DIVERSITY JUDGMENTS

The US Supreme Court's legitimacy – its deliberative integrity and contribution to the good of society – is being questioned today like no other time in recent memory. Criticisms reflect the perspectives of both "insiders" (straight white males) and "outsiders" (mainly people of color, women, and the LGBTQ community). Neither perspective digs deep enough to get at the root of the Court's legitimacy problem, which is one of process. The Court's process of decision-making is antiquated and out of sync with a society that looks and thinks nothing like the America of the eighteenth century, when the process was first implemented. The current process marginalizes many Americans who have a right to feel disenfranchised. Leading scholar of jurisprudence Roy L. Brooks demonstrates how the Court can modernize and democratize its deliberative process so as to be more inclusive of the values and life experiences of Americans, including those who are not straight white males.

ROY L. BROOKS is Warren Distinguished Professor of Law at the all University of San Diego. He is the recipient of five book awards and the author of more than twenty books, including *The Racial Glass Ceiling: Subordination in American Law and Culture* (2017), *Racial Justice in the Age of Obama* (2009), and *Atonement and Forgiveness: A New Model for Black Reparations* (2004).

Diversity Judgments

DEMOCRATIZING JUDICIAL LEGITIMACY

ROY L. BROOKS
University of San Diego School of Law

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For Cameron, Stone, Judah, Carsyn, and Penn

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Preface

Justice is not an achievement, it is a practice.

Cheri Beasley, Chief Justice of the North Carolina Supreme Court

During my days as a law student at Yale Law School a half-century ago, my professors were imbued with sparkle and élan by the Supreme Court's opinion in *Brown* v. *Board of Education*. They were inspired by the court's courage in undertaking a seismic change in the way it approached legal questions involving racial equality.[1] Although more than a few legal scholars argued that the court's "radical jurisprudence" usurped legislative authority, violated established principles of federalism, and simply did not look like conventional judicial analysis, my professors were undeterred. The court's "radical jurisprudence" is, of course, regarded as self-evident today. My professors may or may not have been prescient enough to see this coming. But despite opposition they continued to urge us to think outside the box, to reimage a more just law and, hence, a more virtuous society. "Try to project where law ought to be in the next five or ten years" was a constant refrain. I have been inspired by this tradition of fresh thinking and new ideas in all of my scholarship as a law professor, this book included.

In this book, I challenge the orthodoxy of judicial decision-making in momentous cases and then proceed to project the direction in which that process ought to be moving based on the direction in which our society is moving. Our society is moving in the direction of greater diversity and inclusion; yet the Supreme Court is not. It does not embrace diversity and inclusion in its deliberative process. My goal in

[1] "Courage" is not too strong a word. After overturning every state school segregation law on the books and reversing decades of its own precedent, signs appeared not only in the South but also in the North reading "Impeach Earl Warren," the author of the opinion written for a unanimous Supreme Court. Legal scholars also took strong issue with the reasoning in the opinion. For more details about the Warren Court and Chief Justice Earl Warren, see, e.g., Michael Belknap, *The Supreme Court under Earl Warren, 1953–1969* (Columbia: The University of South Carolina Press, 2005); Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon and Schuster, 1997).

writing this book is to open a fresh, nonpartisan discussion about how the court can move *with* rather than against the society it is charged with serving; how it can democratize its approach to deciding socially significant cases; how, in a word, it can choose democracy over power.

That society is becoming more committed to diversity and inclusion is undeniable. All major American institutions – big law and big business, universities and colleges, public and private schools, sports and entertainment, military and social services, federal, state, and local governments – have made adjustments to accommodate the diversity-and-inclusion norm.[2] The outlier is the Supreme Court of the United States. It stands alone in its failure to recognize and incorporate a norm that is of paramount importance to this country.[3] A process of judicial decision-making that goes in a direction opposite to the direction in which society is marching flirts with illegitimacy.

Judicial illegitimacy is certainly in the air today. There is no dearth of legal scholars who have called into question the court's legitimacy – its deliberative integrity and contribution to the good of society. Two scholars have warned that, absent radical change, the court's legitimacy is in serious jeopardy.[4] While not that blunt, a growing number of scholars, lawyers, and now jurists have expressed similar concerns.[5] Some argue that the court's legitimacy problem is caused by the politicization of the confirmation process,[6] while others trace the problem to what they see as the justices'

[2] See, e.g., Debra Cassens Weiss, "170 Top In-house Lawyers Warn They Will Direct Their Dollars to Law Firms Promoting Diversity," *ABA Journal*, January 28, 2019, www.abajournal.com/news/article/170-top-in-house-lawyers-warn-they-will-direct-their-dollars-to-law-firms-promoting-diversity (accessed December 19, 2019); Elizabeth Olson, "150 Executives Commit to Fostering Diversity, Inclusion," *San Diego Union-Tribune*, June 13, 2017, p. A10.

[3] See, e.g., The United States Department of Justice, "Diversity," May 11, 2020, www.justice.gov/atr/diversity (accessed December 20, 2020). For further discussion, see Introduction, "Modernizing Judicial Legitimacy" p. 44.

[4] See Daniel Epps & Ganesh Sitaraman, "How to Save the Supreme Court," *Yale Law Journal*, 129 (2019): 148.

[5] See, e.g., ibid.; Jack Beauchamp, "The Supreme Court's Legitimacy Crisis Is Here: Brett Kavanaugh's Senate Confirmation Will Likely Turn Many Americans against the Court Itself," *VOX*, October 6, 2018, www.vox.com/policy-and-politics/2018/10/6/17915854/brett-kavanaugh-senate-confirmed-supreme-court-legitimacy (accessed January 17, 2020); Neal Devins & Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (New York: Oxford University Press, 2019); Michael Klarman, "Ensuring the President 'Shall Take Care That the Laws Be Faithfully Executed,'" *Take Care*, October 15, 2018, https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court (accessed January 18, 2020); Suzanna Sherry, "Our Kardashian Court (and How to Fix It)," July 25, 2019, https://ssrn.com/abstract=3425998 or http://dx.doi.org/10.2139/ssrn.3425998 (accessed May 28, 2020).

[6] Justice Roberts offers that neither Justice Ginsburg nor Justice Scalia would be confirmed today. Brent Martin, "Chief Justice Roberts: Scalia, Ginsburg Wouldn't Be Confirmed Today," *Nebraska Radio Network*, September 19, 2014, https://perma.cc/RQ6Z-MRT4 (quoting Chief Justice Roberts). Justice Ginsburg agreed. She stated in 2011 that had she been up for confirmation in that year, she would not have received the bipartisan vote on her nomination that she had received when was confirmed in 1993. See Joan Biskupic, "Justice Ginsburg Reflects on Term, Leadership Role," *USA Today*, June 30, 2011, http://usatoday30.usatoday.com/news/washington/judicial/2011-07-01-supreme-court-ginsburg_n.htm (accessed September 19, 2019). See also Stephen L. Carter, *The Confirmation Mess: Cleaning Up the*

proclivity to decide cases along politically partisan lines.[7] Thus, in an interview with NPR's Nina Totenberg, SCOTUSblog's publisher Tom Goldstein observes that "the Supreme Court's view about whether a president has powers [to do certain things] has tended to track whether the justices in the majority like the president and his policies."[8] Then there are those who point to the relatively recent cultivation of celebrity status by the justices.[9] One highly respected constitutional scholar and former dean argues that the justices are often more interested in pleasing themselves and favoring business interests than in interpreting the written law fairly.[10] Another well-respected constitutional scholar takes an analytical approach.[11]

Federal Appointments Process (New York: Basic Books, 1992); Carl Huse, *Confirmation Bias: Inside Washington's War over the Supreme Court, From Scalia's Death to Justice Kavanaugh* (New York: HarperCollins, 2019).

7 "Justices now act more as adherents to one ideological side, a side increasingly identified in partisan terms, than they did for most of the Court's history." Devins & Baum, *The Company They Keep*, p. 157, see also pp. 4–6. One survey found that "about three-quarters of Americans believe that judges – U.S. Supreme Court Justices and lower court jurists alike – base their decisions on their 'personal political views.'" Dan M. Kahan, David Hoffman, Danieli Evans, et al., "'Ideology' or 'Situation Sense'? An Experimental Investigation of Motivated Reasoning and Professional Judgment," *University of Pennsylvania Law Review*, 164 (2016): 349, 351.

8 Nina Totenberg, "Religion, Abortion, Guns and Race. Just the Start of a New Supreme Court Menu," *NPR/Law*, December 29, 2020, www.npr.org/2020/12/29/950654338/religion-abortion-guns-and-race-just-the-start-of-a-new-supreme-court-menu (accessed December 29, 2020).

9 See, e.g., Richard L. Hasen, "Celebrity Justice: Supreme Court Edition," January 12, 2016, https://ssrn.com/abstract=2611729 (accessed April 20, 2021). Whereas judges have historically worked in relative obscurity and while as late as 2006 only a "small minority" of judges were active participants in the Federalist Society (on the right), the American Constitution Society (on the left), and similar political organizations (Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* [Princeton, NJ: Princeton University Press, 2006], p. 129), today many judges and most Supreme Court justices speak to or write for such organizations and make frequent public appearances as celebrated cultural figures. See Adam Liptak, "Justices Get Out More, But Calendars Aren't Open to Just Anyone," *N.Y. Times*, June 1, 2015. For an excellent analysis of the celebrity status of current Supreme Court justices, see Sherry, "Our Kardashian Court."

10 See Erwin Chemerinsky, *The Case against the Supreme Court* (New York: Penguin Books, 2015).

11 See Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court* (Cambridge, MA: Harvard University Press, 2018). Fallon distinguishes among three types of legitimacy: "sociological" (the public's respect for the legal system); "moral" (the system's inherent goodness – think the opposite of *Dred Scott*); and "legal" (the system's general acceptance from within the legal culture). Ibid., at pp. 21, 24, 35–36. For an excellent analysis of this book, see Tara Leigh Grove, "The Supreme Court's Legitimacy Dilemma," *Harvard Law Review*, 132 (2019): 2240. Assuming that these categories can or should be separated, the position I take in this book clearly suggests that sociological legitimacy is by far the most important type of judicial legitimacy. External legitimacy trumps all other legitimacies in a democracy. Like all other government institutions, the court's legitimacy ultimately comes from the people, not from the justices or the legal establishment. If an educated public does not accept the judicial process the justices are giving us, it matters little that the legal establishment does. *Dred Scott*'s judgment today would be illegitimate even though the court used internally acceptable judicial models in arriving at its judgment. The internal must be in sync with the external. That is way Chief Justice Roberts, who is always concerned about the court's public reputation – its most consequential legitimacy – changed his vote to uphold Obamacare's individual mandate in

Bold remedies have been proposed to resolve the legitimacy problem. Term limits, a lottery system for appointing justices, court packing, and supermajority voting (sometimes enlisting the services of circuit-court judges) are among the most frequently made proposals.[12] Perhaps the most audacious reform calls for

National Federation of Independent Business v. *Sebelius*, 567 U.S. 519, 575 (2012) (opinion of Roberts, C. J.). Law and society must move in the same direction. Legal formalism, one of the judicial models discussed in this book, did not. Within the legal cultural, legal formalism was a generally accepted judicial technique for quite a long period of time. Yet, it was discredited by much of the public because it yielded judicial decisions that prevented the people, through their elected representatives, from resolving pressing social problems. This, of course, led to the court packing crisis of 1937. See William H. Rehnquist, "The American Constitutional Experience: Remarks of the Chief Justice," *Louisiana Law Review*, 54 (1994): 1161, 1169–1171. Justice Holmes spoke to the supremacy of external legitimacy over internal and moral legitimacy when he opined, "if my fellow citizens want to go to Hell I will help them. It's my job." Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (New York: W. W. Norton & Company, 2019), p. 396 (quoting Holmes's correspondence). Fallon appears to accept this proposition as he makes the point that judicial decision-making must be externally and morally legitimate. Fallon, *Law and Legitimacy in the Supreme Court*, pp. 83–87. His main point about internal legitimacy seems to be that whatever judicial model a justice uses, she must use it consistently in all cases, regardless of outcome, if her decision-making is to be legitimate. Ibid., at pp. 129–132, 142–148. I should think that reaching a just result in the case is more important for purposes of legitimacy than sticking with the same judicial philosophy. To achieve justice in *Bostock* v. *Clayton County* (see commentary in Chapter 15), Justice Gorsuch, who authored the majority opinion, changed his textualist approach and Chief Justice Roberts, normally a positivist, moved to a more accommodating judicial philosophy in just this case. As I write in the Introduction, "The Cases" section, the one truth that emerges from the case analyzed in this book is that no single judicial philosophy can accommodate justice in each type of case.

Fallon's discussion of legitimacy is problematic in that it assumes an insider's perspective. He does not engage the growing number of outsider challenges to received legitimacy, both externally and internally, as if to suggest outsiders do not matter. In this book I present both insider and outsider legal perspectives, arguing that judicial legitimacy must be informed by both perspectives. Legitimacy cannot ultimately be based on either perspective; it must be predicated on an external, *ex ante* norm that in my view is our current society's commitment to diversity and inclusion. Thus, if I were to use Fallon's analytical scheme, I would define judicial legitimacy as sociological and legal. The two are inseparable – socio-legal. See generally, Roy L. Brooks, *The Racial Glass Ceiling: Subordination in American Law and Culture* (New Haven, CT: Yale University Press, 2017).

[12] One popular term-limit proposal calls for the justices to term-out of office after eighteen years. The termed-out justices would serve on lower federal courts. This proposal would prevent any president from controlling the Supreme Court long after leaving office. See, e.g., H.R.8424-Supreme Court Term Limits and Regular Appointments Act of 2020, 116th Congress (2019–2020) sponsored by Rep. Ro Khanna (Calf. 17 Dist.); "Term Limits," Fix the Court, September 29, 2020, https://fixthecourt.com/the-fixes/ (accessed October 6, 2020); Jennifer Epstein, "Biden Rules Out Term Limits for Supreme Court Justices," *Bloomberg News*, October 26, 2020, https://bit.ly/2Q03Xmr (accessed October 26, 2020). See generally, *Reforming the Court: Term Limits for Supreme Court Justices*, Roger C. Cramton & Paul D. Carrington, editors (Durham, NC: Carolina Academic Press, 2005). Under the lottery system, the nine-member Supreme Court would be selected by random lottery from all federal appellate judges. Each newly constituted Supreme Court would sit for revolving two-week terms. Epps & Sitaraman, "How to Save the Supreme Court," pp. 18–26. One court-packing proposal would set the size of the court at ten justices, five chosen by Democrats and five by

"Congress … [to] pass a law prohibiting concurring or dissenting opinions and requiring each case to be decided by an unsigned opinion that does not disclose the number of Justices who join it."[13] Even the Judicial Conference Executive Committee, the policymaking body for federal courts, has weighed in with a proposal calling for diversity in judicial appointments and in hiring law clerks who typically write the first draft of opinions.[14]

Yet, I believe none of these analyses or proposals, as innovative as some are, dig deep enough to fix the legitimacy problem. Changing the composition of the court in any particular manner or requiring anonymous opinions or supermajority voting does not, in my view, respond to the deeper malady that is at the heart of the court's legitimacy problem. The problem is one of *process*, as Chief Justice Beasley instructs.

The process of judicial decision-making employed by the Supreme Court, which is taught from day one in law school, consists of the interplay between two constituent processes – the logical method and the policy method. The logical method is rule-oriented while the policy method is policy-oriented, as its name implies. Taken together, these judicial methods mark what is deemed to be the permissible range of judicial decision-making in our society. They define judicial legitimacy as now understood.

But here is the rub: the logical method and the policy method are over 250 years old. Our society today neither looks nor thinks the way it did even fifty years ago, let alone at the time of the Revolutionary War. We are much more committed to diversity and inclusion today than at any other time in our history. A judicial process constructed with the sensibilities of a bygone era when only straight white men ("insiders") were deemed to matter, a judicial process conceived by and for insiders, operates in an unfair and undemocratic manner in today's society. People of color, women, and the LGBTQ community ("outsiders," the "other") did not have a seat at the table 250 years ago and they do not call the shots today. No amount of tweaking around the edges of the process can overcome deep-rooted defects built into the process *ab initio*.[15]

Republicans. An additional five justices would be added to the court from the federal appellate bench to serve for a one-year term. The politically appointed justices would select these additional justices by unanimous vote or by a supermajority vote. If no agreement can be reached on the additional justices, the court would not have a quorum and, therefore, would lack jurisdiction to decide any cases for that year. Ibid., at pp. 27–36. Supermajority voting could be limited to specific cases and facilitated by adding judges drawn from the federal appellate courts. See Guha Krishnamurthi, "For Judicial Majoritarianism," *University of Pennsylvania Journal of Constitutional Law*, 22 (2020):1201.

[13] Sherry, "Our Kardashian Court," p. 2.

[14] Patricio Chile, "Federal Judiciary Elevates Diversity within Own Ranks," *Bloomberg Law*, September 16, 2020, https://news.bloomberglaw.com/us-law-week/federal-judiciary-elevates-diversity-goals-within-own-ranks (accessed September 16, 2020).

[15] Even traditionalist solutions to the legitimacy problem discussed earlier do not embrace outsider values. It is as if the #BlackLivesMatter and #MeToo movements do not matter. See my discussion in note 11 of Fallon, *Law and Legitimacy in the Supreme Court*.

Outsider-oriented criticisms of the Supreme Court have been vigorously advanced, most especially beginning in the 1980s. These criticisms fly under various outsider flags, such as, Critical Race Theory, Critical Feminist Theory, LatCrit Theory, Asian Crit, and QueerCrit Theory.[16] In this book, I attempt to transform these theories of legal criticism into a process of judicial decision-making, which I call "critical process."

But even this transformation of critical theory does not make for a democratic judicial process any more than the existing insider-oriented process, which I call "traditional process" (i.e., the logical and policy methods synthesized). Both critical process and traditional process are, however, essential to augment the democratic quality of judicial decision-making at the Supreme Court. Although oppositional, both processes are needed. One by itself is insufficient. Differences between the two processes should be reconciled on the basis of common ground; to wit, our society's commitment to diversity and inclusion.[17]

A new, democratic concept of judicial legitimacy thus emerges in this book, one that is more in tune with the exigencies of today's society than with eighteenth-century America. Judicial legitimacy inheres in judicial decision-making that faithfully engages traditional process and critical process and vindicates the diversity-and-inclusion norm. The entire process captures a crucial element of judicial legitimacy – *ex ante* decision-making. Judicial outcomes depend not on the decision-makers' private values but on extant community

[16] On another occasion, I noted the origin of critical race theory, which gave birth to other oppositional legal theories:

> In the 1960s, NAACP lawyers, including Robert Carter, the chief legal strategists behind the *Brown* victory and later a federal judge, criticized the Warren Court for having 'struck down the symbols of racism while condoning or overlooking the ingrained practices that had meant the survival of white supremacy.' Derrick Bell took that criticism into the world of academia and developed critical race theory. (The connection between Bell and Carter, or critical race theory and the NAACP, is little known. Bell, who was a close friend of Carter's, worked as a lawyer with the NAACP Legal Defense Fund, handling and supervising school desegregation cases, before embarking upon a fifteen-year career as a professor at Harvard Law School where he became known as the 'father of critical race theory.' . . .). (Brooks, *The Racial Glass Ceiling*, p. 47 (citations omitted)

For a discussion of some of the seminal works in critical theory, see, e.g., Khiara M. Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019); Dorothy A. Brown, *Critical Race Theory: Cases, Materials and Problems*, second edition (St. Paul, MN: Thomson/West, 2007); Richard Delgado & Jean Stafancic, *Critical Race Theory: An Introduction*, third edition (New York: New York University Press, 2017); Nancy Levitt & Robert R. M. Verchick, *Feminist Legal Theory: A Primer*, second edition (New York: New York University Press, 2016); Adrien K. Wing, "Is There a Future for Critical Race Theory?" *Journal of Legal Education*, 66 (2016): 44.

[17] To borrow from Holmes, my solution to the legitimacy problem is not to kill traditional process but "to tame it to make it a useful animal." Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review*, 10 (1896): 457, 469.

expectations of diversity and inclusion. We should, therefore, support the final decision in the case whether it goes for or against outsiders or insiders; for, it is all about the process.[18]

The Introduction to the book describes this new framework more fully. It also elaborates on structural defects in the traditional process that are usually assumed to exist but are never formally identified or examined. Each succeeding chapter in the book applies the framework case by case. Using the judicial voice (opinions written in the distinct first-person voices of particular traditionalist and criticalist jurists) and relying only on the precedents in effect at the time of the original case, I rewrite two dozen of what Justice Holmes called "great cases," or what some would call "hard cases." These are cases that raise socially significant, polycentric issues decided by the Supreme Court or lower federal courts. These cases are great or hard because of their level of legal difficulty and importance in shaping our society. In each case, I apply traditional process, critical process, and the diversity-and-inclusion norm, the latter by way of a concluding commentary. These applications are merely suggestive, not definitive. They are only invitations to start a discussion about how best to promote diversity and inclusion in each case and, more broadly, how best to define judicial legitimacy today.

The ensuing discussion must, however, be genuine. It is an evasion, a cop-out, for one to say, for example, "well, I'm just a man and so I can't empathize with a woman's values or experiences." The notion that one's status or privilege excuses one from making a valiant attempt to step into the shoes of an outsider is rather disingenuous. Whether insider or outsider, we all need to do the emotional and empathetic work needed to advance diversity and inclusion in judicial decision-making. Diversity and inclusion are nothing more than buzzwords without any real weight (dead letters) unless we acknowledge the labor and selflessness it takes to fully embrace it, unless we open ourselves to intellectual exploration and emotional growth. As has been said, if we are to have faith in justice, we must act with justice.

[18] The cultural implications of my judicial proposal are clear. I am advocating for a new "melting pot," one defined not as assimilation but as "transculturalism," a lateral exchange of values. For a more detailed discussion of these concepts, see Brooks, *The Racial Glass Ceiling*, ch. 4.

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