Introduction

The Framework

Our Constitution divides governmental power among three branches of authority: legislative, which makes our laws (Article I); executive, which enforces our laws (Article II); and judicial, which interprets our laws (Article III). This formulation is, however, deceptively simple. We know, for example, that the judiciary also makes law – the common law, or "judge-made law" – and legislates interstitially between the gaps of the written law, often left vague by Congress and the Constitution itself – "due process," "equal protection," and so on. We also know that even clearly written laws can lead to absurd or outrageous results, particularly when applied to novel situations, if not artfully interpreted by judges. This point is famously illustrated by the English common law. To avoid absurdity in the application of a law (designed to prevent criminal behavior) that made it a crime to "draw blood in the street," we would not, Blackstone instructs, expect a judge to apply the law to a doctor "who opened the vein" of a person who fell ill in the street.[1] Judges are called upon to do justice – that is their ultimate role in a democratic society – but the pursuit of justice begs a question American judges and legal scholars have been probing since the beginning of our republic: How does a judge, an unelected official, decide cases through a *process* that a democratic society can regard as just and, hence, legitimate? Judges, most especially Supreme Court justices, have considerable leeway in responding to this question.[2]

My response to the legitimacy question is set forth in this introduction and illustrated in subsequent chapters. The "Overview" section of this Introduction overviews my proposal for a process of judicial decision-making that stakes out a

[1] William Blackstone, *Commentaries on the Laws of England*, vol. I (Oxford: The Clarendon Press, 1765, Special Edition for the Legal Classic Library, Birmingham, AL, 1983), p. 60.

[2] The Supreme Court itself notes, "The Constitution elaborated neither the exact powers and prerogatives of the Supreme Court." *The Supreme Court of the United States* (pamphlet prepared by the Supreme Court of the United States and published with the cooperation of the Supreme Court Historical Society in Washington, DC, revised August 2014), p. 9.

new way to conceptualize judicial legitimacy. The elements of this process are detailed in the "Traditional Process" section, the "Critical Process" section, and the "Modernizing Judicial Legitimacy" section. The final section explains the thinking behind my selection of cases used to illustrate the new process in the remaining chapters.

In each succeeding chapter, this framework is applied case by case using the judicial voice. In other words, I rewrite each case in the voices of traditionalist and criticalist jurists. There are three traditionalist and three criticalist jurists, each proceeding from a particular sense of justice, or legitimacy. Among the traditionalist jurists are Justice Positivism (legitimacy defined as consistency with prior rules), Justice Pragmatism (legitimacy defined as attention to consequences), and Justice Nominalism (legitimacy defined, "if the truth be told," as the will of the judge). Among the criticalist jurists are Justice Symmetrical (legitimacy defined as sameness, or equal treatment), Justice Asymmetrical (legitimacy defined as difference, or equitable treatment), and Justice Hybrid (legitimacy defined as neutralized difference). Thus, my discussion of each case in this book contains six distinct judicial opinions concurring in or dissenting from the majority's judgment rendered in the case. The majority opinion is summarized rather than reproduced due to space limitations. Finally, each case ends with a commentary in which I attempt to reconcile differences among and between traditionalist and criticalist opinions on the basis of common ground – *viz.*, society's commitment to diversity and inclusion. Under this process, judicial legitimacy inheres not in outsider or insider approaches per se but in the shared value of diversity and inclusion that is the common identity of our society today.

OVERVIEW

Our extant notion of what counts as judicial legitimacy is based on ancient Anglo-American concepts that extend back to the days of Blackstone's *Commentaries* written in the eighteenth century.[3] Indeed, John Marshall, the third and arguably our greatest Chief Justice of the Supreme Court, was introduced to law through the pages of Blackstone's magnum opus.[4] Notwithstanding Blackstone's considerable influence, American jurists and legal scholars from the very beginning have engaged in recurring debates regarding the contours of judicial legitimacy. Terms like law versus equity, rules versus policy, formalism versus instrumentalism, and the logical method versus the policy method have been used in the ongoing attempt to understand the meaning of judicial legitimacy.

[3] See Blackstone, *Commentaries on the Laws of England*, Books I–IV (1765–1769). Blackstone was a lawyer, member of Parliament, and a judge who influenced legal theory on both sides of the Atlantic.

[4] See Richard Brookhiser, *John Marshal: The Man Who Made the Supreme Court* (New York: Basic Books, 2018), p. 275.

As discussed in greater detail in the "Traditional Process" section, all sides of the debate have validated the sociolegal power of insiders while at the same time subordinating the values and aspirations of outsiders. Consciously or subconsciously, the internal debate (a debate played out within traditional process) has imbibed the habits and sensibilities of insiders all the while ignoring or discounting questions and concerns of great importance to outsiders. Thus, the traditional conceptualization of judicial legitimacy, the thing that drives the most important part of the opinion – judicial reasoning – routinely indulged categories or values immanent in the insider's experience. It effectively undercuts the *salus populi suprema lex esto* maxim Americans have expressed as civic republicanism.

This does not mean that traditionalist jurists today approach cases with an invidious animus. They are not necessarily racist, sexist, or homophobic as some legal scholars would argue.[5] Some have, in fact, rendered judgments in favor of outsiders. The problem, however, lies less in the judgment than in the reasoning employed to sustain the judgment. Proceeding from the logical method or the policy method, jurists do not self-consciously recognize, let alone validate, the values or life experiences of outsiders. They are invisible even when they are part of the party structure. This omission is consequential.

As the cases analyzed in this book demonstrate so dramatically, the absence of judicial recognition of the outsider perspective or worldview militates against empowering outsiders in the sociolegal order. A court's imprimatur maintains, strengthens, or changes the relationship between identity (race, gender, sexual orientation, or gender nonconformity) and power in our society. This important observation goes to the practical significance of, say, race in our culture. The philosopher Alain Locke broached this point in a 1916 lecture titled, "The Political and Practical Conception of Race." Informed by Franz Boas's anthropological research, Locke, the first African American selected as a Rhodes scholar, argued that "race mainly defined one's relationship to power."[6] By protecting or perpetuating the current relationship between identity and power in our society, the traditionalist view of judicial legitimacy reinforces an *undemocratic* allocation of power in the sociolegal order that no lapse of time or respectable array of people can justify.

In my view, the antidote to the problem of judicial legitimacy is to link our understanding of judicial legitimacy to shared values. Today our society has felt a need to enhance cultural diversity and inclusion. Like all other major institutions in our society, the Supreme Court must operate in deference to our national commitment to diversity and inclusion. The diversity-and-inclusion norm must become the

[5] They are, instead, racial subordinators, which means that they are not off the hook, they are on a different hook. See Roy L. Brooks, *The Racial Glass Ceiling: Subordination in American Law and Culture* (New Haven, CT: Yale University Press, 2017).

[6] Jeffrey C. Stewart, *The New Negro: The Life of Alain Locke* (New York: Oxford University Press, 2018), p. 265.

foundation on which all socially significant judicial conflicts are resolved, all emotions soothed. It must be self-consciously brought into the Court's process of judicial decision-making. Diversity and inclusion must be integral to the Supreme Court's interpretative process.

The framework I propose in this book endeavors to point the Court in the right direction. It begins by respecting both traditional process and critical process. Both processes differ significantly in that they operate on the basis of antithetical sociolegal assumptions rather than shared assumptions. Traditional process assumes that American law is fundamentally neutral or objective when dealing with matters of keen importance to outsiders; hence, there is no reason for judges to tinker with the fundamental relationship between insiders and outsiders, identity and power in our society. Even if a jurist were to concede that the sociolegal order was slanted, his, her, or their (singular) sense of judicial propriety or fealty to the existing order would prevent any attempt to correct the matter or to even say anything about it from the bench. (Chief Justice Cheri Beasley is the exception that proves the rule.) That responsibility belongs to the legislative branch however much it might be in the hands of special interests. In contrast, critical process proceeds from the position that American law is not neutral or objective as to matters involving outsiders and insiders. Not unlike the social environment in which it operates, law is "antiobjective." Law slants, often *sub silento*, in favor of insiders. Law can, however, be made more objective through conscious judicial effort.[7] Rather than preferring traditional process or critical process, my framework attempts to settle differences between the two processes based on the common identity of today's society – our shared value of diversity and inclusion.

TRADITIONAL PROCESS

Every jurist, lawyer, and law student has been taught law through the lens of traditional process. The public is aware of traditional process through coverage of the courts by the media. A documentary and movie on the life of Justice Ruth Bader Ginsburg and Justice Antonin Scalia's frequent public appearances have also done much to popularize traditional process. In this section, I outline the contours of this judicial technique, starting with its concept of judicial legitimacy.[8]

[7] For example, marriage at one time slanted in favor of heterosexual unions until the Supreme Court made the governing law more objective by constitutionalizing same-sex marriage in *Obergefell* v. *Hodges*, 135 S. Ct. 1039 (2015). Yet, the LGBTQ community continues to face a host of unique challenges, see, e.g., *After Marriage Equality: The Future of LGBT Rights*, Carlos A.Ball, editor (New York: New York University Press, 2016). This is true even after *Bostock* v. *Clayton Country*, 2020 U.S. LEXIS 3252, which granted LGBTQ employees Title VII protection. See my commentary in Chapter 15.

[8] For a more detailed discussion, see Roy L. Brooks, *Structures of Judicial Decision Making from Legal Formalism to Critical Theory*, revised second edition (Durham, NC: Carolina Academic Press, 2012).

Traditional Judicial Legitimacy

Traditional process is structured around two competing norms of judicial legitimacy – the logical method and the policy method – which together map out the contours of permissible judicial decision-making in our country. The logical method posits that jurists decide cases with full cultural acceptance and integrity when their reasoning is tethered logically to extant legal text – the Constitution, statutes, regulatory rules, and well-reasoned case law. Max Weber, the legendary German sociologist and political economist, captured the essence of the logical method in his characterization of highly evolved legal systems as "rational" rather than "irrational." The former is marked by value-free judicial decision-making. Weber argued that value judgments (whether "ethical, emotional, or political") have no objective basis, and, thus, do not contribute to the orderly process of law. Weber identified five postulates of legal systems that have "achieved the highest measure of methodological and logical rationality."[9] Taken together, these postulates describe a process of judicial analysis largely driven by deductive reasoning.

The logical method has been described as the "phonograph" theory of judicial analysis in that the judge is viewed "merely as an oral medium through which the preexisting legal principles are given expression."[10] A devotee of the logical method is "less concerned about the consequences of his decisions, as he views those as being more the concern of the political branches."[11] Policy considerations – societal norms, community values or expectations – portend consequences. They are extralegal and, hence, beyond the bounds of legitimate judicial decision-making.

[9] *Max Weber on Law in Economy and Society*, Edward Shils & Max Rheinstein, trans., Max Rheinstein, editor (Cambridge, MA: Harvard University Press, 1954), p. 64.

> First, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof. (Ibid.)

See also David Trubek, "Max Weber on Law and the Rise of Capitalism," *Wisconsin Law Review*, 1972 (1972): 720. For a discussion of Weber (1864–1920) who came to America in 1904, see, in addition to previous sources cited in this note, John Patrick Diggins, *Max Weber: Politics and the Spirit of Tragedy* (New York: Basic Books, 1996).

[10] Lawrence Lessig, "Understanding Changed Readings: Fidelity and Theory," *Stanford Law Review*, 47 (1995): 395, 462 (quoting Robert Eugene Cushman, "The Social and Economic Interpretation of the Fourteenth Amendment," *Michigan Law Review*, 20 [1922]: 737, 744).

[11] Kimberly Strawbridge Robinson, "Gorsuch Doesn't Give a 'Fig' What You Think, Just Like Mentor," *Bloomberg Law/The United States Law Week*, July 27, 2020, https://news.bloomberglaw.com/us-law-week/gorsuch-doesnt-give-a-fig-what-you-think-just-like-mentor (accessed August 23, 2020).

While it purports to operate independently of policy, the legitimacy of the logical method is predicated upon several policy considerations. The logical method is legitimate because it facilitates judicial restraint and the appearance of judicial impartiality. Judicial passivity prevents unelected, and, hence, unaccountable, jurists from imposing their policy preferences on the people and usurping power from elected officials. This, in turn, provides for stability, consistency, and reliability in the administration of justice.

Although the logical method can appear Gradgrindian, beauty, truth, and justice can emerge from its operations. Consider Shakespeare's *The Merchant of Venice* where the court was called upon to enforce a contract that gave one party, Shylock, the legal right to cut a pound of flesh from the other party, Antonio the debtor in default. The judge, Portia, strictly construed the terms of the contract. She ruled that the contract gave Shylock the legal right to a "pound of flesh" but not a drop of blood. That ruling effectively ended the legal matter with grace and justice. It is worth noting that in response to Shylock's legal argument, "I stand here for law," Portia cleverly shifted to the policy method. She expressed an important motivation behind the policy method: "The quality of mercy is not strained; It droppeth as the gentle rain from heaven Upon the place beneath."[12]

The policy method challenges the logical method as the one and only legitimate form of judicial decision-making. Made famous by Justice Oliver Wendell Holmes, the policy method's normative stance is captured in what may be Holmes's most famous aphorism: "The life of the law has not been logic: it has been experience."[13] Law's growth reflects the prevailing zeitgeist of an era. It mirrors "prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the

[12] "The Merchant of Venice," in *Complete Works of Shakespeare*, Hardin Craig, editor (Chicago: Scott, Foresman and Co., 1951; reprinted, 1961), Act IV, Scene 1, Lines 184–203. Portia says to Shylock:

> Tarry a little, there is something else. This bond doth give thee here no jot of blood; The words expressly are "pound of flesh." So take your penalty of a pound of flesh, but if you shed one drop of Christian blood when you cut it, the state of Venice will confiscate your land and property under Venetian law. (Ibid., Lines 304–307)

[13] This aphorism first appeared in an anonymous review, written by Holmes, of a contracts casebook compiled by the legendary dean of Harvard Law School, Christopher Columbus Langdell. See Anonymous [Holmes], "Book Notices," *American Law Review*, 14 (1880): 233, 233. There is no question that Holmes authored this piece. See Eleanor Little, "The Early Readings of Justice Oliver Wendell Holmes," *Harvard Library Bulletin*, 8 (1954): 163, 202. The aphorism appeared again in Oliver Wendell Holmes, *The Common Law*, Mark DeWolfe Howe, editor (Cambridge, MA: Belkamp Press, 1963), p. 5. Holmes explains the aphorism subsequently in an address delivered at Boston University School of Law on January 8, 1997, and later published in the *Harvard Law Review*: "The fallacy to which I refer is the notion that the only force at work in the development of the law is logic." Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review*, 10 (1897): 457, 465. Holmes was concerned with "the forces which determine its [the law's] content and its growth" (ibid., at 464–465).

prejudices which judges share with their fellow-men."[14] Thus, it is a fallacy, Holmes continued, to believe that "the development of the law is logic, . . . that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents."[15] Simply put, "the logical method . . . flatter[s] that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man."[16] When one looks at what judges actually do, rather than what they say they do, it becomes quite apparent that, although judges couched their opinions in "the language of logic" and purport to reason deductively, "[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[17]

Other jurists have agreed with Holmes. For example, Justice Benjamin Cardozo, who not only replaced the retired Holmes on the Supreme Court but was thought to be the only person in the country who carried sufficient reputation to do so, made a similar rhetorical attack on the logical method. Quoting Roscoe Pound, who, like Holmes, was an early critic of the logical method's "mechanical jurisprudence," Cardozo wrote of "the dangers of a 'jurisprudence of conceptions,' . . . the extension of a maxim or definition with relentless disregard of consequences to 'a dryly logical extreme.' The approximate and relative become the definite and absolute."[18]

In short, the policy method's outward focus sits in stark contrast to the logical method's inward focus. Whereas the logical method insists that judges should not displace logical discourse with "extra-legal," public policy considerations, the policy method makes no pretense of being value-free. Whereas the logical method is committed to a normativity of consistency – the internal ordering of law – the policy method is self-consciously attuned to the consequences judicial decisions have on society. Whereas the logical method relegates constitutional expansion to the amendment process – a democratic process – the policy method allows constitutional growth by judicial fiat based on contemporary needs. And whereas the logical method entails the parsing of words and the use of legal reasoning devices such as affirmative and negative *stare decisis*, the policy method weighs extant legal rules against competing policy considerations to arrive at justice. Some judges may combine elements of both the logical method and policy method in their decision-making. The normative question still stands, however.[19]

[14] Holmes, *The Common Law*, p. 5.
[15] Holmes, "The Path of the Law," at p. 465.
[16] Ibid., p. 466.
[17] Ibid.
[18] *Hynes* v. *New York Central Railroad Co.*, 231 N.Y. 229, 235 (1921) (citing Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review*, 8 [1908]: 605, 608, 610).
[19] In an important study, Lee Epstein, William M. Landes, & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press, 2013), the authors present empirical evidence demonstrating some aspects of the logical method and policy method can converge in practice. But as Larry Solum correctly points

Traditional Judicial Models

There are several expressions of the logical method and policy method. Some jurists who believe in the logical method make decisions based on syllogistic reasoning, often exaggerating the transparency of the governing text (legal formalism), or on close, logical readings of authoritative text (Scalian textualism). Jurists faithful to the policy method rest are also diverse. Some rest their decisions on well-defined, data-driven community needs (sociological jurisprudence), others on well-established sociolegal arrangements (legal process), and still others, as legal skeptics, on a personal sense of justice (legal realism). These models of judicial decision-making – legal formalism, Scalian textualism, sociological jurisprudence, legal process, and legal realism – give content to traditional process.

Legal formalism, whose heyday was 1886–1937, envisions a syllogistic process of judicial decision-making in which a judge deduces the holding of a case from supposedly clear extant rules. Judges proceeding under this judicial model, however, typically loaded the major premises of their syllogisms with legal doctrines that favor a minimalist government. Liberty of contract and vested property rights were the principal minimalist doctrines. "Found" in the Fourteenth Amendment's Due Process Clause, these unenumerated, "substantive due process" rights immunize private economic activity from government regulation the Court deemed to be contrary to a political-economic philosophy of laissez faire. All state meddling with private enterprise violated substantive due process except when justified in the interest of the public health, safety, or welfare; in other words, the police powers.

On that reasoning, the Supreme Court in *Allgeyer* v. *Lousiana* overturned a state law that prohibited the purchase of insurance from an out-of-state insurance company that had not bothered to register to do business in the state. The Court reasoned that the state law violated the insurance company's liberty to contract with whomever it deemed fit.[20]

out, these empirical findings do not resolve the normative issue. See Lawrence B. Solum, "Book Review: The Positive Foundations of Formalism: False Necessity and American Legal Realism," *Harvard Law Review*, 127 (2014): 2464, 2492. Jack Balkin's gallant attempt to resolve the normative issue is mostly a rejection of Scalian originalism ("Scalia's originalism must be 'faint-hearted' precisely because he has chosen an unrealistic and impractical principle of construction") and a basic acceptance of the "Living Constitution"("How we apply the principles of equal protection, however, may well be different from what people expected in 1868, based in part on our contemporary understanding and a history of previous constitutional construction") (Jack M. Balkin, *Living Originalism* [Cambridge, MA: Harvard University Press, 2011], pp. 8, 44). See, e.g., Richard H. Pildes, "Institutional Formalism and Realism in Constitutional and Public Law," *The Supreme Court Review* (2013):1, 42–53; Ernest J. Weinrib, "Legal Formalism: On the Imminent Rationality of Law," *Yale Law Journal*, 97 (1988): 949.

[20] 165 U.S. 578 (1897). Liberty of contract was broached in a dissenting opinion in the *Slaughterhouse Cases*, 83 U.S. 36, 111 (1873) (Bradley, J., dissenting). *Allgeyer*, thus, elevated that dissenting opinion to a majority opinion.

Similarly, in *Weaver* v. *Palmer Brothers Company*, the Court threw out a Pennsylvania law that prohibited the use of recycled wool in mattresses;[21] in *Frost & Frost Trucking Company* v. *Railroad Commission of California*, it struck down a California law requiring the licensing of car services transporting passengers;[22] and in *Williams* v. *Standard Oil Company*, the justices overturned a Tennessee law regulating the price of gasoline.[23]

The most important formalist case is *Lochner* v. *New York*.[24] In this case, the Supreme Court struck down a New York statute that sought to limit the number of hours bakers could work on a weekly basis. The Court reasoned that the statute ran afoul of liberty of contract. Citing the Court's preference for laissez faire, Justice Holmes dissented. The majority, he argued, was using the Fourteenth Amendment as vehicle to "enact Mr. Herbert Spencer's Social Statics."[25] In other cases decided under the legal-formalism flag, policy was at times brought into the syllogism through the minor premise when the opinion displayed sensitivity to special facts.[26]

Legal formalism, in short, is failed expression of the logical method. "The syllogism is not value-free; it is infused with legal doctrines that favor a minimalist government (a government of limited powers and importance, typically supportive of private interests), and sometimes with a sensitivity to special facts."[27] Courts flying

[21] 270 U.S. 402 (1926).

[22] 271 U.S. 583 (1926).

[23] 278 U.S. 235 (1929). An example of a state case is *Attorney General* v. *Old Colony Railroad Co.*, 160 Mass. 62 (1893). Massachusetts' highest court overturned a state law that required railroads in the state to take tickets from other railroad lines on a per-mile basis. This law, the Court reasoned, infringed upon the railroad's vested property rights.

[24] 198 U.S. 45 (1905).

[25] Ibid., 75. See Herbert Spencer, *Social Statics, or The Conditions Essential to Happiness Specified, and the First of Them Developed* (New York: D. Appleton & Co., 1910; originally published London: John Chapman, 1851). Between 1860 and 1900, nearly 370,000 copies of Spencer's writings were sold in America. Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1995), p. 28 n.76 (citing sources). "Herbert Spencer's *Social Statics* was the bible of laissez-faire economics." Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (New York: W. W. Norton & Company, 2019), p. 295.

[26] A few years after *Lochner*, the Supreme Court upheld the constitutionality of an Oregon maximum-hour law in *Muller* v. *Oregon*, 208 U.S. 412 (1908). The major premise was the same in both cases; the difference lay only in the minor premise: Oregon's statute dealt solely with female workers who, at the time, were deemed to be the "weaker sex" (ibid., pp. 418–419). "[W]omen's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil" (ibid., p. 420). This paternalistic view of the physical abilities of women was not manufactured by the Court. Rather, it was brought to the Court's attention through counsel's brief (the famous "Brandeis brief") and presented as a "widespread belief" (ibid.). See Wilson Huhn, "The Use and Limits of Syllogistic Reasoning in Briefing Cases," *Santa Clara Law Review*, 42 (2002): 813.

[27] Brooks, *Structures of Judicial Decision Making*, p. 37. See, e.g., Duxbury, *Patterns of American Jurisprudence*, pp. 9–64; Morton J. Horwitz, *The Transformation of American Law, 1780–1860: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), pp. 16, 18, 62, 68, 183–189, 199–200, 202, 208, 215–219, 223–224, 229–230; William M. Wiecek, *Liberty under*

the formalism flag are judicial activists. The heyday of legal formalism demonstrates this point beyond peradventure. In the last two decades of the nineteenth century, the Supreme Court "invalidated some seventy state laws and a dozen acts of Congress," during the nine years of the Taft Court (1921–1930) "the Court struck down almost one hundred state laws," and during the Great Depression, the justices invalidated dozens of New Deal legislation that would lead to the Court packing crisis in 1937.[28]

Textualism is another expression of the logical method. In defining textualism on another occasion, I stated that at its basic level:

> Textualism is the belief that authoritative text should control judicial decision-making. The meaning of a statutory or constitutional provision is to be determined by giving it a plain, or ordinary, reading. Blackstone sounded a similar chord: "Words are generally to be understood in their usual and most known signification; … as their general and popular use." As a general guide to legal interpretation, textualism has broad appeal. Even Justice Oliver Wendell Holmes, the most important proponent of the policy method, could accept a characterization of the interpretive enterprise at this level of generality. He remarked that "we ask, not what [the Framer] meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."
>
> Differences among jurisprudents develop when interpretive difficulties arise, such as when the text is ambiguous or when following the plain meaning of an unambiguous text will lead to an unreasonable outcome. Under these circumstances, some legal theorists are more textualist than others.[29]

Justice Antonin Scalia's brand of textualism has had the most influence on judicial decision-making, especially at the Supreme Court. Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, who clerked for Justice Scalia, have claimed devotion to Justice Scalia's textualism.[30] Scalian

Law – The Supreme Court in American Life (Baltimore: Johns Hopkins University Press, 1988), pp. 111–113.

[28] Budiansky, *Oliver Wendell Holmes*, pp. 288, 408, 412. Chief Justice Rehnquist provides a good summary of the court packing crisis. See William H. Rehnquist, "The American Constitutional Experience: Remarks of the Chief Justice," *Louisiana Law Review*, 54 (1994): 1161, 1169–1171.

[29] Brooks, *Structures of Judicial Decision Making*, p. 61 (sources cited therein).

[30] See discussion in Chapter 15, *Bostock* v. *Clayton County*. Justice Scalia's brand of textualism, as will be seen, is challenged by its inability to produce progressive outcomes, prompting one of his sons to argue: "In cases involving criminal procedure or the rights of the accused, for example, originalist opinions often support progressive policy goals." Christopher Scalia, "Get Ready for a Flood of Falsehoods About Originalism," Opinion/Commentary, *Wall Street Journal*, October 11, 2020, www.wsj.com/articles/get-ready-for-a-flood-of-falsehoods-about-originalism-11602446778 (accessed November 2, 2020). But to the extent that "textualism" is consequentialist (see Tara Leigh Grove, "Which Textualism," *Harvard Law Review*, 134 (2020): 265 (distinguishing between what the author calls "formalistic textualism" – "an approach that instructs interpreters to carefully parse the statutory text, focusing on semantic context and downplaying other concerns" – and "flexible textualism" – an approach that "allows interpreters to make sense of a statutory text by looking at