., Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. Rev. 875, 914 (2003). Insofar as this might be taken to mean that Dworkin denies a significant place for legal sources in legal reasoning, it would be more accurate to say Dworkin accepts that legal sources play a central role in legal reasoning, but he does not believe that the content of the law can be fully identified through a rule of recognition (or is necessarily exhausted by the sources). In this respect, Dworkin is best understood as claiming that the sources thesis and the rule of recognition are not coextensive and as arguing for an alternative version of the sources thesis in which the content of the law is constructed through a process of legal reasoning rather than identified through a social practice of legal officials. See Stavropoulos, Objectivity in Law, 141–42.

101. This is not meant as a claim about the broader philosophical discussion of Kant’s notion that there is an external world “in itself” about which we have necessarily partial access and understanding. For purposes of my discussion of Kant, the formulation of legal or aesthetic judgments can operate if we take preexisting legal or ar-
tistic sources to have a meaningful existence of their own or if we take the judgments of those legal or artistic objects to be their full and only representational existence. Cf. McDowell, *Mind, Value, and Reality*, 307 n. 21 (“My point is that we can have a position that is critical (in the same roughly Kantian sense: it acknowledges that world and mind are constitutively made for each other), but which, by dropping the ‘in itself’, precisely sheds any need to talk of such a contribution.”).

102. See, e.g., Segal, Spaeth, and Benesh, *The Supreme Court in the American Legal System*, 20–21 (“By ignoring certain aspects of reality in order to concentrate on those that allegedly explain the behavior in question, models provide a useful handle for understanding that more exhaustive and descriptive approaches do not. . . . [I]ncreasing a model’s complexity also increases the number of idiosyncratic variables, lessens its coherence, and—most importantly—destroys its parsimony. Inasmuch as no model can, by definition, explain everything, the objective is to discover the most economic explanation that can account for the largest portion of the behavior in question. . . . A necessary feature of any model is that testing of its explanatory capability demands that it be falsifiable.”). For more on the problems with this approach to studying judicial decision making, see Friedman and Martin, “Looking for Law in All the Wrong Places,” in Geyh, *What’s Law Got To Do With It?*, 154 (“The legal model is not falsifiable because it is not a model at all. . . . All one can say is that a model does a better or less good job at explaining or predicting what it set out to explain or predict.”). See also below at 174nn207, 211.

103. Cf. below at 165–66n118.


105. The notion of the judge-as-umpire is an effort in this direction. See below at 110. But cf. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (“Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of government. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large.”) (Brennan, J., concurring); Dep’t of Pub. Works v. Lillard, 33 Cal. Rptr. 189, 193 (Cal. Ct. App. 1963) (“The judge is obligated to conduct the trial in a fair and impartial manner. He may not, of course, choose sides. His function, however, is much more than that of a plate umpire at a baseball game calling balls and strikes.”); State v. Crittenden, 38 La. Ann. 448, 450–51 (1886) (“A trial is not a mere lutte between counsel, in which the judge sits merely as an umpire to decide disputes which may arise between them.”).

106. See, e.g., Melinda Gann Hall, Introduction to “An Analysis of the Rehnquist Court’s Establishment Clause Jurisprudence: A New Marriage of Legal and Social Science Approaches,” 1999 L. Rev. M.S.U.–D.C.L. 865, 867 (1999) (“Reduced to the most fundamental element, Segal and Spaeth argue that the justices’ public policy preferences are the only influences on their votes on the merits of the cases decided by the Court.”) (citing Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press, 1993)) (emphasis in original).

107. Cf. Hurley, *Natural Reasons*, 337 (“[Suppose] the nominee for Justice believes it is better to have an affirmative action policy in a particular context than not to. But under what circumstances would she not believe it was better? In order for a social
knowledge function to apply to an unrestricted domain of counterfactual situations in which her beliefs are different, it must have some way of ascertaining whether circumstances obtain in which her beliefs about alternatives of certain kinds vary independently of truths about them. It might, for example, want to distinguish cases in which, if the candidate were not to have family and friends who would benefit from affirmative action, she would not believe it was right, from cases in which if she had not had first-hand experiences of discrimination and its effects, she would not believe affirmative action was right. The social knowledge function might regard her beliefs about such issues as inappropriate to rely upon in the former case, but not in the latter.

Chapter 2

1. Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 Wm. & Mary L. Rev. 1201, 1206 (1992).

2. Aharon Barak, The Role of a Supreme Court in a Democracy, 53 Hastings L.J. 1205, 1210 (2002). See also Aharon Barak, The Judge in a Democracy (Princeton University Press, 2006), 101-5; John Rawls, Political Liberalism (Columbia University Press, 1993), 236; Melvin Aron Eisenberg, The Nature of the Common Law (Harvard University Press, 1988), 9-10, 14-26; Harry H. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 244 (1973). This position is subtly but importantly different from the view that judges should engage in their own evaluation of the decision or interpretation that best expresses the public values of their society, government, and law (but may not yet be reflected in those public values). See, e.g., Ronald Dworkin, Law’s Empire (Harvard University Press, 1986), 167-68, 225-28, 255-56. Here it is less clear where the judge’s own moral evaluation ends and where the incorporation of public morality, as understood by the judge, enters into the articulation of the law.

3. See above at 16.

4. See W. Preston Warren, Modes of Objectivity, 39 Phil. & Phenomenological Res. 74, 83 (1978). Functional effectiveness can also be thought of as “procedural objectivity.” See Jules L. Coleman and Brian Leiter, Determinacy, Objectivity, and Authority, 142 U. Pa. L. Rev. 549, 596 (1993) (“Legal decision-making procedures are designed to forge compromises among conflicting interests as well as to establish ground rules on which individuals with conflicting all-encompassing theories or political and philosophical conceptions might agree. . . . [P]rocedural objectivists share the view that what justifies the outcomes of legal disputes is the fact that judges reach them by following objective procedures.”).

5. See, e.g., Paul Gewirtz, On “I Know It When I See It,” 105 Yale L.J. 1023, 1025 (1996) (“From this perspective, the exercise of judicial power is not legitimate if it is based on a judge’s personal preferences rather than law that precedes the case, on subjective will rather than objective analysis, on emotion rather than reasoned reflection.”).

enables it to be applied to similar situations with similar results regardless of the identity of the judges who apply it.

7. See, e.g., David Lyons, Open Texture and the Possibility of Legal Interpretation, 18 Law and Phil. 297, 298–308 (1999).

8. A good example here is the work of scholars to apply Wittgenstein’s approach to rule following to ascertain whether legal rules are being followed. See Brian Bix, Law, Language, and Legal Determinacy (Oxford University Press, 1993), ch. 2; Dennis Patterson, Law and Truth (Oxford University Press, 1996), 12–15. For an argument that philosophical disputes about language hold almost no relevance for the philosophy of law, see Michael Steven Green, Dworkin’s Fallacy, or What the Philosophy of Language Can’t Teach Us about the Law, 89 Va. L. Rev. 1897, 1942–46 (2003).


10. One response to these criticisms is that the meaning of language, legal rules, and moral rules can be found in the shared use of those terms in the relevant linguistic community. See, e.g., Simon Blackburn, “Rule-Following and Moral Realism,” in Steven Holtzman and Christopher Leich, eds., Wittgenstein: To Follow a Rule (Routledge & Kegan Paul, 1981). In terms of objectivity, this is the view that law is minimally objective. See above at 10–11.


13. See Donald Davidson, Subjective, Intersubjective, Objective (Oxford University Press, 2001), 91 (“I do not think that, because the ultimate court of appeal is personal, therefore my judgements are arbitrary or subjective, for they were formed in a social nexus that assures the objectivity if not the correctness of my beliefs. Intersubjectivity is the root of objectivity, not because what people agree on is necessarily true, but because intersubjectivity depends upon interaction with the world. . . . It is here that each person, each mind or self, reveals itself as a part of a community of free selves. There would be no thought if individuals did not play the indispensable, and ultimately unavoidably creative, role of final arbiter.”).

14. See Davidson, Subjective, Intersubjective, Objective, 83 (“The ultimate source (not ground) of objectivity is, in my opinion, intersubjectivity. If we were not in communication with others, there would be nothing on which to base the idea of being wrong, or, therefore, of being right, either in what we say or in what we think.”) (emphasis in original). I will not address here the larger philosophical debate about whether Davidson’s approach succeeds as a holistic theory of linguistic meaning. See Scott Soames, Philosophy of Language (Princeton University Press, 2010), 46–49.

15. See Barak, The Judge in a Democracy, 102 (“With impartiality comes objectivity. It means making judicial decisions on the basis of considerations that are external to the judge and that may even conflict with his personal view.”) (footnotes omitted); Matthew H. Kramer, Objectivity and the Rule of Law (Cambridge University Press, 2007), 53 (“Another epistemic variety of objectivity is impartiality, which consists of disin-
teredness and open-mindedness, and which can also be designated as ‘detached
ness’ or ‘impersonality.’ It is to be contrasted with bias and partisanship.”). One prob-
lem with this equation of objectivity and impartiality, as I have discussed in the text,
is that it elides qualities in judges that should be distinguished. Thinking of objectiv-
ity as impartiality and impartiality as detachment (or, worse, “impersonality”) only
encourages the confusion of values with biases. Assuming that judges must be de-
tached from the dispute they are deciding to decide that dispute impartially reinforces
the misleading notion that it is improper for a judge’s own values and perspectives to
influence her judicial decisions. To be fair, Kramer acknowledges this and says that
“although impartiality does consist in detachedness, it does not in any way entail a
lack of empathetic understanding of human actions and intentions.” Kramer, Objec-
tivity and the Rule of Law, 63. It is not clear, then, what work detachment is doing to
improve our understanding of impartiality (or objectivity). Moreover, even Kramer’s
less controversial connection of impartiality to open-mindedness is contested. See,
meaning of ‘impartiality’ (again not a common one) might be described as openmind-
edness. This quality in a judge demands, not that he have no preconceptions on legal
issues, but that he be willing to consider views that oppose his preconceptions, and
remain open to persuasion, when the issues arise in a pending case. This sort of impar-
tiality seeks to guarantee each litigant, not an equal chance to win the legal points in
the case, but at least some chance of doing so. . . . The problem is, however, that . . .
[b]efore they arrive on the bench (whether by election or otherwise) judges have often
committed themselves on legal issues that they must later rule upon.”) (citation omit-
ted) (emphasis in original). My point here is not that I disagree with Kramer’s claim
that open-mindedness is an aspect of impartiality (I do not) or even with his claim
that detachment or impersonality is a necessary aspect of impartiality (although I do).
My point is simply that all this just winds up extending an argument about what ob-
jectivity really means, which ultimately will not improve our understanding of the
process of judging.

16. The first person I can recall suggesting this sort of distinction is Leslie Friedman
Goldstein. I am grateful to her for starting me thinking about this issue.

17. See White, 536 U.S. at 775–76 (“[I]mpartiality’ in the judicial context—and of
course its root meaning—is the lack of bias for or against either party to the proceed-
ing. Impartiality in this sense assures equal application of the law.”). See also Grant
33 (“What we seem to be looking for is something that inappropriately affects the
reasoning process in that it has nothing, or very little, to do with the actual merits of
the case, but is somehow brought into play in the determination of it. . . . A failure to
avoid this sort of error is said by the law to amount to a want of impartiality.”).

18. See, e.g., Lynda L. Butler, The Politics of Takings: Choosing the Appropriate Deci-
sionmaker, 38 Wm. & Mary L. Rev. 749, 761 (1997) (“[T]he judiciary has the best
chance of being objective and rendering decisions that are not affected by a judge’s
own political values.”); John Stick, Can Nihilism Be Pragmatic?, 100 Harv. L. Rev. 332,
370 (1986) (“[L]egal theorists who prize objectivity seek to prevent judicial decisions
that are based on the judge’s own moral or political values.”).

come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

See also Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975) (“[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.”).

20. See In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943) (“Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper.”) (Frank, J.).

21. See generally Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821–22 (1986) (“The record in this case presents more than mere allegations of bias and prejudice, however. Appellant also presses a claim that Justice Embry had a more direct stake in the outcome of this case. . . . More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge ‘can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.’”) (quoting In re Murchison, 349 U.S. 133, 136 (1955)); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (“[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”).

22. See Mass. Const. Part I, art. 29 (“It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.”).

23. See Joel Cohen, Blindfolds Off: Judges on How They Decide (American Bar Association, 2014), 83 (“I’m not sure ‘objective’ is the right word there. There’s a set of values that they [other judges] apply that are just different than the values that I’m applying.”) (remarks of former judge Nancy Gertner). See also White, 536 U.S. at 777 (“It is perhaps possible to use the term ‘impartiality’ in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. . . . A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law.”) (emphasis in original).

24. Linahan, 138 F.2d at 651–53 (citations omitted). The canons of judicial ethics do not assume or require that a judge’s values will not play a role in his legal rulings.
But the canons do require a judge to act impartially. So, for example, Rule 2.2 of the American Bar Association Model Code of Judicial Conduct states that “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” *ABA Model Code of Judicial Conduct* (2011), Rule 2.2. At the same time, one of the official comments explaining the operation of Rule 2.2 recognizes that “each judge comes to the bench with a unique background and personal philosophy.” *ABA Model Code of Judicial Conduct*, Rule 2.2, cmt. [2]. The Model Code envisions judges who bring their own unique backgrounds and personal philosophies of judging to the bench and who can nevertheless adjudicate impartially and fairly.

25. See Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd ed.) (Cambridge University Press, 2013), 212 (“The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes.”).

26. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (“[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has ‘a direct, personal, substantial, pecuniary interest’ in a case. This rule reflects the maxim that ‘[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.’”) (quoting *Tumey*, 273 U.S. at 523 and *Federalist* No. 10).

27. See 28 U.S.C. § 144 (“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists.”) (emphasis supplied); 28 U.S.C. § 455(b) (describing the reasons for judicial recusal as personal bias or prejudice toward a party, or prior professional knowledge of the matter in controversy, or a financial interest in the case or with respect to a party, or a family relationship with one of the parties or attorneys in the case). See also *Paschall v. Mayone*, 454 F. Supp. 1289, 1300 (S.D.N.Y. 1978) (“[T]he alleged bias must be ‘personal’ and ‘stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.’”) (citations omitted).

28. See, e.g., *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (Easterbrook, J.) (party affiliation inadequate to support a claim of specific bias).

29. See, e.g., *Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 163, 181 (E.D. Pa. 1974), aff’d, 478 F.2d 1398 (3d Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (“I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most other ethnic groups take pride in theirs. However, that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant. As do most blacks, I believe that the corridors of history in this country have been lined with countless instances of racial injustice. . . . So long as Jewish judges preside over matters where Jewish and Gentile litigants disagree; so long as Protestant judges preside over matters where Protestants and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree.”) (Higginbotham, J.).
30. *In re Union Leader Corp.*, 292 F.2d 381, 388 (1st Cir. 1961). See also *Ex parte Fairbank Co.*, 194 F. Supp. 978, 989–990 (M.D. Ala. 1912) ("'Prejudice or bias,' in the ordinary sense of the term, and not censurable in its character, may arise from innumerable conditions in life. A man ordinarily has a bias in favor of the political party to which he belongs, or a prejudice in some degree against its opponents. The same thing is true in a degree as to the church of which he is a member, and he is generally prejudiced or biased more or less about his race, his country, and its institutions. He cannot avoid forming to some extent bias or prejudice regarding men and affairs in nearly every matter as to which he has to inform his judgment or regulate his conduct in the walks of daily life. He must have neighbors, friends, and acquaintances, business and social relations, and be a part of his day and generation. Evidently the ordinary results of such associations and the impressions they create in the mind of the judge are not the ‘personal bias or prejudice’ to which the statute refers. The impressions, whether favorable or unfavorable, of men, which a judge receives, or his convictions about them growing out of his contact or acquaintance with them in the ordinary walks of life, cannot fall within the evil the statute designs to suppress, unless they are so strong that they result in personal bias or prejudice as to individual suitors.").

31. See Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. Rev. 181, 189–90 (2005) ("[I]f judges were expected to recuse themselves based on irrational or unsupported conjecture of judicial bias, the parties in the litigation or a vindictive press would be able to control the assignment of judges. A judge whose participation is subject to unjustified removal by the parties or the press cannot be said to be neutral. In order to preserve judicial independence, the law of recusal constrains the policy of impartiality with the requirement that a charge of bias be supported by facts, or that appearance of impartiality be evaluated from the perspective of a reasonable observer."). Of course, a judge’s assessment of his own bias might be clouded, which is why the judge’s decision not to recuse himself may be appealed. See *Caperton*, 556 U.S. at 882–84.

32. See below at 209n13.

33. See below at 71–72, 103–4.

34. See Shetreet and Turenne, *Judges on Trial*, 4–5 (“[I]m impartiality is central to the independence of the individual judge. . . . It is the fundamental principle of justice . . . at common law. . . . It first entails a substantive independence, independence in the conduct of the judicial business—the judge’s core activity being to decide cases. . . . Individual judges are subject to no other authority for their decisions than the appeal courts. A basic requirement for maintaining public confidence in the legal system is the court’s duty to provide a reasoned judgment for its decisions.”) (emphasis in original). For more on the relationship between judicial impartiality and judicial independence, see below at 91–92, 95.

35. In his attempts to locate the source of a text’s meaning either in an individual reader or in an interpretive community of readers, Stanley Fish always misses part of the story, at least where legal texts are concerned. Fish wants to reject subjectivism while embracing antifoundationalism (the view that there is no individual perspective outside of the social and cultural prejudices through which we perceive and experience our world). Our individual interpretations are only meaningful insofar as they
can be understood by and within an interpretive community (of similarly situated, prejudiced, and socially conditioned individuals). See, e.g., Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (Duke University Press, 1989), 323, 342–45. Fish seems to claim that the individual’s interpretation is bounded by the community (or communities) of which he is a part; but at the same time, Fish also seems committed to the claim that the individual remains free to interpret without constraint. This is due, in part, to the fact that Fish never fully accounts for the formal and substantive constraints that legal sources place on the interpretations available to the individual and on the evaluations available to the community. To borrow Pierre Schlag’s phrasing, within the law, not all discourses are equally authoritarian. See Pierre Schlag, Normativity and the Politics of Form, 139 U. Pa. L. Rev. 801, 822 n.58 (1991). See also Owen Fiss, The Law as It Could Be (New York University Press, 2003), 179–89.


37. See Howard Gillman, The Votes That Counted: How the Court Decided the 2000 Presidential Election (University of Chicago Press, 2001), 175–76 (“More difficult to assess are those times when judges rule in a way that is consistent with their party affiliation without support from the other party. . . . However, this alone is not enough to prove partisan decision-making. Disagreements among judges of different political parties occur all the time, for understandable reasons, given what we know about the influence of political ideology on judicial decision-making. In such cases, the question becomes whether the decision seemed to be consistent with the judge’s familiar pattern of decision-making or whether it seemed to be an ad hoc deviation from that pattern in order to accommodate the interests of a favored partisan.”).


39. Cf. Neil MacCormick, Institutions of Law: An Essay in Legal Theory (Oxford University Press, 2007), 181 (“[T]his very non-partisanship of the judiciary is itself a precious achievement of politics when and to the extent that it is realized. . . . It is not then the case that judges and courts are in every sense non-political—of course they ought to be non-partisan, refraining from taking sides overtly in matters of inter-party dispute in the ongoing political struggles of the day. But achieving non-partisan impartiality is itself a particular political role. . . . It is by participating in this way that judges contribute most to sustaining the common good of the polity.”).

40. See above at 9–14.

41. This need not be understood only in legal positivist terms.

42. See below at 58–59, 181–82n45.

43. Dennis Patterson, Normativity and Objectivity in Law, 43 Wm. & Mary L. Rev. 325, 356 (2001). Patterson is not arguing in favor of the scale’s utility.

44. See Patterson, Normativity and Objectivity in Law, 358–59 (“As proof of this thesis, one might point to the fact that in matters arithmetic, consensus is far easier to come by than in law. Why is it that disagreement—which seems pervasive in law—is comparatively absent in arithmetic? Are we not permitted to say that arithmetic, or for that matter, science, is simply ‘more objective’ than law? Could it be that the appearance of objectivity in arithmetic and its comparable absence in law, is due not to the subject matter but to desiderata? In doing sums, there is universal agreement
about what counts as a correct answer. It is not the agreement as such which ‘pro-
duces’ objectivity, rather, universal agreement is the corollary of a prior consensus on
criteria of correctness. In looking at practices like science and arithmetic, we are
tempted to think the ‘hardness’ of these practices is a function of the objects of inves-
tigation. We are tempted to believe that rocks and theorems enjoy an ontological and
epistemological status that is simply of a higher order than propositions of law or liter-
ary criticism.”).

160, 161. The specific concept that McDowell is discussing in this passage is humor.
For reasons I will explain in the next chapter, I think McDowell’s use of the term and
concept “aesthetic” here is especially apt and his point relates equally well to the con-
cepts of beauty and justice. *Cf. id.* at 187 (“[l]t is a mistake to think we cannot show
proper respect for science unless we suppose that truth about disenchanted nature is
the sole context in which the material good standing of an exercise of intellect can be
directly apparent.”).


47. See McDowell, *Mind, Value, and Reality*, 164 (“We have no point of vantage on
the question what can be the case, that is, what can be a fact, external to the modes of
thought and speech we know our way around in, with whatever understanding of
what counts as better and worse execution of them our mastery of them can give us.”).
See also Tasioulas, *The Legal Relevance of Ethical Objectivity*, 220–21 (“[G]iven the self-
understanding of a particular domain, a realist standing might be attributable to the
entities and qualities invoked within it even though they are constitutively tied to the
existence and experience of human beings. . . . [T]here is no explanatory priority ei-
ther way between ethical property and its associated repertoire of ethical responses. . . .
On this sort of view, ethical properties are constituted in part by their normative rela-
tion to human subjective responses (the relation is normative because the property
has to merit the response, it is not enough that it bear some non-normative, e.g. purely
causal, relation to it). But the latter responses can only be understood in terms of con-
cepts of value properties that are there to be discerned independently of any individ-
ual or collective subjectivity. Moreover, these ethical qualities may be tied to modes of
human response that are not natural endowments but rather the product of initiation
into an ongoing tradition, its vocabulary, narratives and paradigms, all subject of
course to endless refinement and revision in the light of a standing obligation to en-
gage in critical reflection on one’s intellectual inheritance.”).

48. See above at 10. I do not want (or need) to press this point too strongly. In some
of his writings, McDowell also seems to express his view in modestly objective terms.
See McDowell, *Mind, Value, and Reality*, 146 (“Values are not brutely there—not there
independently of our sensibility—any more than colours are: though, as with colours,
this does not prevent us from supposing that they are there independently of any par-
ticular apparent experience of them.”).

49. Gerald Postema describes the justification and evaluation of legal judgments
as a form of objectivity he calls publicity. According to Postema, objectivity as public-
ity “is a methodological conception of objectivity. It is defined relative to a particular
notion of correct normative judgments. This notion of correctness has an important
procedural component built into it. It cannot be separated from the process of delib-
erative judging. Broadly speaking, a judgment is correct, on this view, if it is backed by sound reasons that are or can be articulated and assessed publicly. . . . First, correctness is . . . a relation between propositions and arguments or reasons that support them, and this relationship is embodied in the activity of making and assessing arguments offered in support of the proposition. Thus, to say that a proposition is correct is to assess it in terms of standards of argument drawn from the normative discourse in question. Second, the process of offering and assessing arguments for judgments is regarded as essentially interpersonal, public. Correctness is manifested in the process of reasonable persons offering reasons to each other.” Gerald J. Postema, “Objectivity Fit for Law,” in Brian Leiter, ed., *Objectivity in Law and Morals* (Cambridge University Press, 2001), 117 (emphasis in original). Postema’s conception of objectivity is domain-specific and shares many features with McDowell’s view. As with McDowell’s view, Postema’s is broadly supportive of the argument I make here. My one reservation is simply that Postema describes his view as a form of objectivity. As a result, he is driven to concede, due to the underlying philosophical debate, that certain functional realities of legal practice and legal reasoning fall “far short of the ideal of objectivity as publicity” and that their “objectivity-distorting effects” should be improved. *See id.* at 128. This is why I believe that differentiating objectivity from intersubjectivity is important. Postema treats the formulation of legal judgments by judges and the assessment of those judgments by a larger community together as publicity, and he refers to these processes as the objectivity of law. I argue, instead, that we should distinguish among the formulation of legal judgments by judges, the legal norms expressed in those judgments, and the evaluation and reception of those judgments by the community.

50. *See, e.g.*, Goodpaster, *On the Theory of the American Adversary Criminal Trial*, 121–27, 134–38 (differentiating the “truth-finding” theory of a trial from the “fair decision” theory and the “rights theory.”). Of course, as Goodpaster explains, these theories are not mutually exclusive.

51. *See below at* 59–62.

52. *See above at* 148n4.

53. Some will argue that these are also flaws of the system.

54. *See Goodpaster, On the Theory of American Adversary Criminal Trial*, 130 (“[T]he law may also have both a different concept of truth and a different way of finding truth than do other systems of thought. A trial is an accusatory proceeding. As such, trials have no abstract interest in what happened independent of the accusation. In other words, the issue in a trial is the truth of the accusation, and the accusation is true if it is proven to be true within the rules of proof and persuasion. In this manner, a trial *produces* truth, rather than finds it. This truth is a ‘legal’ truth and is that which the system recognizes as true.”) (emphasis supplied).

55. The variety of individual experiences and perspectives that different members of the jury bring with them to the jury box is one good example. *See, e.g.*, Peters v. *Kiff*, 407 U.S. 493, 503–4 (1972) (“[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to
assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (“The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”) (citations omitted). Obviously, some subjective perspectives amount to active biases that will disqualify a juror for an inability to be impartial. See, e.g., *People v. McCray*, 57 N.Y.2d 542, 547 (1982), cert. denied sub nom., *McCray v. New York*, 461 U.S. 961 (1983) (“[T]hose who admit to such prejudices or admit to membership in groups from which such prejudices may readily be inferred, obviously should be disqualified from sitting on juries where these prejudices could interfere with the attainment of a fair and just verdict. For example, fundamental fairness dictates that a member of the Ku Klux Klan be disqualified from sitting on a jury in a case in which a black man is accused of assaulting a white. These individuals can adequately be eliminated through the challenge for cause.”).

56. For example, the legal rules that the parties and the court agree should be applied in a case. Objectivity here can be thought of in a rule of law sense and in a functional effectiveness sense. See above at 146n98, 148n4, and below at 163nn106–111. Part of the problem with the broad term objectivity is that these usages overlap, but not entirely. The parties and the court may agree that the rules exist and that they govern the process in certain ways, but may still disagree about how the rules should be applied or how they should govern the process.

57. In Scotland, jurors may return a verdict of “not guilty” to indicate their conclusion that the defendant did not commit the crime of which he was accused or of “not proven” to indicate their conclusion that sufficient doubt exists to preclude conviction. See Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 Law & Contemp. Prob. 173, 193 (1999).


59. For a sense of what I have in mind here, see Iris Murdoch, *Metaphysics as a Guide to Morals* (Penguin Books, 1993), 25–26 (“A misleading though attractive distinction is made by many thinkers between fact and (moral) value. Roughly, the purpose of the distinction . . . is to segregate value in order to keep it pure and untainted, not derived from or mixed with empirical facts. . . . This originally well-intentioned segregation then ignores an obvious and important aspect of human existence, the way in which almost all our concepts and activities involve evaluation.”) (emphasis in original). See also above at 143n79.

60. Heidi Li Feldman’s discussion of blend concepts is a helpful way of explaining the interaction between legal norms and factual circumstances when attempting to achieve the proper outcome in a given case. See Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 Mich. L. Rev. 1187, 1194–99 (1994).


Rev. 423, 472 (1994) ("The description that language—and by extension, law—will
give to an action or thing will depend upon which aspect of it is important to human
action at the moment. . . . Each description relates it to human action; which is rele-
vant or important or ‘material’ depends upon the context or the purpose of the ac-
tion. By extension, a fact in a case has analogical importance not intrinsically, but by
reference to the point of the inquiry. The common law, by keeping the focus on the
context, sees that the statement of any rule is always tied to the point to which we are
attending.").

63. Cf. Alan Montefiore, "Objectivity, Impartiality and Open-Mindedness," in
Alan Montefiore, ed., Neutrality and Impartiality: The University and Political Com-
mitment (Cambridge University Press, 1975), 19 ("[N]o one can simply carve out the facts
to suit himself merely by choosing some favoured or convenient description; it is in
this sense, as a reminder of and as a way of expressing these constraining limits, that it
may occasionally be worth insisting that the facts are what they are in themselves,
independently of what anyone may think about them. But this in no way limits the
truth or force of the ‘fact’ that the concepts, the descriptions and the categories that
one has to use as soon as one starts to reflect on the facts of any situation, but above all
one that is social or political, must themselves derive from, rest on and reflect a certain
human experience.").

64. Richard Posner uses the term “priors” to describe the range of personal experi-
ences, values and perspectives that any judge brings to any case he must decide, and
he explains that different judges react differently to the same case as a result of their
different priors. See Richard A. Posner, Reflections on Judging (Harvard University Press,
2013), 129–30. See also above at 133n2.

65. See, e.g., Cohen, Blindfolds Off, 82 ("You come with your experience. . . . You’re
listening to someone in the context of your life, that’s the only lens in which to view
them. . . . [I]ssues of plausibility, credibility, all the weighing and balancing tests, even
the procedural questions—how far to delve into a legal issue before you’re satisfied
that you understand it—require judgment, the judgment of human beings") (remarks
of former judge Nancy Gertner).

66. As I have explained, I focus on judges in the text, but this point may be even
more evident when we consider a juror’s response to the evidence and the applicable
45 ("Where the jury decides a case differently from the way in which a judge would
decide it, this usually occurs because what social scientists blandly call ‘values’ have
influenced the very fact-finding process itself, not usually because the jury has found
the same ‘facts’ as the judge and then consciously applied different norms."). This is
also why we should usually consider a judge’s or juror’s responses to the law and the
facts as an individual whose full identity matters but not (simply) as a woman or a La-
tina or a sixty-one year-old. Cf. id. at 143–44.


68. See above at 9–14.

69. See Joseph Raz, The Authority of Law: Essays on Law and Morality (2nd ed.) (Ox-
ford University Press, 2009), 46–48; Joseph Raz, Ethics in the Public Domain: Essays in


72. See, e.g., Benjamin C. Zipursky, *Legal Coherency*, 50 SMU L. Rev. 1679, 1692 (1997) (“The positivist purports to explain what law is, and, in this sense, what makes legal statements true, by pointing to legal sources and to the conduct and attitudes of those who make the legal sources, interpret them, use them, and treat them as authoritative.”) (footnote omitted).


76. Schauer, “Positivism Before Hart,” in Freeman and Mindus, *John Austin’s Jurisprudence*, 279. Schauer says that decisional positivism “seeks to create institutions relying on relatively precise rules, minimizing adjudicative discretion, limiting the law-making power of judges and other law-application officials, restricting legal decision-makers to a limited set of easily identifiable sources, and in general fostering predictability and limiting judicial authority.” Id. Schauer’s characterization is correct with respect to the positivists before Hart (Bentham and Austin) whom he studies in his essay. And perhaps as a means of differentiating positivists from others who hold superficially similar views, this is fair enough. Nevertheless, I believe conceptual positivism and decisional positivism together create intellectual space for a necessary but nonexclusive place for legal sources in legal reasoning that need not limit common law judges quite as stringently as Bentham or Austin supposed. In Schauer’s terms, this represents decisional positivism’s “non-normative aspect” in relation to “just how heavily legal decisions are constrained by the texts of formal legal sources and just how much the array of those sources is a limited subset of the full array of social sources” available to a judge or legal decision maker. Id. at 280. Moreover, as I have mentioned, in its recognition of a unique status for legal sources in legal reasoning, decisional
positivism, standing alone, does not necessarily distinguish positivism from other theories of law. See above at 146n100 and below at 162–63n103.


80. Rawls, Political Liberalism, 94.

81. Cohen, Philosophy, Politics, Democracy, 349.

82. Cohen, Philosophy, Politics, Democracy, 350.


84. Tellingly, for purposes of my concerns with his approach and my argument in this book, Cohen equates the political conception of truth with “the political conception of objectivity.” See Cohen, Philosophy, Politics, Democracy, 349 n. 3.


87. See, e.g., Hart, The Concept of Law, 253–54 (“I still think legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open, as I do in this book (p. 168), the general question of whether they have . . . ‘objective standing.’”); Hart, Positivism and the Separation of Law and Morals, 624–25 (“Emphasis on the distinction between law as it is and law as it ought to be may be taken to depend upon and to entail what are called ‘subjectivist’ or ‘relativist’ or ‘noncognitive’ theories concerning the very nature of moral judgments, moral distinctions, or ‘values.’ . . . I think (though I cannot prove) that insistence upon the distinction between law as it is and law as it ought to be has been, under the general head of ‘positivism,’ confused with a moral theory according to which statements of what is the case (‘statements of fact’) belong to a category or type radically different from statements of what ought to be (‘value statements.’”).


89. See, e.g., Joseph Raz, The Authority of Law, 39–40 (“A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument.”).

90. See above at 158–59n70. See also Coleman, “Authority and Reason,” in George, The Autonomy of Law, 291 (“That some communities—including perhaps our own—incorporate moral principles into law does not violate the separability thesis. The separability thesis is not the claim that law and morality are necessarily separated; rather, it is the claim that they are not necessarily connected.”).


95. See Zipursky, “The Model of Social Facts,” in Coleman, *Hart’s Postscript*, 232–33 (“What, then, can we say about Hart’s frequent and pivotally important statements that rules of recognition are social rules? . . . [F]or a rule of recognition of a legal system (considered as an abstract union of primary and secondary rules) to be the rule of recognition of a community is for there to be a certain kind of social practice among the legal officials in that community of accepting that rule of recognition.”) (emphasis in original).


97. See Hart, *The Concept of Law*, 105 (“[W]hen we consider how the judge’s own statement that a particular rule is valid functions in a judicial decision . . . he plainly is not concerned to predict his own or others’ official action. His statement that a rule is valid is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law in his court, and constitutes not a prophecy of but part of the reason for his decision.”) (emphasis in original).


99. See, e.g., Raz, *The Authority of Law*, 47–48 (“The sources of law are those facts by virtue of which it is valid and which identify its content.”); Coleman, “Authority and Reason,” in George, *The Autonomy of Law*, 288 (“In developing incorporationism [inclusive positivism] I have focused almost exclusively on its conceptions of legality and validity and on the role the rule of recognition plays in determining both.”). I should also mention a further disagreement among inclusive positivists. Coleman argues that the “epistemic function” of the rule of recognition permits a distinction between the identification and the validation of the law. See id. at 291–93. It is unclear whether Hart would accept Coleman’s bifurcation of the epistemic function of the rule of recognition. Hart did not seem to differentiate validation from identification in his writings on the rule of recognition. But for my purposes here, I only want to emphasize that in his discussions of the rule of recognition and its function in legal reasoning, Hart repeatedly refers to the validity and validation of legal rules, rather than to their truth, even where he discusses the possibility that a rule of recognition may incorporate “moral criteria for the identification of the law.” See Hart, *The Concept of Law*, 100–110, 207–12, 247, 250–59, 269.

100. See, e.g., Brian Zamulinski, *Rehabilitating the Declaratory Theory of the Common*
Law, 2 J. L. & Cts. 171, 181 (2014) (“[J]udge-made law qua moral facts neither has nor needs a rule of recognition. . . . The law that can be discovered constrains the law that can be made because enacting a seriously immoral statute would imply the repeal of the law qua moral facts. . . . Since the law qua moral facts cannot be repealed, if an immoral statute were valid, the law would contradict itself. But the law as a whole must be consistent. Since consistency cannot be maintained unless immoral statutes give way, they must give way.”). Although Zamulinski goes on to classify (and dismiss) Hart’s inclusive positivism as an alternative to his own view (see id.), he then seems to embrace just that position (through judicial decisions rather than constitutional provisions) in his rejection of natural law theory. See id. at 182 (“The declaratory theorist’s claim is not that there is a conceptual connection between law and morality of the sort that natural law theorists propose but that moral facts can literally be substantive law in systems that include judge-made law. The invalidity of immoral statutes in such a system does not depend on a definition of law but on the fact that moral facts have been incorporated as substantive law.”) (emphasis supplied). See also id. at 185 (“In light of the declaratory theory, the common law qua system of ‘judge-made law’ is a rational, self-correcting project that identifies a subset of moral facts as substantive law, where the substantive law is a set of publicly enforced standards.”).

101. See, e.g., Raz, Ethics in the Public Domain, 332–33, 334 (“[I]t follows from the sources thesis—as we have just seen—that there is much more to legal reasoning than applying the law, and the rest, which I will call as I did all along reasoning according to law, is—arguably—applying moral considerations. . . . I have divided reasoning into reasoning about the law and reasoning according to law. The first is governed by the sources thesis, the second I believe to be quite commonly straightforward moral reasoning. . . . Observation of judicial practice, at least in the countries that I am familiar with, does more than confirm this argument. It provides strong grounds for the additional contention that it is sound moral practice, which is followed in many legal systems, to require the courts to engage in moral reasoning.”).

102. See Raz, The Authority of Law, 114, 199–200; Hart, The Concept of Law, 185, 203–5. The pervasive misperception of positivism in this aspect is sometimes astonishing. See, e.g., Stephen Macedo, Morality and the Constitution: Toward a Synthesis for “Earthbound” Interpreters, 61 U. Cin. L. Rev. 29, 36–37 (1992) (“Positivism’s virtues are that it allows us to purchase clarity and predictability, but it does this at the price of sacrificing those aspirations that might also be pursued through the institutions of law: political aspirations toward principled debate and criticism, which might be thought to contribute to the moral improvement of the polity.”). Without putting too fine a point on it, this is effectively the opposite of Hart’s and Raz’s view. Along with the sources already cited in the text and the previous one, see Joseph Raz, Dworkin: A New Link in the Chain, 74 Calif. L. Rev. 1103, 1110, 1115 (1986); Joseph Raz, “Legal Principles and the Limits of Law,” in Marshall Cohen, ed., Ronald Dworkin and Contemporary Jurisprudence (Rowman & Allanheld, 1983), 85.

103. See above at 146n100. See generally Robert P. George, Natural Law, 52 Am. J. Juris. 55, 72 (2007) (“Natural law theorists through the ages have taken note of the distinction between the systemic validity of a proposition of law—the property of belonging to a legal system—and the law’s moral validity and bindingness as a matter of conscience. They have had no difficulty accepting the central thesis of what we today
call legal positivism, viz. that the existence and content of the positive law depends on social facts and not on its moral merits.”).


106. See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978), 86 (“[A]ppreciation of the necessary universality of justifying reasons for the decision of particular cases can enable us . . . [to see that] the constraints of formal justice oblige a court to attend to the need for generic rulings on points of law, and their acceptability as generic rulings, as essential to the justification of particular decisions.”). See also id. at 84, 98–99, 214–15.


109. See David Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge University Press, 1993), 35 (“Let us assume that officials should, to do justice, be impartial . . . it does not follow that an official who fails to follow the law acts unjustly. Let us agree that an application of the law which is *not* impartial is unjust; it does not follow that all deviations by officials from the law are unjust . . . An official might deliberately refuse to follow the law; this is not the same as applying it in, for example, a biased or prejudiced manner. This distinction is important, for the official may refuse to follow the law on principled grounds, precisely in order to prevent an injustice of which he would be the instrument.”) (emphasis in original). This point also relates to issues of individual and institutional judicial independence, which I discuss further in chapter 5.


111. For more on this point, see Lyons, *Moral Aspects of Legal Theory*, 112–13 (“Moral judgments, as opposed to mere visceral reactions that can be expressed in words, presuppose some general standards. . . . It is important to appreciate that no part of the constraint of moral consistency or such presuppositions of its applicability as we have considered makes use of the notion of a uniquely true, correct, or sound moral judgment. This minimal constraint concerns merely how one’s judgments, both specific and general, hang together. And yet this constraint has some determinate implications. It says, in effect, that one must apply the same standards to all cases that one is not honestly prepared to distinguish on principled grounds. That does not tell us what cases to distinguish or more generally what principles to apply. But it does tell us to be faithful to our own deepest values, whatever they may be, and to judge specific matters accordingly.”).
112. Richard A. Posner, *The Federal Courts: Challenge and Reform* (2nd ed.) (Harvard University Press, 1996), 312. See also Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. Chi. L. Rev. 1477, 1483 (1995) (“Judges need criteria that are not arbitrary or capricious. . . . The reasons should meet a standard of public articulability and principled consistency.”). The concept of principled consistency is sometimes associated with Herbert Wechsler’s famous article on neutral principles. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19, 31–35 (1959). I prefer Nussbaum’s conception of principled consistency to Wechsler’s. While Wechsler seems to have viewed neutrality as an abstract value of detachment and formally consistent reasoning and results, Nussbaum’s view of principled judicial decision making better reflects the view I intend to defend here: “[T]he real-life judge must also have other abilities and knowledge, and is constrained in many ways by her institutional role and by the demands of statute and precedent, which already establish what she may and may not consider salient. The literary aspects of judging can readily be incorporated into an understanding of judicial reasoning that derives from the common-law tradition. . . . [T]hat tradition does not permit a judge to exercise untethered sympathy or ‘fancy.’ . . . [The common law judge] is committed to neutrality, properly understood. . . . [S]he does not think of this sort of neutrality as requiring a lofty distance from the social realities of the cases before her. Indeed, she examines those realities searchingly, with imaginative concreteness and the emotional responses proper to [her role].” Nussbaum, *Poets as Judges*, 1482. See also MacCormick, *Legal Reasoning and Legal Theory*, 75–76 (“The court which today decides a specific case between individual parties ought to take account of its duty, at least its prima-facie duty, to decide the case consistently with prior decisions on the same or similar points. At the least, formal justice requires that it shall not save for strong reasons decide this case in a manner unlike the manner of its prior decisions in like cases. . . . That I must treat like cases alike implies that I must decide today’s case on grounds which I am willing to adopt for the decision of future similar cases, just as much as it implies that I must today have regard to my earlier decisions in past similar cases. Both implications are implications of adherence to the principle of formal justice. . . . [T]here can genuinely be a conflict between the formal justice of following the precedent and the perceived substantive justice of today’s case. . . . I must thereby commit myself to settling grounds for decision for today’s and future similar cases. . . . [T]here will be [conflict] in the future if today I articulate grounds of decision which turn out to embody some substantive injustice or to be on other grounds inexpedient or undesirable. That is certainly a strong reason for being careful about how I decide today’s case.”).

113. See generally Fiss, *The Law as It Could Be*, 154, 155 (“[T]he meaning of a text does not reside in the text, as an object might reside in physical space or as an element might be said to be present in a chemical compound, ready to be extracted if only one knows the correct process. It recognizes a role for the subjective. Indeed, interpretation is defined as the process by which the meaning of a text is understood and expressed, and the acts of understanding and expression necessarily entail strong personal elements. At the same time, the freedom of those who interpret is not absolute. Interpreters are not free to assign any meaning they wish to the text. They are disciplined by a set of rules that specify the relevance and weight to be assigned to the
material . . . as well as by those that define basic concepts and that establish the procedural circumstances under which the interpretation must occur. . . . Rules are not rules unless they are authoritative, and only a community can confer that authority. Accordingly, the disciplining rules governing an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative. This means, above all, that the objective quality of interpretation is bounded, limited, or relative. . . . Bounded objectivity is the only kind of objectivity to which the law—or any interpretive activity—ever aspires and the only one we care about.”). Fiss seems to assume a “rules as rails” conception of the function and meaning of legal rules. See McDowell, Mind, Value, and Reality, 203–9. Even if that is his view, which is not entirely clear, nothing in the quoted passage (or its application to my argument) necessitates that position.


115. Smith, Belief and Resistance, 16.

116. See Burns, A Theory of the Trial, 212 (“[R]eflective judgment achieves its impartiality not by achieving a Platonic point of view above the contending views nor by an empathic intuition of the feelings of others, but by ‘enlarging’ its understanding in a distinctive manner: ‘The greater the reach—the larger the realm in which the enlightened individual is able to move from standpoint to standpoint—the more ‘general’ will be his thinking.’”) (quoting Hannah Arendt, Lectures on Kant’s Political Philosophy, ed. Ronald Beiner (University of Chicago Press, 1982), 44).

117. See generally Robert G. McCloskey, The American Supreme Court (5th ed.) (University of Chicago Press, 2010), 17 (“[S]ince the constitutional questions that do successfully claim the attention of the Court are often those least answerable by rules of thumb, the predilections, the ‘values’ of the judges, must play a part in supplying answers to them.”); Posner, The Federal Courts, 310 (“[M]any judicial decisions will be based, in part anyway, on value judgments rather than just on technical, professional judgments.”); George Anastaplo, The Amendments to the Constitution: A Commentary (Johns Hopkins University Press, 1995), 91 (“[T]he Constitution, from the beginning, anticipated that American courts (whether National or State) would continue acting as courts in the common-law tradition had ‘always’ acted. A sense of fairness, consistent with precedents, general expectations, and the political, social, economic, and religious opinions and institutions of the Country, is relied upon in how the law is to be developed and applied.”); Kent Greenawalt, Policy, Rights, and Judicial Decision, 11 Ga. L. Rev. 991, 1052–53 (1977).

118. See, e.g., Richard A. Posner, How Judges Think (Harvard University Press, 2008), 120 (“Greater recognition of the role of the personal, the emotional, and the intuitive in judicial decisions would not weaken the force of these factors in judicial decision making, because there are no adequate alternatives and judges have to decide their cases with the tools at hand.”); William J. Brennan, Jr., Reason, Passion, And “The Progress Of The Law”, 42 Record of the Ass’n of the Bar of the City of New York 948, 951, 952 (1987) (“It is my thesis that this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality. . . . Cardozo did not shrink from the implications of that admission. He rejected the prevailing myth that a judge’s personal values were irrelevant to the decision pro-
cess, because a judge’s role was presumably limited to application of existing law, a process governed by external, objective norms.”).

119. Cf. David Bell, *The Art of Judgement*, 96 Mind 221, 224 (1987) (arguing that there are three requirements “that an acceptable doctrine of judgement might be expected to meet. . . . [T]hey concern the intersubjectivity, expressibility, and the truth of thoughts.”). I prefer the term communicability rather than expressibility, because communicability better connotes the judgment’s relationship to an audience to whom it is communicated (whereas expressibility might only suggest that the judgment be expressed and not necessarily communicated to another individual). See below at at 57, 63–66.

120. Cf. Lucia Corso, *Should Empathy Play Any Role in the Interpretation of Constitutional Rights?*, 27 Ratio Juris 94, 103 (2014) (“[A] constitutional judge . . . when required to express an opinion on the meaning of privacy or personal freedom . . . would not be able to decide the case without trying to understand what goes through the mind of the Latino suspect held in a police cell and confronted with white police officers, or how it feels for an adolescent to be strip-searched in front of her school mates, or what it means for a black man to be ejected from a railroad carriage because of the color of his skin.”) (citations omitted).


127. See Ari L. Goldman, “Gerald Gunther, Legal Scholar, Dies at 75,” N.Y. Times, Aug. 1, 2002, at B9 (“Professor Gunther, who was then on the Columbia faculty, ‘got me my clerkship by pressuring every judge in the Southern District,’ Justice Ginsburg said. She said that Professor Gunther had to promise that ‘if I didn’t work out, he would find a male lawyer to replace me.’”).


129. See Klebanow and Jonas, *People’s Lawyers*, 362.


138. See Rosemary C. Salomone, Same, Different, Equal: Rethinking Single-Sex Schooling (Yale University Press, 2003), 165 (quoting Ginsburg’s comment that writing the VMI judgment “was winning the Vorchheimer case twenty years later.”). For more on Vorchheimer, see Mayeri, The Strange Career of Jane Crow, 256–64.


140. Ginsburg Hearings, 124.


143. Ginsburg Hearings, 252.

144. 133 S.Ct. 2612 (2013).

145. See Shelby County, 133 S.Ct. at 2631.

146. Shelby County, 133 S.Ct. at 2625. See also id. at 2621 (“[t]hings have changed in the South”) (citation omitted), 2626 (“Those extraordinary and unprecedented features were reauthorized—as if nothing had changed.”), 2629 (“Congress . . . reenacted a formula based on 40-year-old facts having no logical relation to the present day.”), 2631 (“Our country has changed.”), 2631 (“[O]ur Nation has changed.”) (Thomas, J., concurring).

147. Shelby County, 133 S.Ct. at 2634 (Ginsburg, J., dissenting).

148. See Shelby County, 133 S.Ct. at 2633–41.

149. Shelby County, 133 S.Ct. at 2642 (Ginsburg, J., dissenting) (emphasis supplied).


151. Miller, 515 U.S. at 919, 920.

152. See Miller, 515 U.S. at 921–22.
153. Miller, 515 U.S. at 919.
155. Miller, 515 U.S. at 935 (Ginsburg, J., dissenting).
156. Miller, 515 U.S. at 944 (Ginsburg, J., dissenting).
157. Miller, 515 U.S. at 944 (Ginsburg, J., dissenting). See also id. at 947 (“In adopting districting plans, however, States do not treat people as individuals. . . . Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics. . . . That ethnicity defines some of these groups is a political reality.”).
158. See Miller, 515 U.S. at 948–49.
159. 134 S.Ct. 2751 (2014).
161. See Hobby Lobby, 134 S.Ct. at 2775.
163. Hobby Lobby, 134 S.Ct. at 2785 (Kennedy, J., concurring).
164. Hobby Lobby, 134 S.Ct. at 2796 n.17 (Ginsburg, J., dissenting). See also id. at 2797 n. 19 (“The Court does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public. No need to speculate on that, the Court says, for ‘it seems unlikely’ that large corporations ‘will often assert RFRA claims.’ Perhaps so, but as Hobby Lobby’s case demonstrates, such claims are indeed pursued by large corporations, employing thousands of persons of different faiths.”) (internal citation omitted).
166. See Hobby Lobby, 134 S.Ct. at 2798 (“The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial.”) (Ginsburg, J., dissenting).
167. Hobby Lobby, 134 S.Ct. at 2790 (Ginsburg, J., dissenting).
168. Ginsburg reiterated this basis for her dissent in a later interview about the case: “Contraceptive protection is something that every woman must have access to to control her own destiny. I certainly respect the belief of the Hobby Lobby owners. On the other hand, they have no constitutional right to foist that belief on the hundreds and hundreds of women who work for them who don’t share that belief. I had never seen the free exercise of religion clause interpreted in such a way.” See below at n171.
169. Hobby Lobby, 134 S.Ct. at 2799 (Ginsburg, J., dissenting) (citations omitted).
170. See Guy Gugliotta and Eleanor Randolph, “A Mentor, Role Model and Heroine of Feminist Lawyers,” Wash. Post, June 15, 1993, at A14 (“[T]o be a woman, a Jew and mother to boot, that combination was a bit much. Probably motherhood was the major impediment.”).
172. Interview by Katie Couric with Ruth Bader Ginsburg.
175. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Ginsburg stated that Justice O’Connor’s opinion in Hogan “was the closest guide” for the judgment in VMI, which O’Connor joined. See United States v. Virginia, 518 U.S. at 523–24.
177. Morrison, 529 U.S. at 617. Morrison was a 5–4 ruling in which O’Connor joined the majority and Ginsburg was among the dissenting justices.
178. 538 U.S. 343 (2003). The Virginia statute at issue in Black made it a felony for someone to burn a cross “with the intent of intimidating any person or group of persons” and indicated that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” Id. at 348 (quoting Va. Code Ann. § 18.2–423 (1996)).
181. Surprisingly, given the precedent of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) and other cases, the Court ruled that “The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.” Black, 538 U.S. at 363. See also id. at 353 (referring to the Klan’s “reign of terror” in the South), 356 (“The burning cross became a symbol of the Klan itself.”), 357 (“[T]he burning of a cross is a ‘symbol of hate.’”) (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 771 (1995)) (Thomas, J., concurring). Although the Court went on to conclude that the prima facie provision of the statute was unconstitutional because it “does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim,” Black, 538 U.S. at 366, the Court’s ruling that some cross burning was not protected expression under the First Amendment and could be criminalized is itself a notable development.
182. Thomas’s dissent continued along the same lines as his questioning at the argument. He concluded that cross burning is conduct, not speech, and that the prima facie provision creates a justifiable inference of intention rather than an irrebuttable presumption. See id. at 394–95, 396–98.
183. See Lithwick, “Personal Truths and Legal Fictions,” at A35 (“This court has always protected such symbolic expression, with prior cases deeming laws singling out cross- and flag-burning unconstitutional. But with his personal narrative, Justice Thomas changed the terms of the legal debate. After he spoke, members of the court took turns characterizing burning crosses as uniquely threatening symbolic speech . . . and as therefore undeserving of First Amendment protection.”); Linda Greenhouse, “An Intense Attack by Justice Thomas on Cross-Burning,” N.Y. Times, Dec. 12, 2002, at A1 (“The case . . . raised tricky questions of First Amendment doctrine, and it was not clear how the court was inclined to decide it—until Justice Clarence Thomas spoke.”). Although Lithwick and Greenhouse seem to disagree about how difficult a case Black
was for the Court to decide, they agree entirely on the influence of Thomas’s comments upon the other members of the Court.

184. Like Justice Ginsburg, despite graduating with honors from Stanford Law School, Justice O’Connor received no offers of employment. See O’Connor, Justice O’Connor Reflects on Arizona’s Judiciary, 1 (“When I graduated from law school in 1952, I received no offer of employment as a lawyer. There was one half-hearted offer of a job as a legal secretary. In time, I persuaded the District Attorney of San Mateo County to give me a job as a deputy. My career as a lawyer was launched. John and I were married, and within a year he was drafted, then accepted in the Judge Advocate General’s Corps, and assigned to a post in Germany. I gave up my hard-won job and followed John to Germany, where I obtained a job as a lawyer in the Quartermaster Market Center in Frankfurt am Main. On John’s discharge from the Army in 1957, we came to Phoenix. . . . Once again, I failed to find a law firm that would consider hiring a woman.”). See also Martin D. Ginsburg, Some Reflections on Imperfection, 39 Ariz. St. L.J. 949, 951 (2007) (“Prior to 1981 Sandra Day O’Connor and Ruth Bader Ginsburg had not met, they were from very different places and backgrounds, but they did have something formatively important in common. While each had gone to a great university and to great law schools—Stanford, Cornell, Harvard, Columbia—and each had graduated at the top of her class, in the 1950s no law firm would hire either of them.”).

185. See Arthur S. Miller and Ronald F. Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 664 (1960) (“Neutrality, if it means anything, can only refer to the thought processes of identifiable human beings. . . . The choices that are made by judges in constitutional cases always involve value consequences, thus making value choice unavoidable. The principles which judges employ in projecting their choices to the future, or in explaining them, must also refer to such value alternatives.”).

186. Cf. Ruth Bader Ginsburg, A Tribute to Justice Sandra Day O’Connor, 119 Harv. L. Rev. 1239, 1239 (2006) (“The first woman to serve on the Supreme Court brought to the Conference table experience others did not possess: the experience of growing up female in the 1930s, 40s, and 50s, of raising a family, of doing all manner of legal work—government service, private practice, successive successful candidacies for legislative and judicial office, leadership of her state’s Senate, state court judicial service, first on a trial court, then on an appellate bench.”).

187. See P.S. Atiyah and R.S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (Oxford University Press, 1987), 21–28; Patterson, Normativity and Objectivity in Law, 355 (“The forms of argument make it possible for us to engage in the myriad activities we call ‘law’ (e.g., arguing, asserting, deciding). The forms are the very thing that give law its normativity, for they enable us to show how assertions are correct and incorrect, true and false. The forms are the grammar of law.”). On Patterson’s account, there are (at least) four traditional forms of argument at common law: textual, historical, doctrinal, and prudential. See id. at 352–53.

content is determined and the law enforced. Claims about content are made whenever the substantive purposes of legal rules are essential to the normative defence of the rule: the law’s posture in such cases is that it has made its best judgment about the underlying substantive purposes and reached a conclusion that reflects the law’s view about how the issue should be resolved. . . . Procedural claims are the state’s fall-back response to the possibility that content claims might be wrong. Procedural claims—that the state has proceeded in a morally defensible fashion . . . are an inescapable part of the claim to justice.”).

189. As I hope is apparent at this point, my discussion of the formal aspects of legal judgment and their relation to the systemic value of formal justice in the common law tradition should not be misunderstood as an endorsement of formalism. The difference between formal reasoning and formalistic reasoning is easy to miss. As Patrick Atiyah explained, “[W]e ought to distinguish between formal reasoning and formalistic reasoning. . . . Where reasons of substance ought to be considered by the decision-maker, and he refuses to consider them, any formal reasons he gives for his decision will be out of place and unjustifiable, and hence can fairly be called formalistic. . . . But the fact that formalistic reasons are always bad does not justify us in jumping to the conclusion that all formal reasoning is bad. Indeed, it is quite apparent that the law uses, and, I will argue, correctly uses, formal reasons in all sorts of situations.” P. S. Atiyah, “Form and Substance in Legal Reasoning” in Neil MacCormick and Peter Birks, eds., The Legal Mind: Essays for Tony Honoré (Oxford University Press, 1986), 21. Formalism amounts to the claim that the only legitimate basis for judicial decision making involves the enforcement of existing legal norms (or the notion that every legal case can be decided solely by reference to existing legal norms). Cf. Atiyah and Summers, Form and Substance in Anglo-American Law, 28–31; Lyons, Moral Aspects of Legal Theory, 42–44, 52–57. I argue instead that judicial decisions must be expressed within recognized forms of legal judgment with regard to authoritative sources and modes of argument. But within this formal structure, the common law also always preserves space for individual judicial evaluation, assessment, and (on occasion) alteration of existing law. Judges are the institutional actors who must determine the substantive value of legal standards that precede and are produced by the judicial process.

190. See below at 71–72, 73–75. See also MacCormick, Rhetoric and the Rule of Law, 144, 147–48 (“For J the judge in the case to be justified in deciding for C or D, in such a dispute, J must surely be willing to make a ruling on the law upholding not merely ad hoc and ad hominem C’s claim so advanced or D’s defence so presented. J must be willing to do so on terms that hold good for any persons who satisfy the same qualifications and engage in the same acts in the same circumstances.”).

191. See MacCormick, Rhetoric and the Rule of Law, 77 (“[T]he argumentation at this level cannot be properly conceived of in simply bivalent true-or-false terms. We enter here the realms of the better-or-worse, the arguable, the preferable, the more or less persuasive.”).

192. See Steven L. Winter, A Clearing in the Forest: Law, Life, and Mind (University of Chicago Press, 2001), 317 (“If there is one thing that practicing lawyers certainly know, it is that the life of the law is not logic but persuasion . . . . The law that emerges from this process is a social product—that is, the product of an interaction between particular, situated historical actors. It is not—and, as Robert Cover points out, can
never be—the work of a single ‘heroic’ judge trying to advance some particular political or social agenda. It follows that any theory of law that takes seriously the insight that law is not a ‘thing’ but an activity that judges do, must take into account the role of persuasion in the decisionmaking process.” (emphasis in original) (footnotes omitted).

See also Dworkin, Law’s Empire, 254; Charles E. Wyzanski, Jr., A Trial Judge’s Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1302-4 (1952).

193. See Ronald Kahn, The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius, 73 Md. L. Rev. 133, 176-77 (2013) (“[T]he development of constitutional law is a process involving both the comparison of principles and the social and economic constructions Justices articulate in support of these principles. These comparisons require that Justices apply the principles they advocate to the lived lives of individuals, as described in precedent and as applied in cases before the Supreme Court.”).

194. See Kahn, The Commerce Clause and Executive Power, 177. Kahn carefully examines Chief Justice John Roberts’s majority opinion and Ginsburg’s dissent in Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), and concludes that Roberts’s attempt to establish a doctrinal distinction for Commerce Clause purposes between inaction and action, drawn in part from an implicit liberty interest in choosing whether and how to engage in commerce, is unlikely to endure because the “inaction-action” distinction is inconsistent with the reality of the choice at issue and with the principle derived from the pertinent precedents. See id. at 173-76.

195. See, e.g., MacCormick, Rhetoric and the Rule of Law, 77 (“Every statement of law, both in judicial justification and in doctrinal commentaries, rests at least on an implicit, and often on an explicit and articulated, interpretative argument. Such arguments presuppose, and often articulate value systems and value judgements.”). See also Julie Dickson, Evaluation and Legal Theory (Hart Publishing, 2001), 32. As Dickson explains, no legal theory can avoid being evaluative (and, for this reason, Dickson resists attempts to characterize different legal theories as descriptive or normative, or as “value-free” or “morally evaluative”). Dickson’s point holds in relation to judging, as well. Common law judging can never be value-free. Judging requires evaluation, directly or indirectly, although that evaluation need not necessarily be moral in nature. Cf. id. at 37-57, 65-67.

196. See Tara Smith, Originalism, Vintage or Nouveau: “He Said, She Said” Law, 82 Fordham L. Rev. 619, 624, 625 (2013) (“The problem is, the law is political. . . . To make laws is to take a stand on the proper relationship between governors and the governed, a stand on the kinds of restrictions that it is legitimate to forcibly impose on people. In this specific philosophical sense, then, law is political, and judicial rulings about the meanings of laws must be informed by these premises.”) (emphasis in original).

197. Cf. Irving R. Kaufman, The Anatomy of Decisionmaking, 53 Fordham L. Rev. 1, 15 (1984) (“[T]he ‘personal element—that individual sense of justice—is not only inextinguishable, but essential for the orderly development of the law.’. . . Our gravest error may be in repressing our individual values in the hopes of achieving a pure legal result.”) (citation omitted).

198. See Gardner, Law as a Leap of Faith, 257-58; Dworkin, Law’s Empire, 89-90; Raz, Authority of Law, 196 (“These explanations of the piecemeal progress of the com-
mon law are not meant to deny that over the years the common law may undergo radical transformation. Nor do they diminish the important contributions of single judgments by great judges to such developments. The very knowledge that one’s pronouncements from the Bench can later be revised and moderated, while acting to restrain many judges from departing too far from existing doctrine, does on occasion encourage bold spirits to experiment.”; Wyzanski, *A Trial Judge’s Freedom and Responsibility*, 1303 (“Novel remedies begin as permissible exercises of discretion by the court of first instance. They win approval and imitation by similarly circumstanced courts. And in the end what was discretionary has become mandatory. Here is the common law at work—a progressive contribution by the judges, trial as well as appellate.”).

199. See MacCormick, *Rhetoric and the Rule of Law*, 78 (“[C]onsiderations in favour of universalism . . . in no way entail a denial that particular reasons must always exist for particular decisions, justified ones anyway. Nor do they imply that inattention to the full particular detail of a case would be compatible with just or satisfactory decision-making.”); Raz, *Ethics in the Public Domain*, 234–35 (“The sources thesis leads to the conclusion that courts often exercise discretion and participate in the law-making process. . . . Saying this does not mean, however, that courts in exercising their discretion either do or should act on the basis of their personal views on how the world should be ideally run. That would be sheer folly. Naturally judges act on their personal views, otherwise they would be insincere. . . . But judges are not allowed to forget that they are not dictators who can fashion the world to their own blueprint of the ideal society.”).


203. Unlike Tamanaha, I argue that a reorientation away from objectivity and toward intersubjectivity will more helpfully respond to these and other challenges to subjectivity in judging. In relation to the argument in the text, however, this broader divergence in our approaches is immaterial.


205. See, e.g., Richard A. Posner, *The Problematics of Moral and Legal Theory* (Harvard University Press, 1999), 148–49 (“[T]his is just to say that personal values and political preferences are apt to play an important role in courts that have broad discretion, and hence that we want a diverse bench and also that we want our judicial candidates carefully screened not only for temperament and character and intelligence and knowledge of the law but also for their experiences and values.”). Restrictions of space prevent me from discussing various issues concerning political influences on judicial selection, means of assessing merit and ideology in judicial selection, and the relative values of judicial nomination and judicial election as methods of judicial selection. As Judge Posner suggests, the best way to account for the interaction between judicial values and decisions is not to deny or decry the importance of personal values in judgments, but instead to ensure that our processes of judicial selection are sufficiently attentive and sensitive to this interaction.


210. Baum, *Judges and Their Audiences*, 6. According to Baum, the “strategic conception of judicial behavior is now the closest thing to a conventional wisdom about judicial behavior.” Id. at 7 (citation omitted).

211. See Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 Mo. L. Rev. 1209, 1217–18 (2005) (“Empirical literature on judicial preference change is sparse, due to the fact that prevailing models of political science research on the Supreme Court assume that judicial preferences are generally fixed over time. As several leading empirical scholars recently stated in summarizing their field, ‘the “stability assumption” is sufficiently widespread that almost all tests of preference-based theories of judicial decision making treat it as a given.’ For modeling purposes, the studies treat the different Justices as having heterogeneous preferences, but generally consider each Justice’s own voting behavior as fixed longitudinally through time. A stark example of this assumption is the prominent role that Segal/Cover scores play in attitudinal political science literature on the Court. Segal/Cover scores distill the assessments of expert commentary on the Justices’ views prior to their confirmation by the Senate into numerical scores along a single linear scale ranging from −1 to 1.”).

Chapter 3


2. All of my own citations to Kant’s third *Critique* are to Immanuel Kant, *The Critique of Judgement*, trans. James Creed Meredith (Oxford University Press, 1928). When I refer to this edition of Kant’s third *Critique*, I will spell the title as Meredith did. When I refer to the third *Critique* more generally, I will use the conventional US spelling. I would also mention, if for no reason other than its historical serendipity in relation to this chapter’s subject, that Meredith was a respected judge who served on the Supreme Court of Ireland.

3. For reasons of scope and space, I also do not attempt to place Kant’s aesthetic theory in its broader historical context (or in relation to other important theorists
such as Lord Shaftesbury, Joseph Addison, David Hume, Edmund Burke, or Friedrich Schiller), nor do I address larger questions of aesthetics to which Kant’s answers are contested, such as: (1) the relationship of art to utility, (2) whether aesthetic responses are best conceived as natural or ideal, (3) whether artistic taste is innate or cultivated, and (4) the extent to which beauty (and the capacity to appreciate beauty) signifies or symbolizes morality.

4. Kant was born in Königsberg in 1724 and his major work of aesthetic theory, the *Critique of Judgment*, was first published in 1790. See Paul Guyer, “Introduction,” in Paul Guyer, ed., *The Cambridge Companion to Kant and Modern Philosophy* (Cambridge University Press, 2006), 3–4. Henry II is often credited with establishing the common law system in England in the middle of the twelfth century. See R. C. van Caenegem, *The Birth of the English Common Law* (2nd ed.) (Cambridge University Press, 1988), 40–41. Obviously, the historical development of the common law system is a much larger topic than I can address here, and important aspects of that system (reliance on precedent, judicial independence, etc.) evolved over time.


6. A notable exception is Linda Ross Meyer. See Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press, 2010), chap. 1; Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. Cin. L. Rev. 727 (1999). I cannot entirely (or adequately) address the breadth of Meyer’s work here. Her analysis is enlightening and is in many ways consistent with and supportive of my argument. My one reservation about her view, however, is that Meyer presents the goal of aesthetic and legal judgment as truth rather than validity. For reasons I will explain, this seems a problematic and ultimately misleading characterization of Kant’s project in the third *Critique* and of the common law’s conception of judging. For example, Meyer writes, “If the question is really one of truth and not of power, then we must explain how truth can be both shareable and yet subject to dispute. . . . Kant seems to find a basis for the unity of human experience that does not rely on subjective experiences of the effect of particular objects on particular people, the contingent agreement of inter-subjectivity, nor on universal principles of reason that we would share with all other reasonable beings.” Meyer, *Between Reason and Power*, 748, 749 (emphasis supplied). Framing the inquiry in terms of truth or power leads Meyer to find her cognitive bridge in the form(s) of rhetoric. I am sympathetic to this effort, and it is shared by others as a way
through these problems in the understanding of law. See above at 170n187. I agree that understanding the nature of legal reasoning helps us to unravel certain perceived problems about the realities of legal indeterminacy. Meyer’s account, however, misstates Kantian aesthetic judgment, because Kant’s theory does not, as Meyer claims, seek to avoid the subjective experiences of particular people or the central role of intersubjective agreement in the formulation of judgments of taste. Indeed, these are indispensable to Kantian aesthetic theory. In my view, reorienting our focus from truth to validity helps us to appreciate the authentic operation of subjective experience and intersubjective agreement in Kantian aesthetic judgment and in common law legal judgment.

7. I am using the term “taste” here to describe a faculty or judgment in Kant’s terms, which are entirely different from the use of the term in the previous chapter.

8. See above at 149–50n15.


10. I do not organize this chapter in accordance with Kant’s four “moments” of a judgment of taste (viz., disinterestedness, universality, purposiveness, and necessity), although I will discuss disinterestedness, universality, and necessity at some length. My principal reasons for eschewing the moments as an organizational structure are: (1) that approaching Kant’s work in this way would necessitate familiarity with Kant’s Critique of Pure Reason, and (2) the moments do not seem the most effective means of applying Kant’s aesthetic theory to the common law. On the relationship between the four moments in the first and third Critiques, see Christian Helmut Wenzel, An Introduction to Kant’s Aesthetics: Core Concepts and Problems (Blackwell, 2005), 10–18; Béatrice Longuenesse, “Kant’s Leading Thread in the Analytic of the Beautiful,” in Rebecca Kukla, ed., Aesthetics and Cognition in Kant’s Critical Philosophy (Cambridge University Press, 2006), 195–97. Although it would take me too far from the focus of this book to address this in detail, I should mention that scholars disagree as to the equivalence between Kant’s analytic method and structure in the first Critique and the third Critique. Some (Paul Guyer and Salim Kemal, for example) argue that Kant did not intend for the logical functions of cognitive judgment in the first Critique to be read as tracking the four moments of aesthetic judgment in the Critique of Judgment. See, e.g., Paul Guyer, Kant and the Claims of Taste (2nd ed.) (Cambridge University Press, 1997), 114–16; Salim Kemal, Kant and Fine Art: An Essay on Kant and the Philosophy of Fine Art and Culture (Oxford University Press, 1986), 150–51. Others (such as Henry Allison) contend that Kant meant for the moments of aesthetic judgment to be understood as mirroring the table of logical functions of cognitive judgment in the Critique of Pure Reason. See Henry E. Allison, Kant’s Theory of Taste: A Reading of the Critique of Aesthetic Judgment (Cambridge University Press, 2001), 72–84. For a comprehensive examination of judgment in Kantian thought, which explores the relationship between the first and third Critiques, see Béatrice Longuenesse, Kant and the Capacity to Judge: Sensibility and Discursivity in the Transcendental Analytic of the Critique of Pure Reason (Princeton University Press, 1998).

11. See Charles Martindale, Latin Poetry and the Judgement of Taste: An Essay in Aesthetics (Oxford University Press, 2005), 39 (“Kant maintains that there are no rules for beauty or concepts under which objects can be subsumed as beautiful (if there were,
the judgement of taste would be logical, not aesthetic).”). See also id. at 23, 29–30. I am grateful to Meghan Reedy for introducing me to Martindale’s work.

12. Stephan Körner, Kant (Yale University Press, 1955), 175. In fact, the German term Kant used, urteilskraft, is more accurately translated into English as the “power of judging” or the “power of judgment,” and many scholars now translate the title of the third Critique this way. For more on analysis of the third Critique beyond its applicability to aesthetics, see David Bell, The Art of Judgement, 96 Mind 221, 231–32 (1987).

13. Lewis White Beck, Essays on Kant and Hume (Yale University Press, 1978), 55 (quoting Meredith, “Introduction,” in Kant, Critique of Judgment, 31). The footnote to this passage in Professor Beck’s book indicates that it appears on page 91 of the Meredith introduction to the third Critique. This is an error.

14. Paul Guyer views this considered aesthetic judgment as the result of “a double process of reflection both producing pleasure and evaluating it.” Guyer, Kant and the Claims of Taste, 133. There is some dispute about whether these stages of apprehension of a work of art are successive or simultaneous. See e.g., Craig Burgess, Kant’s Key to the Critique of Taste, 39 Phil. Q. 484, 485, 491 (1989). Burgess’s essay is an effort to expose an error in Guyer’s work. According to Burgess, Guyer “assumes that the two types of reflection comprising aesthetic experience are successive” whereas Burgess argues that they occur simultaneously. For ease of expression, I will sometimes describe the process of aesthetic judgment as though it occurs sequentially. But this should not be read as an endorsement of Guyer’s view on this subject. For my purposes, the important point here is that Burgess and Guyer agree that the feeling of pleasure engendered by contemplating a beautiful object is a consequence of (not a precursor to) the judgment that the object is beautiful.

15. See Kant, Critique of Judgment, § 9, at 57 (“Hence it is the universal capacity for being communicated incident to the mental state in the given representation which, as the subjective condition of the judgement of taste, must be fundamental, with the pleasure in the object as its consequent.”) (emphasis supplied). See also id. at 58–59 (“[T]his purely subjective (aesthetic) estimating of the object, or of the representation through which it is given, is antecedent to the pleasure in it.”).

16. See Eva Schaper, “Taste, Sublimity, and Genius: The Aesthetics of Nature and Art,” in Guyer, The Cambridge Companion to Kant, 375 (“[N]ot only I, but every subject of experience standing in the same relation to the object would feel the same, and, further, have the same justification for having such a feeling in virtue of sharing the same structure of mentality. . . . We rely on our innermost feelings of pleasure alone when estimating the beautiful—an aesthetic judgment ‘is one whose determining ground cannot be other than subjective’ (§1, 5:203)—and yet we claim for the deliverances of taste a suprapersonal import. We believe it to be binding for all subjects and not merely for the one on whose experience it is based.”) (quoting Kant, Critique of Judgment) (emphasis in original).

17. See Donald W. Crawford, Reason-Giving in Kant’s Aesthetics, 28 J. of Aesthetics and Art Criticism 505, 506–7 (1970) (“The pure judgment of taste is based on a feeling of pleasure, but this feeling is occasioned not by mere sensation but by the contemplation of, or reflection upon, the form of that being considered—by a consideration of whether it is suitable for cognition in general. . . . Although the pleasure resulting from the awareness of this purposiveness of form is subjective, the awareness itself must be
intersubjective as a necessary condition for communication . . . and hence there is a basis for the universal validity of judgments of taste.”).

18. See Kemal, *Kant and Fine Art*, 157–58, 166. Kemal also mentions a third characteristic, necessity, which is the claim that other future judges of an object should concur with my judgment of it. I discuss this in detail below at 67–69.

19. See Paul Guyer and Henry Allison, “Dialogue: Paul Guyer and Henry Allison on Allison’s *Kant’s Theory of Taste*,” in Rebecca Kukla, *Aesthetics and Cognition in Kant’s Critical Philosophy* (Cambridge University Press, 2006), 129 (“[F]eeling for Kant plays an essential judgmental role. Indeed, this is the only way in which I can understand the Kantian conception of an ‘aesthetic power of judgment.’ Thus, in the very first section of the third *Critique*, Kant states explicitly that the feeling of pleasure or displeasure ‘grounds an entirely special faculty for discriminating and judging.’ In short, . . . Kant is committed to the view that in a judgment of taste one judges *through one’s feeling.*”) (quoting Kant, *Critique of Judgment*, § 1) (emphasis in original).

20. I do not address the question whether the capacity to make aesthetic judgments is an innate human trait or a cultivated and refined faculty. For my purposes, whichever answer one gives to this question, Kantian aesthetic theory requires that this capacity is shared by other potential judges of the artistic object to whom the judgment of taste is communicated. Kant sometimes refers to this shared capacity as a “common sense (*sensus communis*).” See Kant, *Critique of Judgement*, § 20, at 82. For the different uses Kant makes of this term, see Kemal, *Kant and Fine Art*, 181–86, 196–214, esp. at 184 (“the common sense is both the feeling shared and the ability to judge that the feeling is shared.”) (emphasis in original).

21. See above at 8–9 and below at 78.


25. The concept of freedom (of the individual as a self-legislating and autonomous agent) is central to much of Kant’s work in the three *Critiques*. See, e.g., Guyer, *Cambridge Companion to Kant*, 20–21. Although I cannot possibly engage with the entire scope of Kantian freedom and autonomy in relation to aesthetic judgment or to the common law, I do want to emphasize one aspect in particular. Kant understood freedom—or more precisely autonomy—to require that individuals may formulate their judgments in the absence of external pressures and through the exercise of their own reason. This conception of freedom fittingly describes the position and action of common law judges. Cf. Susan Meld Shell, *Kant and the Limits of Autonomy* (Harvard University Press, 2009), 110–12. The common law expects judges to bring their own reason and experience to the judgments they make, and the common law tradition protects judges from external pressures in the course of reaching their decisions.

26. See below at 91–92.

27. See Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), 277 (“[T]here is no point in offering an argument unless it tries to show something, to show at least why some opinion or opinions are le-
gally better or sounder than others. . . . No one has a judgement other than his or her own to apply to these questions and the result reached can only be a matter of that person’s judgement. . . . That judgement, however, is one about the possible grounds of rightness.”). MacCormick indicates that this form of argumentation implies a belief in “objective interpersonal criteria of legal soundness.” Id. While I believe the word “objective” is problematic in this context, I agree entirely with MacCormick’s view of the personal and interpersonal nature and evaluation of legal judgments.

28. See above at 138n52.
29. See below at 209n13, 211n26, and 220–21n98.
30. See below at 95–101.
31. See, e.g., Louis L. Jaffe, English and American Judges as Lawmakers (Oxford University Press, 1969), 21 (“A judiciary which is gagged or has the sense of being gagged in one area may well be gagged in all. The judge should have a sense of moral freedom, a sense of independence in the service of justice. We cannot look to him to resist abuse of power if he is made to feel impotent.”).
33. See above at 46–47.
34. See below at 91–95, 102–4.
35. Cf. Arendt, Between Past and Future, 217 (“The power of judgment rests on a potential agreement with others . . . even if I am quite alone in making up my mind, in an anticipated communication with others with whom I know I must finally come to some agreement. From this potential agreement judgment derives its specific validity. . . . [J]udgment must liberate itself . . . from the idiosyncrasies which naturally determine the outlook of each individual in his privacy . . . but which are not fit to enter the market place, and lack all validity in the public realm.”).
36. For more on this point in relation to an aesthetic community, see Kemal, Kant and Fine Art, 159 (“[W]e need criteria by which the success of our actual judgements is assured. And Kant proposes that we assess whether particular justifications are successful, and our preferred subjective responses universalizable, by considering whether others can gain our experience. As to justify an aesthetic judgement is to enable another subject to gain the same experience, a successful judgement must also be one that is communicated. Here, we rely on . . . a regulative ideal of satisfactory communication, and by means of this ideal seek to ensure the success of our actual particular aesthetic judgements.”) (emphasis in original). The concept of universalizability is another important link between Kantian aesthetic judgment and common law legal judgment. See Neil MacCormick, Legal Reasoning and Legal Theory (Oxford University Press, 1978), 84, 86, 98–99, 214–15; MacCormick, Rhetoric and the Rule of Law, 99, 146, 147, 149–51. And universalizability also famously serves as a foundation for Kantian moral theory through the categorical imperative. See Immanuel Kant, Groundwork of the Metaphysics of Morals (Mary Gregor, trans.) (Cambridge University Press, 1998), 4:421, at 31 (“There is, therefore, only a single categorical imperative and it is this: act only in accordance with that maxim through which you can at the same time will that it become a universal law.”) (italics deleted). (Of course, Kant actually offered more than one formulation of the categorical imperative.) For more on the forms and processes of communication in relation to a legal community, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution (Oxford University Press, 1982),
chaps. 1–7 (discussing a typology of constitutional arguments); Dennis Patterson, *Law and Truth* (Oxford University Press, 1996), 51 (“Assertions in law are claims the truth of which are vindicated by intersubjective (not mind-independent) justificatory criteria. . . . The forms of argument are the grammar of legal justification—the way lawyers show that propositions of law are true or false. Apart from these forms of argument, there is no legal truth.”). To some (myself included), it seems problematic that Patterson describes the goal of his book as determining claims of “truth” in law. See, e.g., Andrew Halpin, *Reasoning with Law* (Hart Publishing, 2001), 140–41 (“Patterson does not demonstrate that from forms of argument that are successful we derive conclusions in terms of truth. Indeed his emphasis in *Law and Truth* on the roles of persuasion and commendation in legal argument would suggest otherwise.”) (emphasis in original). While I share this concern about Patterson’s way of stating the goal of his project, his references to the forms of legal argument and to the necessity of intersubjective evaluation as predicates for legal judgment broadly support the argument made here.


38. Körner, *Kant*, 183 (emphasis in original). For Kant’s own articulation of this point, see *Critique of Judgment*, § 7, at 52 (“With the agreeable, therefore, the axiom holds good: Every one has his own taste (that of sense). The beautiful stands on quite a different footing. It would, on the contrary, be ridiculous if any one who plumed himself on his taste were to think of justifying himself by saying: This object . . . is beautiful for me. For if it merely pleases him, he must not call it beautiful . . . . [W]hen he puts a thing on a pedestal and calls it beautiful, he demands the same delight from others. He judges not merely for himself, but for all men, and then he speaks of beauty as if it were a property of things. Thus he says the thing is beautiful . . . he demands this agreement of them [other judging subjects]. He blames them if they judge differently, and denies them taste.”) (emphasis in original). See also id., § 9, at 59 (“In a judgement of taste the pleasure felt by us is exacted from every one else as necessary, just as if, when we call something beautiful, beauty was to be regarded as a quality of the object forming part of its inherent determination according to concepts; although beauty is for itself, apart from any reference to the feeling of the Subject, nothing.”) (emphasis supplied).


42. Kant, *Critique of Judgement*, § 8, at 55. See also id., § 6, at 51 (“Accordingly he [the judge] will speak of the beautiful as if beauty were a quality of the object and the judgement logical (forming a cognition of the Object by concepts of it); although it is only aesthetic, and contains merely a reference of the representation of the object to the Subject.”) (emphasis added).

43. Cf. Kemal, *Kant and Fine Art*, 317 n. 5. It is, of course, more complicated than this. According to Kant, cognitive judgments are objective in the full sense that they may be determined to be true or false, and they are also intersubjective in the sense that they may be communicated and they carry a claim to assent by other judging subjects. Aesthetic judgments share intersubjectivity with cognitive judgments (in terms of their communicability and claim to universality) but they are not—and this
is the point I wish to emphasize—objective (i.e., they depend for their validity on subjects' shared responses and capacities of response rather than on empirical claims and falsifiability). For an excellent discussion of the nuanced comparisons and contrasts between cognitive and aesthetic judgments, see Kemal, Kant and Fine Art, 161–70.

44. See Linda Meyer, “Nothing We Say Matters”: Teague and New Rules, 61 U. Chi. L. Rev. 423, 470–71 (1994) (“Because language grows from context, it makes sense for the judgment to be taken in context, rather than the judge’s reasoning or enunciated rule, to be authoritative. . . . [A]fter reading many cases, the sense of the right result in the case under decision is clearer than the ‘principle’ that would capture the continuity. Having looked at a series of examples, one intuitively knows ‘how to go on in the same way’ without necessarily being able to state the rule. In short, the common law assumes that our ability to sense the continuation of a pattern in a particular context will be keener than our ability to explicate a rule.”).

45. Stephen R. Perry, The Varieties of Legal Positivism, 9 Can. J.L. & Juris. 361, 369–70 (1996). See also John Chipman Gray, The Nature and Sources of the Law (Ashgate, 1997), 147 (“[I]t is not true that we can trace historically the development of theological, philosophical, or scientific truths in the utterances of successive thinkers; what we can trace is the development of human knowledge and belief of those truths; but the truths themselves are entirely independent of human knowledge and belief. . . . So the laws of light do not depend upon the ideas of Sir Isaac Newton or any other physicist with regard to them. ‘We do not infer that philosophers make the laws of nature; how then can we infer that judges make the law of the land?’ is what Professor Hammond says. . . . Because the laws of nature are independent of human opinion, while the Law of the land is human opinion.”); Joel B. Grossman, Lawyers and Judges: The ABA and the Politics of Judicial Selection (John Wiley & Sons, 1965), 214 (“The products of scientific decision are open to verification by accepted methods. Its premises are acknowledged, and its results are empirical. But the judicial decision is the product of a greater array of forces, its premises are often inarticulate, and its results are not similarly verifiable.”); Kent Greenawalt, Law and Objectivity (Oxford University Press, 1992), 208 (“Standards of legal correctness must be accessible to human beings; they cannot rest on some truth that is wholly undiscoverable by human beings. . . . The answer to a legal question must in some sense be provided by the law.”) (emphasis in original); Ronald Dworkin, Justice in Robes (Harvard University Press, 2006), 152 (“Some of our concepts are governed . . . by an entirely different set of background assumptions: that the correct attribution of the concept is fixed by a certain kind of fact about the objects in question. . . . What philosophers call ‘natural kinds’ provide clear examples. . . . Are the political concepts of democracy, liberty, equality, and the rest like that? Do these concepts describe, if not natural kinds, at least political kinds that like natural kinds can be thought to have a basic ingrained physical structure or essence? Or at least some structure that is open to discovery by some wholly scientific, descriptive, non-normative process? Can philosophers hope to discover what equality or legality really is by something like DNA or chemical analysis? No. That is nonsense.”). Cf. George Steiner, Real Presences (University of Chicago Press, 1989), 75 (“Two indispensable criteria must be satisfied by theory: verification or falsifiability by means of experiment and predictive application. There are in art and poetics no crucial experiments, no litmus-paper tests. There can be no verifiable or falsifiable deduc-
tions entailing predictable consequences in the very concrete sense in which a scientific theory carries predictive force.

46. See above at 9–14.

47. See Beck, Essays on Kant and Hume, 168, 170 (“[U]nless there is some standard for assessing a judgment, that is to say, unless the judgment first is ‘necessary’ in contrast to ‘arbitrary,’ the judgment cannot be said to be right or wrong . . . Error in taste arises from sinning against the conditions of aesthetic validity . . .”) (emphasis in original).

48. See, e.g., Kemal, Kant and Fine Art, 168; Guyer, Kant and the Claims of Taste, 8.

49. Beck, Essays on Kant and Hume, 169.

50. For example, imagine a case in which the law dictates that the plaintiff should prevail and a judge decides in the plaintiff’s favor not on the basis of the evidence or the law but instead out of a fondness for the plaintiff’s necktie.

51. See Guyer, Kant and the Claims of Taste, 131–33. For more on this point, see Kemal, Kant and Fine Art, 163, 164, 165 (“[C]oncepts are used to make objective judgements—which can be true or false, depending on whether they correspond to the way the world is. As the truth of a judgement depends on its agreement with an object, in an important sense agreement with other subjects does not provide objective judgements with any greater validity. . . . Validity does not depend on the existence of other individuals, but has consequences for their judgements on the same objects in that it compels their agreement. . . . In all these features, aesthetic judgements differ significantly from cognitive ones. And accounts of Kant’s aesthetic theory are likely to be mistaken where they try to apply the epistemological model of the First Critique too quickly to the Third Critique . . . . [W]e must treat the subjectivity, autonomy, basis in feeling, and intersubjectivity of actual aesthetic judgements as recommendations and require a distinctive necessity of them—one gained through cultural development.”). Just to follow up on a point raised above in note 10, even those scholars who believe the structure of aesthetic judgment in the third Critique should be read as tracking the logical functions of cognitive judgment in the first Critique agree that the distinction between objectivity and intersubjectivity holds in relation to Kant’s approach and argument in the Critique of Pure Reason and in the Critique of Judgment. See Allison, Kant’s Theory of Taste, 77 (“[A]n aesthetic judgment is a judgment, and therefore necessarily has a scope. But, once again, since it is an aesthetic judgment, its scope or quantity cannot be understood according to the model of the logical quantity of a cognitive judgment about objects (“All S are P”), but must rather concern the sphere of judging subjects to whom the feeling is applicable. In short, as Kant argues . . . the universality of a judgment of taste, as an aesthetic judgment, can only be a subjective universality. Furthermore, even though the judgment of taste has a subjective basis and cannot be quantified over objects, it expresses an evaluation of an object or its representation. . . . [T]he relation here differs markedly from its logical counterpart, since it holds between the feeling of the judging subject and the object judged.”) (emphasis in original). And for their part, scholars who argue for the differentiation of cognitive and aesthetic judgments also concede that these judgments should be recognized as, in certain respects, “complementary to each other in culture.” Kemal, Kant and Fine Art, 151; see also id. at 268.

52. Guyer, Kant and the Claims of Taste, 132 (quoting Kant, Critique of Judgment, §
8) (brackets and emphasis in original). See also Longuenesse, *Kant and the Capacity to Judge*, 168–69 n. 4 (“[A]ccording to Kant, . . . for them [aesthetic judgments] we claim subjective, although we make no claim to objective[,] universality and necessity.”) (emphasis in original).

53. See Kant, *Critique of Judgement*, § 9, at 59 (“[W]hen we call something beautiful, beauty was to be regarded as a quality of the object forming part of its inherent determination according to concepts; although beauty is for itself, apart from any reference to the feeling of the Subject, nothing.”). This indicates that Kant did not mean to describe or ascribe beauty as an objective quality in any “mind-independent” sense, which means that beauty is not something that exists in an object irrespective of our perception and evaluation of that object (in the way that, for example, an object’s chemical composition does). For more on the relationship of objectivity to mind-independence, see Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge University Press, 2007), 3–14. In the previous chapter, I explained some other distinctions between objectivity and intersubjectivity that touch on this discussion. See above at 26–30.

54. See Ted Cohen and Paul Guyer, “Introduction,” in Ted Cohen and Paul Guyer, eds., *Essays in Kant’s Aesthetics* (University of Chicago Press, 1982), 12 (“The statement ‘x is beautiful’ is deceptive, then, insofar as it may seem to signal an underlying logical (objective) judgment, but Kant’s deep and radical idea is that there is no deception whatever in using the statement, for using it is the only way to say what one wants to say about it. The form of words may seem to be appropriate only if one purports to say something ‘objectively’ true about x, something which has a genuine contradictory, but it is in fact justified whenever one refuses the disagreement of others who judge about x . . . Kant is the first to formulate the point precisely, in this way: one says ‘x is beautiful’ instead of ‘x pleases me’ or ‘I like x’ just when one wants to make a judgment with more than personal import.”) (emphasis in original).

55. See, e.g., Kant, *Critique of Judgement*, § 6, at 16–17. And, of course, Kant called the first book of the third *Critique* the “Analytic of the Beautiful.”

56. Here I may be extrapolating from Kant’s theory in a way that diverges from his own view. It is not clear that Kant himself would have seen artistic objects as succeeding when conveying a sense of something other than beauty. In addition, Kant seemed to see a tripartite spectrum of aesthetic responses to an object: beautiful (producing pleasure), ordinary (producing indifference), and ugly (producing displeasure). See Paul Guyer, *Values of Beauty: Historical Essays in Aesthetics* (Cambridge University Press, 2005), 143–44.

57. Cf. *Dillon v. United States*, 184 F.3d 556, 566 (6th Cir. 1999) (“[W]e are not at liberty to act as free-wheeling chancellors of old, riding roughshod over rules that in our opinion are inequitable. The rule of law requires that such a change come from either Congress or the Supreme Court, which I in fact would urge be done. In the meantime, I agree with the wisdom of President Ulysses S. Grant’s statement that ‘the best way to get rid of a bad law is to enforce it.’”) (Gilman, J., dissenting). President Grant’s precise statement, to which Judge Gilman refers, is from his first inaugural address: “I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution” (March 4, 1869).

58. See generally T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of

59. A complicating factor here is that aesthetic judgments are evaluations of artistic objects, but legal judgments are not solely evaluations of existing legal sources. A legal judgment (in the form of a judicial decision) is itself also an independent source of law.

60. Guyer, Kant and the Claims of Taste, 62.

61. See MacCormick, Rhetoric and the Rule of Law, 277 (“The kind of reasoning which goes forward in legal decision-making, legal argumentation, and indeed in legal thought in all its forms and levels . . . proceeds under a pretension to correctness, an implicit claim to being correct.”) (citing Robert Alexy, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Oxford University Press, 1989), 104–8, 214–20); Gerald J. Postema, “Objectivity Fit for Law,” in Brian Leiter, ed., Objectivity in Law and Morals (Cambridge University Press, 2001), 105, 107 (“Ordinarily, to say that a judgment is objective . . . is to say something about the relationship between the judging subject, the judgment, and its subject matter, and, in view of that relationship, to vouch for the credibility, if not necessarily the truth, of the judgment . . . Correctness or validity of a judgment implies that it is worthy of acceptance or endorsement.”) (emphasis in original). Postema also very helpfully summarizes Kant’s view of intersubjective validity via communication and mutual agreement across the different realms of theoretical and practical reason as “probative of truth” even though the respective bases for assessing a judgment’s objectivity will vary depending upon the availability of a preexisting or autonomously produced object of the judgment. See id. at 110–11.

62. On the provision of supportive reasons in Kantian aesthetic judgment, see Crawford, Reason-Giving in Kant’s Aesthetics, 508, 509. On the provision of supportive reasons in the common law tradition, see above at 153n34, 161n97, 164n112.

63. Kemal, Kant and Fine Art, 87, 88.

64. Barbara Herrnstein Smith’s excellent discussion of “the unquiet judge” relates well to the discussion in the text. See Barbara Herrnstein Smith, Belief and Resistance: Dynamics of Contemporary Intellectual Controversy (Harvard University Press, 1997), chap. 1. Very briefly stated, Smith argues that the absence of a commitment to objectivist thought does not in any way disable normative claims, convictions, and justifications. Objectivists, Smith says, frequently assume that nonobjectivists cannot make normative judgments of value (because they have no external basis on which to ground their conclusions). Nonobjectivists are urged to (and often do) retreat to postures of quietism—the abstention from making value judgments—as a result of their rejection of objectivism. Smith’s point, which supports and reinforces my argument, is that a rejection of objective truth as the goal for judgment does not entail an incapacity to judge or to justify one’s judgments. See id. at 2–3. Once we reject the false dichotomy between “objective reasons” and “subjective preferences,” we can see that “judgments that do not claim objective status . . . [can] reflect not merely the[ ] indi-
vidual or partisan preferences [of judges] but the interests and values of larger relevant groups, including, sometimes, the entire relevant community.” *Id.* at 3, 4. There is a valuable parallel here between Smith’s and Kant’s accounts of the subjective and the intersubjective in the process of judging. Moreover, applying this analysis to judgments of law, Smith argues that judges can and should acknowledge that their values and experiences inform their judgments, while at the same time attempting to justify their judgments by reference to the “extensive and effective explanatory and justificatory [sic] resources at their disposal. Contrary to the common charge or fear, then, neither the authority nor the persuasiveness of a non-objectivist judge’s rulings would be hobbled by the fact that, in justifying them, she did not invoke any ‘objective grounds’ but only indicated . . . how she weighed and weighted such matters in the light of historical evidence and judicial precedent (as she interprets them), broader communal interests and communal goals, and her own general values, beliefs, and prior experiences.” *Id.* at 16–17.


67. See Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (University of Chicago Press, 2001), 318 (“[T]he central concern of the conventional view is to avoid subjectivity in legal decisionmaking. It requires reason to do so because it does not recognize any other kind of constraint. On this model, persuasion represents the antithesis of reason—and, thus, is understood to exacerbate the danger of subjectivity—because it appeals to extrarational considerations. . . . [However,] if persuasion works only to the extent that the decisionmaker already shares the values being appealed to, then it is hard to see in what sense the resulting process could be said to be ‘subjective.’ Quite the contrary. Persuasion is, by definition, an intersubjective process—not only in the trivial sense that it takes at least two people to occasion persuasion, but also in the more important sense that persuasion can proceed only on the basis of shared values and perspectives.”) (emphasis in original). It is not entirely clear whether Winter seeks to devalue the subjective aspect of the decisional process or to challenge conventional views of what subjectivity means. And there is a question begged here about the extent and kinds of values and perspectives that must be shared for the process of persuasion to proceed. In fairness to Winter, though, I should mention that his larger project aims to reinterpret the “subject-object” dichotomy itself as a means of reframing our understanding of human cognition and law as a process and a product of human imagination (as he uses that term). For reasons of space and focus, I cannot address Winter’s more expansive project here. For now, it is enough to observe that, *pace* Winter, the Kantian and common law traditions are concerned more with explaining the complementary and reflexive dynamics of subjectivity and intersubjectivity in the process of judgment, rather than challenging or redefining the subjective aspect of the process. With these qualifications in mind, Winter’s insightful comments concerning the threat subjectivity allegedly poses for legal judgment and the intrinsic importance of intersubjectivity for the process of persuasion help to illuminate the discussion in the text.

68. To be sure, errors and disagreements occur with respect to empirical cognitive
judgments, as well. But the point is that the means of testing cognitive judgments and the conclusions reached as a result of a realized error differ importantly (at least so far as Kant is concerned) from the means of testing aesthetic judgments and the conclusions reached as a result. See Kemal, *Kant and Fine Art*, 317 n. 5. In the legal context, dissenting opinions are the most familiar (and perhaps the most important) institutional demonstration of the value of disagreement. See, e.g., William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 430–35 (1986). See also *Employers’ Liability Cases [Howard v. Illinois Central R.R. Co.]*, 207 U.S. 463, 505 (1908) (Moody, J., dissenting); *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 329 (1837) (Story, J., dissenting).

69. See Kant, *Critique of Judgement*, § 8, at 56 (“The judgement of taste itself does not postulate the agreement of every one (for it is only competent for a logically universal judgement to do this, in that it is able to bring forward reasons); it only imputes this agreement to every one, as an instance of the rule in respect of which it looks for confirmation, not from concepts, but from the concurrence of others.”) (emphasis in original). See also Kemal, *Kant and Fine Art*, 172–73 (“Kant goes on to link the possibility of error in actual judgements with the need for communication. At best, in aesthetic judgements we can only impute agreement to everyone. . . . For the only way to confirm an aesthetic judgement is to bring another subject to gain the pleasure felt by the judging subject. That is, given that a putative judgement may be mistaken . . . the only way he can support his claim for the rightness of his own judgement is by enabling another subject to make the same judgement . . . it goes to confirm that our own reflection and pleasure are universalizable and that our actual judgement is not mistaken. . . . Though we may not recognize our mistakes through our own reflection, we could do so when our judgement is unable to gain concurrence.”) (emphasis in original).


71. See below at 67–70.

72. For more on the form of Kantian aesthetic judgments, see Donald W. Crawford, *Kant’s Aesthetic Theory* (University of Wisconsin Press, 1974), 92, 96–100 (noting the distinction in Kant’s theory between the form of aesthetic judgment and the content of specific judgments). For more on the form and structure of common law legal judgments, see above at 48–50.


74. See Patterson, *Law and Truth*, 97–98. A useful link to Kant on this point is his treatment of aesthetic judgments as “recommendations.” See Kemal, *Kant and Fine Art*, 170, 180, 181.

75. Of course, there are questions of vertical and horizontal *stare decisis* that complicate matters here. In the interests of clarity and space, I cannot pursue these questions at length. Nevertheless, in an effort to forestall certain possible objections, I would argue that judges do not often make decisions they know are wrong. To the extent that *stare decisis* sometimes requires judges to reach decisions with which they disagree, the common law permits (and might even require) them to say so. In addition, if a judge’s reasoning in criticizing existing precedent (even if the judge felt compelled to follow it in her ruling) is persuasive, future judges may well choose to follow the reasoning of their predecessor rather than their predecessor’s ruling in future
cases. So the individual judge’s claim to the correctness of her reasoning and her preferred judgment remains (even when that judge was obliged to decide otherwise due to institutional constraints).


78. See Kant, *Critique of Judgement*, § 9, at 57, 58 (“Were the pleasure in a given object to be the antecedent, and were the universal communicability of this pleasure to be all that the judgement of taste is meant to allow to the representation of the object, such a sequence would be self-contradictory. For a pleasure of this kind would be nothing but the feeling of mere agreeableness to the senses, and so, from its very nature, would possess no more than private validity. . . . [T]he subjective universal communicability of the mode of representation in a judgement of taste is to subsist apart from the presupposition of any definite concept . . . [I]t must be just as valid for every one, and consequently as universally communicable . . .”). This section of the third *Critique* is notoriously opaque. Whatever else it means, however, Kant differentiated purely private reactions from intersubjectively valid judgments in virtue of a specific process of cognition and communication.

79. See, e.g., Kant, *Critique of Judgement*, § 9, at 57 (“[I]t is the universal capacity for being communicated incident to the mental state in the given representation which, as the subjective condition of the judgement of taste, must be fundamental.”). See also Allison, *Kant’s Theory of Taste*, 80 (“[T]he subjective universality (or universal communicability) of one’s feeling is part of what one means in judging an object beautiful.”) (emphasis in original).

80. See Melissa Zinkin, “Intensive Magnitudes and the Normativity of Taste,” in Rebecca Kukla, ed., *Aesthetics and Cognition in Kant’s Critical Philosophy* (Cambridge University Press, 2006), 159 (“When I claim that something is beautiful, I do not merely demand that someone else agrees with me, in the sense of adding her judgment to mine and saying she thinks so too. . . . I do not think that my judgment could count as a judgment of taste unless I believe everyone ought to agree with me.”) (emphasis supplied).


82. See John Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 Colum. L. Rev. 59 (1963).


84. See Bell, *The Art of Judgement*, 225 (explaining that a judgment must be “taken to be true” by the judge offering it). The key here is that a judge must in good faith believe his judgment to be the proper legal conclusion, but this is different from the judgment’s being “true” in an objective sense.


86. On the confluence of legal and moral obligation with respect to a judge’s duty to articulate and develop the law, see, e.g., MacCormick, *Legal Reasoning and Legal Theory*, 33 (“That ‘must’ is not the ‘must’ of causal necessity or of logical necessity. It is the ‘must’ of obligation. The judge has a duty to give that judgment. It is merely banal to observe that his having a duty so to give judgment does not mean or entail that he does or that he will give, or that he has given, such a judgment. . . . The judge’s issuing an order is an act which he performs or does not perform, and in so acting he either fulfills or does not fulfil his duty.”) (emphasis in original); Greenawalt, *Law and Objectivity*, 22–25, 89; Kent Greenawalt, *Conflicts of Law and Morality* (Oxford University Press, 1987), 32 (“A duty attaches to a particular position or to one’s status as a human being; one speaks of the duties of judges and parents and of people generally. In this usage, one can speak of moral obligations and duties, but one can also speak of obligations and duties that are other than moral. These nonmoral duties, or obligations, may carry moral weight—‘it is morally right that judges perform their legal duties’—but moral argument is needed to link the nonmoral duty to what one morally ought to do.”).


88. See Crawford, *Kant’s Aesthetic Theory*, 162 (“[I]n Kant’s aesthetic theory the activity of judging the beautiful is intimately connected with the appreciator’s experience of the beautiful. . . . Verdictive judgments of taste are, for Kant, the natural culmination of the process of experiencing beauty, at least in the social context in which we wish to communicate our knowledge and feelings to others. Kant explains the existence of the institution for making judgments of taste in terms of our innate desire to obtain and share knowledge, our desire to reach and communicate that which lies beyond the realm of our sense experience. . . . Thus, although the verdictive judgment is a social act, it is the making public of a product of a natural human activity—exercising our reflective power of judgment in order to apprehend a unity (purposiveness) in a manifold of intuition.”).

89. See Paul Guyer, “Pleasure and Society in Kant’s Theory of Taste,” in Cohen and Guyer, eds., *Essays in Kant’s Aesthetics*, 52 (“Kant does not always or even usually say that in solitude there is no pleasure in the beautiful; most frequently he does say merely that there is no taste in solitude. . . . But if the judgment on the communicability of a felt pleasure is properly distinguished from the reflection leading to that pleasure, the claim that there is no taste in solitude need not mean that no one in solitude can take pleasure in beauty, but implies only that the solitary cannot be imagined to make judgments of taste about his pleasures. . . . [I]n fact it may be only in society that an
individual can learn to make that judgment about his own feelings requisite to call an object which pleases him ‘beautiful.’”) (emphasis in original). I discuss certain senses in which a judgment of taste necessitates a conception of the self as a part of a larger community in the next section.


91. See Kemal, Kant and Fine Art, 185–86.

92. See Crawford, Kant’s Aesthetic Theory, 162–63.

93. See Harold J. Berman, Law and Language: Effective Symbols of Community (Cambridge University Press, 2013), 38 (“It should be stressed that language presupposes a transfer of meanings not only from speaker to listener (or writer to reader) but between them; for some response from the listener (or reader) is presupposed in every utterance. Such reciprocal interaction is not only a purpose of language but also what language is operationally: speech does inevitably effectuate an exchange. . . . We need a new verb, ‘speak-listen,’ to express the reciprocal character of language in action. . . . [L]anguage is thus understood in the first instance as a process of creating relationships among those who jointly engage in it.”) (emphasis in original); Marianne Constable, Our Word Is Our Bond: How Legal Speech Acts (Stanford University Press, 2014), 80–81 (“[A] legal speech act is not, strictly speaking, caused by its speaking subject. . . . Joint speaking and hearing do not cause, but together are, what the (singular) social act is . . . . Even the most conventional or performative utterances of law involve a hearing ‘you’ and a speaking ‘I’ who understand one another’s language and how to speak with one another. In dialogue, persons take turns being ‘you’ and ‘I,’ initiating new states of affairs and opening up and closing down possibilities of response, without determining them. . . . [T]he utterances of I-who-speak are designed to recall to you-who-hear who ‘we’—who share practices of speech and hearing, or of language and of law—are.”) (emphasis in original).

94. It may well be that communication requires a community at all times. By limiting my statement to Kant and the common law, I do not mean to contest the “private language argument.” See Ludwig Wittgenstein, Philosophical Investigations, ed. P. M. S. Hacker and Joachim Schulte (4th ed.) (Wiley-Blackwell, 2009), paras. 243–326. I limit my statement to Kant and the common law because of the focus of this chapter and this book.

95. See, e.g., Kant, Critique of Judgement, § 6, at 51 (“[T]he judgement of taste . . . must involve a claim to validity for all men.”); § 7, at 52 (“[W]hen he puts a thing on a pedestal and calls it beautiful, he demands the same delight from others. He judges not merely for himself, but for all men . . . he demands this agreement of them. He blames them if they judge differently, and denies them taste. . . . [A]esthetic judgement [is] capable of making a rightful claim upon the assent of all men.”) (emphasis in original); § 8, at 56 (“[W]hen we call the object beautiful, we believe ourselves to be speaking with a universal voice, and lay claim to the concurrence of every one.”); § 9, at 59 (“In a judgement of taste the pleasure felt by us is exacted from every one else as necessary.”).

96. See above at 172–73n198, 187n77.

consensus is in determining a judgment’s intersubjective validity, we must always un-
derstand the evaluative process as involving the judge and the community together. See id. at 1229 (“If the judgment applies a blend concept—which, as such, has a social nature—the judgment will be interpersonally valid in a strong sense. That is, it will be interpersonally reason-giving, and those who have converged upon it will regard it as reason-giving for one another, as well as for themselves. Convergence simply suggests—rather than vouchsafes—objectivity. . . . [C]onvergence upon a blend judg-
ment signals objectivity only when genuinely shared goals, values, and interests in-
form the *diagonal* method by which the judgment was reached, and when that method is genuinely *diagonal*.”) (emphasis supplied).

98. See above at 142n69, 170–71nn187–189 and accompanying text.

99. See above at 153n34, 161n97, 164n112 and accompanying text.

100. See above at 155–56n49, 163n106, 179–80n36, 187n76, and accompanying text.


102. Scholars disagree about whether the community of subjects to whom a judg-
ment is communicated—“those with the capacity to judge”—includes everyone with
this potential as a rational agent or only those with an already refined faculty of taste. See, e.g., Anthony Savile, *Aesthetic Reconstructions: The Seminal Writings of Lessing, Kant, and Schiller* (Blackwell, 1987), 153–59. Analogizing to the common law, people also dis-
agree about whether the audience for a legal judgment is the public itself or the le-
gal community. See generally Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006) (considering differently config-
ured potential audiences for judicial decisions and arguing that the way we define the audience affects the way we perceive the judge’s actions). I tend to think it is most ac-
curate to think here in terms of a broadly described legal community, but for purposes
of my argument either the more expansive or the more restrictive conception of the community is acceptable, and I will refer to both groups as the potential audience for legal judgments in the discussion that follows.

103. Kant distinguishes between the act of judging and the product of judging. See,
e.g., Ralf Meerbote, “Reflection on Beauty,” in Cohen and Guyer, eds., *Essays in Kant’s Aesthetics*, 61. In a manner consistent with the argument of this chapter, the for-
malization of the judgment and the independent existence of the judgment are related in
terms of the common law, too. In other words, the reasoning that supports a judge’s deci-
sion and the rule of law contained within the decision are intimately connected,
but still distinct, in the process of legal reasoning and evaluation of the judge’s ruling
as a judgment about the law, and as an ongoing source of legal authority.

The root thought here is the Kantian idea that judging is an activity for which judgers
are, and take themselves to be, responsible. . . . In making judgments, judgers vouch
for the correctness of their judgments. Of course, the correctness of their judgments cannot
be constituted by their commitment to them; for then no distinction between their
seeming to be correct and their being so could be made, and without that no mistakes
would be possible, and without the possibility of mistake, the normative idea of correct-
ness loses its content. . . . Thus, judgments stand in need of reasons and are capable of functioning as reasons for other judgments, and judges are regarded and regard themselves as beings capable of giving, requesting, and being challenged to give reasons.

105. See Meerbote, “Reflection on Beauty,” in Cohen and Guyer, Essays in Kant’s Aesthetics, 75 (A judge “would be right to expect and to demand that his declaration be concurred in by other human beings. ‘To concur’ here means not that some other person would merely accept his judgment—there is for Kant no such thing as aesthetic belief based on testimony or even authority—but rather that any other human being, were he to apprehend the same object in a fashion identical in all nonaesthetic respects . . . should likewise declare the object to be beautiful. Any undesirable arbitrariness is ruled out, according to this analysis, by the requirement of such qualitative identity of pleasurable responses of all human beings under the stated conditions, and hence the analysis guarantees the possibility of the correctness of the judgment by means of this very requirement.”) (emphasis in original).

106. Arendt, Lectures on Kant’s Political Philosophy, 72. See also id. at 67 (“I judge as a member of this community and not as a member of a supersensible world.”).

107. Kemal, Kant and Fine Art, 151. Cf. Constable, Our Word Is Our Bond, 78 (“Assessing the ‘fact’ and ‘value’ of an act such as Cardozo’s [or any judge’s] holding is as much about verifying the particular conditions surrounding Cardozo’s announcement as it is about the correspondence of the state of affairs named in the holding to post-1928 New York law. Being able to judge such conditions and states is a matter of language and of time . . . . Claiming that Cardozo’s act of holding happened and that the holding is New York State law requires knowledge of speech and of the world that is shared among those who speak the same tongue. Such speaking . . . involves dialogue with others over time.”); Dennis Patterson, Normativity and Objectivity in Law, 43 Wm. & Mary L. Rev. 325, 348 (2001) (“The normativity of rule-following—the ground of correctness and incorrectness—is not to be found in the agreement of others as such. Agreement is a necessary feature of the normativity of our practices, but the ‘agreement’ must be regularity in reaction to use. In short, when we say there must be ‘agreement in actions’ what we are really saying is that there must be harmony in application, over time. This harmony in reaction and application is constitutive of legal practice and, thus, is the basis of our legal judgments.”) (emphasis in original).

108. Graham Mayeda emphasizes that the distinctive role of the courts in protecting individual rights requires that the relevant community to whom a legal judgment is communicated must include those who are sometimes excluded from the majoritarian political community. See Mayeda, Uncommonly Common, 122.

109. See above at 62.


111. As Arendt put it, a judgment “cannot function in strict isolation or solitude; it needs the presence of others . . . whose perspectives it must take into consideration, and without whom it never has the opportunity to operate at all . . . . [J]udgment, to be valid, depends on the presence of others . . . . [Kant] was highly conscious of the public quality of beauty.” Arendt, Between Past and Future, 217, 218.

112. Kemal, Kant and Fine Art, 88. See also Terry Eagleton, The Ideology of the Aesthetic (Blackwell, 1990), 75 (“When, for Kant, we find ourselves concurring spontaneously
in an aesthetic judgment . . . we exercise a precious form of intersubjectivity, establishing ourselves as a community of feeling subjects linked by a quick sense of our shared capacities.”).

113. See generally J. R. Lucas, “On Processes for Resolving Disputes,” in Robert S. Summers, Essays in Legal Philosophy (Blackwell, 1970), 177–78 (“I go further, and make it part of the definition of a community that disputes between its members are never settled by force, but by some method common to all its members. It is in virtue of this that we can talk of a community’s being a single entity. The members of a community are not always of one mind, necessarily not always of one mind. What is common to them is not their views on all questions, but a way, a method, of settling, or at least of deciding, those disputes that cannot be resolved by argument alone. A community, therefore, is defined as a body of individuals who have a common method of deciding disputes.”) (emphasis in original).

114. See above at 171–72n191–192, 185n67.

115. Guyer, Kant and the Claims of Taste, 8.


117. Guyer and Allison, “Dialogue,” in Kukla, Aesthetics and Cognition in Kant’s Critical Philosophy, 132. While Guyer and Allison agree that Kant’s theory incorporates a justificatory dynamic into aesthetic judgment, they disagree about the proper characterization of the ultimate goal of aesthetic judgment (as an “expectation” of agreement or as a “demand” of agreement). I do not address this further disagreement here.

118. See Meyer, “Nothing We Say Matters,” 471 (“Although law is dependent upon these situational intuitions, we should not skeptically conclude that it is therefore subjective or ‘result-oriented’ in a narrow, selfish way. We share these intuitions with others within our practice. From this standpoint, law is no more subjective than language, whose structure itself requires that law be tied to context. And language works pretty well: most of the time, we understand each other.”) (footnotes omitted). Cf. Robert P. Burns, A Theory of the Trial (Princeton University Press, 1999), 206 (“The power of language to invoke dimensions of situations beyond the simple referents of its statements is thus a pervasive aspect of ordinary conversation. Indeed, these unspoken dimensions are the meanings that, in a strong sense, actually ‘constitute’ the community’s identity.”).

119. See John Bell, “The Acceptability of Legal Arguments,” in Neil MacCormick and Peter Birks, eds., The Legal Mind: Essays for Tony Honoré (Oxford University Press, 1986), 54 (“The notion of the legal audience has two aspects. The first, emphasized here, is its epistemological character: legal reasoning is only possible as justifications directed to a particular legal audience. The audience provides a focus for argument, a way of making it accessible to all, and thus of making the claim to universality which is characteristic of justification. However, it also has a technical character. In the real world of practical discourse, the criteria for whether a legal argument is acceptable may well be the reactions of the actual legal community.”). See also above at 140n57.

120. See Postema, “A Similibus ad Similia,” in Edlin, Common Law Theory, 125 (“[A]lthough it is only individuals who participate in analogical reasoning, these individuals proceed as members of a group, participants in a social practice: and even when the reasoning is carried on, as it were, in their own heads, it is an interior version
of an essentially exterior, interpersonal, public enterprise. They deliberate . . . not for their own part only, but as members of a larger whole.”).

121. See Meyer, “Nothing We Say Matters,” 473 (“Although knowledge of legal distinctions requires special legal knowledge and experience, common law reasoning presupposes that the ‘importance’ of facts is already available to the judge, just as the ‘importance’ of facts in everyday description is already available to the competent user of a natural language. The judge is not just reading prior statements of other judges; she is supposed to know already what sorts of facts might be important in particular contexts.”).

122. Cf. H. Jefferson Powell, Constitutional Conscience: The Moral Dimension of Judicial Decision (University of Chicago Press, 2008), 71–72 (“Persuasion in a constitutional-law argument, furthermore, depends on the extent to which the interpreter seems, to the reader (or hearer), to grasp the point of the constitutional enterprise. . . . [The interpreter] assume[s] that the Constitution is, or gives rise to, law in a technical sense, the sort of human practice in which there is a role for technical expertise, learning, and skill which are not common among any citizen body as a whole. But his own practice, while technically skilled, [i]s aimed at allowing those lacking the relevant professional training . . . to understand and indeed to judge his professional judgment.”) (emphasis supplied).

123. Cf. Alan Brudner, Constitutional Goods (Oxford University Press, 2004), 366; Owen Fiss, The Law as It Could Be (New York University Press, 2003), 8–11; Joseph Raz, “On the Authority and Interpretation of Constitutions,” in Larry Alexander, ed., Constitutionalism: Philosophical Foundations (Cambridge University Press, 1998), 174–75 (“[T]he reference to the ‘self-legitimating’ character of the ‘constitution’ is not to the formal legal existence of the constitution but to the constitution as it exists in the practices and traditions of the country concerned.”); Robin L. West, Are There Nothing But Texts in This Class? Interpreting the Interpretive Turns in Legal Thought, 76 Chi.-Kent L. Rev. 1125, 1131 (2000) (“To truly understand a text is to interpret it, and to interpret it, just is to do so by using, not setting aside, the prejudices and traditions that constitute both the reader (or hearer) and the reader’s (or hearer’s) community—it is precisely those prejudices and traditions that facilitate the reader’s conversational capacity. So to understand the Due Process Clause or the First Amendment in anything but a hermeneutical, participatory fashion is . . . impossible for us human creatures.”); Walter F. Murphy, Civil Law, Common Law, and Constitutional Democracy, 52 La. L. Rev. 91, 130 (1991) (“To maximize the constitutive enterprise’s chances of success, founders must take their own past into account. Men and women who would create a new constitution cannot . . . simply transpose a constitutional text from one state to another, no matter how successfully that document has operated in its original context. A nation has its own history and sets of collective, if typically fuzzy, inaccurate, and conflicting memories of that history. Founders cannot erase and replace these myths. It is highly probable that if a people are to accept a constitution as legitimate, it must reflect some of their history, perhaps even retain some familiar institutions, processes, and proximate ends.”).

therefore, our Constitution’s most significant clauses, such as the Due Process and Equal Protection Clauses, are indeterminate. . . . This indeterminacy becomes the very mechanism by which judgment informs constitutional deliberation. . . . Judgment, rather than deductive prowess, is required precisely in those situations posing genuine dilemmas, forcing us to choose between or otherwise accommodate conflicting interests and obligations. Resolution of these dilemmas necessitates the development of a value hierarchy not itself provided by the constitutional text. Thus, the choices compelled by constitutional deliberation are themselves ‘constitutive’ in nature. They delineate our ‘moral identity’ as they constitute us as this sort of community rather than that sort—as a community that, at least in some contexts, values this more than that.”) (footnotes deleted).

125. I exclude from this discussion “sham” or “fictive” constitutions. See Beau Breslin, From Words to Worlds: Exploring Constitutional Functionality (Johns Hopkins University Press, 2009), 26–27.


129. See above at 29–30, 184–85n64.

130. See above at 143n78, 143–44n80, 144n82.

131. See above at 14, 140n57, 142n69, 164–65n113.


133. Kant, Critique of Judgement, § 2, at 42. See also id., § 6, at 50–51.

134. Kant, Critique of Judgement, § 2, at 43. See also id. at § 5, at 48, 49 (“[T]he judgement of taste is simply contemplative, i.e. it is a judgement which is indifferent as to the existence of an object. . . . [T]aste in the beautiful may be said to be the one and only disinterested and free delight.”) (emphasis in original).

135. Kant, Critique of Judgement, § 2, at 43.

136. See Kant, Critique of Judgement, § 6, at 50 (“This definition of the beautiful is deducible from the foregoing definition of it as an object of delight apart from any interest.”).

137. See Allison, Kant’s Theory of Taste, 94–95 (“The short answer is that one cannot be indifferent, but that, appearances to the contrary, the disinterestedness thesis does not really require that one be. . . . This explication indicates that the disinterestedness thesis concerns the quality of the liking (or disliking) by means of which an object is deemed beautiful (or nonbeautiful). In other words, it is the determination of aesthetic value that must be independent of interest, because any such dependence would make this determination subservce some other value, thereby undermining both the autonomy and the purity of taste.”) (emphasis in original).

of aesthetic response does imply that we cannot take a certain form of interest in beautiful objects, but this does not mean that we must look beyond the phenomenon of aesthetic response itself to explain our desires with respect to natural and artistic beauty.”) (emphasis in original).

139. See Kant, *Critique of Judgement*, § 6, at 50–51 (“For where any one is conscious that his delight in an object is with him independent of interest, it is inevitable that he should look on the object as one containing a ground of delight for all men. For, since the delight is not based on any inclination of the Subject (or on any other deliberate interest), but the Subject feels himself completely free in respect of the liking which he accords to the object, he can find as reason for his delight no personal conditions to which his own subjective self might alone be party. Hence he must regard it as resting on what he may also presuppose in every other person. . . . The result is that the judgement of taste, with its attendant consciousness of detachment from all interest, must involve a claim to validity for all men.”) (emphasis in original). See also Allison, *Kant’s Theory of Taste*, 81.


141. The Oxford English Dictionary defines “uninterested” as “unconcerned, indifferent.” I should mention, in connection with Judge Posner’s observation in the previous note, that this is the second definition offered by the OED. The first definition is “impartial, disinterested.” In this respect, I am an unrepentant “purist” where the different shades of meaning between these two terms are concerned.

142. See above at 22. The Oxford English Dictionary defines “disinterested” as “not influenced by one’s own advantage; impartial, free from personal interest.” Again, this is the second listed definition. The first definition treats disinterested and uninterested as synonymous. For more on this point, see Martindale, *Latin Poetry and the Judgement of Taste*, 22.

143. See Kant, *Critique of Judgement*, § 2 n. 1, at 43 (“A judgement upon an object of our delight may be wholly disinterested but withal very interesting.”) (emphasis in original). I need to be careful about a point of translation here. In English, uninterested can be defined as indifferent. In German, the term gleichgültig might be translated as indifferent or uninterested, and the term uninteressierte might be translated as disinterested or uninterested. Kant used both of these terms in his writing of the third *Critique*. I am not arguing that Kant did or would accept the distinction that I discuss in the text and I am not quibbling over varying translations of gleichgültig or uninteressierte. I simply wish to identify the different German terms and to explain that I use the English terms uninterested and disinterested to underscore the terminological distinction in English and to challenge the assumption people often make about common law judges (that they should be both disinterested and uninterested). Cf. Paul Guyer, *Kant and the Experience of Freedom: Essays on Aesthetics and Morality* (Cambridge University Press, 1993), chaps. 2–3; Meerbote, “Reflection on Beauty,” in Cohen and Guyer, *Essays in Kant’s Aesthetics*, 70–71.

144. Kant, *Critique of Judgement*, § 13, at 64 (“Every interest vitiates the judgement of taste and robs it of its impartiality.”). Arendt stressed impartiality as the “the most
important condition for all judgments,” and she connected it directly to disinterest. 

Arendt, *Lectures on Kant’s Political Philosophy*, 68.

145. See Mayeda, *Uncommonly Common*, 121 (“To make Arendt’s theory an acceptable theory of legal judgment, we must thus adapt it by deriving the normativity of impartiality, not from disinterest, but from the function of the judge as a person involved in an actual dispute. . . . We see this in the fact that the presence of the judge affects the nature of the arguments given in court. She is intimately involved in settling the dispute. Only certain types of claims are admissible before her.”) (emphasis in original). *See also* above at __. Mayeda argues that this understanding requires discarding the Kantian notion of disinterestedness. I believe it requires understanding the Kantian notion more precisely. In this context, however, this is a relatively minor point. I agree generally with Mayeda’s view here.

146. Arendt’s comments on Kantian aesthetic judgment apply quite closely to this aspect of my argument. See Arendt, *Lectures on Kant’s Political Philosophy*, 42 (“You see that impartiality is obtained by taking the viewpoints of others into account; impartiality is not the result of some higher standpoint that would then actually settle the dispute by being altogether above the mêlée.”) (emphasis in original). *Cf.* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 882–83 (2009) (“Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. ‘The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.’ The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and *disinterest* and neutrality are among the factors at work.”) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), 9) (emphasis supplied).

147. *See* above at §4.

148. Whether Kant understood the formulation of an aesthetic judgment to occur in separable stages is not a point that I pursue here. I describe the process in this manner for the sake of clarity and ease of exposition.

149. *See* Kant, *Critique ofJudgement*, § 6, at 50–51 (“This definition of the beautiful is deducible from the foregoing definition of it as an object of delight apart from any interest. For where any one is conscious that his delight in an object is with him independent of interest, it is inevitable that he should look on the object as one containing a ground of delight for all men. . . . [S]ince the delight is not based on any inclination of the Subject . . . the Subject feels himself completely free in respect of the liking which he accords to the object. . . . Hence he must regard it as resting on what he may also presuppose in every other person; and therefore he must believe that he has reason for demanding a similar delight from every one.”) (emphasis in original).

150. *See* Kemal, *Kant and Fine Art*, 158 (“The Analytic of the Beautiful sets out our expectations of judgements of taste. . . . We learn that judgements must be disinterested and formal in order to ensure that they are singular but subjectively universal and necessary. . . . What makes the universality of aesthetic judgements subjective is
that it attaches to a mere feeling, and the feeling is universal in that we expect it to carry more authority than an expression of merely personal preferences.

151. See Crawford, *Reason-Giving in Kant’s Aesthetics*, 507 (“Of course, showing that a judgment of taste is impure is not sufficient to show that it is false; it simply shows it is ill-founded. One can always be right for the wrong reasons.”).

152. See, e.g., *Model Code of Judicial Conduct*, canon 1 (“A judge . . . shall avoid impropriety and the appearance of impropriety.”); *Code of Conduct for United States Judges*, canon 2 (“A judge should avoid impropriety and the appearance of impropriety in all activities.”).

153. See, e.g., Crawford, *Kant’s Aesthetic Theory*, 170 (“Analyzing aesthetic value in terms of pleasure allows it to remain at the level of being felt; by giving it a basis in purposiveness and form, Kant allows for the possibility of positive reasons. Thus, in Kant’s aesthetic theory we see a necessary, intimate connection between experience and evaluation.”).

Chapter 4


2. See generally A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan, 1905), 486 (“Judge-made law is real law. . . . Whoever fairly considers how large are the masses of English law for which no other authority than judicial decisions or reported cases can be found, will easily acquiesce in the statement that law made by the judges is as truly law as are laws made by Parliament.”); Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010), 14–26, 125–31.

3. See, e.g., Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 Harv. J. L. & Pub. Pol’y 1035, 1039 (2009) (“Judges do not have authority to make law, so they do not have authority to choose what the words of our laws say or what they mean. In other words, judges apply the law to decide cases, but they may not make the law they apply.”).

4. An interesting and pointed exchange between Justices White and Scalia underscores the nature of the disagreement on this point (even among judges). Compare *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (“I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law. But they make it as judges make it, which is to say as though they were ‘finding’ it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.”) (Scalia, J., concurring) (emphasis in original) with id. at 546 (“[E]ven though the Justice [Scalia] is not naïve enough (nor does he think the Framers were naïve enough) to be unaware that judges in a real sense ‘make’ law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naïve enough to believe them.”) (White, J., concurring). This exchange is also helpful in demonstrating that Justice Scalia does not deny the judicial lawmaking function either (however he believes judges should choose to characterize what they do). In fact, when he is off the bench, Justice Scalia’s disagreement with Justice White on this point seems far less stark. See Antonin Scalia, *The Rule of Law as a Law of Rules*,
56 U. Chi. L. Rev. 1175, 1176–77 (1989) (“In a judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, and even by the prior decisions of their own court, courts have the capacity to ‘make’ law. Let us not quibble about the theoretical scope of a ‘holding’; the modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the outcome of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself. And by making the mode of analysis relatively principled or relatively fact-specific, the courts can either establish general rules or leave ample discretion for the future.”).

5. Following up on the example with which I began this book, in response to questioning before the Senate Judiciary Committee, Justice Sotomayor asserted at her confirmation hearing that “judges must apply the law and not make the law.” Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009), 70. In fairness, however, I should clarify that Justice Sotomayor’s comment was made in the course of distinguishing between a judicial decision based upon what the law requires and what the judge’s sympathies toward individual litigants might otherwise encourage her to do. Justice Sotomayor also went on to distinguish between the prejudices toward a litigant that would improperly bias a judge’s decision in a particular case, and the life experiences and perspectives that influence a judge’s outlook on any case she would decide. Responding to the question “is there any circumstance in which a judge should allow their prejudices to impact their decision making?” Justice Sotomayor responded, “Never their prejudices. . . . Life experiences have to influence you. . . . [T]here are situations in which some experiences are important in the process of judging because the law asks us to use those experiences.” Id. at 70–71.

6. See, e.g., Richard A. Posner, “What Am I, a Potted Plant? The Case Against Strict Constructionism,” in David M. O’Brien, ed., Judges on Judging: Views from the Bench (4th ed.) (CQ Press, 2013), 227 (“Everyone professionally connected with law knows that . . . [judges] make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.”); H. L. A. Hart, The Concept of Law (3rd ed.) (Oxford University Press, 2012), 97 (“[I]f courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a ‘source’ of law.”).

7. “Tautologically true” is probably an overstatement. Raz, for example, embraces the notion that judges, when establishing legal norms, should act as legislators do. See Joseph Raz, The Authority of Law: Essays on Law and Morality (2nd ed.) (Oxford University Press, 2009), 197 (“[W]ithin the admitted boundaries of their law-making powers courts act and should act just as legislators do, namely, they should adopt those rules which they judge best.”). There are a few problems here, though. First, as MacCormick explains, it is inaccurate to say that courts act as legislators do when they make law. See above at 48. The institutional position, obligations, and constraints under which judges act are entirely different from those of legislators, and these differences affect
the way judges articulate legal norms. Second, it is unclear that judges should act as legislators do, because judges and legislators do not serve the same constituencies in the same ways. Third, Raz’s underlying assumption that legislators generally “adopt those rules which they judge best” seems problematic descriptively and normatively. Raz has the British Parliament in mind here, and perhaps this is a fairer functional description of Parliament than it is of, say, the United States Congress. But in any case, it does not seem an accurate description of legislators *tout court*. Moreover, it is not clear that legislators should (or do) usually adopt those rules which *they* judge best. It may very well be the case that legislators should (and often do) adopt those rules which they believe their constituents want them to adopt (even when these are not the rules the legislators themselves believe to be best). Raz’s assumption about the legislative function recalls the classic dichotomy between the “delegate” and “trustee” conceptions of the legislative role, which traces back to Edmund Burke’s “Speech to the Electors of Bristol” (3 November 1774) in 2 Edmund Burke, *The Works of the Right Honorable Edmund Burke* (Oxford University Press, 1906), 95 (“[I]t ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect; their business unremitting attention. . . . But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. . . . Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”). Burke, like Raz, favored the trustee conception of representation. (Burke, it also should be noted, was not re-elected.) Although I do not intend these comments to suggest my endorsement of either view of the legislative role in representative government (or, indeed, that these are the only two options), it does seem fair to say that no matter how one understands the legislative function, it should not be equated or conflated with the judicial function.

8. See above at 170–71 nn 187–188.

9. See 4 John Finnis, *Philosophy of Law: Collected Essays* (Oxford University Press, 2011), 399–400 (“[A]djudication is not the telling of some story which if accurate might be called history—or prescient prediction—and if inaccurate a myth or fairy tale. Adjudication is the effort to identify the rights of the contending parties *now* by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions *when entered upon and done*. If those rested on a view of the law then widely settled, the judge may nonetheless have the duty now to take and act upon a contrary view of the law. . . . [A]n important element in judicial duty . . . [is] the duty of judges to differentiate their authority and responsibility, and thus their practical reasoning, from that of legislatures.”) (emphasis in original).


11. As I indicated above at note 7, I do not address whether this means the legisla-
tor should act as his constituents want him to act or on the legislator’s own view of what is in the best interests of his constituents.


15. See generally Gray, The Nature and Sources of the Law, 72 (“A judge of an organized body is a man appointed by that body to determine duties and the corresponding rights upon the application of persons claiming those rights. It is the fact that such application must be made to him, which distinguishes a judge. . . . The essence of a judge’s office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs . . . but is to determine cases which are presented to him.”) (emphasis in original); Charles L. Black, Jr., The People and the Court: Judicial Review in a Democracy (Macmillan, 1960), 167–69; Kent Greenawalt, Law and Objectivity (Oxford University Press, 1992), 54–58; Neil MacCormick, Legal Reasoning and Legal Theory (Oxford University Press, 1978), 32–33, 53–54. See also Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (“A common-law judge could not say, ‘I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.’”) (Holmes, J., dissenting);

16. See Ronald Dworkin, Law’s Empire (Harvard University Press, 1986), 244 (“[J]udges are in a very different position from legislators. . . . Judges must . . . deploy arguments why the parties actually had the ‘novel’ legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past.”); 401 (“[L]aw is a matter of rights tenable in court. This makes the content of law sensitive to different kinds of institutional constraints, special to judges, that are not necessarily constraints for other officials or institutions.”).

17. Cf. Pennsylvania v. Local Union 542, 388 F. Supp. 155, 180 (E.D. Pa. 1974), aff’d, 478 F.2d 1398 (3d Cir. 1974), cert. denied, 421 U.S. 999 (1975) (“[T]he critical issue is, what conduct by black judges will assure their impartiality? Should they be robots? Should they demean their heritage by asking for less than first class citizenship for other blacks? Should they not tell the truth about past injustices? Of course, there is a dramatic difference between the role which legislators, politicians, and elected officials play in our society, one which is far closer to the cutting edge of policy development, and the role which could be tolerated or expected from a federal judge. I willingly accept those limitations; they are inherent in the judicial process. I am aware that Judge Higginbotham is not Senator Higginbotham, or Mayor Higginbotham, or Governor Higginbotham, but I also know that Judge Higginbotham should not have
to disparage blacks in order to placate whites who otherwise would be fearful of his impartiality.

18. I am grateful to Tracy Lightcap for this point.

19. The ergodic/nonergodic distinction has been employed in various fields. One prominent example involves the dispute among economists concerning whether their field is properly understood as ergodic or nonergodic. Compare Paul Samuelson, “Classical and Neoclassical Monetary Theory,” in Robert W. Clower, ed., Monetary Theory: Selected Readings (Penguin, 1969), 12, 170, 184–85 (arguing that economics is ergodic) with Paul Davidson, The Keynes Solution: The Path to Global Economic Prosperity (Palgrave Macmillan, 2009), 167 (noting that Keynes himself rejected the ergodic axiom in economics).


22. See Douglass C. North, Dealing with a Non-Ergodic World: Institutional Economics, Property Rights, and the Global Environment, 10 Duke Envtl. L. & Pol’y F. 1, 2 (1999) (“Let me begin by asserting that the world we live in is not an ergodic world; it is a non-ergodic world. . . . That does not mean that there are not ergodic aspects of the world.”).


26. I am modifying Douglass North’s term “adaptive efficiency” to echo the point he makes, but with reference to a system that might be better thought of as capable of evolutionary change rather than efficient change. Cf. North, Dealing with a Non-Ergodic World, 12 (“I use the term ‘adaptive efficiency’ to describe how economies and societies work effectively, not at a moment in time, but through time. . . . Our institutions have been flexible, here and there. So, the United States has continued to have economic growth, despite the enormous amount of stresses, strains, and tensions that have evolved in our economy over time. Thus, adaptive efficiency is certainly a required characteristic of any institutions that we devise with regard to the global environment. We must think in terms of creating not only a structure that will improve the environment today but a structure with built-in flexibility so that it can adjust to the tensions, strains, and unanticipated circumstances of tomorrow.”).

27. See MacCormick, Rhetoric and the Rule of Law, 150–51 (“[T]he very fact that justifications have to focus themselves on rulings about disputed points of law narrows the field of argumentation as between parties and of judicial deliberation on the questions they put in issue. . . . [This] restricts the range of legally justifiable resolutions that can conceivably be advanced.”). See also id. at 147.

28. Such as the recognition of an independent negligence claim for an infant
harmed in utero. See Woods v. Lancet, 303 N.Y. 349, 354–55 (1951) (“Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another cases. Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it. . . . Chancellor KENT, more than a century ago, had stated that upwards of a thousand cases could then be pointed out in the English and American reports ‘which had been overruled, doubted or limited in their application’, and that the great Chancellor had declared that decisions which seem contrary to reason ‘ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.’ And Justice SUTHERLAND, writing for the Supreme Court said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than ‘with some outworn and antiquated rule of the past.’ . . .

The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield’s answer to that will serve: ‘if that were a valid objection, the common law would now be what it was in the Plantagenet period.’ . . . We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice. The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.”) (citations omitted).


30. Weintraub, 64 N.J. at 447.

31. Weintraub, 64 N.J. at 448. A motion was also filed by the real estate broker for the amount of its commission. In the interest of clarity (and narrative drama), I do not discuss the broker’s claims in the text.

32. Weintraub, 64 N.J. at 449 (quoting Keen v. James, 39 N.J. Eq. 527, 540–41 (E. & A. 1885)).

33. Weintraub, 64 N.J. at 450.

34. 311 Mass. 677 (1942).

35. Swinton, 311 Mass. at 679.

36. See Swinton, 311 Mass. at 678–79 (“The law has not yet, we believe, reached the point of imposing upon the frailties of human nature a standard so idealistic as this. That the particular case here stated by the plaintiff possesses a certain appeal to the moral sense is scarcely to be denied.”).


39. Weintraub, 64 N.J. at 456. The New Jersey Supreme Court later extended the seller’s duty to disclose material latent defects to off-site conditions that might reasonably affect a purchaser’s interest in the subject property. See Strawn v. Canuso, 140 N.J. 43, 65 (1995).

40. E.g., Holcomb v. Zinke, 365 N.W.2d 507, 511–12 (N.D. 1985) (“our basic notions of fair dealing and fair play”); Johnson v. Davis, 480 So.2d 625, 627–29 (Fla.


42. See Melvin A. Eisenberg, Disclosure in Contract Law, 91 Calif. L. Rev. 1645, 1674–80 (2003); Anthony T. Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 J. Legal Stud. 1, 26 (1978). One lingering question in this area concerns a seller’s ability to insulate himself from liability for nondisclosure through the inclusion of an “as is” clause in the contract. See, e.g., Kaye v. Buehrle, 8 Ohio App. 3d 381, 383 (1983). Some commentators believe that an “as is” clause should shield sellers from liability for nondisclosure (but not affirmative misrepresentations). See Florrie Young Roberts, Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk, 34 Conn. L. Rev. 1, 39–45 (2001). Professor Roberts argues that “as is” clauses allow parties to bargain for and allocate risk in contracts and thereby enhance efficiency and certainty in real estate transactions. The problem with this view is that, purely in terms of efficiency and information access, sellers typically possess enhanced information about their property and preexisting incentives to acquire this information during their time of ownership. See Eisenberg, Disclosure in Contract Law, 1674–75, 1676–77. In effect, an “as is” clause simply reintroduces the discarded caveat emptor rule as a contractual provision, with the same asymmetries of access to information and the same inequities in enforcement and effect. Cf. Ferguson v. Cussins, 713 S.W.2d 5, 6 (Ky. App. Ky. 1986) (“The general rule is that real estate is sold in an ‘as is’ condition, and all prior statements and agreements, written and oral, are merged into the deed of conveyance, and the purchaser takes the property subject to the existing physical condition. The doctrine of caveat emptor obtains. There are certain exceptions to this rule, however, as where the defective condition is inherently nonobservable.”) (citing Borden v. Litchford, 619 S.W.2d 715 (Ky. App. Ky. 1981)) (other citation omitted).


44. The 1964 Act describes public accommodations as: “Establishments affecting interstate commerce or supported in their activities by State action as places of public
accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment.” 42 U.S.C. § 2000a(b)(1)-(3) (internal citation omitted).

45. To distinguish (and avoid) the result of the Civil Rights Cases, 109 U.S. 3, 9–11, 17–18 (1883), which struck down similar provisions in the Civil Rights Act of 1875 due to the absence of any cognizable state action, the Supreme Court upheld the 1964 Act as an exercise of Congress’s power to regulate interstate commerce. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–59 (1964); Katzenbach v. McClung, 379 U.S. 294, 300–305 (1964).


47. 54 Wash. 2d 440 (1959).
48. Browning, 54 Wash. 2d at 442–43.
50. Browning, 54 Wash. 2d at 446.
51. Browning, 54 Wash. 2d at 446.
52. Browning, 54 Wash. 2d at 447 (quoting Restatement of Torts § 46 (1948)).
53. Browning, 54 Wash. 2d at 448 (quoting Restatement of Torts § 46 cmt. g).
54. Browning, 54 Wash. 2d at 449.
55. Browning, 54 Wash. 2d at 448–49.
56. Browning, 54 Wash. 2d at 448 (citation omitted).
57. Although the court ruled that a statutory violation was established on these grounds alone, the court also concluded that the amount of damages awarded could not similarly be assumed in the absence of a showing by the plaintiff that compensatory damages were warranted. See Browning, 54 Wash. 2d at 449–50. Put differently, the Browning court ruled that a claim for intentional infliction of emotional distress could be presumed by the fact of racial discrimination at a public accommodation, but the amount of damages awarded depended upon a specific demonstration of the severity of the distress suffered by the plaintiff. The Washington Supreme Court later ruled explicitly that there is no threshold of severity required for a plaintiff to establish a claim of intentional infliction of emotional distress. See Nord v. Shoreline Savings Ass’n, 116 Wash. 2d 477, 482–84 (1991).
58. *Browning*, 54 Wash. 2d at 456 (Mallery, J., dissenting) (citation omitted).
59. *Browning*, 54 Wash. 2d at 453, 454.
60. See above at 204n45.
63. See *Browning*, 54 Wash. 2d at 449 (“We can fully sympathize with the desire to punish the defendant for its discriminatory tactics, but punishment, under these circumstances, is the prerogative of the state.”) (citations omitted). *Browning* reflects and reinforces the distinction between impartiality and objectivity and between values and biases, which I discussed in chapter 2.
64. See *Heart of Atlanta Motel*, 379 U.S. at 261.
67. [1991] 1 All ER 759.
68. Sexual Offences (Amendment) Act 1976, § 1(1)(a) (internal numbering deleted) (emphasis supplied).
70. I say English law here to emphasize that Scotland had already revoked the marital exemption not long before *R. v. J.* was decided. See *S. v. HM Advocate*, [1989] SLT 469, 473. In the United States, limited exemptions from (or heightened requirements for) criminal liability for marital rape persisted in certain states into the twenty-first century. In Tennessee, for example, a defendant could not be convicted of spousal rape unless a deadly weapon was used, serious bodily injury was caused, or the spouses were living separately and one of them had filed for maintenance or divorce. See *Tenn. Code Ann.* § 39-13-507 (2003). This statutory provision was repealed by 2005 Tenn. Pub. Acts, ch. 456 (effective June 18, 2005).
73. The Appellate Committee of the House of Lords was formally reconstituted and reconvened, beginning October 1, 2009, as the Supreme Court of the United Kingdom. See Constitutional Reform Act 2005, c. 4, § 23.
74. In fact, before the case reached the House of Lords, the Criminal Division of the Court of Appeal decided *R. v. R.* in a reported decision that presaged the House’s judgment. Writing for the Court, Lord Lane concluded that the time had come to eliminate the marital rape exemption from English law: “It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present-day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment. . . . [W]e do not consider that we are inhibited by the 1976 Act from declaring that the husband’s immunity as expounded by Hale CJ no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.” *R. v. R.*, [1991] 2 All ER 257, 266 (CA).
76. See generally A. V. Dicey, *Introduction to the Study of the Law of the Constitution*
(8th ed.) (Liberty Fund, 1982), 27 (“[T]he term ‘sovereignty,’ as long as it is accurately employed in the sense in which Austin sometimes uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. . . . [T]he sovereign power under the English constitution is clearly ‘Parliament.’ ”); Vernon Bogdanor, The New British Constitution (Hart Publishing, 2009), 13 (“[T]he British Constitution could thus be summed up in just eight words: ‘What the Queen in Parliament enacts is law.’ . . . [T]he sovereignty of Parliament has been seen as the central principle of the British Constitution.”).


80. Cf. J. R. Spencer, “Criminal Law,” in Louis Blom-Cooper, Brice Dickson and Gavin Drewry, The Judicial House of Lords, 1876–2009 (Oxford University Press, 2009), 604 (“[I]n answer to those who have criticised the Law Lords for extending the criminal law when this ought to be left to Parliament, two points in my view can be made. The first is that the ‘marital exemption’ in rape was a rule which, at the end of the twentieth century, nobody defended on the merits. And the second is that the ‘marital exemption’ was an anomalous rule which conflicted with a broader and more important principle: that to be valid, a person’s consent to acts done to his or her body must subsist at the time the act takes place.”).

81. See, e.g., R. v. Clegg, [1995] 1 AC 482, 500 (“Like Lord Simon, I am not averse to judges developing law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved. A good recent example would be the affirmation by this House of the decision of the Court of Appeal (Criminal Division) that a man can be guilty of raping his wife.”) (Lord Lloyd) (citing R. v. R.). Cf. DPP for Northern Ireland v. Lynch, [1975] AC 653, 684–85 (“We are here in the domain of the common law; our task is to fit what we can see as principle and authority to the facts before us, and it is no obstacle that these facts are new. The judges have always assumed responsibility for deciding questions of principle relating to criminal liability and guilt.”) (Lord Wilberforce).


86. See Andrew Ashworth, Principles of Criminal Law (5th ed.) (Oxford University Press, 2006), 65–66 (“Rectification of an anomaly (for example, the old rule that a
husband may [not] be convicted of the rape of his wife) may well lead to a new sphere of criminalization. . . . Thus the extension of the criminal law into areas such as . . . marital rape may be justified on the ground that the wrongs involved in such conduct are no less significant than those involved in many serious crimes already established. . . . One might well agree that we all prefer our behaviour to be subject to as few constraints as possible, but that preference must be placed in the context of our membership of a community.”) (citing R. v. R.).

Chapter 5


2. “Structural” here refers to “the power of governmental bodies outside the judiciary to . . . modify judicial institutions. . . . Judicial independence is at risk . . . when the ‘political branches’ use or threaten to use their control over structure to shape adjudicative outcomes.” Peter H. Russell, “Toward a General Theory of Judicial Independence,” in Peter H. Russell and David M. O’Brien, eds., Judicial Independence in the Age of Democracy: Critical Perspectives from around the World (University Press of Virginia, 2001), 13–14. As I argue in this chapter, attempts to interfere with the judicial decision-making process as a way of influencing adjudicative outcomes are threats to the structural features of the institution that were meant to preserve the independence of the decision-making process.


4. Congressional efforts of this kind are nothing new. In United States v. Klein, the Supreme Court addressed federal legislation that would have prevented the Court from considering pardons issued by President Lincoln to those who aided the Confederacy when determining whether they were entitled to proceeds from the sale of their property. The Court ruled that Congress could not predetermine legislatively which evidence the Court could consider. See United States v. Klein, 80 U.S. (13 Wall.) 128, 147–48 (1872) (“In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary. We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. . . . Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself. The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted
the power of pardon; and it is granted without limit. . . . Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.”) (Chase, C.J.).

5. See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219–26 (1995) (holding unconstitutional a provision of the Securities Exchange Act that would have forced courts to reopen final judgments); Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948) (“Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”); Hayburn’s Case, 2 U.S. (2 Dall.) 409, 411, 413 (1792) (same).

6. Plaut, 514 U.S. at 218–19 (emphasis in original) (internal quotation marks deleted) (citations omitted).

7. I am wary of relying on dictionaries as authorities for this sort of point. But I will mention that the Oxford English Dictionary defines “adjudge” as “determine in one’s own judgement.” Oxford English Dictionary (5th ed.) (Oxford University Press, 2002), 27. This is not the only definition offered, of course.

8. See generally Shimon Shetreet and Sophie Turenne, Judges on Trial: The Independence and Accountability of the English Judiciary (2nd ed.) (Cambridge University Press, 2013), 4 (“Judicial independence must be secured both at the institutional level and at the individual level for judges to be protected from threats to their personal or professional security that may influence their official duties.”).


10. The language of the US Constitution that is meant to ensure judicial independence through life tenure was drawn from the English statute that established judicial independence from parliamentary influence and interference. Compare US Const. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behaviour”) with Act of Settlement 1701, 12 & 13 Will. 3, c. 2, § 3 (“Judges Commissions be made Quam diu se bene Gesserint” [as long as he shall behave himself well]). See J. H. Baker, An Introduction to English Legal History (4th ed.) (Oxford University Press, 2007), 168 (“William III was advised to appoint all his judges during good behaviour, and from 1701 tenure during good behaviour was guaranteed by the Act of Settlement.”); Robert Stevens, The Act of Settlement and the Questionable History of Judicial Independence, 1 Oxford U. Commonw. L. J. 253, 261 (2001) (“Historically, the Act of Settlement marks the crossroads of the English Constitution. The provisions of the Act . . . represented an inarticulate effort to have the kind of separation of powers spelled out with much greater clarity at the Constitutional Convention in Philadelphia 75 years later.”). In Federalist 78, Hamilton
adverts to the reference of Article III to the Act of Settlement. See Alexander Hamilton, John Jay, and James Madison, *The Federalist* (Liberty Fund, 2001), 408 (“[T]here can be no room to doubt, that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of judicial offices. . . . The experience of Great Britain affords an illustrious comment on the excellence of the institution.”) (emphasis in original).


12. In Ferejohn’s view, the relative security of institutional independence, which he calls the “dependent judiciary,” derives mainly from the (contingent) confluence of political realities in which judicial opinion and majority opinion are unlikely to remain opposed for very long, and a political party is unlikely to remain in power over time with a sustained motivation to challenge judicial authority. See Ferejohn, *Independent Judges, Dependent Judiciary*, 381–82.

13. The language of Article III and its incorporation of the preexisting English statute and tradition may seem plain enough to have established this from the time of the Constitution’s ratification. See above at 208n10. Whatever uncertainty may initially have existed concerning the power of Congress to constrain judicial independence through the power of impeachment, the failed attempt to remove Samuel Chase from the Supreme Court established the constitutional reality that judges may not be punished or penalized for their judicial decisions. See generally William S. Carpenter, *Judicial Tenure in the United States with Especial Reference to the Tenure of Federal Judges* (Yale University Press, 1918), 119–20, 121, 123 (“[T]he impeachment of Judge Pickering was only the initial step in a movement wherein the Republicans aimed to replace the Federalists upon the judiciary with their own partisans and to bring the judges within the control of the legislature. . . . [W]ith the assault upon Justice Chase it became apparent that the majority party in Congress had determined to carry out [Sen. William] Giles’ plan to ‘sweep the supreme judicial bench clean’ through the process of impeachment. . . . He [Giles] treated with the utmost contempt the idea of an independent judiciary . . . [and asserted that] if the judges of the Supreme Court should dare, as they had done, to declare an act of Congress unconstitutional or to send a mandamus to the President, as they had done, it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them for giving such opinions, however honest or sincere they may have been in entertaining them. . . . With the acquittal of Justice Chase the partisans of Jefferson were forced to abandon their attempt to bring about the removal of Federalist judges through the impeachment process.”) (quoting 1 Charles Francis Adams, ed., *Memoirs of John Quincy Adams, 1795-1848* (J. B. Lippincott & Co., 1874), 322). At Chase’s impeachment trial before the Senate, Chase’s defenders argued specifically that “to permit the impeachment of a judge in these circumstances would prostrate the judiciary at the feet of the House and undermine its independence.” Robert R. Bair and Robin D. Coblentz, *The Trials of Mr. Justice Samuel Chase*, 27 Md. L. Rev. 365, 382 (1967) (quoting the opening statement of Joseph Hopkinson).

14. See below at 96.

15. For a related example, see 28 U.S.C. § 2254(d)(1) (“An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State
court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

This legislation manifested Congress’s effort to prevent lower federal courts from relying upon their own precedent as authoritative sources of legal doctrine when adjudicating petitions for habeas corpus. In his dissent from the Seventh Circuit’s en banc opinion upholding the constitutionality of this provision, Judge Kenneth Ripple, joined by Judge Ilana Rovner, determined that Congress had impermissibly intruded into the process of judicial decision making. See Lindh v. Murphy, 96 F.3d 856, 886, 887, 890 (7th Cir. 1996), rev’d on other grounds, 521 U.S. 320 (1997) (“Under the new amendment, in ascertaining whether there has been a violation of the Constitution, the courts are restricted to the case law of the Supreme Court of the United States; they are not permitted to rely as well upon their own precedent. In short, Congress . . . has now specified that the judiciary is required to disregard the work product of one of its components, a source of law upon which the courts otherwise would rely in the adjudication of the case. . . . [T]here are limits on the power of Congress to dictate the process of decision-making within the judicial department with respect to the meaning of the Constitution. Although Congress has the authority to create and abolish the lower federal courts and to regulate their jurisdiction, it has no power to dictate how the content of the governing law will be determined within the judicial department. . . . [T]he Constitution assigns to each of the three coordinate branches their own responsibilities and vests in each their own powers . . . [and] if one branch, through its actions, ‘unduly interferes’ with the role of another, such actions are void. . . . The amended statute significantly ‘interferes’ with the judicial role and to a great extent prevents the judicial department from accomplishing its ‘constitutionally assigned functions.’ Simply put, the statute, as amended, deprives a federal court of the right to adjudicate the case. And a court that does not adjudicate advises: a role decidedly different than the one the Constitution envisions for courts and judges of the Third Article.”) (Ripple, J., dissenting) (citations omitted).

16. Stephen B. Burbank, The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein, 97 Colum. L. Rev. 1971, 1978 (1997). A couple of years later, Professor Burbank broadened his understanding of judicial independence to embrace courts and judges. See Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. Cal. L. Rev. 315, 335, 336–37 (1999) (“The core of judicial independence, as defined above, consists of the freedom of courts to make decisions without control by the executive or legislative branches or by the people. . . . [T]he concept requires, close to the core, that those responsible for judicial decisions interpreting or making law themselves be impartial: free of interests, prejudices, or incentives that could materially affect the character or results of the judicial process. There are federal constitutional provisions that speak to this aspect of judicial independence, and to all judges.”). As I will explain further, though, Burbank continues to believe that judicial independence is primarily about institutional independence.

with the judiciary demonstrates “the need to talk about judicial independence in terms of the purposes it serves: to facilitate impartial decisionmaking and preserve the integrity of the judiciary as a separate branch of government. The term ‘judicial,’ when joined with ‘independence,’ can relate to judges individually, collectively, or as a branch. Thinking about judicial independence with reference to judges individually highlights the role independence plays in case decisionmaking.”). See also above at 151–52n24.

18. US Const. art. III, § 1 (emphasis supplied).


23. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57, 58, 60 (1982) (citations omitted). Cf. A. L. Goodhart, English Law and the Moral Law (Stevens & Sons, 1953), 60 (“If the judiciary were placed under the authority of either the legislative or the executive branches of the Government then the administration of the law might no longer have that impartiality which is essential if justice is to prevail.”).

24. Northern Pipeline, 458 U.S. at 59 n. 10 (citation omitted) (emphasis supplied).


30. See Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012).

31. See Awad, 670 F.3d at 1128–1132.

32. For a small sample of the work on this question, see Daniel A. Farber, The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History, 95 Calif. L. Rev. 1335 (2007); Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int’l Law 1 (2006); John O. McGinnis, Foreign To Our Constitution, 100 Nw. U. L. Rev. 303 (2006); Steven G. Calabresi and Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 Wm. & Mary L. Rev. 743 (2005); Ernest A. Young, Foreign Law and the Denominator Problem, 119 Harv. L. Rev. 148 (2005); Symposium, The United States Constitution and International Law, 98 Am. J. Int’l L. 42 (2004) (articles by T. Alexander Aleinikoff, Roger P. Alford, Harold Hongju Koh, Gerald L. Neuman, and Michael D. Ramsey). See also Roper v. Simmons, 543 U.S. 551, 575–578 (2005) (citing Trop v. Dulles, 356 U.S. 86, 102–103 (1958)) (other citations omitted); Lawrence v. Texas, 539 U.S. 558, 576–577 (2003); Atkins v. Virginia, 536 U.S. 304, 316 n. 21 (2002). In the context of my argument in this chapter (and this book as a whole), it is worth highlighting the Court’s emphatic statement in Atkins that a judgment with respect to the constitutionality of executing mentally disabled individuals must ultimately rest on the justices’ own determination: “[T]he objective evidence, though of great importance, did not ‘wholly determine’ the controversy, ‘the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’ . . . Thus, in cases involving a consensus, our own judgment is ‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” Atkins, 536 U.S. at 312–313 (emphasis supplied) (citation omitted). See also Hayburn’s Case, 2 U.S. at 410 (“[W]e are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us.”) (emphasis supplied).


35. See Statement of the Judges of the United States District Court for the Northern District of California, 14 F.R.D. 335 (N.D. Cal. 1953). The judges unanimously agreed that the summoned judge should not testify about judicial proceedings, and he did not. See id. at 335–36 (“This separation of functions is founded on the historic concept that no
one of these branches may dominate or unlawfully interfere with the others. In recognition of the fundamental soundness of this principle, we are unwilling that a Judge of this Court appear before your Committee and testify with respect to any Judicial proceedings. The Constitution does not contemplate that such matters be reviewed by the Legislative Branch, but only by the appropriate appellate tribunals. The integrity of the Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.”). Judge Louis Goodman did, however, appear before the Committee as requested. In the same year, the House of Representatives Judiciary Committee requested, and the House Committee on Un-American Activities subpoenaed, Justice Tom Clark to appear and testify concerning, among other things, his service as Attorney General and the work of the Department of Justice. In both instances, Justice Clark refused. See Letter from Associate Justice Tom C. Clark to Rep. Harold Velde, quoted in Roy E. Brownell II, Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development, 84 St. John’s L. Rev. 423, 488 (2010) (“I have your subpoena dated Nov. 10, 1953, calling upon me to appear before your committee. . . . As you know, the independence of the three branches of our Government is the cardinal principle on which our constitutional system is founded. This complete independence of the judiciary is necessary to the proper administration of justice. In order to discharge this high trust, judges must be kept free from the strife of public controversy. . . . For this reason, as much as I wish to cooperate with the legislative branch of the Government, I must forego an appearance before the committee.”).


39. See United States v. Ming He, 94 F.3d 782, 788–89 (2d Cir. 1996); United States v. Roberts, 726 F. Supp. 1359, 1363–66, 1372–73 (D.D.C. 1989) (Greene, J.). Judge Greene ruled that the SCA was unconstitutional for these and other reasons. See id. at 1374–75.

41. See, e.g., United States v. Mendoza, 2004 U.S. Dist. LEXIS 1449, at *17 (C.D.Cal. 2004) (“The Sentencing Guidelines, for the most part, have taken away from the Judiciary the ability to sentence the individual. The Sentencing Guidelines have mandated the Judiciary to sentence the crime, not the individual.”). Cf. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense . . . treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass. . . . This Court has previously recognized that ‘[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.’”) (citation omitted). With this overarching concern in mind, the SRA and the Guidelines permit judges to formulate sentences that depart upward or downward from the Guidelines on the basis of aggravating or mitigating factors, but even this discretionary authority is specified and limited by the Guidelines. See Koon v. United States, 518 U.S. 81, 92–96 (1996) (Breyer, J., concurring in part and dissenting in part).

43. Mistretta, 488 U.S. at 390.
44. Mistretta, 488 U.S. at 384–85.
45. Mistretta, 488 U.S. at 390 (citation omitted).

47. Similarly, the issue in Mistretta was not whether “Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.” Mistretta, 488 U.S. at 388 (emphasis supplied).

48. See generally Charles Fried, Saying What the Law Is: The Constitution in the Supreme Court (Harvard University Press, 2004), 74 (“Separation of powers, as it applies to the judiciary, thus means that Congress and the President may influence the judge only through the law. . . . It means that the ultimate adjudication of rights must be left to the courts. Undergirding this statement is the idea that if the judiciary’s independence is to be an effective constitutional principle, then only the judiciary may do the judiciary’s work.”). See also above at 212nn32–33.

50. Mistretta, 488 U.S. at 424–25 (citations omitted) (emphasis supplied).
53. See, e.g., United States v. Flores, 336 F.3d 760, 768 (8th Cir. 2003) (Bright, J., concurring) (“It is not my position to criticize Congress. I simply point out that this enactment will exacerbate the problems with the Guidelines by making it even more difficult for district judges to do justice under the law as circumstances warrant. . . . I
want to conclude by making a plea to the district judges of this country who feel that they should have some say and some discretion in sentencing. Let your opinions disclose your views about the injustice of the sentencing decision or decisions you are obligated to impose by congressional mandate and/or the Sentencing Guidelines.


55. See Detwiler, 338 F. Supp. 2d at 1173.

56. Detwiler, 338 F. Supp. 2d at 1171. The Feeney Amendment was passed without notice, hearings, or substantive debate. See id. at 1170–72.


59. Detwiler, 338 F. Supp. 2d at 1173, 1174 (quoting Mistretta, 488 U.S. at 422–23 (Scalia, J., dissenting)).

60. See Detwiler, 338 F. Supp. 2d at 1174–75.


62. See United States v. Booker, 543 U.S. 220, 245–46 (2005) (“We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), incompatible with today’s constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e), which depends upon the Guidelines’ mandatory nature. So modified, the federal sentencing statute, see Sentencing Reform Act of 1984 (Sentencing Act), makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.”) (citations omitted). The Court also stated that the Booker decision did “not call into question any aspect of our decision in Mistretta,” Id. at 242, because “the Act without its ‘mandatory’ provision and related language remains consistent with Congress’ initial and basic sentencing intent.” Id. at 264. As Justice Scalia observed in his dissent in Booker, this is a difficult position to maintain. See id. at 303–4.

63. McBryde v. Committee to Review Circuit Council Conduct and Disability Orders, 264 F.3d 52, 54 (D.C. Cir. 2001) (quoting the Judicial Council and Disability Act, 28 U.S.C. § 351(a) (1980)). This finding by the Committee describes the crossing of an imprecise but intuitive line. A judge may not be disciplined for displaying some impatience or irritation in his courtroom, unless that conduct reasonably seems to jeopardize his fairness and impartiality. See, e.g., Liteky v. United States, 510 U.S. 540, 555–56 (1994) (“[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a
bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” (emphasis in original); *In re Hocking*, 451 Mich. 1, 16 (1996) (“[E]very angry retort or act of discourtesy during the course of a proceeding does not amount to judicial misconduct. . . . [A] judge is only subject to discipline when the comment amounts to ‘conduct that is clearly prejudicial to the administration of justice.’”) (citation omitted).


67. Cf. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 136 (1970) (“An independent judiciary is one of this Nation’s outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment.”) (Douglas, J., dissenting); *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1111 (D.C. Cir. 1985) (“Although I have no reason to doubt the integrity of members of the federal judiciary, I am willing to assume that there may be a few corrupt judges, who dishonor their title and role in our society. This does not change my view, however, that the Constitution specifies only one procedure for disciplining them—impeachment. . . . In my view, the Framers’ choice here was to limit the accountability of individual judges for misconduct to impeachment in order to maximize judicial independence. . . . We must temper our eagerness to see that only honorable and dedicated women and men fill the judicial ranks with an awareness of the danger to the judiciary of impairing independence and inhibiting diversity of style and opinion among jurists.”) (Edwards, J., concurring).

68. *McBryde*, 264 F.3d at 64.

69. *McBryde*, 264 F.3d at 64, 65.

70. US Const. art. II, § 4, quoted in *Chandler*, 398 U.S. at 136 (Douglas, J., dissenting). Judges may also be tried for alleged criminal activity before or after impeachment articles are brought. *See, e.g.*, *United States v. Claiborne*, 727 F.2d 842, 845–47 (9th Cir. 1984) (per curiam).

71. *See McBryde*, 264 F.3d at 65. *See also* American Bar Association Report of the Commission on Separation of Powers and Judicial Independence (1997), 58 (“Despite preliminary uneasiness among some judges that the Act threatened the judiciary’s institutional independence, it is now generally agreed that the Act does no such thing.”); Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America’s Judicial System* (University of Michigan Press, 2006), 110 (“[T]he act is better understood as a congressional effort to promote judicial accountability by transferring disciplinary power to the courts, thereby enhancing the judiciary’s independence as an institution and reducing the need for congressional intrusions via the
impeachment process."). For reasons I explain below, I believe it is better to analyze the Act in terms of a distinction between judicial decision making and judicial administration, rather than between inter- or intrabranch regulation of individual judicial action. So long as the Act does not allow interference (by Congress or other judges) with an individual judge’s decisional autonomy, the risk of a statutory violation of the judge’s constitutional independence under Article III is minimized. And the question still remains whether precluding a judge from hearing certain cases is interfering with his decision making or with the administration of his docket.

72. Chandler, 398 U.S. at 84.

73. See In re Clay, 35 F.3d 190, 192 (5th Cir. 1994) (“Courts and commentators focus on the importance of insulating judges from Congress and the Executive Branch. But as Chief Judge Kaufman noted, ‘it is equally essential to protect the independence of the individual judge, even from incursions by other judges . . . ’ and giving one judge power over another chills judicial individualism. A judge must be free to decide a case according to the law as he sees it, without fear of personal repercussion or retaliation from any source.”) (citation omitted).

74. Geyh, When Courts and Congress Collide, 9. See also ABA Report on Separation of Powers and Judicial Independence, iii (“Judicial independence includes the independence of an individual judge as well as that of the judiciary as a branch of government. Individual independence (otherwise known as decisional independence) is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security. Branch independence (otherwise known as institutional independence) involves matters affecting the operation of the judiciary as a separate branch of government.”).

75. See Fried, Saying What the Law Is, 72 (“The independence of the judiciary is the reciprocal of the separation of powers. . . . [J]udges must be allowed to do their work free from the interference—direction—of the executive or legislative branch. That work is the deciding of cases and controversies.”).


77. Penny J. White, An America without Judicial Independence, 80 Judicature 174, 174–75 (1997). Justice (now Professor) White’s description of judicial independence is especially noteworthy because she is the only member of the Supreme Court of Tennessee to lose a retention election, which resulted from her vote (with the majority) in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). The Odom court upheld the conviction of the defendant for rape and murder, and upheld the Court of Criminal Appeals’ decision to overturn the sentence of death for failing to meet the applicable statutory requirements. Justice White’s retention election was held later that same year, and proponents of capital punishment characterized a vote against her retention as a vote to preserve capital punishment in Tennessee. See Paula Wade, White’s Defeat Poses Legal Dilemma: How Is a Replacement Justice Picked?, Com. Appeal (Memphis, Tenn.), Aug. 3, 1996, at A1.

78. See Yakus v. United States, 321 U.S. 414, 467–68 (1944) (“[B]road as is Congress’ power to confer or withhold jurisdiction, there has been none heretofore to confer it and at the same time deprive the parties affected of opportunity to call in question in
a criminal trial whether the law, be it statute or regulation, upon which the jurisdiction is exercised squares with the fundamental law. Nor has it been held that Congress can forbid a court invested with the judicial power under Article III to consider this question, when called upon to give effect to a statutory or other mandate. It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. . . . [W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process.”) (Rutledge, J., dissenting).

79. By focusing on the United States in the text, I do not mean to limit the scope of the discussion solely to that jurisdiction or to suggest that genuine judicial independence depends upon a US-style written constitution, judicial review, or separation of powers. See, e.g., Beau Breslin, From Words to Worlds: Exploring Constitutional Functionality (Johns Hopkins University Press, 2009), 174–76. See also Edlin, A Constitutional Right to Judicial Review, 90–99.


81. See A. v. Secretary of State for the Home Department, [2004] UKHL 56, at [36], [81], [100]–[101], [144], [160], [164] (hereafter Belmarsh).

82. See Belmarsh, [2004] UKHL 56 at [43], [76]–[78], [83], [126], [132], [189]. In response to the House’s declaration of incompatibility in Belmarsh, id. at [73], [139], [239], Parliament rescinded the challenged sections of the Anti-Terrorism Act through the Prevention of Terrorism Act of 2005. See Prevention of Terrorism Act 2005, § 16(2)(a) (repealing Anti-Terrorism, Crime and Security Act 2001, §§ 21–32).


84. These decisions are often referred to as the Belmarsh cases in reference to the prison where the detainees are held. See, e.g., Ruth Bader Ginsburg, “A Decent Respect to the Opinions of Humankind”: The Value of a Comparative Perspective in Constitutional Adjudication, 1 F.I.U. L. Rev. 27, 41 (2006).


86. Belmarsh II, [2005] UKHL 71 at [1]. The United States courts that have addressed this point have tended to concentrate on the question of involvement of or authorization by United States officials. See, e.g., United States v. Yousef, 327 F.3d 56, 138–39 (2d Cir. 2003) (citing United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974)) (other citations omitted); United States v. Salameh, 152 F.3d 88, 117 (2d Cir. 1998). However, the House was less concerned with the question of British involvement than with the impact of the tainted evidence upon the integrity of the judicial process itself. See Belmarsh II, [2005] UKHL 71 at [51]–[52] (“It trivialises the issue be-
before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer. I accept the broad thrust of the appellants’ argument on the common law. The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.” (Lord Bingham).

88. See Belmarsh II, [2005] UKHL 71 at [11] (“[F]rom its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law. . . . In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.”) (citing John Fortescue, De Laudibus Legum Angliae, ed. S. B. Chrimes (Cambridge University Press, 1942), 47–53; Thomas Smith, De Republia Anglorum: A Discourse on the Commonwealth of England, ed. L. Alston (Cambridge University Press, 1906), 104–7; Edward Coke, Institutes of the Laws of England (Flesher, Lee & Pakeman, 1644), Part II, 34–36; William Blackstone, Commentaries on the Laws of England (Oxford University Press, 1769), 320–21; James Fitzjames Stephen, A History of the Criminal Law of England (Macmillan, 1883), 222) (other citations omitted). See also id. at [64]–[65].
89. Belmarsh II, [2005] UKHL 71 at [12] (quoting David Jardine, A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth (Baldwin & Cradock, 1837), 6, 12). See also id. at [81]–[83], [112], [129], [152].
90. Belmarsh II, [2005] UKHL 71 at [12], [13], [86].
93. Belmarsh II, [2005] UKHL 71 at [15] (citing Wong Kam-ming v. The Queen, [1980] AC 247). I should mention that the House could not agree on whom the burden should rest. Lords Bingham, Nicholls, and Hoffmann concluded that the initial burden belongs to the individual to assert that evidence was obtained through tor-
ture, but at that point the burden should shift to the Secretary of State to demonstrate that evidence was not obtained through torture. And where the SIAC cannot definitively determine that the evidence was not obtained through torture, it should be excluded. See Belmarsh II, [2005] UKHL 71 at [56], [80], [98]. Lords Hope, Rodger, Carswell, and Brown agreed that the burden should not rest on the individual once the initial assertion of torture has been made, but Lords Hope, Rodger, Carswell, and Brown believed that the SIAC should determine whether the evidence was definitively acquired via torture, rather than establish that the evidence was not acquired via torture. See Belmarsh II, [2005] UKHL 71 at [116]–[126], [138]–[145], [156]–[158], [172]. The key here is that Lords Bingham, Nicholls, and Hoffmann would exclude evidence absent an affirmative showing that the evidence was not tainted, while Lords Hope, Rodger, Carswell, and Brown would accept evidence absent a demonstration that the evidence was tainted. A contrast here between the UK and US cases is that the House seemed willing to consider evidence of known practices regarding torture as probative of the likelihood that a particular individual was more likely to have been tortured. See Belmarsh II, [2005] UKHL 71 at [56]. A line of federal cases in the United States seems to establish a fairly broad prohibition against the introduction of evidence obtained through torture. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (quoting U.N. Declaration on the Protection of All Persons from Being Subjected to Torture (1975)); LaFrance v. Bohlinger, 499 F.2d 29, 34 (1st Cir. 1974) (“It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government’s behest in order to bolster its case.”). Nevertheless, certain United States courts have indicated some reticence concerning the admissibility of state practices to support an individual claim that evidence was, in fact, acquired by torture. See Yousef, 327 F.3d at 129 n. 59.

94. Belmarsh II, [2005] UKHL 71 at [18].


98. See Belmarsh II, [2005] UKHL 71 at [70] (“The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. Often there is an urgent need for action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.”) (Lord Nicholls), [94]–[95] (“[T]he 2001 Act makes the exercise by the Secretary of State of his extraordinary powers subject to judicial supervision. . . . It [the
SIAC] is to form its own opinion, after calm judicial process, as to whether it considers that there are reasonable grounds for such suspicion or belief. It is exercising a judicial, not an executive function. Indeed, the fact that the exercise of the draconian powers conferred by the Act was subject to review by the judiciary was obviously an important reason why Parliament was willing to confer such powers on the Secretary of State. . . .

In my opinion Parliament, in setting up a court to review the question of whether reasonable grounds exist for suspicion or belief, was expecting the court to behave like a court. In the absence of clear express provision to the contrary, that would include the application of the standards of justice which have traditionally characterised the proceedings of English courts. It excludes the use of evidence obtained by torture, whatever might be its source.”) (Lord Hoffmann), [161]–[162] (Lord Brown). There is an alternative that is not contained in the existing statutory scheme in which prosecutors, rather than the police or the courts, would make the determination regarding the quality and sufficiency of the evidence. See Clive Walker, Keeping Control of Terrorists Without Losing Control of Constitutionalism, 59 Stan. L. Rev. 1395, 1429–30 (2007).

99. Belmarsh II, [2005] UKHL 71 at [91]. See also id. at [137] (Lord Rodger), [150] (Lord Carswell), [164] (Lord Brown). The Supreme Court of the United States reached its own version of the same conclusion in Brown v. Mississippi, 297 U.S. 278, 285, 286, 287 (1936) (“[T]he trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires ‘that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’ . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.”) (Hughes, C.J.) (citations and quotation marks omitted).

100. See Belmarsh II, [2005] UKHL 71 at [83]; Belmarsh, [2004] UKHL 56 at [36]. See also Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681, 1741–42 (2005) (“A third point [regarding the use of torture by the state] addresses the issue of the rule of law—the enterprise of subjecting ‘the engines of state’ to legal regulation and restraint. We hold ourselves committed to a general and quite aggressive principle of legality, which means that law does not just have a little sphere of its own in which to operate, but expands to govern and regulate every aspect of official practice. . . . I think we should be concerned about the effect not just on American law but on the rule of law of a weakening or an undermining of the legal prohibition on torture. We have seen how the prohibition on torture operates as an archetype of various parts of American constitutional law and law enforcement culture generally. I believe it also operates as an archetype of the ideal we call the rule of law. That agents of the state are not permitted to torture those who fall into their hands seems an elementary incident of the rule of law as it is understood in the modern world. If this protection is not assured, then the prospects for the rule of law generally look bleak indeed.”).
101. See, e.g., Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), 52 (“The judiciary is the point of most direct confrontation between the government, law, and the individual, and it can therefore serve as the best barrier against lawless governmental actions.”); Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Harvard University Press, 1999), 256 (“During the seventeenth century not only did Parliament become established as a powerful political institution; the foundation was also laid for the role of the judiciary as a protective buffer between the government and the citizenry, a role that it plays in all modern constitutional polities.”); R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge University Press, 1995), 98 (“The parliamentary and constitutional monarchy which . . . took shape in England . . . provided a solid central government, which protected the national interest, but was nevertheless bound to operate within the parameters of the law, *inter alia*, because of the impact of an influential and independent judicature.”); Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (University of Chicago Press, 2003), 182–83 (“The first cause of an independent judiciary and its subsequent rise to power in eighteenth- and nineteenth-century America seems to be the blending of Montesquieu's complicated liberal constitutionalism with the common-law tradition of mixed constitutionalism, something undertaken nowhere more extensively than in America. . . . Hamilton and Marshall argued for judicial independence, a common-law profession, and judicial review so as to establish judges as guardians of constitutional tradition and limited government.”).


104. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 Int’l and Comp. L. Q. 1 (2004). The phrase actually has a longer history in English judicial opinions, but I want to restrict its meaning to the context of the detainees in Guantanamo and Belmarsh. Even with that limitation, however, the phrase appears in *R. (on the application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598, [22].


Chapter 6


2. Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005), 55. For further comments on the “judge-as-umpire” trope, see, e.g., Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. Rev. 1069, 1069–70 (2006) (“At his confirmation hearings for the Chief Justice position, Judge John Roberts began the proceedings by analogizing his future role to that of a baseball umpire. Although both make decisions, it is hard to think of a less apt analogy. An umpire applies rules created by others; the Supreme Court, through its decisions, creates rules that others play by. An umpire’s views should not make a difference in how plays are called; a Supreme Court Justice’s views make an enormous difference. . . . Why did Chief Justice Roberts, who obviously knows better, use such a disingenuous analogy? Undoubtedly, he wanted to begin the confirmation hearings by delivering the message that his views would not matter and, accordingly, there was no reason for the Senators to be concerned about his views or his refusal to discuss them. . . . I have personally heard th[is view] echoed by scholars and commentators. But the statements are indeed nonsense. . . . [H]ow can a judge’s own views and experience not matter?”).


5. See above at 58–59, 181–82n45 and accompanying text. See also Connie S. Rosati, *Some Puzzles about the Objectivity of Law*, 23 Law & Phil. 273, 286, 303 (2003) (“[W]hat is really of interest to us when we attempt to investigate the objectivity of law is not best understood in terms of a framework that appeals to various senses or kinds of objectivity applicable to different domains. . . . [L]aw is something we make, and the conventional origins of law seem terribly at odds with the idea that legal facts are utterly independent of our beliefs, judgments, attitudes, or reactions concerning what the law is.”).

6. See above at 29, 156n54.

7. See above at 10.

8. I suggested functional effectiveness as a form of objectivism that might be used to explain the judicial process as distinct from the forms of objectivism that are used to explain law. See above at 17, 21, 29, 36–37, 79, 113, 137n23, 148n4, 157n56.


11. See Rosati, *Some Puzzles about the Objectivity of Law*, 290. See also above at 142n70.

12. See Obergefell v. Hodges, 192 L. Ed. 2d 609, 625 (2015) (“[T]he reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage
bans under the Due Process Clause.”) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)) (other citation omitted).


15. See above at 81–82, 84–85, 87–88.

16. See Lawrence v. Texas, 539 U.S. 558, 604–5 (2003) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapproval of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution’ . . . This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”) (Scalia, J., dissenting). Scalia also does not believe that Loving serves as precedent for striking bans on same-sex marriage. See id. at 599–601 (arguing that laws differentiating people on the basis of race should be analyzed under strict scrutiny but laws differentiating people on the basis of sexual orientation should be analyzed according to a rational basis test).

17. Lawrence, 539 U.S. at 602 (Scalia, J., dissenting).

18. In Lawrence, for example, Scalia indicated his belief that the majority’s opinion was driven by a “law-profession culture, that has largely signed on to the so-called homosexual agenda” despite the reality (as he saw it) “that the attitudes of that culture are not obviously ‘mainstream’”). 539 U.S. at 602–3.

19. See Guyora Binder and Robert Weisberg, The Critical Use of History: Cultural Criticism of Law, 49 Stan. L. Rev. 1149, 1151–52 (1997) (“[T]he legal representation of social will bears little resemblance to scientific observation. It is more like the literary representation of generic themes. . . . Like preferences, none of these entities exists independent of its representations. These representations are judged aesthetically rather than epistemologically: They are judged according to the experience they enable rather than their truth to experience. So too can we judge law aesthetically, according to the society it forms, the identities it defines, the preferences it encourages, and the subjective experience it enables. We can ‘read’ and criticize law as part of the making of a culture.”).


21. The German term weltanschauung originated in Kant’s first Critique and encompasses (in its modern usage) our understandings of history, art, culture, society, and the experiences of our interior world and the external world.


26. *Grutter*, 539 U.S. at 373 (citation omitted).

27. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (“[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with a badge of inferiority.”) (Thomas, J., concurring in part and concurring in the judgment).


34. Compare Thomas, *My Grandfather’s Son*, 86 (“One high-priced lawyer after another treated me dismissively. . . . Many asked pointed questions unsubtly suggesting that they doubted I was as smart as my grades indicated.”) with Sotomayor, *My Beloved Life*, 188, 189 (“[T]he partner facing me asked whether I believed in affirmative action. . . . [?]Do you think you would have been admitted to Yale Law School if you were not Puerto Rican?”).


38. *Schuette* was a 6–2 decision. Justice Kagan did not participate. Justice Breyer, who joined the majority in *Grutter*, concurred in the *Schuette* judgment, because in his view “the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution,” 134 S. Ct. at 1649, and because the case “does not involve a reordering of the political process; it does not in fact involve the movement of decisionmaking from one political level to another.” 134 S. Ct. at 1650 (emphasis in original).


42. 458 U.S. 457 (1982).

43. *Schuette*, 134 S. Ct. at 1659 (citation omitted).

44. *Schuette*, 134 S. Ct. at 1659.
51. See *Grutter*, 539 U.S. at 325 (“[W]e endorse Justice Powell’s view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).
52. See *Grutter*, 539 U.S. at 328–33.
54. *Grutter*, 539 U.S. at 371, 372 (Thomas, J., concurring in part and dissenting in part). See also *Fisher*, 133 S. Ct. at 2431 (“Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. Tellingly, neither the University nor any of the 73 amici briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. . . . But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared.”) (Thomas, J., concurring). This is not the place to discuss the “mismatch” theory endorsed by Justice Thomas. Very briefly, however, I should note that this argument has gained purchase among opponents of affirmative action. See, e.g., Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (Simon & Schuster, 1997), 391–97, 405–11; Richard H. Sander and Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It* (Basic Books, 2012); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367, 371–72 (2004). The argument has also been challenged by proponents of affirmative action. See, e.g., William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton University Press, 1998), 59–68, 114–15, 142–44, 258–65; Thomas J. Kane, “Misconceptions in the Debate Over Affirmative Action in College Admissions” in Gary Orfield and Edward Miller, eds., *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* (Harvard Education Publishing Group, 1998), 18–23; Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1811–40 (2005); David L. Chambers, *et al.*, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 Stan. L. Rev. 1855, 1868–74 (2005); David B. Wilkins, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915, 1919–41 (2005).
55. See generally Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 Wm. & Mary L. Rev. 197, 206–7 (2010)
(“Courts, policymakers, and scholars have long struggled with a vigorous and perhaps intractable debate: whether antidiscrimination law should be understood as driven by antisubordination as opposed to anticlassification values. Antisubordination advocates urge that the Equal Protection Clause should be understood to bar those government actions that have the intent or the effect of perpetuating traditional patterns of hierarchy. Under this view, government actions that seek to undermine such hierarchies, including those expressly based on race, do not offend antidiscrimination values. This approach thus finds ‘no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.’ Those who urge an anticlassification understanding of the Equal Protection Clause, in contrast, take the view that the Constitution prohibits government from ‘[r]educ[ing] an individual to an assigned racial identity for differential treatment.’ They thus consider differential race-based treatment as uniformly morally and legally repugnant regardless of motive.”) (footnotes deleted).

56. See above at 71–72, 73–75.
57. See above at 169nn178–182.
58. 530 F.3d 87 (2d Cir. 2008), reh’g denied en banc, 530 F.3d 88 (2d Cir. 2008), rev’d, 557 U.S. 557 (2009).
60. Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009), 7–8 (italics in original).
61. Benjamin Vargas is his name. See Ricci, 557 U.S. at 607.
62. Judge Parker was nominated to the United States District Court for the Southern District of New York by Bill Clinton.
63. Sotomayor, My Beloved Life, 176.
65. See Rosati, Some Puzzles about the Objectivity of Law, 286, 301.