Occupy Justice: Introducing the Injustice Framework

Jon Hanson* & Jacob Lipton**

INTRODUCTION ................................................. 3 3 5
A. The Occupation: Ten Years After Occupy ................... 3 3 5
B. What the Hell Is Justice? ................................. 3 3 6
C. Preview ............................................... 3 3 9

I. OCCUPYING JUSTICE: INTRODUCTION TO THE INJUSTICE FRAMEWORK .............................................. 3 4 0
A. The Sense of Injustice and its Effects ...................... 3 4 0
B. Activating a Sense of Injustice ............................ 3 4 3
C. The Problem of Invisible Injustice ......................... 3 4 8
D. Advancing Justice by Highlighting Injustice ............ 3 5 2

II. JUSTICE OCCUPIED: SEVEN ICONIC TEXTS RESISTING INJUSTICE ................................................. 3 5 4
A. “Declaration of Independence”—International Injustice ..... 3 5 4
   1. Context ............................................ 3 5 4
   2. Text .............................................. 3 5 5
   3. Post-Text .......................................... 3 6 3
B. “Declaration of Rights and Sentiments”—Gender Injustice . 3 6 4
   1. Context ............................................ 3 6 4
   2. Text .............................................. 3 6 7
   3. Post-Text .......................................... 3 6 9
C. “What to the Slave Is the Fourth of July?”—Antebellum Racial Injustice ......................................... 3 7 1
   1. Context ............................................ 3 7 1
   2. Text .............................................. 3 7 3
   3. Post-Text .......................................... 3 7 8
D. New Deal Speeches—Economic Injustice ................... 3 7 8
   1. Context ............................................ 3 7 8
   2. Texts .............................................. 3 8 1

* Alan A. Stone Professor of Law and Director of the Systemic Justice Project, Harvard Law School.
** Co-Executive Director at Justice Catalyst.

For their excellent assistance in researching and refining this Article, we are grateful to Tomás Arango, Zachary Berro, Leanne Cares, Julia Hammond, Landon Harris, Carol Igoe, Rosie Kaur, Jessica Liu, Lucy Litt, Emily Marcus, Austin Nielsen-Reagan, Sam Perri, Zaika Shabir, Arman Smigieliski, Indy Sobol, Justin Walker, and Angela Wu. For invaluable feedback, we are indebted to Jonathan Gould, Kathleen Hanson, Diana Lipton, Jonah Lipton, and Dean Strang. We also owe thanks to the thoughtful and supportive editors of the *Harvard Law and Policy Review*, especially Max Lupin and Alex Tobin. For financial support, we are grateful to the Harvard Law School Summer Research Fund. Finally, for their love, encouragement, and support, our deepest appreciation and gratitude go to Kathleen Hanson, Gaye Johnson, and Emily Wettstein.
334 Harvard Law & Policy Review [Vol. 15

a. “A New Deal for the American People” ............ 381 R
b. “An Economic Declaration of Rights” ............ 384 R
c. “A Rendezvous with Destiny” ............ 386 R
3. Post-Texts ........................................... 393 R
E. Brown v. Board of Education—Legal Injustice .... 395 R
1. Context............................................. 395 R
2. Text .................................................... 401 R
3. Warren on Justice ................................... 405 R
4. Post-Text ............................................ 409 R
F. “Letter from Birmingham Jail”—Modern Racial Injustice .... 411 R
1. Context............................................. 411 R
2. Text .................................................... 413 R
3. Post-Text ............................................ 421 R
G. “Declaration of the Occupation of New York City”—Corporate Injustice .... 424 R
1. Context............................................. 424 R
2. Protest ................................................ 429 R
3. Text .................................................... 434 R
4. Post-Text ............................................ 437 R

III. JUSTICE-BASED MEANINGS OF FREEDOM AND DEMOCRACY .... 439 R
A. “Freedom” as Liberation from Injustice ............ 440 R
1. “Declaration of Independence” .................. 441 R
2. “Declaration of Rights and Sentiments” ........ 441 R
3. “What to the Slave is the Fourth of July” .... 442 R
4. New Deal Speeches ................................ 443 R
5. “Letter from a Birmingham Jail” .............. 443 R
B. “Democracy” as the Primary Means to Freedom and Justice .... 444 R
2. “Declaration of Rights and Sentiments” ........ 445 R
3. “What to the Slave is the Fourth of July?” .... 446 R
4. New Deal Speeches ................................ 446 R
6. “Letter from a Birmingham Jail” .............. 450 R
7. “Declaration of the Occupation of New York City” .... 450 R

IV. RECENT MOVEMENTS FOR JUSTICE .... 451 R
A. #BLM—“State of the Black Union” .............. 451 R
B. Obergefell vs. Hodges ............................ 453 R
C. #MeToo .............................................. 458 R
D. “How Dare You!” .................................. 460 R

V. LESSONS AND LOOKING FORWARD: A FOREWORD .... 462 R
A. The Water of Justice ............................... 462 R
B. Foreword .............................................. 462 R
1. Veena B. Dubal on Gig Workers ............... 464 R
2. Shi-Ling Hsu on Climate Change ............... 465 R
3. Lisa Alexander on Housing Insecurity ........ 466 R
INTRODUCTION

A. The Occupation: Ten Years After Occupy

This issue of Harvard Law & Policy Review is framed as a commemoration of Occupy Wall Street, the protest that, ten years ago, sparked a global movement that unsettled how we understood the economic inequalities and “mass injustice” that had grown salient at that time. In the roughly six months that Occupy Wall Street lasted, the movement also tested a theory of change for those hoping to reimagine and remake our systems.

The injustices that catalyzed the Occupy movement still burn. Today, the world may be even more fraught with the conflagrations of injustice, wealth inequality, environmental destruction, political dysfunction, and long-overdue reckonings than it was a decade ago. The grip of corporate interests over institutions and structures may be tighter than it was then. And any social-justice-centered alliances forged in that heat are increasingly...
met with energized, organized, and sometimes violent backlash. It can be discouraging.

The articles in this issue speak to some of the sources and manifestations of the inequalities and injustices that motivated Occupy Wall Street. We will return to those articles in the last section of this foreword, but we have some work to do first.

Our initial goal is to use this occasion to sketch some of the deeper causal forces shaping how the very concept of justice is understood and how that understanding shapes political and legal responses to exigent systemic problems. In the process, we hope to place Occupy Wall Street and the movement it catalyzed into a broader context. That goal is motivated by our belief that the hope and demands for justice cannot be fulfilled without a better understanding of the psychological, social, political, cultural, and economic forces behind that yearning and behind how justice itself is understood.

We hope the body of this Article is of interest and use to some readers, but, for those eager for an overview of the outstanding articles in this collection, please jump ahead to Part V(B).

B. What the Hell Is Justice?

In 2014, we co-founded the Systemic Justice Project at Harvard Law School,7 and got busy designing several courses around the theme.8 We spent the following six years teaching, researching, and writing about systemic justice. In the process, we developed a framework for understanding what justice is and why it matters. This Article, among other things, provides a basic overview of that framework.

"Justice" is a term that is notoriously difficult to define. Even dictionaries offer little more than useless tautology, defining justice as, for instance, "the quality of being just."9 Judges and legal scholars commonly reject justice as a viable norm for assessing policy in part because of its lack of shared meaning. For example, Oliver Wendell Holmes, Jr. confessed to “hat[ing]

9 Justice, DICTIONARY.COM, https://www.dictionary.com/browse/justice [https://perma.cc/ZLE6-7937]; see also Justice, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/justice [https://perma.cc/XP2K-WJEC] (offering definitions such as "the maintenance or administration of what is just" and "the quality of being just, impartial, or fair"); Justice, BLACK’S LAW DICTIONARY 995 (10th ed. 2014) (providing definitions such as "[t]he fair treatment of people," "[t]he quality of being fair and reasonable," and "[t]he fair and proper administration of laws").
“justice” for that reason. Richard Posner similarly complained that terms “like fairness and justice... have no content.” The prevailing view, particularly in law, has been to pay lip service to the value of justice as the law’s ultimate normative goal, but to ignore the value of justice when deciding cases or discussing larger policy ends. Strikingly, though, the assertion that justice is undefined is usually unaccompanied by any effort to provide the term with meaning.

Particularly in light of the legal system’s trumpeted commitment to justice, we concluded that justice as a norm was being too cavalierly dismissed. In our view, those behind the law’s curtain have an obligation to employ or search for a workable definition of the norm, whether by adopting one of the many philosophical conceptions of justice, or, as we shall propose, utilizing a framework for parsing, debating, and contemplating the norm. So we set out to examine whether the mystery of meaning was more superable than supposed. With modest exertion, we discovered that there was plenty to learn and say about justice, its meaning, and its actual and potential significance in law and society. In our view, those who have abandoned justice as meaningless have done so in part because they have approached the topic from the wrong perspective—a mistake, as we’ll see, that Wall Street’s “Occupants” did not make.

10 Letter from Oliver Wendell Holmes to John C.H. Wu (July 1, 1929), in Justice Holmes to Dr. Wu: An Intimate Correspondence, 1921–1932, 53 (1935) (“I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.”).

11 Paul M. Barrett, Influential Ideas: A Movement Called “Law and Economics” Sways Legal Circles, WALL ST. J., Aug. 4, 1986, at 1, col. 1 (“Judge Richard A. Posner has little use for words like fairness and justice. ‘Terms which have no content,’ he calls them. What America’s lawyers and judges need... is a healthy dose of free-market thinking.”).

Philosopher Tommie Shelby, in writing about social justice and Ghetto poverty, notes the “common tendency to treat the answers” regarding questions of justice “as obvious or to regard disagreements about the answers as products of irresolvable ‘ideological’ differences.” Tommie Shelby, Dark Ghettos 4 (2016). Shelby indicates that some are skeptical of the very idea of social justice and later asserts that there is “profound disagreement, among philosophers and citizens alike, about what justice requires,” leading some to focus on empirical questions in order to evade the “messy disputes over what justice requires.” Id. Traveling on such contested terrain, those skeptics maintain, is “unnecessary, unfruitful, or pointless, at best a mere academic exercise.” Id. Shelby rejects those claims, arguing that “[j]ustice questions should... be a focal point of public policy, political activism, and civic discourse concerning the future of our cities and their most disadvantaged inhabitants.” Id.


That commitment is reflected in the prevalence of the term “justice” engraved on court buildings, see e.g. The Court and Constitutional Interpretation, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/BEA2-94YW], in law school mission statements, see Irene Scharf & Vanessa Merton, Table of Law School Mission Statements (2016), http://scholarship.law.umassd.edu/fac_pubs/175/ [https://perma.cc/L35A-MCSZ], in bar association logos, see e.g. American Bar Association, Logo, https://commons.wikimedia.org/wiki/File:American_Bar_Association.svg [https://perma.cc/S3BR-QBFR] (“Defending Liberty: Pursuing Justice”), in the title of the highest judges, the name of the Department of Justice, and the use of the phrase “the justice system” to describe the part of the legal system that exerts the greatest direct force over individuals. See also West, supra note 13, at 60, 92.
To understand the common misapprehension, consider the famous, if hackneyed,15 David Foster Wallace parable:

There are these two young fish swimming along[,] and they happen to meet an older fish swimming the other way, who nods at them and says, “Morning, boys. How’s the water?” And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes[,] “What the hell is water?”16

In Wallace’s telling, the fish swim and eat and breathe, clueless about the very environs upon which their lives and all its dimensions depend.17 “What the hell is water?”18 Although the jolt of the older fish’s query lifted the young swimmers’ liquid world into their consciousness for a moment, their sustaining surroundings were likely to seep quickly back into the oblivion of everywhere.19 Such mindlessness, Wallace explains, is the “default setting.”20

Now imagine a twist in the story. Suppose the pair of young fish ventured into an inlet rich in food before being beached by a fast-retreating tide. Those fish would quickly understand what water is and its life-or-death significance.

Justice, in that sense, is like water: viscerally perceptible in its absence. Our systems and collective survival depend upon its existence and purity—and its preservation and vitalizing effects depend upon our being attentive to it. And, like water to fish, the significance and meaning of justice are clarified through scarcity and deprivation. The experience and feeling of its absence—the stuff of “injustice”—serve as the baseline from which justice is readily appreciated. In other words, for those who seek a definition of “justice,” the response is simple: it’s the elimination of “injustice.”

In distorting the Wallace parable, our point is not to suggest that our society has been swimming in an ocean of justice. Quite the opposite: the point is that some things that are profoundly important for our survival can be best understood and appreciated in their absence. And the last decade or two represent what, to many, feels like a fast-retreating tide, leaving growing numbers of people literally and figuratively suffocating and calling out for justice.21

15 See Emily Harnett, How the Best Commencement Speech of All Time Was Bad for Literature, LITERARY HUB (May 17, 2016), https://lithub.com/how-the-best-commencement-speech-of-all-time-was-bad-for-literature [https://perma.cc/NJ6N-TX6T].
17 Id.
18 Id.
19 Id.
20 Id.
21 Our point is not that systems have uniformly grown more unjust but that, regardless, systemic injustices have become more conspicuous to a wider public. As described below, the perceptions of justice and injustice may be illusory. See infra Part I (describing the factors that can, when perceived, contribute to an injustice dissonance and the problem of invisible injustice).
This Article introduces a framework for understanding and debating justice and its potential role in law and the legal system. Such a framework is, in our view, long overdue and responds to a fundamental hypocrisy in the law. An institution that wields immense state power and gains legitimacy by expressly promising justice—even branding itself with justice-related statutory and symbols—should not be permitted to disregard the norm, much less dismiss it as meaningless. Of all institutions, the law should be true to its promise. The legal profession, the judiciary, and the legal academy, among others, either should make a good-faith effort to render the norm functional and meaningful or they should abjure it altogether. This Article represents our attempt to advance the former option.

Part I begins by introducing our framework, which follows in a tradition of viewing justice as the absence, or elimination, of injustice and identifying some of the elements that arouse a sense of injustice. The Part further explores the connection between feelings of injustice and the meaning of justice, the persistence of injustice in our system, and the strategies available to those challenging injustice. In the process, Part I introduces our “injustice framework,” which highlights common factors that produce a sense of injustice and that encourage individuals and groups to mobilize for change. Although the injustice framework does not itself resolve questions of justice, it does have implications for how and where injustice might thrive and how it might be challenged by advocates, activists, organizers, and policy entrepreneurs seeking to advance justice.

Part II surveys seven iconic texts associated with movements for justice, analyzing how their rhetorical (and associated direct-action) strategies accord with our injustice framework. Ranging from the Declaration of Independence to the Declaration of the Occupation of New York City, the texts and their authors take on many of this nation’s longstanding systemic injustices, around race, gender, class, and more. That part argues that the consistency of approaches across such widely hailed texts supports our claim that the injustice framework captures a basic consensus regarding the meaning of injustice and helps illustrate what amounts to a nationally or culturally shared conception of justice.

Part III revisits those same texts to explore briefly what they reveal about the relationship between justice and two other fundamental cultural values: freedom (or liberty) and democracy. That part suggests that the texts give those terms discernible meanings that cohere and overlap with justice, thus forming a network of related definitions.

Part IV examines key texts in some of the prominent social justice movements that have arisen in the decade since Occupy Wall Street. That section illustrates how those texts similarly employ the elements and associated strategies of the injustice framework and reflect the interrelated meanings of justice, freedom, and democracy.
Finally, Part V sets up and introduces the four superb articles in this symposium and calls for greater attention to, and study of, justice within the legal system.

I. OCCUPYING JUSTICE: INTRODUCTION TO THE INJUSTICE FRAMEWORK

A. The Sense of Injustice and its Effects

As Pip observes in Charles Dickens's *Great Expectations*, “there is nothing so finely perceived and finely felt, as injustice.” We agree. This Part argues that perceived injustice is the wellspring of powerful emotions and that those feelings, more than syllogisms, are key to understanding the sense of justice. The urge for justice is, by that account, the desire to eliminate perceived injustice. Insofar as such perceptions are veridical, justice can indeed be advanced by preventing, removing, or repairing that which produces injustice.

We are hardly the first to call for the centering of injustice as a means to understanding justice. In noting the lack of a shared definition of justice, sociologist Morris Ginsberg observed that “it is easier to recognize injustice than to define justice.” John Stuart Mill wrote that “justice . . . is best defined by its opposite.” Thomas Hobbes argued that “whatsoever is not unjust, is just.” Philosopher and lawyer Edmond Cahn also defined justice by way of contrast: “Justice,” he wrote, “means the active process of remedying or preventing what would arouse the sense of injustice.” Political philosopher Tommie Shelby points out “that systematic attempts to explain what justice requires are as old as Plato’s *Republic,*” without a consensus emerging, but that “[r]eflecting on modes of injustice . . . can help us better understand the meaning and urgency of this perennial philosophical question.” Legal scholar Martha Minow notes that “it is easier to know what injustice is” than to define justice. Social psychologists Tom Tyler and Heather Smith explain that “people are seldom at a loss when asked to make judgments about injustice—‘they know it when they see it!’” Theologian Richard Hughes similarly “define[s] justice as an act of protesting, prevent-

22 1 CHARLES DICKENS, GREAT EXPECTATIONS 131 (Chapman & Hall 1861).
23  MORRIS GINSBERG, ON JUSTICE IN SOCIETY 73 (1965).
24  JOHN STUART MILL, UTILITARIANISM 64 (7th ed. 1879) (1863).
27  SHELBY, supra note 12, at 14.
ing, and remediing situations that arouse a sense of injustice.”30 And economist Amartya Sen describes how the pursuit of justice has been less about “trying to achieve a perfectly just world (even if there were any agreement on what that would be like)” and more about attempting “to remove clear injustices.”31

If attempts to define “justice” in abstract, analytical terms can be unsatisfying, it may be because the cognitive alarm bell of sensed injustice is largely a perception-triggered internal experience (influenced by external realities, cultural understandings, and the like). Such personal and bodily feelings can often be tasted more readily than defined. As philosopher Robert Solomon writes: “Justice, if it is to be found anywhere, must be found in us.”32

More than just sensed, perceived injustice links closely with emotions and behavior. As part of that phenomenology of injustice, social psychologist Dale Miller explains, the “perception of injustice is frequently tied to the emotion of anger.”33 Martha Minow captures that linkage when describing her own internal experience this way: When “[a] sense of injustice rises up, . . . I feel outrage.”34 The anger and outrage linked to perceived injustice may be what Dr. Martin Luther King meant in his “I Have a Dream” speech when referring to the “the flames” and “sweltering . . . heat of injustice.”35

The sense of injustice, paired with anger, also links with behavior, emboldening individuals and galvanizing groups. Anger, social psychologists have learned, is an “empowering emotion”36 that “has an unusually strong ability to capture attention.”37 At the same time, the perception of injustice has a transcendent and transformative effect on how people understand and respond to a given interaction or outcome.38 Dale Miller explains: “To label an insult an injustice transforms it from a personal matter to an impersonal matter of principle,” “transforms the private into the public,” and transforms a “personal insult” into a “collective harm,” such that “avenging the injustice

33 Dale Miller, Disrespect and the Experience of Injustice, 52 ANNU. REV. PSYCHOL. 527, 534 (2001). In some instances, “anger acts as ‘an alarm system’ that triggers the perception of injustice.” Id. In other situations, perceptions of injustice elicit the emotion of anger. Id. (“The perception of injustice can lead to anger . . . . [and] the arousal of anger can lead to the perception of injustice.”).
34 Minow, supra note 28, at 4.
35 King, supra note 2.
38 Miller, supra note 33, at 534.
becomes a defense of the honor and integrity of the entire moral community.”39 Reviewing the research, Miller continues: “The arousal of moralistic anger is not confined to injustices perpetrated against one’s self.”40 “Cries of injustice from one’s peers are [also] difficult to resist.”41 More generally, “[w]itnessing the harming of a third party can also arouse strong feelings of anger and injustice” leading to “a greater obligation to rally around” victims of injustice and compelling “support for retaliatory actions.”42

Numerous scholars contemplating the meaning of justice have noted the catalyzing effect of perceived injustice. “What moves us,” Amartya Sen writes, is “that there are clearly remediable injustices around us which we want to eliminate.”43 Edmond Cahn, rejecting the notion of “justice” as “some ideal relation or static condition or set of perceptual standards,” examines instead “what is active, vital, and experiential in the reactions of human beings . . . to a real or imagined instance of injustice.”44 Cahn’s phenomenology of injustice aligns with Miller’s, as he too emphasizes “the sympathetic reaction of outrage . . . and anger” associated with perceived injustice. Cahn goes further, though, in suggesting a natural explanation for the link. The behavioral quickening of injustice “equip[s] all men to regard injustice to another as personal aggression,” and thus “prepare[s] the human animal to resist attack.”45

Thus understood, injustice is an experience and “sense” that is coupled with particular emotions and concomitant behavioral urges. Perceiving injustice has a transcendent and transformative effect on how people understand and respond to a given outcome. It seizes our attention and galvanizes us, transforming the “you” and “I” into “we” and activating a selfless urge to support victims of injustice and retaliate against its perpetrators.

In sum, attending to the sense and feelings of injustice disarms the critique that justice is useless or lacks content and reveals how requiring a clear definition of justice, as Justice Holmes and Judge Posner did,46 abridges the inquiry before it begins. As philosopher Robert Solomon argues, the search “for a single, neutral, rational position has been thwarted every time.”47 Through such misdirection, justice naysayers have erased a fundamental feature of experience and its significance to law and policy. Ignoring justice, by confusing the unseen for the non-existent, is like young fish mindlessly ignoring the presence and significance of water while swimming headlong toward waterless hazards. We ignore injustice at our peril.

39 Id. at 534–35 (citations omitted).
40 Id. at 535.
41 Id.
42 Id.
43 SEN, supra note 31, at vii.
44 CAHN, supra note 26, at 13.
45 Id. at 24.
46 See supra text accompanying notes 10–13.
B. Activating a Sense of Injustice

If advancing justice requires the alleviation of injustice, and injustice is understood as sensed and felt, the question remains whether there are common factors that activate that sense of injustice. This section offers a partial answer to that question that later sections of this paper (and later work) will help to validate. It does so by sketching a framework for understanding the factors that contribute to “injustice dissonance”—that is, the cognitive and emotional discomfort resulting from sensed injustice.48

There are, we posit, three fundamental elements that, when all are perceived, tend to trigger a sense of injustice regarding a given causal agent49:

1. a causal agent’s power (ranging from conspicuous and coercive force to subtle and systemic influence) employed to
2. produce some harm, suffering, or inequality (for example, some relative privilege for the causal agent or harm to others) when
3. either the power of the causal agent or the resultant inequality lacks legitimacy50 (in the form of, say, consent or a compelling authority, tradition, precedent, reason, or process). Those three elements interact such that greater amounts of perceived power or inequality require more robust levels of perceived legitimacy to maintain a sense of justice.

---

48 See generally Jon Hanson & Kathleen Hanson, The Blame Frame: Justifying (Racial) Injustice in America, 41 HARV. C.R.-C.L. L. REV. 413 (2006) (exploring the historical role of “injustice dissonance” in shaping whether, when, and how racial inequalities were rationalized or challenged).

49 We have in mind a capacious notion of “causal agent” that includes individuals, groups, entities, institutions, and systems.

50 In his influential work on “legitimacy and legitimation,” social psychologist and legal scholar Tom Tyler studies and analyzes the factors that lead individuals “to believe that the decisions made and rules enacted by others are in some way ‘right’ or ‘proper’ and ought to be followed.” See Tom Tyler, Psychological Perspectives on Legitimacy and Legitimation, 57 ANNU. REV. PSYCHOL. 375, 376 (2006) That is essentially what he means by “legitimacy”—a belief that the group-imposed allocations, regulations, strictrures, and mandates are just and ought to be followed. Describing “legitimacy” as a kind of “framework through which actions are evaluated and judged to be just or unjust,” id. at 384, he explains:

[when it exists in the thinking of people within groups, organizations, or societies, . . . leads them to feel personally obligated to defer to those authorities, institutions, and social arrangements. . . . Irrespective of whether the focus is on an individual authority or an institution, legitimacy is a property that, when it is possessed, leads people to defer voluntarily to decisions, rules, and social arrangements.

Id. at 376; see also Tom R. Tyler, Why People Obey the Law 4 (2006) (explaining that “normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior”).

Tyler’s definition of legitimacy aligns with that of other social scientists and legal philosophers. Political scientist Mark C. Suchman, for instance, describes “organizational legitimacy” as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” Mark C. Suchman, Managing Legitimacy: Strategic and Institutional Approaches, 20 ACADEMY MGMT. REV. 571, 574 (1995). Legal philosopher Richard Fallon describes the “legitimacy,” as “measured in sociological terms,” of “a constitutional regime, government institution, or official decision” as “a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.” Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 HARV. L. REV. 1787, 1795–96 (2005).
Relatedly, when mechanisms of legitimacy lose efficacy for any reason, then a previously acceptable inequality or power dynamic can be perceived as less just. “Injustice,” as the noun, and “unjust” as the adjective, can thus be understood as blanket labels to describe an unacceptable imbalance among those elements: excessive power and inequality relative to legitimacy.51

Although “injustice,” “unjust,” “justice,” and “just” are commonly used to summarize those perceptions and the resultant “sense,” that feeling of injustice and its behavioral effects may arise even if unnamed or if named under other labels, such as “unfair,” “oppressive,” or “exploitative.” To be sure, labels matter and are, like stories and frames, often shortcuts for producing perceptions and eliciting emotions. That is why the “[c]ries of injustice from one’s peers are difficult to resist.”52 Still, the labels may vary and are not necessary; a perceived imbalance among power, inequality, and legitimacy is sufficient.

The three elements of our injustice framework find support in the work of other political philosophers and political scientists—although the delineated elements of our framework are often only implicit in theirs.53 Consider a few examples over the last half century.

David Miller’s overview of “justice” in the Stanford Encyclopedia of Philosophy provides a helpful illustration. Regarding outcomes that raise a “concern of justice,” he wrote:54

Suppose we have two people A and B, of whom one is significantly better off than another—has greater opportunities or a higher income, say. Why should this be a concern of justice? It seems it will not be a concern unless it can be shown that the inequality between A and B can be attributed to the behaviour of some agent, individual or collective, whose actions or omissions have resulted in A being better off than B—in which case we can ask whether the inequality between them is justifiable, say on grounds of their respective deserts.55

As the italicized terms highlight, Miller’s list of factors that create a “concern of justice” maps well with our framework’s elements of injustice. He pointed to an inequality between two parties, created and imposed by one over the

51 When we use balance or imbalance throughout this Article, we refer primarily to an imbalance in this direction. That is, the legitimacy is insufficient for a given level of power or inequality.

52 Miller, supra note 33, at 535.

53 Furthermore, as illustrated below, even when they employ similar definitional frameworks to ours, they don’t always refer to the concept they’re defining as “injustice.”


55 Id. (emphasis added).
other—where the power of the former is implied and outcome is “justifiable” or, in our terms, legitimate. 56

John Rawls, in *A Theory of Justice*, was concerned with “social justice” by which he meant “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.” 57 Rawls’s “general conception of justice,” applied to those powerful “social” institutions, requires that “[a]ll social values . . . are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.” 58 Resembling our injustice framework, Rawls treated equality as a presumptive baseline against which the allocations of powerful actors are to be measured. To be legitimate and therefore just, Rawls argued, deviations from that baseline, must satisfy the “maximin” principle. 59 Social inequalities (inequalities brought about by power) that lack legitimacy (defined by the maximin principle) are unjust.

Some theorists employ a framework like ours while emphasizing terms other than justice. For instance, Rawls described “[u]njust social arrangements” as “a kind of extortion,” 60 and terms like extortion and oppression often evoke the elements of injustice—power producing suffering or inequality without legitimacy. 61 Marilyn Frye, writing about “oppression” in 1983, spoke in terms of those same elements on a systemic and structural level. Her classic description of the “double bind”—“situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation”—was a description of the gender-based inequality and power that lacks legitimacy. 62 Frye offered the metaphor of a birdcage to capture how the collection of double binds combine, like individual bars in a cage, to immobilize women. The lives of women, by virtue of their identity in that group, are unjustly subordinated to men. They are

56 Miller elsewhere explains that “justice requires an agent whose will alters the circumstances of its objects . . . . So we cannot, except metaphorically, describe as unjust states of affairs that no agent has contributed to bringing about.” Id.
57 JOHN RAWLS, A THEORY OF JUSTICE 6 (Revised ed. 1999).
58 Id. at 54.
59 Id.
60 Id. at 333–35.
61 Id. at 302.
62 Rawls offered a “theory of justice” that was based upon what he considered to be a legitimate process (a kind of social contract) created in a situation where participants were equals in every relevant way (the original position).
63 Marilyn Frye, *Oppression*, in THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 2, (1983). Sukaina Hirji helpfully summarizing Frye’s argument, explaining that “this network” of binds is constructed by, and in service of, the interests of some group or groups. So, for Frye, a cis man who is not a member of an oppressed group might feel frustrated that certain career paths are female-coded and difficult for him to enter: he might experience this as a barrier and restriction on his movement. But, for Frye, this barrier is itself created and maintained by men, for the benefit of men. To determine whether someone is oppressed or not, in Frye’s view, it is not enough to know that there is some barrier or restriction on movement, or that some encounter is painful or frustrating. Instead, we need to understand who constructs and maintains the barrier or restriction, and whether that barrier exists in a network that serves to immobilize or reduce some group, for the benefit of some other group.
confined and shaped by forces and barriers which are not accidental or occasional and hence avoidable, but are systematically related to each other in such a way as to catch one between and among them and restrict or penalize motion in any direction. It is the experience of being caged in: all avenues, in every direction, are blocked or booby trapped.  

In 1990, Iris Marion Young picked up those themes in her classic book, *Justice and the Politics of Difference*. She argued that “a conception of justice should begin with the concepts of domination and oppression” and defined “justice” as “the elimination of institutionalized domination and oppression”  

Her definition of “domination and oppression” aligns with what we mean by “injustice.” For instance, Young explained that oppressive “exploitation” occurs through a steady process of the transfer of the results of the labor of one social group to benefit another. The *injustice* of class division does not consist only in the distributive fact that some people have great wealth while most people have little. Exploitation enacts a structure relation between social groups. Social rules about what work is, who does what for whom, how work is compensated, and the social process by which the results of work are appropriated operate to enact relations of power and inequality.  

In “Five Faces of Oppression,” Young conceived “oppression” as “a systematic and unreciprocated transfer of powers from women to men” and “not merely . . . an inequality of status, power and wealth resulting from [exclusion] from privileged activities. The freedom, power, status, and self-realization of men is possible precisely because women work for them.” The injustice of exploitation, then, results from the fact that a powerful group reproduces its privilege by enacting, without legitimacy, structures that yield unequal allocations of who does what, who gets what, and who is considered what.  

In 2001, political scientist Jane Mansbridge defined group subordination as “a system of social organization in which members of one group create and reinforce inequalities between themselves and members of another group.”

---

64 See id. at 4.
65 Iris Marion Young, *Justice and the Politics of Difference* 6 (2011) [hereinafter YOUNG, JUSTICE].
66 Young explicates five aspects of oppression—exploitation, marginalization, powerlessness, cultural imperialism, and violence. We focus here only just the first, exploitation, to illustrate our point. Id. at 6.
67 YOUNG, JUSTICE, supra note 65, at 49 (emphasis added).
69 YOUNG, JUSTICE, supra note 65, at 50.
group through the exercise of power . . . .” Mansbridge used “the word ‘oppression’” to describe the unjust exercise of power by a dominant group over a subordinate group. A group is oppressed only if its position in a particular hierarchical system derives from unjust inequalities that result from the exercise of power (in the sense of threat of sanction or imposition of constraint). Injustice and power are central.

Mansbridge’s definition of “oppression” also coincides with our injustice framework: a particular kind of inequality—a “hierarchical system” among groups—in which a “dominant group” “exercise[ ] . . . power” “over a subordinate group,” yielding a “unjust inequalities.” Political philosopher Tommie Shelby, in his 2016 book *Dark Ghettos*, described the mechanisms of “systemic injustice,” including the ”self-reproducing exploitative relationship” between racialized classes, emphasizing the self-perpetuating inequalities caused by power:

X and Y are in a self-reproducing exploitative social relationship if:

(i) Y is regularly forced to make sacrifices that result in benefits for X; (ii) X obtains these benefits by means of a power advantage that X has over Y; and (iii) as a result of conditions (i) and (ii) X’s power advantage over Y is maintained (or is increased) and Y remains in the condition of being forced to make sacrifices for X’s benefit.

Elsewhere Shelby makes explicit his concern with the “legitimacy” of “unjust institutions” with “power.” Shelby’s ”exploitation” is what we mean by injustice, where the more powerful X employs power, built into underlying structures, to produce or reproduce inequality without legitimacy.

---


71 Id.

72 Id.

73 SHELBY, supra note 12, at 197. Shelby rejects simple fixes and conventional narratives, emphasizing instead the need to address the “systemic injustices” at the root of ghettos. The proper frame is neither “the dysfunctional behavior of the black poor or structural obstacles to upward mobility.” Id. at 2. Ghettos are the predictable consequence of fundamentally unfair schemes. Any solution will involve a “fundamental reform of the basic structure of our society.” And the appropriate frame should be “what justice requires and how we, individually and collectively, should respond to injustice.” Id.

74 Id. at 197.

75 See id. at 58 (“Supporting unjust institutions can give them legitimacy, effectively strengthening their power over the oppressed and enhancing their staying power.”).

76 Many earlier philosophers and political theorists employ the elements of the framework we describe. While we will not take the space here for a more detailed exposition, we can offer a few prominent examples from canonical texts as illustrative.

Jean-Jacques Rousseau opened *On the Social Contract* with an implicit invocation of injustice: “Man is born free, and everywhere he is in chains. . . . What can render it legitimate?” JEAN-JACQUES ROUSSEAU, *On the Social Contract*, in *BASIC POLITICAL WRITINGS* 141 (Donald A. Cress trans. and ed., 1987). Where power produces such stark harm and inequality, questions of legitimacy—and ultimately injustice—are raised, for “force”—that is, power without legiti-
As those examples illustrate, a variety of philosophers and scholars attempting to capture the meaning of justice—or the source of injustice dissonance—have offered frameworks that parallel our injustice framework.

C. The Problem of Invisible Injustice

Having offered some support for the elements of the framework, we now turn to one potential source of ongoing injustice. If a sense of injustice is the product of perceptions, there is always the potential for a gap between such perceptions and reality. There may be situations in which actual injustice (that is, a situation in which causal agents employ power to produce harms without legitimacy) fails to elicit a sense of injustice.77

In fact, those who have studied power, inequality, and legitimacy from a variety of disciplinary perspectives tend to emphasize the potential for these phenomena to operate invisibly, to be missed or misattributed. While we cannot review those extensive literatures here, a few instances of theorists ofma—"does not bring about right" and "one is obliged to obey only legitimate powers." Id. at 144.

Similarly, in "Discourse on the Origins of Inequality," Rousseau defined "moral or political inequality" as the sort of inequality that implicates justice concerns precisely because it is the product, not of nature, but of power. JEAN-JACQUES ROUSSEAU, Discourse on the Origins of Inequality, id. at 38. His solution emphasized the role of equality, in a social contract in which "since each person gives himself whole and entire, the condition is equal for everyone." R OUSSEAU, On the Social Contract, supra at 148.

John Stuart Mill described a general conception of justice that also aligns with our framework, positing that "[a]ll persons are deemed to have a right to equality of treatment, except when some recognized social expediency requires the reverse." MILL, supra note 24, at 94 (using the term "treatment" to suggest attention to inequalities produced by some agent or source of power). For Mill, too, the baseline norm is equality, and unequal treatment is presumptively illegitimate, unless it is pursuant to such an expediency. "And hence," Mill concluded, "all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of injustice." Id. (emphasis added).

Friedrich von Hayek likewise indicated a role for all three elements of the injustice framework. In "The Mirage of Social Justice," he highlighted the starting presumption of philosophers like Mill and Rawls in favor of equality and acknowledged how "[t]he postulate of material equality would be a natural starting point" or baseline presumption in circumstances where the unequal "shares of the different individuals or groups were . . . determined by deliberate human decision." 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY 81 (1982). Where such power is intentionally exerted for those ends the resultant inequality would be unjust. Hayek wrote:

In a society in which this were an unquestioned fact, justice would indeed demand that the allocation of the means for the satisfaction of human needs were effected according to some uniform principle such as merit or need (or some combination of these), and that, where the principle adopted did not justify a difference, the shares of the different individuals should be equal.

Id. In short, for Hayek, injustice is an illegitimate (or "not justified") inequality created by power (or "deliberate human decision"). This was a mere aside, and not the basis of Hayek’s theory, because of his view that in market societies, distribution was not the result of "deliberate human decision." Id.

77 The reverse is also true: perceived injustice might itself be illusory. And that illusion could itself be a source of injustice; this is part of what is at stake in critiques of justice as a judicial norm. See, e.g., infra note 715. We believe that the framework has purchase on these questions in both directions, but for now our focus is on unidentified injustice.
2021]  Occupy Justice  349

power noting that the most effective forms of power tend to operate invisibly will illustrate.

In The Anatomy of Power, for instance, economist John Kenneth Galbraith explains that “[s]ome use of power depends on its being concealed,” that “much exercise of power depends on a social conditioning that seeks to conceal it,” that “the purposes for which power is being sought will often be extensively and thoughtfully hidden by artful misstatement,” and that, indeed, “neither those exercising [power] nor those subject to it need always be aware that it is being exerted.” Political theorist Steven Lukes similarly describes “power” as sometimes being “at work in ways that are hidden from the view of those subject to it and even of its possessors.” Power is, he argues, “more effective the less perceptible its workings to agents and observers alike.” Social psychologists have demonstrated countless ways that power is exercised over people’s behavior invisibly through “situation” and how those controlling the situation are, to that extent, invisibly powerful. Philosopher Anne Cudd writes about “oppression” resulting not only through visible harms, such as violence against an unarmed person, but also through actions that reinforce oppressive social norms. Such actions may not be intended to oppress, and it may even be virtually impossible for the actor to avoid reinforcing the oppressive social norm.

Writers from Karl Marx to John Stuart Mill agree that a society’s baseline power structure operates largely behind the realm of consciousness, profoundly shaping its ideas and morality. Antonio Gramsci, analyzing “the functions of social hegemony and political government,” similarly distinguished between “[t]he apparatus of state coercive power” and the purportedly “spontaneous’ consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental

80  Id. at 12.
81  Id. at 9.
82  Id. at 24.
84  As Stanley Milgram put it, “[t]he social psychology of [the twentieth] century reveals a major lesson: often it is not so much the kind of person a man is as the kind of situation in which he finds himself that determines how he will act.” STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 205 (1974). For overviews of that research and its implications, see Jon D. Hanson & David Yosifon, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, The Situation] and Jon D. Hanson & David Yosifon, The Situational Character: A Critical Realist Perspective on the Human Animal, 93 GEORGETOWN L.J. 1 (2004) [hereinafter Hanson & Yosifon, The Situational Character].
86  See Mansbridge, supra note 70, at 4 (quoting Marx, “The ruling ideas of each age have ever been the ideas of the ruling class,” and Mill, “Wherever there is an ascendant class, a larger portion of the morality of the country emanates from its class interests”).
group.” Chicago-School economist George Stigler takes a similar view of the hidden power of corporate influence over administrative regulation—invisibly capturing the institution to transform it into a tool for its own ends, while allowing the uninformed polity to believe that the regulator serves the public interest.88

Even without adducing similar evidence regarding the psychological, interpersonal, and structural mechanisms for rendering inequality and suffering invisible and for creating false perceptions of legitimacy, those texts confirm our claim that actual injustices may not correspond with perceived injustices.89 If, however, injustice involves a felt sense, then one might ask how there can be a gap between real and perceived injustice. Viewed through our framework, the question of actual injustice is a normative and empirical question regarding whether causal agents are employing power to encourage inequalities or suffering without (normative) legitimacy.90 If no such imbalance exists—if the legitimacy is sufficient to cover the inequalities and the exercise of power that created them—then there is no actual injustice. If, however, such an imbalance among power, inequality, and legitimacy is present, whether perceived or not, then there would be actual injustice. Thus, while the perceived relationship between those three considerations contributes to whether people tend to perceive injustice, those perceptions are not necessarily veridical: the existence of injustice and its constituent elements does not depend on their perception.

Indeed, illusions of justice or injustice can thrive in the breach between the perceived and the real. For example, there may be harms for which actual injustice (that is, where power is producing the harm without legitimacy) is not sensed. By the same token, there may be instances when injustice is readily perceived—perhaps because humans are especially prone to see it. The trope of the highway robber, or soldier with a gun, or a brutalizing police officer make for obvious and prototypical examples. More generally, perceived group-based acts or threats by a dispositionalized outgroup of “them” toward a situationalized ingroup of “us”—including, their threats to our possessions, our status, our way of life, our credibility, and our worldviews—tend to catalyze injustice dissonance within the ingroup; such threats satisfy the three components of injustice more or less automatically.91 That is another part of what Dale Miller is pointing to when he observes that “[c]ries of injustice from one’s peers are difficult to resist.”92 And it is part

88 See George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 3 (1971) (“A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”).
89 See supra text accompanying notes 48–52.
90 By “normative legitimacy” we mean to draw a contrast with perceived legitimacy, or what Richard Fallon calls “sociological” legitimacy. See supra note 50.
91 For more general support for the claims made in this paragraph, see Hanson & Yosifon, The Situation, supra note 84; Adam Benforado, Jon Hanson, & David Yosifon, Broken Scales: Obesity and Justice in America, 53 Emory L. J. 1645 (2004); Hanson & Hanson, supra note 48.
92 See supra text accompanying note 52.
of what Edmond Cahn is referring to when he argues that perceptions of injustice “prepare the human animal to resist attack.” Like all perceptions, the perception of injustice and its components is influenced by biases, motivations, ideological and cultural presumptions, and manipulation. Some perceptions of injustice are psychologically, culturally, and situationally primed and stick out while others blend in like water. As the following section describes, this all has implications for how justice tends to be pursued when the injustice itself is baked into the system.

Before turning to that, however, it may be helpful to distinguish our injustice framework from a more conventional theory of justice. Our framework is intended to help clarify key factors that contribute to a sense of injustice and thus forms the foundation of a deeper and more productive examination or conversation about justice, particularly in the legal context. With this framework, however, we neither purport fully to resolve the often-competing intuitions and perceptions about justice nor do we endeavor to generate ultimate answers to the justice questions that have long occupied moral and political philosophers or that animate advocates in today’s most polarizing policy debates. Our ambition with the injustice framework, again, is rather to disaggregate the bigger, often confused, debates and assertions about justice that occur or are avoided in legal and jurisprudential discourse into a set of more precise and tractable questions about which there might be—though need not be—greater potential consensus.

Like most legal frameworks, our injustice framework is capacious enough to incorporate conflicting views. To take one example, Supreme Court jurisprudence regarding the standard for whether a restriction on abortion is unconstitutional asks whether it imposes an “undue burden” on “a woman seeking an abortion.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 877 (plurality opinion). Of course, judicial views differ not only on whether that is the appropriate standard, but on how it should be applied in specific cases. Just as conflicting views can be articulated within the framework of that legal doctrine, our justice framework allows articulation of conflicting views about injustice.

In the abortion debate, for instance, there are (at least) two conflicting claims of injustice, each keenly felt. The “pro-life” side highlights the inequality between the mother and her unborn fetus, in which the former exerts greater power to deprive the latter of life. For many advocates there is no legitimate justification for such an exercise of harm-causing power (or only a narrow set of possible legitimating reasons). Some on the “pro-choice” side, in contrast, see abortion as nested within a larger injustice: longstanding, deep-rooted, and illegitimate inequalities. They see the right to choose, not only as key part of a general right to bodily autonomy, but also as a partial antidote to the patriarchal power dynamics behind that injustice. The same dynamic is in play for almost all of the most spirited and polarizing policy debates; indeed, they are spirited or polarizing precisely because each side perceives injustice in the other side’s position or behavior.

Our purpose here is not to produce clear answers, but to show that advocates on both sides of many legal and policy debates make injustice claims that are significantly informed by perceptions of power, inequality, and legitimacy. Still, we believe that understanding the implicit role of the injustice framework and its underlying elements in policy discourse can, by clarifying the issues, help to resolve some of those debates. It reveals how even those who are not explicitly employing the norm of justice may nonetheless be appealing to it and calls upon anyone who is appealing to that norm to interrogate its components carefully and critically. That is, a true and genuine commitment to advancing justice requires an open and concerted commitment to making veridical assessments of those elements. See infra text accompanying notes 771–777.
The goal of pursuing justice, as we have defined it, can be understood as that of preempting, eliminating, or lessening injustice and its consequences. To promote a just outcome then, is to ensure that no power or suffering exceeds what is legitimate given the causal agent’s relative power and the inequality or suffering to which the causal agent contributes. That might be achieved, for instance, by creating a balanced relationship between power, inequality, and legitimacy and by preventing, compensating, or repairing the consequences of injustice. The pursuit of justice can occur in many ways and in many places. It might happen through interpersonal communication, a strongly worded op-ed, a social media campaign, or physical force. Of course, the legal system—the justice system—purports to wield monopoly power over who, how, when, and whether particular claims of injustice can be made and, if so, how they can be vindicated. The legal system recognizes and responds, however, only to a subset of the perceived injustices that transpire within society. Worse, as evident from history or any thorough account of our system today, there are many deep-seated injustices—systemic injustices—that the laws and legal system have facilitated, co-created, or even mandated. The focus in most of the rest of this Article will be on those sorts of deep-seated or systemic injustices. There is, in our view, a lot to learn about the cultural meaning of justice by examining how those fighting against injustice approach challenges outside of the language, categories, and processes of law.

This subsection offers a few brief observations on the strategies of prominent and influential efforts to advance justice. Justice-oriented social activism and movements typically build upon the emotional and transcendent effects of perceiving injustice and seek to promote perceptions of injustice by highlighting or exposing one or more of the three elements of the injustice framework introduced above. There are thus three characteristic “moves” available to those seeking to highlight or activate injustice dissonance, corresponding to the three elements.

The first move is to reveal power: that is, to render the causal agent’s power (or its causal connection to a given outcome or behavior) more conspicuous. This can take many forms. An activist or justice-seeker might challenge culturally dominant causal narratives, perhaps by describing an outcome from the perspective of individuals and groups who have been harmed and from whose point of view subtle power dynamics may be more evident. They might draw analogies and comparisons to other outcomes or practices where power is widely understood to play a significant causal role. They might denaturalize a common practice known to produce an inequality or harm in order to demonstrate its social contingency and, therefore, the role of choice, strategy, and design in its production. Or they might publicize

---

95 Or it may be to clarify and strengthen of the causal connection between the powerful causal agent and the inequality.
a particularly salient or egregious manifestation of power, or even provoke latent power into making itself more visible.

The second move is to highlight the inequality or harm: that is, to heighten the salience of the inequality or suffering produced by a causal agent employing power to advantage itself relative to others. Activists employing this move might render the inequality or harm more visible through photos, videos, or art. Or they might promote an emotional connection to the inequity or suffering through storytelling, closer proximity, or direct personal experience. They might recharacterize or redefine the relevant groups or parties in a way that allows inequalities between those groups to become legible, employing oppositions of capital and labor, Black and White, oppressor and oppressed, local and outsider, us and them, Catholic and Protestant, men and women, the 99% and the 1%, and so on.96

The third move is to challenge the legitimacy of the outcome: that is, to undermine the normative basis of the inequality or suffering or the exercise of power that produced them. An inequality or harm to a group or individual, even one brought about by power, may be described as legitimate (and therefore just) if it is the product of an appropriate process, or in line with an honored tradition or controlling precedent, or justified through a particular kind of reasoning process or appeals to certain authorities, or if the parties involved have meaningfully consented to the outcome. The third move can be pursued, therefore, by interrogating and criticizing the legitimating foundation of a given outcome—by, for instance, revealing bias in the process, identifying an equally controlling, but contradictory, precedent, questioning the authority’s right to govern or decide, or showing that the outcome was actually non-consensual.

Employing any of those three moves—(1) revealing power, (2) highlighting inequality, or (3) challenging legitimacy—can promote injustice dissonance. In practice, those challenging a given outcome or allocation as unjust often pursue all three strategies, arguing that a given outcome manifests a significant inequality or harm, brought about by power, without legitimacy. To illustrate and begin to validate that understanding of justice and injustice, Part II reviews a sample of historically significant texts—prominent manifestos, a legal opinion, and speeches—that are widely associated with major justice-advancing social movements.

96 Group categorizations also can link to the other elements in the injustice framework, as the very creation of the group classifications often facilitates automatic, motivated, and manipulable identity group biases, stereotypes, and prejudices that connect to presumptions regarding power and legitimacy. See Hanson & Yosifon, The Situational Character, supra note 84, at 54–58, 108; see generally Hanson & Hanson, supra note 48; Ronald Chen & Jon Hanson, Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory 77 S. CAL. L. REV. 1103 (2004).
II. JUSTICE OCCUPIED: SEVEN ICONIC TEXTS RESISTING INJUSTICE

The nominal goal of this section is to examine seven movement-making texts through the lens of the injustice framework to ascertain the extent to which each validates that model. If our conception of justice and our injustice framework have any purchase, they should be able to illuminate the goals, strategies, and effects of those iconic documents.

And they do. This section illustrates how all of the texts spotlight injustice by demonstrating an unjust imbalance among the three elements of power, inequality, and legitimacy. More specifically, the authors all employ versions of the three characteristic moves identified above: revealing power, highlighting suffering or inequality, and challenging the legitimacy of that power or its harmful outcome. In the process, each helps to overcome the problem of invisible injustice as a means to advancing justice.

This Part thus solidifies our thesis that terms like justice and injustice do indeed have meaning, not located in a dictionary but in the usage-based connotations as manifested within iconic documents known in part for their role in naming and challenging injustice and advancing justice.

To be clear, we come to this project with a more ambitious aim. This effort to make sense of justice as political and legal norm and to examine iconic justice-related movements, reflects a larger and longer-term goal of offering insight into the insidious structures that have contributed to the longevity of our society's most profound systemic injustices, notwithstanding our cultural commitment to justice.

A. "Declaration of Independence"—International Injustice

1. Context

The Declaration of Independence, drafted primarily by Thomas Jefferson, articulates some of the highest and noblest aspirations of the United States and, in the process, reflected and initiated many of the nation’s deepest and darkest hypocrisies.97

The document is best known for declaring the thirteen colonies’ independence from Great Britain and for asserting American self-sovereignty. Nearly fifty years after it was signed, John Quincy Adams described the Declaration as the document through which “[a] nation was born in a day.”98

97 See infra notes 141–144 and accompanying text.
98 See JOHN QUINCY ADAMS, AN ADDRESS DELIVERED AT THE REQUEST OF THE COMMITTEE OF ARRANGEMENTS FOR CELEBRATING THE ANNIVERSARY OF INDEPENDENCE AT THE CITY OF WASHINGTON ON THE FOURTH OF JULY 1821, UPON THE OCCASION OF READING THE DECLARATION OF INDEPENDENCE 23 (Cambridge, Univ. Press, 1821) (stating that “the people of North America” were “imploring justice and mercy from an inexorable master in another hemisphere” like “children appealing in vain to the sympathies of a heartless mother,” up until they signed the Declaration of Independence. It was at that point that they became “a nation, asserting as of right, and maintaining by war, its own existence.”).
However, the body of the document is not concerned with asserting nationhood as much as it is with justifying the new union’s secession from Britain. By framing and enumerating the many injustices of British rule, the document is, in a sense, a declaration of international injustice. This section defends that claim by reviewing different parts of the Declaration through the lens of the injustice framework.

2. Text

The Declaration of Independence opens as follows:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.99

Viewed through our injustice framework, that sentence does a lot of work. It announces the general purpose of the document and establishes two groups: the colonists, described as “one people,” and the British, distinguished from the colonists, as “another.” Then, more subtly, the sentence insists that nothing more than “political bands” had connected the ingroup and outgroup. This binary establishes a convenient boundary upon which the balance of the argument for independence is premised.

The sentence also suggests a normative baseline of equality (and thus a presumption against unequal treatment) for all peoples,100 a norm reiterated later in the Preamble.101 Inequality is thus an indicator of injustice; the presence of unequal treatment between relevant groups, 102 that is, raises questions about the source and legitimacy of that inequality.

99 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
100 That is, an “equal station to which the Laws of Nature and of Nature’s God entitle” all peoples. Id.
101 See THE DECLARATION OF INDEPENDENCE, supra note 99, at para 2.i.
102 To be sure, the norm of equality for all peoples did not include all people and, as others have detailed, shared racism among the founders and colonies was a key ingredient in galvanizing the colonists—providing them “common cause”—and making the Declaration of Independence and Revolution possible. Historian Robert Parkinson recently summarized the argument this way:

[The men who orchestrated the creation of the United States justified that new nation by excluding some people they thought unworthy. The so-called “founders” might have believed that all men were created equal, but they also arranged things so the United States would not belong to everyone. Believing unity to be the highest priority, they traded away equality to secure the union. From its first inception, the exclusion of African Americans and Native peoples was what allowed the states to be and stay united. Since that new republic would be one based on citizenship—a form of political belonging that acts much like a club, where the members get to decide who’s included and who’s not—the argument that some people didn’t belong as Americans would endure after the Revolution. Whether they intended to do so or
The last portion of the first sentence announces that the document will take the form of an argument and an explanation—a declaration of “causes which impel” the colonists to separate from the British.\textsuperscript{103} It thus introduces the document as a reason- and reasoning-based public justification of the extraordinary dissolution between the colonists and British. Promising to detail the justifications of separation, the signers were thus claiming to be motivated by elevated ends born of Enlightenment ideals of reason and progress. They were not, as their critics might claim, moved by selfish interests, rank opportunism, ungrateful resentments, or misplaced anger.\textsuperscript{104} By stating their case for separation persuasively, the signers also hoped to embolden their fellow colonists and appeal to other nations with whom they hoped to ally.\textsuperscript{105}

The opening sentence also introduces a notion, implied throughout the document, that the revolution is imposed on, not chosen by, us.\textsuperscript{106} The dissolution is “necessary.” It is the inescapable result of “causes” and the sacred norms and obligations of the “Laws of Nature and of Nature’s God.”\textsuperscript{107} The propellants to revolution were thus bigger than a passing moment or even an extended dispute between the colonists and their oppressors. Introducing abstract principles and claims to higher laws, the opening sentence launches an appeal to a shared sense of injustice and inevitability that would justify the radical actions and consequences—including blood, death, and trauma—that the revolutionaries were initiating.\textsuperscript{108}

not, through the stories they sponsored, the words they used, and the statements they made, those founders buried prejudice deep in the cornerstone of the new American republic in 1776. There it remains.

\textbf{ROBERT G. PARKINSON, THIRTEEN CLOCKS: HOW RACE UNITED THE COLONIES AND MADE THE DECLARATION OF INDEPENDENCE 2–3 (2021); see also GERALD HORNE, THE COUNTER-REVOLUTION OF 1776 SLAVE RESISTANCE AND THE ORIGINS OF THE UNITED STATES OF AMERICA passim (2016) (arguing that the protection and maintenance of slavery was a fundamental cause of the American Revolution).}

\textsuperscript{103} See supra text accompanying note 99.

\textsuperscript{104} Id.; see also DANIELLE S. ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY 92 (2014) (observing that “the signers indicate that they will declare the reasons for their actions: . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation”).

\textsuperscript{105} Cf. Id. at 96 (explaining that the signers sought the approval and support of “all the colonies,” “the world,” and “God” or “the Supreme Judge of the world”).

\textsuperscript{106} Indeed, Jefferson employed the passive voice in his description of “the causes which impel them to the separation,” to suggest the colonists’ lack of agency in the events leading to the dissolution of ties between them and the British. Cf. Silvia Knobloch-Westerwick & Laramee D. Taylor, The Blame Game: Elements of Causal Attribution and its Impact on Siding with Agents in the News, 35 COMM’N RSCH. 723 (2008) (suggesting that agents associated with negative events typically aim to downplay or deflect their responsibility by putting the blame for the situation on someone else).

\textsuperscript{107} See supra text accompanying note 99.

\textsuperscript{108} Danielle Allen argues, in effect, that the Declaration was premised upon the assumption that all people have an ability to recognize injustice and a desire to eliminate injustice, though she uses the term “fairness”:

Our capacity to judge how things are going includes the ability to discern whether someone is causing others harm or depriving them of liberty. In other words, all people have a sense of fairness that makes it possible for them to be reasonable
Although the Declaration’s introduction never employs the labels of “injustice” or “justice,” it does activate injustice dissonance by emphasizing the pertinent elements of the injustice framework—Great Britain employing its power to harm the colonists without legitimacy. Revealingly, it also echoes and draws from a previous document, co-authored by Jefferson: the introduction of the “Declaration of the Causes and Necessity of Taking Up Arms.” In that Declaration, the label “justice” was explicit. It stressed, for instance, that those “called to this great decision” should “be assured that their cause is approved before supreme reason; so is it of great avail that its justice be made known to the world.”

The colonists decided to deal with the world by presuming it to be populated with fair judges and by making their case to those fair judges. They could presume this because they believed that nature had given all human beings an innate sense of fairness, which, though it perhaps lay dormant sometimes, could nonetheless be activated by spelling out the terms on which fair judgments are made. It could be activated with explanations of principle.

ALLEN, supra note 104, at 141–42.


Declaration of the Causes, supra note 109, at 92 (emphasis added). That sentence was later edited, likely by Jefferson’s co-author John Dickinson, to the following: “we esteem ourselves bound, by obligations of respect to the rest of the world, to make known the justice of our cause.” ALLEN, supra note 104, at 51 (emphasis added) (quoting the sentence). “The Declaration of the Causes and Necessity of Taking Up Arms” was one of several statements that Congress promulgated to rationalize the need for armed resistance against the British. Editorial Note: Declaration of the Causes and Necessity for Taking Up Arms, NAT’L ARCHIVES: FOUNDER’S ONLINE, https://founders.archives.gov/documents/Jefferson/01-01-02-0113-0001 [https://perma.cc/99PL-TQH2]. By the time that it was issued, the British Parliament had passed the Intolerable Acts, delegates from all thirteen colonies had drafted a formal petition outlining their grievances against King George III, the Continental Army had been created, and the American Revolutionary War had begun. See Continental Congress, 1774-1781, DEPT. OF STATE OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1776-1783/continental-congress [https://perma.cc/E3TF-AU9A] (outlining the work of the Continental Congress during the years 1774-1781). “The Declaration of the Causes and Necessity of Taking Up Arms,” drafted in June 1775, reflected the co-authors’ collective desire for reconciliation with the British, like the Olive Branch Petition that was sent to the King in July 1775. See ALLEN, supra note 104, at 50–51 (explaining how Jefferson’s writing in the Declaration of the Causes and Necessity for Taking Up Arms was tamer than his prior writing) and id. (for the timeline of events around the Declaration of Independence). At the time of its issuance, colonists were divided on the question of independence. But, as warfare progressed, Thomas Paine laid out a convincing case for independence, and colonists started to realize that they might...
The Preamble of the Declaration of Independence, certainly the most celebrated and quoted section of the document, summarizes the principled basis upon which the extreme option of revolution was selected. Without mentioning the longstanding historical relationship between the colonies and the Crown, the Preamble offers a set of purportedly general and incontrovertible principles and values:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .111

By reiterating the norm of equality of “all men” and the means by which a government “instituted among Men” could wield “just powers,” the Preamble elevates the norms of the “consent of the governed” and the advancement of “unalienable rights” as essential to the government’s legitimacy.112

A government that wields its power without such consent or in ways that violate those rights is therefore committing an injustice. To the extent that “any Form of Government becomes destructive of those ends”—or unjust, meaning that the government deploys its power to produce inequalities or harms that lack legitimacy—the people’s obligation to obey it is attenuated.113 Of course, in practice, as the document acknowledges, “mankind are more disposed to suffer[ ] while evils are sufferable.”114 Or as Danielle Allen puts it, “people often do live with injustice and oppression for a long time.”115

Still, the blurry line separating justice and sustained injustice provides the normative threshold between a people’s obligation (and inclination) to either obey or overthrow their system of government. In the words of the Preamble: “[W]hen a long train of abuses and usurpations, pursuing invaria-

---

111 THE DECLARATION OF INDEPENDENCE, supra note 99, para. 2 (emphasis added).
112 See id.
113 To be sure, some minor and fleeting injustices must be tolerated, the Preamble acknowledges, but when a government persists in illegitimately deploying its power to produce inequalities and harm to the people, that obligation is voided. See id. (“Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.”).
114 Id.
115 ALLEN, supra note 6, at 194.
by the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.\textsuperscript{116} The "long train of abuses" is thus taken as evidence of an intention, or "design,"\textsuperscript{117} of the existing governmental powers to harm the people. Such "absolute Despotism"\textsuperscript{118} is succinctly contrasted with legitimate governmental actors whose ends must be "to secure" "unalienable Rights,"\textsuperscript{119} and whose means must include "the consent of the governed."\textsuperscript{120} Governments that routinely fall afoul of these substantive and procedural tests, by implication, produce injustices that trigger the people’s anger and activate their right and duty to revolt and overthrow such an unjust government.

The Preamble thus begins by establishing a general standard, applicable to all governments, for identifying injustice and justifying revolutions. With that norm established, the Preamble asserts that the standard had been more than met in this case; "the necessity which constrains [these Colonies] to alter their former Systems of Government" has been produced.\textsuperscript{121} Specifically, the conclusion of the Preamble presents the following factual claim matching the abstract norm of injustice, which the later portion of the document elaborates: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." This frame, again, is the injustice frame: a powerful, corrupt causal agent (King George III) is harming the States (through "repeated injuries and usurpations"\textsuperscript{122}) without legitimacy (in the form of "an absolute Tyranny"\textsuperscript{123}).

In the next portion of the document, sometimes known as the "indictment of George III" or the "list of grievances," the Declaration offers a list of specific complaints as "Facts [to] be submitted to a candid world."\textsuperscript{124} Every one of the 27 complaints articulates a specific injustice; each describes how the exercise of power has been deployed to produce an inequality or harm without legitimacy. The following sample of five grievances is illustrative:

\begin{itemize}
  \item "[King George III] has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."\textsuperscript{125}
  \item "[He has] impos[ed] Taxes on us without our Consent."\textsuperscript{126}
\end{itemize}

\textsuperscript{116} The Declaration of Independence, supra note 99, para. 2; see also infra note 451 (Martin Luther King, Jr. making a similar case for direct action and civil disobedience).
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at para. 12 (the tenth grievance listed).
\textsuperscript{126} Id. at para. 19 (the seventeenth grievance listed).
“[He has] taken away our Charters, abolished our most valuable Laws, and altered fundamentally the Forms of our Governments.”

“[He has] suspended our own Legislatures, and declared themselves invested with power to legislate for us in all cases whatsoever.”

“He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.”

In short, the King has, again and again, deployed his power to harm us without legitimacy.

The list of grievances—the “long train of abuses and usurpations”—helps make the injustice visible, making plain the source of the colonist’s anger with and disdain for the British monarch and government.

The list finishes by highlighting the apparently deliberate procedural design by which the bad and tyrannical “him” has oppressed the good and humble “us”:

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Pointing to repeatedly “unanswered” “Petitions for Redress” underscored the futility of available options. The two arguments taken together—that is, significant, sustained injustices plus the unavailability of alternative remedies—establish the necessity of revolution.

The Declaration’s conclusion extends the accusation of injustice beyond King George III, to the British people from whom the colonies were also separating. It points out the number and content of the colonists’ attempts to call upon them for support in standing up against the tyranny of the crown:

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by

127 Id. at para. 23 (the twenty-first grievance listed).
128 Id. at para. 24 (the twenty-second grievance listed).
129 Id. at para. 26 (the twenty-fourth grievance listed).
130 The final grievance reads: “He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.” Id. at para. 29 (the twenty-seventh grievance listed). Robert Parkinson argues that the document’s final grievance manifested and manipulated the prejudices built into the minds of the colonists and the fabric of the founding. See supra note 102; see generally Parkinson, supra note 102, passim. That grievance not only heightened the fear of insurrection, thus strengthening the unifying bonds among colonists, it clarified that the “we” in “we the people” excluded the enslaved (or “domestics”) and native peoples. See The Declaration of Independence, supra note 99, at para. 29 (the twenty-seventh grievance listed).
131 Id. at para. 2.
132 Id. at para. 30 (conclusion of the list of grievances).
their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice . . . , and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. 133

Here the label of “justice” is explicit. Those who might have been allies—part of “us” as “consanguin[eous]” “brethren” and fellow subordinates to the King—have opted to be enemies. 134 The Declaration thereby frames the British people’s inaction as complicity and betrayal. Even if the King was the primary enemy and cause of the injustice, the British people’s indifference to that injustice legitimized the end of political kinship and ties between the two groups.

So, after detailing the injustices at the heart of their revolutionary movement, the Declaration arrives at its ultimate destination:

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; . . . . And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor. 135

This concluding section serves several ends. It attempts to establish the document and its signers as legitimate. The document is not simply an assertion of right by a small group of prominent power-hungry individuals. It is rather manifestation of a consent-based institution (the “Representatives” in the “General Congress”) and process on behalf of the “the good People” of “the united States of America.” Furthermore, echoing the introduction, the document ends by emphasizing a final time the “them” versus “us” relationship, proclaiming a robust disunion with the unjust “them,” and an unbreakable union among “ourselves” in pursuit of justice.

* * *

This section has argued that the Declaration of Independence is consistent with the injustice framework and reflects an attempt to advance justice by focusing on the elimination of injustice. The Declaration confronts the challenge of justifying a rebellious exertion of power and military force, an

133 Id. at para. 32 (emphasis added).
134 Id.
135 Id.
act which, by definition, violates the existing government’s duties and standards of justice. The declaration acknowledges this burden—the requirement to “declare the causes”—and argues that the colonists’ actions are, in fact, just.

As the injustice framework suggests, the primary mechanism for arguing for the justice of rebellion is to decry the injustice of the status quo. And that argument for injustice is made over the terrain of power, inequality, and legitimacy. The Declaration describes the revolution as a conflict between two unequal sides: the unjustly powerful King, Parliament, and British, and the unjustly powerless colonists. The Declaration eschews the more obvious groupings of King and subjects, instead including the “British brethren” with the King. This defines a new inequality between two groups who should be similarly situated on either side of the Atlantic. The import of this inequality is only amplified by the stirring claim that “[a]ll men are created equal.”

Having defined the groups, the Declaration reveals an exercise of power—the “long train of abuses and usurpations”—that created the harm and inequality between them. Finally, the Declaration defines a new basis of legitimacy for governmental power, “the consent of the governed,” providing a test by King George can be shown to have failed, and still standing as the most prominent articulation of this longstanding standard of legitimacy.

To be clear, the point of this section is not to suggest that the Declaration of Independence succeeded in achieving its high-minded aspirations. If anything, the Declaration exposes the deep hypocrisies of privileged founders “overlooking” and reifying profound injustices as they claimed to abhor all injustice. Others would use Jefferson’s Enlightenment-based claims

136 Id. at para. 1.
137 Id. at paras. 31–32.
138 Id. at para. 2.
139 Id.
140 Id.
141 Even when the Declaration was written, some people were not persuaded that a government could ever achieve the lofty goals pronounced by the founders. In 1776, The English philosopher and jurist Jeremy Bentham called the theory of government at the foundation of the Declaration of Independence “absurd and visionary.” JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 98 (2018).
142 See supra note 102; see also infra text accompanying notes 202–228.

In thinking about such hypocrisies, it may be worth expounding upon one revolutionary phrase contained in the Declaration of Independence, that “all men are created equal.” This proclaimed truth signals the founders’ rejection of the tradition-based systems of rigid social hierarchies determined by birth.

If John Locke was right that all men are born “of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another,” JOHN LOCKE, SECOND TREATISE ON GOVERNMENT ch. 2 § 4 (1690), https://www.gutenberg.org/files/7370/7370-h/7370-h.htm [https://perma.cc/MXE7-BPH5], then Aristotle’s question of how rule by some over others can be justified was ripe for consideration during the Revolutionary era. A monarch ruling over subjects did not square with the growing, Lockean, notion that a state’s authority depends upon the consent of the governed. The irreconcilable discrepancy between the “equality of men” and monarchy drove colonists to declare their independence.
2021] Occupy Justice 363

about the equality of “all men” against him, pointing out the obvious contradictions in his rhetoric. Property-owning White male colonists responded to injustices they perceived by claiming independence from the producers of injustice, all while disregarding the injustices their new government was institutionalizing. The signers boldly pursued justice for themselves but disregarded injustices they perpetrated on others. Put differently, they used their power to produce and maintain their advantages through laws and policies that unjustly produced group-based inequalities without legitimacy.

3. Post-Text

The notions of equality and consent raised inevitable questions about who would be equal and whose consent would count. As a preoccupation with liberation from the oppressions of arbitrary power emerged as a prime measure of justice, essentializing categories of race and sex hardened, defining who was entitled to justice and which hierarchies, inequalities, and harms counted as injustice.

In his famous pamphlet, Thomas Paine insists that “mankind [proceeds] originally [as] equals in the order of creation,” and that there can be “no truly natural or religious reason” to distinguish king from subjects. THOMAS PAINE, Common Sense: On the Origin and Design of Government in General, with Concise Remarks on the English Constitution, in THE WRITINGS OF THOMAS PAINE 1, 75 (Moncure D. Conway ed., New York, The Knickerbocker Press 1894). He goes so far as to describe the distinction between king and subjects as, “the most prosperous invention the Devil ever set on foot,” and a “manifest injustice.” Id. at 75, 79 (emphasis added). Paine describes those in the royal line of succession as, “[s]elected from the rest of mankind” without consent from those governed, having minds “early poisoned by importance,” and living in a world that materially differs from others so that they are “the most ignorant and unfit of any throughout the dominions.” Id. at 81–82. On a foundational level, Paine suggests that the monarch “makes against” peace by separating itself from the people. Id.

Though the founding fathers clearly rejected English tyranny, they still faced a set of predicaments as they pursued independence. They sought a means of justifying the revolution against unjust monarchical power, as well as the creation of a new government that was powerful enough to be effective but different enough from a monarchy to be just. They eagerly imbibed the social contract literature of the enlightenment, particularly in its Lockean rendition, as the key to this puzzle. And so it was that “consent of the governed” emerged as the touchstone of legitimate authority, as notions of social contract supplanted those of social status, as democratic norms emerged as a palatable substitute for feudal tyranny.

But the question remained: would the laws and structures of the new system be a means of achieving justice, insulating the vulnerable from the powerful and attenuating unjustified hierarchies, or would they reinforce injustice, enabling the advantage of the powerful over the vulnerable and enhancing unjustified hierarchies?

143 See supra notes 102 and infra Parts II(B) & II(C).

144 Jill Lepore, highlighting the contradictions inherent in the founders’ proclamation of independence, calls the Declaration “a stunning rhetorical feat, an act of extraordinary political courage,” but also a marker of “a colossal failure of political will, in holding back the tide of opposition to slavery by ignoring it, for the sake of a union that, in the end, could not and would not last.” LEPORE, supra note 141, at 99.

145 The contradictions inherent in the proclaimed notion of consent, the hierarchies solidified with the new nation, and the harms perpetuated by the founders were noted contemporaneously, including by Samuel Johnson, who wrote “How is it that we hear the loudest yelps for liberty among the drivers of negroes?” SAMUEL JOHNSON, TAXATION NO TYRANNY (1775), quoted in LEPORE, supra note 141, at 92.
Still, the Declaration of Independence, owing to its soaring rhetoric, its transcendent principles and promises, and, we would add, its normative standard of justice, has served as a tool for undermining the legitimacy of existing arrangements and exposing injustices. Indeed, many groups excluded at the time—including enslaved people, women, and indigenous peoples—have invoked the founding ideals to pursue their own freedom from oppression. As detailed below, several of the most influential movement-based writings of the next two centuries would, in some form or other, wield the Declaration of Independence as a weapon against injustice.

B. “Declaration of Rights and Sentiments”—Gender Injustice

1. Context

In 1775, shortly before Jefferson had composed his finest prose and helped to inspire a revolution in pursuit of justice on behalf of “all men,” Abigail Adams penned a letter to her husband, John Adams. In it, perhaps moved by the spirit of the times, she entreated John to “Remember the Ladies.” Their budding nation’s larger ideals of justice could not be realized, Abigail warned, without reforming the laws that already gave husbands “unlimited power.” A “new Code of Laws” must counteract the unfortunate truth that “all Men would be tyrants if they could.” Her argument was a specific instantiation of a more general concern that she shared with many of her generation—the problem of power. “I am more and more convinced,” she wrote on another occasion, “that Man is a dangerous creature, and that power whether vested in many or a few is ever grasping, and like the grave cries give, give.”

Abigail’s admonitions went unheeded, but her cause would eventually gain its movement three quarters of a century later in Seneca Falls, New York, home to the first convention of the women’s rights movement. Within a broader cultural zeitgeist of rebellion and revolution, 1848 was a watershed year for the women’s movement. That year, with sex-based

---

146 The Declaration of Independence, supra note 99, at para. 2.
148 Id.
149 Id.
150 Id.
153 In Europe, the year would become known as “the year of revolution” and marked widespread ferment and numerous successful attempts to subvert or oust monarchs, monarchy, and their feudal vestiges and structures, and to replace them with more democratic and liberal institutions. The changes tended to be somewhat leveling across classes, to give more voice and
power asymmetries in mind, Elizabeth Cady Stanton and a small group of like-minded women (including Lucretia Mott, the renowned minister and abolitionist154) planned the first woman’s rights convention in Seneca Falls, vote to a wider swath of the population, and to build upon nationalistic, liberal political identities. The contagion of revolution would, soon enough, be met with a contagion of division, backlash, and crackdowns—a pendulum that has been swinging to and fro, at least since the French Revolution. But the successes of 1848, even if nominally short-lived, again suggested the potential for revolution to change political systems, alter social hierarchies, and to reallocate power. Those occupying the lower echelons of society, who might otherwise have perceived their situation as fixed, were more likely to construe their status as contingent and subject to change, assuming they could find ways to unite and resist existing structures. See generally DAVID M. POTTER & DON E. PEHRENBRACHER, THE IMPENDING CRISIS: AMERICA BEFORE THE CIVIL WAR: 1848–1861 (1976); Bonnie S. Anderson, The Lid Comes Off: International Radical Feminism and the Revolutions of 1848, 10 NAT’L WOMEN’S STUD. ASS’N. J. 1 (1998) (exploring the connection between revolutions in Europe with the women’s movements of France, the German states, and the United States in the year 1848). The larger experiment underway in the U.S., and its revolutionary origins and partial rejection of class and traditional, qualities that had only recently been described for a western audience by Tocqueville, added to the legitimacy of such undertakings. See generally ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835).

During that time, still more radical political ideologies were taking shape—those calling for empowerment beyond national boundaries and for abandoning liberal ideals of individualism and capitalism as part of the problem. Indeed, 1848 was the year that Karl Marx and Friedrich Engels published The Communist Manifesto, which summarized “[t]he history of all hitherto existing society is the history of class struggles,” and called for the “forcible overthrow of all existing social conditions” that produce those classes and the resultant struggles. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 9, 46 (Samuel H. Beer ed., Appleton-Century-Crofts, Inc. 1955) (1848).

Abolitionism, which had been gaining momentum in the North and internationally during this period, probably did most to nurture and inspire the women’s rights movement in the U.S. In their anti-slavery fight, many women came to perceive their own social fetters. That is where they learned to recognize and dissect the relationship of power to laws, customs, and ideologies. That is where they experienced the comfort of solidarity, developed theories of change, and witnessed the effect of collective action and agitation. Through that praxis, women would sometimes gain a public voice, a public audience, and a public role. As three of its leaders would later describe:

[above all other causes of the ‘Woman Suffrage Movement,’ was the Anti-Slavery struggle in this country. . . . In the early Anti-Slavery conventions, the broad principles of human rights were so exhaustively discussed, justice, liberty, and equality, so clearly taught, that the women who crowded to listen, readily learned the lesson of freedom for themselves, and early began to take part in the debates and business affairs of all associations.]

The History of Woman Suffrage, 1848–1861, at 52 (Susan B. Anthony et al. eds., 2d ed. 1889).

The fires of discontent were quite active in the western reaches of New York state, where numerous reform movements were underway—abolition, racial justice, educational reform, labor reform, moral reform, vegetarianism, temperance, Indian rights, women’s rights and suffrage—and where the revivals of the Second Great Awakening catalyzed reformers’ zeal even more. See Judith Wellman, The Road to Seneca Falls: Elizabeth Cady Stanton and the First Woman’s Rights Convention chs. 2–5 (2004).

154 See generally Carol Faulkner, Lucretia Mott’s Heresy: Abolition and Women’s Rights in Nineteenth-Century America (2011) (describing Mott’s important role as an abolitionist and women’s rights advocate, her activism and participation in nearly every nineteenth-century reform effort, her understanding of all forms of oppression as related, and her radical and often heretical views on religion).
New York.\textsuperscript{155} Three hundred women and men\textsuperscript{156} attended the two-day event.\textsuperscript{157} It was the first of many women’s rights conventions and the birth of what would, waves later, be dubbed “first-wave feminism.”\textsuperscript{158}

Stanton was, by many measures, the chief visionary behind the first convention. At the convention, she made several major presentations and emerged as the movement’s lead architect and most compelling orator. On the morning of the first day,\textsuperscript{159} she presented the document, “The Declaration of Rights and Sentiments,” that she had primarily authored and that she and her co-organizers hoped would establish and orient the movement. She began her remarks by confessing her nervousness and noting that she had “never before spoken in public,”\textsuperscript{160} drawing attention to the traditional gender boundaries against which her remarks would take aim.

Stanton justified her deviation from the strictures of “true womanhood”\textsuperscript{161} with an appeal to a sense of injustice.\textsuperscript{162} In her opening remarks, she

\begin{itemize}
\item[155] Stanton and Mott first met at the World Anti-Slavery Convention in London in 1840. Nancy A. Hewitt, \textit{From Seneca Falls to Suffrage? Reimagining a “Master” Narrative in U.S. Women’s History, in \textit{No Permanent Waves: Recasting Histories of U.S. Feminism} 15, 17} (Nancy A. Hewitt ed., 2019). They came together again in 1848 for the now famous Waterloo Tea Party, where they coordinated plans for the convention. \textit{Id.} The other women who helped to organize the convention, Jane Hunt, Mary Ann and Elizabeth McClintock, and Martha Wright (Mott’s sister), were all Quakers and had been active in the abolitionist movement with Mott. \textit{Id.}
\item[156] \textit{WELLMAN, supra note 153, at 201.}
\item[157] The event took place on July 19–20, 1848. \textit{See id. at 189.}
\item[159] Originally, the first day was supposed to include only women, with men joining on the second day. Jone Johnson Lewis, \textit{A History of the Seneca Falls 1848 Women’s Rights Convention, ThoughtCO} (Mar. 11, 2019), \url{https://www.thoughtco.com/seneca-falls-womens-rights-convention-3530488} at the conference, however, the women decided to admit men on the first day, but not to allow them to speak until the second. \textit{See id.} (“Forty of the participants at Seneca Falls were men, and the women quickly made the decision to allow them to participate fully, asking them only to be silent on the first day which had been meant to be ‘exclusively’ for women.”).
\item[161] Hers had been conventional middle-class life; her father was a prominent conservative lawyer; her maternal grandfather had been a hero of the American Revolution. Ginzberg describes her childhood as follows:
\item[162] “Her parents, Daniel and Margaret Livingston Cady, were devoted to family, tradition, and the Federalist Party. They were strict and stodgy, and their children were raised according to old-fashioned norms of childhood, religion, class—and, especially, gender. Church, school, and family taught only ‘that everlasting no! no! no!’ and conspired to enforce “the constant cribbing and crippling of a child’s life.” It struck the young Elizabeth Cady that “everything we like to do is a sin, and . . . everything we dis-like is commanded by God or someone on earth.”
\end{itemize}
called upon each woman in the audience to “understand the height, the depth, the length, and the breadth of her own degradation.”\textsuperscript{163} She emphasized that “the time had fully come for . . . woman’s wrongs to be laid before the public,” and, given those wrongs, Stanton believed she had both the “right and [the] duty” to speak up.\textsuperscript{164} And so she did. In a deliberate echo of Jeffersonian rhetoric and reasoning, she read aloud her own “Declaration of Rights and Sentiments.”\textsuperscript{165}

2. Text

Stanton’s strategy in drafting the Declaration was to refer back to the Declaration of Independence and highlight its principles and arguments to underscore the degree to which these promises remained unfulfilled. She affirmed the inalienable rights named by the founders, while simultaneously demonstrating how those rights were denied to most of the population.\textsuperscript{166}

By carefully mimicking Jefferson’s injustice-exposing language, Stanton managed simultaneously to endorse the founders’ rhetoric and to turn its words against those who would unjustly limit their application. She led her audience through very familiar terrain, only to help them discover altogether new dimensions (and applications to new groups).\textsuperscript{167} To appreciate those effects, it is helpful to read the document’s opening paragraphs:

\begin{quote}
When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident; that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed.
\end{quote}

\textsuperscript{163} LORI D. GINZBERG, ELIZABETH CADY STANTON: AN AMERICAN LIFE 15 (2011) (citation omitted). By 1848, she was married, with three sons, and four more children still to come. She had wanted to continue her education and go to college, but her father had prohibited it (and there were, at the time, no U.S. colleges at the time admitting women). \textit{See id.} at 11.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} Elizabeth Cady Stanton, \textit{Declaration of Sentiments}, U.S. National Park Service (July 19, 1848), \url{https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm} [https://perma.cc/5FVX-HFUS].

\textsuperscript{166} \textit{See id.} She thus employed a general strategy developed by abolitionists and that, as noted below, Frederick Douglass took to new heights in his compelling 4th of July speech. \textit{See infra} text accompanying notes 184–226.

\textsuperscript{167} \textit{See supra} text accompanying notes 159–165.
these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.

Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves, by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.168 Abigail Adams would have cheered.

Because the parallels with Jefferson’s Declaration of Independence are evident, this section offers only a cursory and comparative re-application of the injustice model to Stanton’s Declaration of Right and Sentiments.

To begin, Stanton redefines the groups between which inequalities are identified. She shifts from colonists and King to “her” and “him.” While those group identities had changed and the particular inequalities and harms were different, the injustice frame was unchanged. Again, the former group had too long wielded illegitimate power over the latter, while the latter had neither meaningfully consented to the laws and customs behind its subjugation nor participated in the institutions and processes that contrived them. The unjust domination of one over the subjugated other represents, in form and function, “an absolute tyranny,”169 producing what has been “a history of repeated injuries and usurpations.”170 The later Declaration thus appropriates—word for word—the earlier document’s base of legitimacy, daring any listener who honors the one to ignore the other. Stanton’s clever revisions were as rousing as her message was clear: the laws and traditions of the United States were unjust. The system hypocritically promised inalienable rights to all but limited them to a select group in power, to whom the powerless were subservient.171

168 Stanton, supra note 165.
169 Id.
170 Id.
171 As Douglass wrote shortly after the convention:
Like Jefferson’s, Stanton’s declaration of injustice specifies a collection of particular grievances, each of which includes the basic components of injustice: power producing inequality or harm without legitimacy. Again, a sample of five illustrates the point.

- “He has never permitted her to exercise her inalienable right to the elective franchise.”
- “He has compelled her to submit to laws, in the formation of which she had no voice.”
- “He has made her, if married, in the eye of the law, civilly dead.”
- “[H]e has taxed her to support a government which recognizes her only when her property can be made profitable to it.”
- “He has endeavored, in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.”

The list of grievances likely humanized the oppression, heightening her audience’s emotional connection to the inequalities, highlighting how “he” has actively advantaged himself at “her” expense, and thus helping to unite and mobilize the audience against the perceived injustice.

3. Post-Text

The manifesto was well received that morning and would, by the end of the day, garner one hundred signatures. Despite the rhetorical force of applying an existing and accepted frame to a different inequality, Stanton was under no illusion that this “protest against . . . unjust laws” would receive general public acclaim. Their journey, that is, would not be “strewn with the flowers of popular applause”; instead, it would pass “over the thorns of bigotry and prejudice,” as they faced forceful opposition from those in power, “who have entrenched themselves behind the stormy” (and legitimat-

In respect to political rights, we hold woman to be justly entitled to all we claim for man. We go farther, and express our conviction that all political rights which it is expedient for man to exercise, it is equally so for women. All that distinguishes man as an intelligent and accountable being, is equally true of woman; and if that government is only just which governs by the free consent of the governed, there can be no reason in the world for denying to woman the exercise of the elective franchise, or a hand in making and administering the laws of the land. Our doctrine is, that “Right is of no sex.”


172 Stanton, supra note 165.
173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
178 See WELLMAN, supra note 153, at 201.
179 Stanton, supra note 165 (emphasis added).
ing) “bulwarks of custom and authority.” Put differently, Stanton understood that unjust norms and laws were themselves self-perpetuating: the powerful and privileged could and would maintain their advantages through the very legal and social mechanisms that they had illegitimately constructed. Her predictions were prescient. Indeed, after that first convention, Stanton reported:

[S]o pronounced was the popular voice against us . . . that most of the ladies who had attended the convention and signed the declaration, one by one, withdrew their names and influence and joined our persecutors. Our friends gave us the cold shoulder and felt themselves disgraced by the whole proceeding.181

The document set the foundation stone upon which feminism and the fight for women’s rights and gender justice have been constructed. Many of the goals that Stanton helped to name, and for which she continued to battle, have since been achieved. But not all of them. Nearly 175 years and multiple waves of feminism later, sex, gender, reproductive justice, and sexual identity remain among the intersecting dimensions of our society’s most stubborn injustices, “entrenched,” as they are, “behind the stormy bulwarks of custom and authority.”

180 Id.

181 ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE: REMINISCENCES 1815–1897 149 (1898).

182 Of the one hundred signatories, 68 were women and 32 were men. See WELLMAN, supra note 153, at 201; see also id. at 201–02 (explaining that historians “do not know why as many as two-thirds of the attenders did not sign.”). It may be illuminating to consider a few more details regarding Stanton’s remarks on that day. In the afternoon, Stanton delivered a keynote speech, which began, “We have met here today to discuss our rights and wrongs, civil and political.” Elizabeth Cady Stanton, Seneca Falls Keynote Address (July 19, 1848), https://susanbanthonyhouse.org/blog/wp-content/uploads/2017/07/Elizabeth-Cady-Stanton-Seneca-Falls-1848.pdf [https://perma.cc/4GDX-2CV6]. She went on to sketch some of the laws that privileged men and subjugated women, an oppressive system that operates without the consent of the oppressed:

[W]e are assembled to protest against a form of government existing without the consent of the governed—to declare our right to be free as man is free, to be represented in the government which we are taxed to support, to have such disgraceful laws as give man the power to chastise and imprison his wife, to take the wages which she earns, the property which she inherits, and, in case of separation, the children of her love; laws which make her the mere dependent on his bounty. Id. A government that produces such injustices—guaranteeing rights to some but denying them to others—is unworthy of allegiance. “It is to protest against such unjust laws as these,” Stanton told her audience, “that we are assembled today, and to have them, if possible, forever erased from our statute books, deeming them a shame and a disgrace to a Christian republic in the nineteenth century.” Id. (emphasis added).

183 See supra text accompanying note 180.
C. “What to the Slave Is the Fourth of July?”—Antebellum Racial Injustice

1. Context

Frederick Douglass was one of 32 men and the only African American to both attend the First Women’s Rights Convention in Seneca Falls and to sign the Declaration of Sentiments.\(^{184}\)

Elizabeth Cady Stanton had, in her opening speech, announced that “we [women] now demand our right to vote.”\(^{185}\) The approval with which that demand was first met faded when, later, she put the ninth resolution of her Declaration of Rights and Sentiments up for a vote: “Resolved, That it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise.”\(^{186}\) Although the body had readily and unanimously ratified every other resolution that Stanton proposed, this one was too radical for even these progressive women to endorse. As Lucretia Mott had warned Stanton, the demand risked making “the convention ridiculous.”\(^{187}\) At that critical moment, Frederick Douglass spoke up.\(^{188}\) With characteristic gravitas, he spoke in favor of women’s franchise: “In this denial of the right to participate in government, not merely the degradation of woman and the perpetuation of a great injustice happens, but the maiming and repudiation of one-half of the moral and intellectual power for the government of the world.”\(^{189}\) The resolution passed.\(^{190}\)

Shortly after the convention, in an issue of his abolitionist North Star, Douglass highlighted the main themes of the convention, which included the inherent equality of the sexes and the illegitimacy of existing power disparities that, in turn, yielded laws that reinforced those unjust disparities. He wrote:

In respect to political rights, we hold woman to be justly entitled to all we claim for man. We go farther, and express our conviction that all political rights which it is expedient for man to exercise, it is equally so for women. All that distinguishes man as an intelligent and accountable being, is equally true of woman; and if that government is only just which governs by the free consent of the governed, there can be no reason in the world for denying to woman the exercise of the elective franchise, or a hand in making

\(^{184}\) WELLMAN, supra note 153, at 201, 205.
\(^{185}\) Stanton, supra note 160.
\(^{186}\) Stanton, supra note 165.
\(^{187}\) WELLMAN, supra note 153, at 195.
\(^{188}\) See SALLY MCMILLEN, SENeca FALLS AND THE ORIGINS OF THE WOMEN’S RIGHTS MOVEMENT 93 (2008); WELLMAN, supra note 153, at 203.
\(^{190}\) WELLMAN, supra note 153, at 202–03.
and administering the laws of the land. Our doctrine is, that “Right is of no sex.”

At the 1888 International Council of Women, on the occasion of the 40th anniversary of the First Woman’s Rights Convention and the Declaration of Sentiments, Douglass spoke again on the topic of women’s rights. In echoes of Jefferson and Stanton, he spoke of the self-evident truth of woman’s inherent equality with man and her concomitant to inalienable rights: “Such a truth is woman’s right to equal liberty with man. She was born with it. It was hers before she comprehended it. It is inscribed upon all the powers and faculties of her soul, and no custom, law or usage can ever destroy it.” And he recalled the importance of his Seneca Falls speech in favor of women’s suffrage in his own evolution as an advocate of justice:

There are few facts in my humble history to which I look back with more satisfaction than to the fact, recorded in the history of the woman-suffrage movement, that I was sufficiently enlightened at that early day, and when only a few years from slavery, to support your resolution for woman suffrage. I have done very little in this world in which to glory except this one act—and I certainly glory in that. When I ran away from slavery, it was for myself; when I advocated emancipation, it was for my people; but when I stood up for the rights of woman, self was out of the question, and I found a little nobility in the act.

Douglass’s recollection thus captured the transcendence of the selfless motivation behind, and satisfaction of, the pursuit of justice.

Douglass’s 1848 experience at Seneca Falls may have helped inspire what was to become his most moving, important, and celebrated speech. Four years after the convention, Douglass was invited by the Ladies’ Anti-Slavery Society of Rochester, New York, to speak at a July 4 celebration, commemorating the very document whose contradictions he had watched Stanton so brilliantly expose. This was his turn to apply the same strategy—that is, to deploy the injustice framework—to expose an injustice.

---

191 Douglass, supra note 171 (emphasis added).
192 Douglass, supra note 158.
193 Id.
194 Id.
195 See supra text accompanying notes 36–45.
196 Cf. 2 Frederick Douglass, The Life and Writings of Frederick Douglass 39 (Philip S. Foner ed., 1975) (calling a portion of this speech “probably the most moving passage in all of Douglass’ speeches”); see also Top 10 Greatest Speeches: Frederick Douglass on The Hypocrisy of American Slavery, TIME, http://content.time.com/time/specials/packages/article/0,28804,1841228_1841749_1841739,00.html [https://perma.cc/8AYN-LMBU] (ranking this speech as one of the top 10 greatest speeches in history); Hillel Italie, Frederick Douglass’ July 4 Speeches Trace American History, ASSOCIATED PRESS (July 1, 2018), https://apnews.com/393ae428732c-4cf5905f3c3af01126d7 [https://perma.cc/JW5T-H95Z] (ranking this speech as “high in the canon of American oratory” and as “still widely cited as a corrective to [July 4th’s] celebratory spirit”).
197 See supra text accompanying notes 166–178.
On July 5th, 1852, Douglass opened his remarks by humbling himself, much as Stanton had done at Seneca Falls, reminding the “ladies and gentlemen” of the “considerable” “distance between this platform and the slave plantation, from which [he] escaped.”

Douglass then turned to crediting the “[t]he signers of the Declaration of Independence” as “statesmen, patriots and heroes” “for the good they did” and their “principles.” By invoking the iconic document and the celebrated founders, Douglass was creating a commonality with his audience and a shared foundation on which to build his subversive project. In particular, Douglass highlighted the founders’ sense of justice, and the priority they gave to that value:

Your fathers staked their lives, their fortunes, and their sacred honor, on the cause of their country. In their admiration of liberty, they lost sight of all other interests.

They were peace men; but they preferred revolution to peaceful submission to bondage. . . . With them, nothing was “settled” that was not right. With them, justice, liberty and humanity were “final”; not slavery and oppression.

With justice as his theme, Douglass’s first task was to redefine the group identities on which his argument would build—a project he had already implicitly begun. By referring to “your fathers, the fathers of this republic,” he was already highlighting the enormous and horrific lacunae in their achievements and previewing the profound racial injustices between “you,” his White audience and “I, or those I represent,” a Black former

---

198 See supra text accompanying note 160. He began: “He who could address this audience without a quailing sensation, has stronger nerves than I have. I do not remember ever to have appeared as a speaker before any assembly more shrinkingly, nor with greater distrust of my ability, than I do this day.” Frederick Douglass, The Meaning of July Fourth for the Negro (July 5, 1852) in DOUGLASS, supra note 196, at 181. He went on in that vein for paragraphs, referring to his “limited powers of speech,” describing his “astonishment” and “gratitude” for the opportunity. Id.

Perhaps Douglass hoped to highlight the racialized roles against which he was resisting. Or maybe he sought to reduce his audience’s defensiveness and heighten their receptivity to his criticism. Or perhaps he simply wanted to lower his audience’s expectations. In any event, he ended his windup this way:

You will not, therefore, be surprised, if in what I have to say I evince no elaborate preparation, nor grace my speech with any high sounding exordium. With little experience and with less learning, I have been able to throw my thoughts hastily and imperfectly together; and trusting to your patient and generous indulgence, I will proceed to lay them before you.

Id.

199 Id.
200 Id. at 186.
201 Id. (emphasis added).
202 Id. at 187.
203 Id. at 188.
slave and his people. Douglass drove home the message by using the word “you,” “your,” or “yours” roughly 200 times in the speech. One of his introductory paragraphs, for example, contained the following phrases: “the birthday of your National Independence and of your political freedom,” “your great deliverance,” “your national life,” and “your nation,” and “you are . . . only in the beginning of your national career.”204 With each use of the term, Douglass was drawing a line and drawing out a contrast and, more quietly, an injustice.

With those pieces in place, Douglass finally allowed his indignation to show, pausing to query:

Fellow-citizens, pardon me, allow me to ask, why am I called upon to speak here to-day? What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us? and am I, therefore, called upon to bring our humble offering to the national altar, and to confess the benefits and express devout gratitude for the blessings resulting from your independence to us?205

In those lines, injustice is laid bare in its most elemental form. You and I, your people and my people, you and us, we are not equal. That disparity between our groups—between the free and the enslaved—is maintained by power rendered illegitimate by the “great principles” articulated in the very document you ask me to celebrate. So, “why,” he asked, “am I . . . here?”206

Between groups so defined, Douglass thus brought into focus the enormous contradictions—and illegitimate inequalities—permeating the nation’s founding: the legal construction of race and slavery in the face of such grand talk of freedom and justice.207 Drawing out the hypocrisy of a celebration of justice and liberty in the face of continued injustice and slavery, Douglass highlighted how the entire experience underscored the immense inequalities between “your” circumstances and “mine.” He even wondered aloud whether his hosts were mocking him. Stressing the “sad sense of the disparity between us,” he explained:

I am not included within the pale of this glorious anniversary! Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common.—The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought life and healing to you, has brought stripes and death to me. This Fourth July is yours, not mine. You

204 Id. at 182 (emphasis added).
205 Id. at 188–89 (emphasis added).
206 Id. at 188.
207 See also supra note 102, notes 141–144, and infra text accompanying notes 205–226 (describing some of the designed contradictions of the Declaration of Independence).
2021] Occupy Justice 375

may rejoice, I must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony. Do you mean, citizens, to mock me, by asking me to speak to-day?208

Again, by emphasizing the persistent racial inequalities and their illegitimacy by the measure of the very document being commemorated, Douglass was highlighting the profound injustice that its celebration would only heighten. In essence, Douglass asked, “How can I celebrate your unjust system?”209

Douglass also took time to highlight the exercises of illegitimate power—such as unjust laws—that had created or exacerbated the group-based inequalities he was describing. He emphasized the barbarity of the Fugitive Slave Act, recently passed “[b]y an act of the American Congress,”210 and requiring citizens and officials of free states to capture and return runaway slaves. “[S]lavery,” he lamented, “has been nationalized in its most horrible and revolting form.”211 “For black men,” therefore, “there is neither law nor justice.”212 Douglass then sketched some of the mechanisms by which power achieved primacy in shaping the legal system’s unjust outcomes:

The oath of any two villains is sufficient, under this hell-black enactment, to send the most pious and exemplary black man into the remorseless jaws of slavery! His own testimony is nothing. He can bring no witnesses for himself. The minister of American jus-

208 Douglass, supra note 198, at 189 (emphasis added).
209 Douglass also made a clear distinction between his audience and their forefathers, telling them that
[y]our fathers have lived, died, and have done their work, and have done much of it well. You live and must die, and you must do your work. You have no right to enjoy a child’s share in the labor of your fathers, unless your children are to be blest by your labors. You have no right to wear out and waste the hard-earned fame of your fathers to cover your indolence.

Id. at 188. Instead, his audience members were participants in a parallel collection of injustices and enslavements that they so proudly honored their “fathers” for fighting and defeating, based on their “sublime faith in the great principles of justice and freedom.” Id. at 187 (emphasis added).

210 Id. at 195.
211 Id. In greater detail, Douglass described the legal system’s effects:
By that act, . . . the power to hold, hunt, and sell men, women and children, as slaves, remains no longer a mere state institution, but is now an institution of the whole United States. The power is co-extensive with the star-spangled banner, and American Christianity. Where these go, may also go the merciless slave-hunter. . . . Your broad republican domain is hunting ground for men. Not for thieves and robbers, enemies of society, merely, but for men guilty of no crime. Your law-makers have commanded all good citizens to engage in this hellish sport. Your President, your Secretary of State, your lords, nobles, and ecclesiastics enforce, as a duty you owe to your free and glorious country, and to your God, that you do this accursed thing. . . . For black men there is neither law nor justice, humanity nor religion. The Fugitive Slave Law makes mercy to them a crime; and bribes the judge who tries them.

Id. at 195–96 (emphasis added).
212 Id. at 196 (emphasis added and omitted).
tice is bound by the law to hear but one side; and that side is the side of the oppressor. Let this damning fact be perpetually told. Let it be thundered around the world that in tyrant-killing, king-hating, people-loving, democratic, Christian America the seats of justice are filled with judges who hold their offices under an open and palpable bribe, and are bound, in deciding the case of a man’s liberty, to hear only his accusers! In glaring violation of justice, in shameless disregard of the forms of administering law, in cunning arrangement to entrap the defenceless, and in diabolical intent this Fugitive Slave Law stands alone in the annals of tyrannical legislation.213

Those judges charged with administering “American justice” are themselves committing “glaring” injustice under law, Douglass insists, by employing their power illegitimately to reproduce oppressive inequality. Again, Douglass emphasized how power produces suffering without legitimacy, the elements of the injustice framework.

The invocation of “annals of tyrannical legislation,” so closely tracking the language of the Declaration of Independence, brings us to perhaps Douglass’s most effective argument: demonstrating the illegitimacy of the inequalities he was describing. He claimed for himself the declared words and deeds of the men he had been called to praise, and he used their own rhetoric against the very system they had constructed.

First, Douglass used the founding generation to demonstrate the legitimacy of challenging and overturning unjust arrangements and social hierarchies. He explained that the founders did not adopt the now “fashionable idea . . . of the infallibility of government, and the absolute character of its acts.”214 They were instead willing “to pronounce the measures of government unjust, unreasonable, and oppressive, and altogether such as ought not to be quietly submitted to.”215 Further, they had the courage to challenge the powerful interests who had a stake in the maintenance of the status quo, even when doing so posed a significant risk, “tried men’s souls,” and would stigmatize them as “plotters of mischief, agitators[,] rebels,” and “dangerous men.”216 It is daring to stand up to power by calling out injustice—to, in Douglass’s words, “side with the right against the wrong, with the weak against the strong, and with the oppressed against the oppressor!”217 But those men, he explained (while drawing on gendered stereotypes), possessed the “solid manhood”218 necessary to place larger interests above selfish interests:

213 Id. at 196 (emphasis added and omitted).
214 Id. at 183.
215 Id. (emphasis added).
216 Id. at 184.
217 Id.
218 Id. at 186.
They were peace men; but they preferred revolution to peaceful submission to bondage. They were quiet men; but they did not shrink from agitating against oppression. They showed forbearance; but that they knew its limits. They believed in order; but not in the order of tyranny. With them, nothing was "settled" that was not right. With them, justice, liberty and humanity were "final," not slavery and oppression. You may well cherish the memory of such men. They were great in their day and generation.219

Douglass’s praise helped him expose, not only the duplicity in the founding generation’s revolution, but also the unfavorable contrast with his own generation, which was failing to complete the founders’ unfinished project (or correct their inexcusable shortcomings).

To stir his contemporaries to action, he could now drive home the hypocrisy and activate injustice dissonance, all while relying on the very legitimating principles to which his audience declared their allegiance. In the crescendo of his speech—a high point of American oratory220—Douglass brought the injustice into its starkest relief by asking what July 4th, and all it commemorated, meant “to the American slave.”221 He answered:

A day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of these United States, at this very hour.222

219 Id. (emphasis added). Douglass continued:

Fully appreciating the hardship to be encountered, firmly believing in the right of their cause, honorably inviting the scrutiny of an on-looking world, reverently appealing to heaven to attest their sincerity, soundly comprehending the solemn responsibility they were about to assume, wisely measuring the terrible odds against them, your fathers, the fathers of this republic, did, most deliberately, under the inspiration of a glorious patriotism, and with a sublime faith in the great principles of justice and freedom, lay deep, the corner-stone of the national super-structure, which has risen and still rises in grandeur around you.

Id. at 187 (emphasis added).

220 See supra note 196.

221 Douglass, supra note 196, at 192.

222 Id. (emphasis added).
To Douglass, then, the injustice woven into the tapestry of this country was “glaring.” Neither Douglass nor the millions of slaves who still lived under the collective heel of tyrants, he pointed out, had been represented in the founding fathers’ fight for “justice, liberty and humanity”; nor had they gained an audible voice in the echelons of government that had taken shape since. “The freedom gained is yours,” he underscored, “and you, therefore, may properly celebrate this anniversary.”

3. Post-Text

To too many in power, injustice remained seemingly obscured behind the pretext of political ideologies, Christian platitudes, philosophical bromides, sacred documents, and system-affirming ceremonies. Douglass was among the many abolitionists tugging the threads of that tapestry, which would, within a few years, be rent by civil war. Despite the early promise of Reconstruction, with underlying power and knowledge structures still largely in place, powerful “White” interests continued to invent and adjust “race” and racial stereotypes to produce and justify racial inequalities that otherwise lacked legitimacy. Racial injustices would therefore return behind the facade of a rewoven fabric composed of White supremacist laws, sciences, religious ideologies, cultural scripts, and stereotypes, all unfolding within the interconnected collection of political, judicial, social, commercial, educational, religious, and journalistic institutions.

We will return to an (inadequate) effort to address some of these reformulated systems of racial inequality almost exactly a century after Douglass’s speech. First, however, we turn to an effort to address economic injustice, though one much criticized for its relationship to racial inequality.

D. New Deal Speeches—Economic Injustice

1. Context

The political era known as the New Deal is widely viewed as one of the two or three most transformative and egalitarian periods in U.S. history—in

---

223 See supra notes 102 & 141-144; see also A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: The Colonial Period 371 (1978) (“The success of the first Revolution in no way altered the degraded status of most [Black Americans], . . . [n]or did it free the more than half-million slaves in the colonies.”).

224 See supra text accompanying note 213.

225 Douglass, supra note 196, at 186.

226 Id. at 185.

227 See infra Part II(E).

228 To be clear, we do not consider racial injustice, gender injustice, and economic injustice (among numerous intersecting injustices) to be independent or fully separable. We also presume that attending to one while disregarding others often makes for normatively undesirable policies. Our focus on one dimension of injustice or another is simply to align with the emphasis of each text. As already illustrated, however, we attempt to highlight some of the exclusions and injustices resulting from failing to take a more systemic, holistic, intersectional perspective.
2021] Occupy Justice 379

a league with the founding and the Civil War. As it happens, there is no single text or speech associated with the immeasurable policy shifts arising from the New Deal. There is, instead, an eloquent politician, whose direct influence was spread over two tumultuous decades and whose impact still reverberates today. Franklin D. Roosevelt’s oratorical prowess—which included evocative lines like “the only thing we have to fear is fear itself” and “a date which will live in infamy”—needs no introduction. His weekly “Fireside Chats,” for instance, famously cracked on national airwaves as families huddled around their Philcos, eager to absorb Roosevelt’s soothing, cohesive balm to ease the upheaval and suffering that economic depression and world war wrought.

With no single iconic text to examine, this section examines three major speeches that FDR delivered over a four-year period to announce, explain, and defend his New Deal policies: (1) FDR’s acceptance speech at the Democratic National Convention in 1932; (2) a complementary speech he gave a few months later, and (3) his re-nomination acceptance speech at the Democratic National Convention in 1936. Each of the speeches, as we’ll see,

---

229 See Bruce Ackerman, We the People: Foundations 51–52 (1991) (“When modern lawyers and judges look to the deep past, they tell themselves a story that has a distinctive structure. . . . three historical eras stand out from the rest. . . . The first. . . is the Founding itself. . . . A second great period occurs two generations later, with the bloody struggles that ultimately yield the Reconstruction amendments. Then there is another pause of two generations before a third great turning point. This one centers on the 1930’s and the dramatic confrontation between the New Deal and the Old Court that ends in the constitutional triumph of the activist welfare state.”); Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution, 94 B.U. L. REV. 669, 689–90 (2014) (noting the “egalitarian and anti-oligarchic features” of the New Deal); Kate Andrias, An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act, 128 YALE L.J. 616, 642–43 (2019) (highlighting some of the egalitarian reforms).

230 See, e.g., Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 18–24 (2017) (highlighting the ways in which New Deal housing programs deliberately contributed to racial segregation); Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 53–61 (2005) (noting that New Deal labor protections were crafted to exclude the Black population in order to get Southern Democrat support). But see Eric Schickler, Racial Realignment 9–10 (2016) (arguing that “New Deal liberalism . . . had racially inclusive elements that ran counter to the well-documented exclusionary aspects of Roosevelt’s program” even as “top party leaders resisted” the fusion of “‘class’ and ‘race’ by the ‘CIO and its allies.’”).

231 Franklin D. Roosevelt, U.S. President, First Inaugural Address (Washington, D.C., March 4, 1933), in Harvey J. Kaye, FDR on Democracy: The Greatest Speeches and Writings of President Franklin Delano Roosevelt 57 (2020).

232 Cf. Stephen Smith, Radio: FDR’s ‘Natural Gift,’ AMERICAN PUBLIC MEDIA REPORTS, (Nov. 10, 2014), https://www.apmreports.org/episode/2014/11/10/radio-fdrs-natural-gift [https://perma.cc/C9BD-3ZQS] (“President Franklin D. Roosevelt was a radio natural. He spoke in a confident, informal way, using simple words and phrases that were easy to grasp. His Fireside Chats reached record-breaking audiences. He pioneered the modern, electronic political campaign. And with a nation gripped first by the Great Depression and then World War II, Roosevelt and his administration made extensive use of radio as a tool to educate and persuade the American people.”).
invoked and mirrored aspects of Jefferson’s Declaration of Independence.\textsuperscript{234} Because each of the speeches was delivered in response to different crises for particular audiences with particular purposes in mind, we will again offer some context.

The difficult circumstances of Franklin D. Roosevelt’s landslide victory in the 1932 U.S. Presidency are well known. In the midst of the Great Depression, a sense of injustice was in the air, as economic inequality, business power, and political corruption were especially salient. Rampant unemployment meant that suffering and despair hit home for millions. Historian David Kennedy explains:

By early 1932 well over ten million persons were out of work, nearly 20 percent of the labor force. In big cities like Chicago and Detroit that were home to hard-hit capital goods industries like steelmaking and automobile manufacturing, the unemployment rate approached 50 percent. Chicago authorities counted 624,000 unemployed persons in their city at the end of 1931. In Detroit, General Motors laid off 100,000 workers out of its 1929 total of some 260,000 employees. All told, 223,000 jobless workers idled in the streets of the nation’s automobile capital by the winter of 1931–32. Black workers, traditionally the last hired and the first fired, suffered especially. In Chicago blacks made up 4 percent of the population but 16 percent of the unemployed; in the Pittsburgh steel districts they were 8 percent of the population but accounted for almost 40 percent of the unemployed.\textsuperscript{235}

With the excesses of capitalism seemingly on full display, Roosevelt’s Republican opponent, incumbent President Herbert Hoover, became a vulnerable target. Following the stock market crash, as the contours and lived realities of the economic abyss came into view, Hoover’s refusal to initiate large-scale relief programs and his tendency to rely on modest programs of voluntarism and cooperation frustrated an ailing public.

Hoover’s ideological commitments to individualism and anemic response to the widespread dislocation of millions of Americans compounded the impression that he was part of the problem or, at best, indifferent to it. Kennedy explains: Hoover “stewed in anxieties about the dole and endlessly lashed the Congress and the country with lectures about preserving the nation’s moral fiber, not to mention the integrity of the federal budget, by avoiding direct federal payments for unemployment relief.”\textsuperscript{236} “No issue,” writes Kennedy, “more heavily burdened Hoover in the presidential election year of 1932” than his image “as the Great Scrooge, a corrupted ideologue

\textsuperscript{234} Later portions of this Article will refer to this collection, taken together, as the New Deal speeches.  
\textsuperscript{236} Id. at 91.
2021] Occupy Justice 381

who could swallow government relief for the banks but priggishly scrupled over government provisions for the unemployed.”237

Fairly or not, Hoover was widely blamed for the visible ravages of the era.238 Indeed, reflecting that attribution, the hundreds of homeless encampments springing up across the U.S. were popularly dubbed “Hoovervilles.”239 Franklin D. Roosevelt, in contrast, was neither linked to the cause of that suffering nor lacking in ambitious prescriptions. His confidence, sense of urgency, bold ideas, and fatherly reassurance played well with an impoverished and weary population.

2. Texts

a. “A New Deal for the American People”

In his 1932 speech accepting his party’s nomination, Roosevelt announced “A New Deal for the American People.”240 He called upon Americans to “resume the country’s interrupted march along the path of real progress, of real justice, of real equality for all of our citizens, great and small.”241 The national woes, he argued, were the consequence of accepting a system that had been constructed upon, not real, but illusory forms of progress, justice, and equality. They were the result of flawed ideologies that allowed large commercial interests to thrive at the expense of everyone else. Detailing that diagnosis, Roosevelt pointed to the dramatic economic expansions through the 1920s that nonetheless provided “little or no drop in the prices that the consumer had to pay” even when “the cost of production fell very greatly.”242 He continued:

[C]orporate profit resulting from this period was enormous; at the same time little of that profit was devoted to the reduction of prices. The consumer was forgotten. Very little of it went into increased wages; the worker was forgotten, and by no means an adequate proportion was even paid out in dividends—the stockholder was forgotten. . . . What was the result? Enormous corporate surpluses piled up—the most stupendous in history.243

In describing the source of the problem, Roosevelt made the elements of injustice plain by tracing the key group-based dividing line along which economic security and power were asymmetrically distributed. On one side,
there were corporations, callously reaping the profits of a post-war expansion; on the other side were the many stakeholder groups whose labor and sacrifice yielded those surpluses but who shared in none of it. They were, in a word, “forgotten.” That line and narrative was at the heart of the New Deal justifications and policies that would follow.

Roosevelt also drew a distinction between his story and that of his Republican rivals, who considered the economic dislocations to be the ineluctable product of markets. Hoover had treated the ups and downs of the economy, Roosevelt suggested, like the weather, and treated the depression like a hurricane. As devastating as the natural disaster may have been, it was beyond human control and therefore outside the responsibility of the federal government to address. “Our Republican leaders tell us economic laws—sacred, inviolable, unchangeable—cause panics which no one could prevent,” he complained.244 Roosevelt emphasized the suffering and framed the Depression as the product of governmental policy and therefore repairable: “[W]hile they prate of economic laws,” Roosevelt observed, “men and women are starving. We must lay hold of the fact that economic laws are not made by nature. They are made by human beings.”245

It was a powerful indictment, as FDR placed his rivals at the source of the suffering, indicating that those with the power to help had evaded their responsibility behind disingenuous denials about the catastrophes of their own making. The Republican policy makers, by that account, were not fellow innocent victims of inevitable forces, but perpetrators of injustice: deploying their power (while feigning powerlessness) to produce harm without legitimacy.246

Having painted corporate elites and Republican leaders as the source of the problem, Roosevelt simultaneously portrayed all those who had unjustly suffered as a single group of victims. He spoke of “men and women” “[t]hroughout the nation” who had been “forgotten in the political philosophy of the government of the last years.”247 The group definition underscored not only the gross inequality and power disparity that had existed between the few and the many but also the power that the many were now accessing by recognizing their common enemy and by coming together politically. They were on the same team, in common opposition to the shared threat. “Never in history have the interests of all the people,” as Roosevelt put it, “been so united in a single economic problem.”248 That capacious group shared an interest in achieving what was rightfully theirs: a federal government that responds to injustice. That is why, in Roosevelt’s words, the many “look to us here for guidance and for more equitable opportunity to

244 Id. at 36.
245 Id. at 36.
246 Cf. ROUSSEAU, On the Social Contract, supra note 76 (discussing the natural/political distinction).
247 Roosevelt, supra note 240, at 37.
248 Id. at 34. As detailed below, the Occupy Wall Street protest employed similarly broad us-them categories and similar strategies for highlighting inequalities and power. See infra text accompanying notes 530–626.
share in the distribution of national wealth.” That is why the government was obliged to alleviate the suffering for the “millions of our people who have suffered so much.” And that is why, to achieve that end, Roosevelt paid “tribute” to his “countrymen” experiencing “crushing want,” by offering “a new chance” and pledging “a new deal.” Anything less would not only further the injustice but heighten the resentment of a population hungry for food and justice. Anything less would “not only . . . betray their hopes but . . . misunderstand their patience.”

Roosevelt’s emphasis on the frayed patience of his “countrymen” was a key aspect of his case. Recall Thomas Jefferson’s description of the “long train of abuses” that triggered a sense of injustice and the anger that would fuel the patriots and justify revolution. Such a moment of reckoning, Roosevelt intimated, was fast approaching. The anger and frustration felt by those who had been so clearly harmed by the unjust actions of the powerful profit-seeking corporations and the politicians who enabled them was reaching its tipping point.

In a related speech, delivered two weeks later, Roosevelt spelled out more explicitly his underlying goal of justice—the numerous ways of addressing injustice by promoting egalitarian and harm-reducing ends through legitimate means—and the policy presumptions that such a goal dictated. “Friends,” he exhorted,

if poverty is to be prevented, we require a broad program of social justice. We cannot go back to the old prisons, for example, to the old systems of mere punishment under which a man out of prison was not fitted to live in our community alongside of us. We cannot go back to the old system of asylums. We cannot go back to the old lack of hospitals, the lack of public health. We cannot go back to the sweatshops of America. We cannot go back to children working in factories. Those days are gone.

There are a lot of new steps to take. It is not a question of just not going back. It is a question also of not standing still. For instance, the problem of unemployment in the long run . . . can be and shall be solved by the human race. Some leaders have wisely declared for a system of unemployment insurance throughout this broad land of ours; and we are going to come to it.

In that speech, Roosevelt again underscored how the nation’s problems—poverty, incarceration, mental health, physical health, public health, worker conditions, and unemployment—had been misdiagnosed as

249 Id. at 37.
250 Id. at 32.
251 Id.
252 Id. at 37.
253 Id. at 32.
254 See supra text accompanying notes 116–130.
255 Franklin D. Roosevelt, Campaign Address, (Detroit, Mich., Oct. 2, 1932), in KAYE, supra note 231 at 48, 51 (emphasis added).
individualistic. To ignore the systemic role that government played in creating those problems, Roosevelt indicated, was itself a source of injustice—a subterfuge to evade accountability for achieving justice. Speaking of his critics, Roosevelt observed:

They maintain that these laws interfere with individualism, forgetful of the fact that the causes of poverty in the main are beyond the control of any one individual . . . . The followers of the philosophy of "social action for the prevention of poverty" maintain that if we set up a system of justice we shall have small need for the exercise of mere philanthropy. Justice, after all, is the first goal we seek. We believe that when justice has been done individualism will have a greater security to devote the best that individualism itself can give.256

Between those back-to-back speeches, Roosevelt provided an initial mapping of the injustices, the opposing sides, and pertinent battle lines. Roosevelt wound down his nomination remarks, then, by declaring war against the inequities of the status quo and promising "a new deal for the American people."257 He closed the speech with a rousing battle cry: "This is more than a political campaign; it is a call to arms. Give me your help, not to win votes alone, but to win in this crusade to restore America to its own people."258

b. "An Economic Declaration of Rights"

Building upon the categories, themes, and narratives of injustice that he had sketched in his "New Deal" speech, Roosevelt delivered his next major speech two months later, calling for an economic declaration of rights.

In this later speech, Roosevelt summarized his vision of U.S. history and the bounty-to-bust economic trends unfolding at the turn of the 20th century.259 There was the closing of the western frontier and, with it, the lost opportunities that purportedly open and arable lands had long promised. There was, he argued, the migration of labor from farms to factories and, with it, the loss of independence and self-determination. At the very time the people were growing more vulnerable, he explained, corporations were accumulating power with which to exploit that weakness.260 The consequent

256 Id. at 51 (emphasis added).
257 Roosevelt, supra note 240, at 37.
258 Id.
259 Cf. Kennedy, supra note 235, at 123 (explaining that "the speech accurately reflected theories of history and economic principles that FDR had repeatedly heard discussed in his evenings with the Brain Trusters").
260 See Franklin D. Roosevelt, Speech to the Commonwealth Club, (S.F., Cal., Sept. 23, 1932), in Kaye, supra note 231, 38, at 41–43 ("Our last frontier has long since been reached, and there is practically no more free land. More than half of our people do not live on the farms or on lands and cannot derive a living by cultivating their own property. There is no safety valve in the form of a Western prairie to which those thrown out of work by the Eastern economic machines can go for a new start.").
power imbalance, Roosevelt argued, produced the very sort of feudal tyranny that the founding generation fought to defeat:

In retrospect we can now see that the turn of the tide came with the turn of the century. We were reaching our last frontier; there was no more free land and our industrial combinations had become great uncontrolled and irresponsible units of power within the state. Clear-sighted men saw with fear the danger that opportunity would no longer be equal; that the growing corporation, like the feudal baron of old, might threaten the economic freedom of individuals to earn a living. In that hour, our antitrust laws were born. The cry was raised against the great corporations. . . .

While business was where great wealth was being amassed, that source of upward mobility provided little promise for the average person. The small enterprise, that is, was not a viable competitor against corporate giants. In Roosevelt's words:

Just as freedom to farm has ceased, so also the opportunity in business has narrowed. It still is true that men can start small enterprises . . . ; but area after area has been preempted altogether by the great corporations, and even in the fields which still have no great concerns, the small man starts under a handicap. The unfeeling statistics of the past three decades show that the independent business man is running a losing race. . . . Put plainly, we are steering a steady course toward economic oligarchy, if we are not there already.

Thus the opposing sides—the oppressor and the oppressed—were clear. The industrialist and the “financial titan” posed a “danger” to everyone else. What we, the people, needed was the sort of “enlightened administration” that would ensure the economy and the corporations dominating it began “distributing wealth and products more equitably” and in “service of the people.”

The echoes of Jefferson’s case against an unjust and unrepresentative monarchy were heightened when Roosevelt called for “an economic declaration of rights.” But instead of igniting the flames for revolution, Roosevelt’s proposed declaration was meant to stave off a conflagration by dampening the tinder and controlling the burn. Equalizing the allocation

261 Id. at 42.
262 Id. at 43.
263 Id. (using the phrase twice).
264 Id.
265 Id. at 44.
266 The prospect of revolution was salient early in Roosevelt’s first term. See, e.g., KENNEDY, supra note 235, at 117 (summarizing the preliminary legislative program provided to President-elect Roosevelt from his close adviser, Adolf Berle, in which Berle warned that “it must be remembered that by March 4 next we may have anything on our hands from a recovery to a revolution. The chance is about even either way.”); id. at 141 (noting the 1933 Senate
of power and wealth was imperative, he argued, not only to satisfy the people, but for the “safe order of things.”

Born of perceived injustice, theirs was an understandable, if combustible, anger. Responding appropriately was “not only . . . the proper policy of government,” it was also

the only line of safety for our economic structures as well. We know, now, that these economic units cannot exist unless prosperity is uniform, that is, unless purchasing power is well distributed throughout every group in the nation. That is why even the most selfish of corporations for its own interest would be glad to see wages restored and unemployment ended . . .

It was, Roosevelt claimed, that very concern regarding the implications of festering injustice that motivated wise “business men everywhere” to work to “bring the scheme of things into balance, even though it may in some measure qualify the freedom of action of individual units within the business.”

While FDR’s first nomination acceptance speech announced the New Deal, the candidate was at that moment “vague and inscrutable” regarding its concrete meaning. This second major speech, as historian David Kennedy argues, was the closest that Roosevelt would come early on to sharing “the germ” of his “mature political thought.” In “emphasizing consumption more than production, the economics of distribution rather than the economics of wealth creation, issues of equity over issues of growth,” FDR was highlighting the ideological foundations underlying the New Deal. Still, it would not be until the second half of his first term that Roosevelt would take “up the task of translating those sentiments and generalities into a concrete political credo” and of laying out, with specificity, the terms of the New Deal.

c. “A Rendezvous with Destiny”

The third speech, the most important of the three, was FDR’s re-nomination acceptance speech at the 1936 Democratic National Convention. It was the keystone in what historian David Kennedy describes as “a remarkable series of addresses” that, “taken together, etched . . . the outlines of a
structured and durable social philosophy” at “the ideological heart of the New Deal.”

By 1935, the New Deal was in full swing. In his annual message to Congress in January of 1935, Roosevelt proclaimed that “social justice, no longer a distant ideal, has become a definite goal.”

By that time, however, opposition and backlash against his policies and his candidacy were also in full swing, with both the progressive left and the business-backed right forming new institutions.

On the left, three prominent populists, including Louisiana Senator Huey Long, formed the Union Party to contest the 1936 election.

From the right, business interests working to undermine the New Deal formed the American Liberty League,” which, in the words of historian Kim Phillips-Fein, aimed “to rectify what its members perceived as an imbalance in the body politic: that 'business, which bears the responsibility for the paychecks of private employment, has little voice in government.' Between those political poles, FDR veered leftward, intensifying his rhetoric

275 Id. at 244.
276 Id. at 247 (emphasis added).
277 The others were Dr. Francis Townsend, a California physician, and Reverend Charles Coughlin, a Catholic priest and radio host. See id. at ch.8.
278 Id. at 283–84.
280 Id. The American Liberty League was especially opposed to the high taxes imposed on commercial interests during the New Deal. See KENNEDY, supra note 235, at 281. Roosevelt had justified those taxes by invoking Jefferson’s Declaration of Independence when asserting that aggregated power and wealth of commercial entities was “as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our government.” Franklin D. Roosevelt, Message to Congress on Tax Revision (June 19, 1935), in KAYE, supra note 231, at 86.
against corporate elites and doubling down on his egalitarian policy objectives (though in ways that deliberately excluded African Americans). In what would be one of the most important speeches of his career, often referred to as his “Rendezvous with Destiny” speech, FDR made the clearest case he ever would for the New Deal. In doing so, he delivered what one historian calls “the most radical speech ever given by a serving president.”

Roosevelt began the speech by offering another history lesson, immediately linking his project with, and drawing authority from, the country’s founding. Before 100,000 Democratic supporters in a Philadelphia football stadium, FDR began the speech by offering another history lesson, immediately linking his project with, and drawing authority from, the country’s founding. Before 100,000 Democratic supporters in a Philadelphia football stadium, Roosevelt began the speech by offering another history lesson, immediately linking his project with, and drawing authority from, the country’s founding.

They realize that in thirty-four months we have built up new instruments of public power. In the hands of a people’s government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people. Give them their way and they will take the course of every autocracy of the past—power for themselves, enslavement for the public.

Their weapon is the weapon of fear. I have said, “The only thing we have to fear is fear itself.” That is as true today as it was in 1933. But such fear as they instill today is not a natural fear, a normal fear; it is a synthetic, manufactured, poisonous fear that is being spread subtly, expensively, and cleverly by the same people who cried in those other days, “Save us, save us, lest we perish.” I am confident that the Congress of the United States well understands the facts and is ready to wage unceasing warfare against those who seek a continuation of that spirit of fear.

Id. at 97–98; see also id. at 91 (Kaye explaining that “[e]veryone knew he was referring on the one hand to the spread of Fascism in Europe and, on the other, to the efforts at home by many of the most powerful and wealthiest corporate figures in America, organized in a group called the Liberty League.”).

283 For example, the safety net and security provided in the Social Security Act deliberately excluded most African Americans by defining agricultural workers and household workers as ineligible for benefits. See infra notes 322–323; see generally KATZNELSON, supra note 230.

Similarly, FDR’s Federal Housing Administration systematically excluded people of color from its benefits. See ROTHEISEN, supra note 230, at 64–65 (“Because the FHA’s appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program.”).


285 See Canellos, supra note 283 (stating that the “speech came far closer to revealing his inner theories and motivations” than other speeches and that “[n]ever before or after would he lay out his vision in greater clarity”).

286 KAYE, supra note 231, at 99.
Occupy Justice

stadium and a national radio audience, FDR opened his remarks by observing that

Philadelphia is a good city in which to write American history . . . fitting ground on which to reaffirm the faith of our fathers; to pledge to ourselves to restore to the people a wider freedom; to give to 1936 as the founders gave to 1776—an American way of life.

Roosevelt likened the contemporary challenge to that facing the signers of the Declaration of Independence, which, in turn, allowed him to borrow Jefferson’s rhetorical blueprint. As Jefferson had, Roosevelt highlighted values of equality and freedom in exposing injustice and in encouraging mobilization around justice-advancing change. He began with a brief definition of “freedom” that would implicitly invoke injustice: “[F]reedom,” he proclaimed, “in itself and of necessity, suggests freedom from some restraining power.” Roosevelt then turned to a cursory historical account of that time, against which he could draw a series of comparisons and highlight analogous elements of the injustice frame.

In 1776 we sought freedom from the tyranny of a political autocracy— from the eighteenth century royalists who held special privileges from the crown. It was to perpetuate their privilege that they governed without the consent of the governed; that they denied the right of free assembly and free speech; that they restricted the worship of God; that they put the average man’s property and the average man’s life in pawn to the mercenaries of dynastic power; that they regimented the people.

And so it was to win freedom from the tyranny of political autocracy that the American Revolution was fought. That victory gave the business of governing into the hands of the average man, who won the right with his neighbors to make and order his own destiny through his own Government. Political tyranny was wiped out at Philadelphia on July 4, 1776.

However incomplete and inaccurate Roosevelt’s historical story may have been, it represented a fairly standard historical account. It did so by implicitly highlighting the role of the American Revolution in confronting injustice—that is, freedom-constraining “dynastic power,” autocracy, monarchy, and hierarchy all operating without the “average man’s” consent and, thus, without legitimacy. And then there is the happy ending in which justice is achieved—or freedom is won through revolution.

286 See Canellos, supra note 283.
287 See Kennedy, supra note 235, at 280 (describing “a memorable speech broadcast nationwide from Philadelphia’s Franklin Field”).
289 See infra Part II(A) (arguing that such an understanding of freedom was the dominant view in the sort of political discourse typified by the iconic texts reviewed in this Article).
290 Roosevelt, supra note 288, at 100.
291 Id.
292 See infra Part II(A) (discussing the relationship between justice and freedom).
As others had before him, including Stanton and Douglass, Roosevelt treated that moment of achievement as incomplete. The American Revolution and the goals ostensibly motivating it marked not a destination but a lodestar: a system of deep values to be employed as navigational cues on a journey of self-government. Where Stanton and Douglass primarily sought to widen the circle of inclusion in that governing process, Roosevelt focused primarily upon expanding notions of how power—and the power dynamics behind oppression and injustice—operated.293

The founders’ achievement, Roosevelt emphasized, addressed only the problem of “political tyranny.” Roosevelt, though, pointed to a new and different tyrant, which had taken form through the rapid technological, economic, social, and institutional changes unfolding in the years since 1776. In that time, Roosevelt explained:

[M]an’s inventive genius released new forces in our land which reordered the lives of our people. The age of machinery, of railroads; of steam and electricity; the telegraph and the radio; mass production, mass distribution—all of these combined to bring forward a new civilization and with it a new problem for those who sought to remain free.294

The “new problem”—the new threat to freedom, as he defined it—was no less menacing and harmful to the lives of the people than had been the old problem of monarchy. It was as if the new tyrant had gradually filled the power vacuum left by the defeated colonial power: Roosevelt argued:

For out of this modern civilization, economic royalists carved new dynasties. New kingdoms were built upon concentration of control over material things. Through new banks and securities, new machinery of industry and agriculture, of labor and capital—all undreamed of by the fathers—the whole structure of modern life was impressed into this royal service.295

Roosevelt clearly demarcated the victims and the victimizers, distinguishing the large, powerful corporate and financial interests who sought to dominate others from the small, vulnerable individuals and groups whose freedom they threatened. With their wealth and power, they enlisted “mercenaries . . . to regiment the people, their labor, and their property,” and they gained top-to-bottom control over the economic arena. As Jefferson and Stanton had done through their lists of grievances, Roosevelt described some of the unjust harms that large corporations were producing in the material lives of the people:

293 As we have described, however, all three invoked and expanded each of the three injustice elements.
294 Id. at 100.
295 Id.
The hours men and women worked, the wages they received, the conditions of their labor—these had passed beyond the control of the people, and were imposed by this new industrial dictatorship. The savings of the average family, the capital of the small business man, the investments set aside for old age—other people’s money—these were tools which the new economic royalty used to dig itself in.

Those who tilled the soil no longer reaped the rewards which were their right. The small measure of their gains was decreed by men in distant cities.

Throughout the Nation, opportunity was limited by monopoly. Individual initiative was crushed in the cogs of a great machine. The field open for free business was more and more restricted. Private enterprise, indeed, became too private. It became privileged enterprise, not free enterprise.

Through their economic power, “the privileged princes of these new economic dynasties,” “thirsting” for more, expanded their empire to include “control over Government itself.” With mutually reinforcing economic and political power, the new tyrants “created a new despotism,” which they legitimized by “wrvapp[ing] it in the robes of legal sanction.” With the same old wine repackaged in new bottles, “the average man once more confront[ed] the problem that faced the Minute Man.”

This new form of tyranny, though distinct from the political tyranny on which Jefferson focused, was no less unjust. Moreover, the two problems,

---

296 Id. at 101; see also id. (“There was no place among this royalty for our many thousands of small business men and merchants who sought to make a worthy use of the American system of initiative and profit. They were no more free than the worker or the farmer. Even honest and progressive-minded men of wealth, aware of their obligation to their generation, could never know just where they fit[ ] into this dynastic scheme of things.”).

297 Id.

298 Id.

299 Id.

300 Id. By defining the problem that way—an economic analogue to Jefferson’s political tyranny—Roosevelt lightened his burden of persuasion considerably: he could, as Stanton and Douglass had, now piggyback on the Declaration’s familiar narrative.

301 Roosevelt was challenged not only with delegitimizing “the monopol[ies]” and “privileged enterprises” that produced “this new industrial dictatorship.” He also had to undermine the legitimating narratives of law and the legal system, with all of their claims to neutral or apolitical authority. For instance, he needed a compelling counter-story for the wealth- and business-friendly premise that property rights and laissez faire notions of contract were inviolable normative principles of law and that the “consent” attributed to contracts between unequal parties—including, for instance, a giant corporation and an individual factory worker—were normatively indistinguishable from contracts between two corporate behemoths. The conventional legal assumption was that a contract, any contract, was a contract, and that all contracts manifested the consent of the parties involved and were therefore normatively worthy of enforcement. That conception connected to the broader notion of private allocations as presumptively consensual and of public allocations as coercive. Legal realists had, in a variety of ways, exposed those formalist presumptions as mistaken, and revealed the purportedly “free” aspects of the market as illusory—social constructs hiding implicit notions of justice and morality. See, e.g., Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci.
Roosevelt argued, were intertwined—overlapping, mutually reinforcing, and substitutable: “Today we stand committed to the proposition that freedom is no half-and-half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place.”

Roosevelt suggested that there is no freedom or justice with one but not the other:

The royalists of the economic order have conceded that political freedom was the business of the Government, but they have maintained that economic slavery was nobody’s business. They granted that the Government could protect the citizen in his right to vote, but they denied that the Government could do anything to protect the citizen in his right to work and his right to live.

And it was no less the role of a government of, by, and for the people to address this new tyranny. Indeed, Roosevelt claimed, the government was obliged to respond. “Government in a modern civilization,” he declared, “has certain inescapable obligations to its citizens, among which [is] . . . the establishment of a democracy of opportunity.” Only the government possessed the requisite power to domesticate corporate power. And, indeed, absent a concerted governmental response, that very government would itself become the tool of corporate power. As Roosevelt put it: “Against economic tyranny such as this, the American citizen could appeal only to the organized power of Government. The collapse of 1929 showed up the despotism for Q. 470 (1923); Morris R. Cohen, Property and Sovereignty, 13 CORNELL L. REV. 8 (1927). For fuller discussions of the criticisms and insights of legal realists, see Joseph W. Singer, Legal Realism Now, 76 CAL. L. REV. 465, 487–94 (1988).

Roosevelt, whose inner circle included several legal realists, sought to make a related criticism of laissez-faire presumptions in a way that the general public could easily grasp. He did so by highlighting the fact that wealth (that is, the stuff of property and property law) was, in effect, an instrument of power, and that consent (that is, the normative foundation of contract) was just a means of manifesting or transferring that power. From that perspective, where parties were significantly unequal to start, the contract they agreed to would reflect that significant disparity, permitting the powerful to exploit the powerless under the guise of “law” and a legitimating aura of consent. In reality, the result was unjust—power producing and reproducing inequality without legitimacy. Contract was not the equalizing, consent-paved path to justice; it was a tool of injustice inasmuch as, in the context of inequality, consent is illusory. Roosevelt captured that notion and others in this way:

An old English judge once said: “Necessitous men are not free men.” Liberty requires opportunity to make a living—a living decent according to the standard of the time, a living which gives man not only enough to live by, but something to live for.

For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people’s property, other people’s money, other people’s labor—other people’s lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.

Roosevelt, supra note 288, at 101.  
302 Id. at 102.  
303 Id.  
304 Id.
2021] Occupy Justice 393

what it was. The election of 1932 was the people’s mandate to end it. Under that mandate it is being ended.\footnote{2021}{Id.}

Responding to the criticisms of New Deal policies by the American Liberty League and other spokespeople for corporate interests,\footnote{2021}{Id. at 101; see also supra text accompanying notes 277–282.} Roosevelt simply reframed the injustice—that is, the powerful interests producing harm without legitimacy—that those groups sought to insulate and justify:

These economic royalists complain that we seek to overthrow the institutions of America. What they really complain of is that we seek to take away their power. Our allegiance to American institutions requires the overthrow of this kind of power. In vain they seek to hide behind the Flag and the Constitution. In their blindness they forget what the Flag and the Constitution stand for. Now, as always, they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the over-privileged alike.\footnote{2021}{Roosevelt, supra note 288, at 102.}

By Roosevelt’s telling, those fighting to enhance corporate interests and corporate power were “the resolute enemy within our gates.”\footnote{2021}{Id. at 102.} They disingenuously sought legitimating cover behind “the Flag and the Constitution.”\footnote{2021}{Id.} This powerful and formidable enemy, he warned, would succeed unless, those committed to justice and freedom fought back “in greater courage.”\footnote{2021}{Id. at 103.}

Like it or not, those were the options. Or, as Roosevelt concluded in his memorable peroration: “There is a mysterious cycle in human events. To some generations much is given. Of other generations much is expected. This generation of Americans has a rendezvous with destiny.”\footnote{2021}{Id. at 103–04; see also infra Parts III(A)(4) and III(B)(4) (discussing how Roosevelt’s speeches illustrate shared meanings of “freedom” and “democracy”).} Ours was “a war for the survival of democracy,” a “[f]ight for freedom,”\footnote{2021}{Id. at 104.} and a battle “to save a great and precious form of government for ourselves and for the world.”\footnote{2021}{Roosevelt’s win reflected the power of what came to be known as the “New Deal coalition,” which comprised a variety of voting constituencies, including blue collar workers, African Americans, religious minorities, and rural White Southerners. See IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 17–18 (2013).}

3. Post-Texts

In the end, notwithstanding the robust opposition he received from the left and the right, Roosevelt won the 1936 election in another landslide.\footnote{2021}{Id.} The New Deal policies his administration had begun would continue—at
least until the date that has “live[d] in infamy”315 and the wars for “ourselves and for the world”116 turned outward.

Roosevelt’s speeches, particularly those he delivered when battling for a second term, did more than help him win the election. Through those speeches, as David Kennedy summarizes, Roosevelt

elaborate[d] for his countrymen his vision of the future into which he hoped to lead them. He gave the nation a presidential civics lesson that defined nothing less than the ideology of modern liberalism. He breathed new meaning into ideas like liberty and freedom. He bestowed new legitimacy on the idea of government. He introduced new political ideas, like social security. He transformed the country’s very sense of itself, and of what was politically possible, in enduring ways. Before he was finished, . . . Roosevelt had changed the nation’s political mind and its institutional structure to a degree that few leaders before him had dared to dream, let alone try, and that few leaders thereafter dared to challenge.317

This section has argued that the deeper story behind those shifts of “ideas,” “meaning,” “mind,” and “structure” was largely the consequence of perceived injustice, which Roosevelt effectively tapped into and amplified. He did so, as Jefferson, Stanton, and Douglass had before him, by revealing power dynamics and asymmetries, highlighting resultant inequalities and suffering, and challenging the legitimacy of the system and its allocations and outcomes.318

For some groups (for instance, labor and capital), the New Deal managed to flatten wealth and power disparities; for the most vulnerable groups, however, the New Deal was the same old deal. As indicated in the previous section, for instance, African Americans were left out of New Deal legislation by design.319 Those laws were, in fact, tailored to exclude racialized sectors and thus would serve to largely reproduce the racial hierarchy in the United States. Agricultural and domestic service industries, which African Americans largely occupied, were not given social security or minimum wage protection.320 States continued to segregate African Americans in hospitals,

315 Roosevelt, supra note 232, at 164.
316 Roosevelt, supra note 288, at 104.
317 KENNEDY, supra note 235, at 245.
318 Roosevelt’s commitment to advancing justice, express and implied, continued well past 1936. For instance, in a 1940 campaign address, he declared that “[t]he true measure of our strength lies deeply imbedded in the social and economic justice of the system in which we live.” Franklin D. Roosevelt, Campaign Address, (Cleveland, Ohio, Nov. 2, 1940), in KAYE, supra note 231, at 135.
319 See ROTSTEIN, supra note 230, at 155 (stating Roosevelt “could assemble the congressional majorities he needed to adopt New Deal legislation only by including southern Democrats, who were fiercely committed to white supremacy[,]” the result of which was that African Americans were largely excluded from New Deal benefits and protections).
320 See id. at 155–56 (“Social Security, minimum wage protection, and the recognition of labor unions all excluded from coverage occupations in which African Americans predominated: agriculture and domestic service.”).
schools, and industries. The 1933 Federal Emergency Relief Administration gave more of its funds to unemployed White people and often gave African Americans worse jobs for lower pay.\footnote{See id. at 156 (“[T]he Federal Emergency Relief Administration, adopted in 1933, disproportionately spent its funds on unemployed whites, frequently refused to permit African Americans to take any but the least skilled jobs, and even in those, paid them less than the officially stipulated wage.”).} Similarly, the National Labor Relations Act, Social Security Act, and Fair Labor Standards act all, while facially neutral, excluded most African American workers.\footnote{See V.B. Dubal, The New Racial Wage Code: Reframing the 'Third Category' of Worker, 15 HARV. L. & POL’Y REV. 511 (2021) (“The New Deal legislation that followed [the invalidation of the NIRA]—including the National Labor Relations Act (1935), Social Security Act (1935), and the Fair Labor Standards Act (FLSA, 1938)—recreated many of the racially explicit carveouts and differentials that became de facto realities for African American workers under the agency governance of the NRA.”); see also supra note 230.} As V.B. Dubal summarizes (in this symposium), the New Deal “conspicuously created differential wages and wholesale legal exclusions for majority African American workforces.”\footnote{Dubal, supra note 322, at 519; see also id. (“While uplifting white workers and providing the most hospitable climate ever fashioned in American history for decent enforceable conditions of employment, these first wage laws entrenched the existing boundaries of racial hierarchy through the legalization of lower wages for Black workforces and wholesale work law exclusions for racialized sectors. For Black America, these carveouts were, in historian Harvard Sitkoff’s terms, “an old deal, a raw deal.” (footnotes omitted) (citations omitted) (quoting HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 26 (2009)). But see Schickler, supra note 230.}}

E. Brown v. Board of Education—Legal Injustice

It was in that context of highly selective egalitarianism—of unequal equalizing—that the watershed constitutional case, Brown v. Board,\footnote{324 Id.} was decided.

1. Context

The case known as Brown v. Board consolidated five separate cases heard by the U.S. Supreme Court involving segregation in public schools. The Court’s 1954 opinion in Brown\footnote{325 347 U.S. 483 (1954).} stands as the most important and
celebrated Supreme Court decision of the 20th century, perhaps ever, marking the high point of the justice spectrum on which Dred Scott marks the low point. Like Dred Scott, therefore, Brown occupies an uncontroversial normative position and has become the most important test of constitutional law theories. As much as Brown has been celebrated for its outcome, it has


327 See Justin Driver, The Significance of the Frontier in American Constitutional Law, 2011 SUP. CT. REV. 345, 358 (“Brown has become a litmus test for theories of constitutional interpretation, as any theory worth its salt must accommodate the decision.”); Bernard Schwartz, The Warren Court: A Retrospective 264 (1996) (“Any analysis of the Warren Court’s principal decisions should begin with Brown v. Board of Education, in many ways the watershed constitutional case of the century. When the Brown decision struck down school segregation as violative of the Equal Protection Clause, it signaled the beginning of effective civil rights enforcement in American law.”); Mark V. Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 WM. & MARY L. REV. 997, 999 n.4 (1986) (“For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why [Brown v. Board] was correct.”); Pamela S. Karlan, What Can Brown Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause, 58 DUKE L.J. 1049, 1060 (2009) (“Precisely because Brown has become the crown jewel of the United States Reports, every constitutional theory must claim Brown for itself. A constitutional theory that cannot produce the result reached in Brown . . . is a constitutional theory without traction.”); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 952 (1995) (“The supposed inconsistency between Brown and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of Brown that if any particular theory does not produce the conclusion that Brown was correctly decided, the theory is seriously discredited.”); Ronald Turner, A Critique of Justice Antonin Scalia’s Originalist Defense of Brown v. Board of Education, 60 U.C.L.A. L. REV. DISCOURSE 170, 175 (2014) (“[McConnell’s answer to that question] regarding the fit of theories with Brown (quoting and citing McCon-
also been described, often criticized, as emblematic of the Warren Court's mode of judicial decision making—as a form of "activism" in robes.328 As we argue below, that is true in part because "justice" served as the implicit judicial norm.

For roughly half a century, Plessy's "separate but equal" interpretation stood as the legal norm against which any claim of racial discrimination through segregation would be held.329 Other courts and decisions routinely upheld the "separate but equal" decision and its underlying premises and logic.330

328 NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 373 (2010) ("At no time in the history of the United States had a judicial body stood in the vanguard of promoting progressive social change. . . . A Supreme Court ruling that segregation was unconstitutional would be the most aggressive piece of judicial activism in American history."); Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 FORDHAM L. REV. 545, 555 (2006) ("Beginning roughly in the 1980s, originalism gave conservative activists a language in which to attack the progressive case law of the Warren Court on the grounds that it had "almost nothing to do with the Constitution" and was merely an effort to enact "the political agenda of the American left." (quoting and citing Lino A. Graglia, 'Constitutional Theory': The Attempted Justification for the Supreme Court's Liberal Political Program, 65 TEX. L. REV. 789, 789 (1987)); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 258–60 (1992) (describing the Brown opinion as the paragon of judicial activism); Lino A. Graglia, Do Judges Have a Policy-Making Role in the American System of Government?, 17 HARV. J.L. & PUB. POL'y 119, 124 (1994) (arguing that Brown transformed judicial branch into "our society's most important initiator and accelerator of change").

329 Some cases challenged the interpretation of "equal" in Plessy. See Swett v. Painter, 339 U.S. 629, 634 (1950) ("Under equal protection clause of Fourteenth Amendment, qualified Negro applicant had personal and present right to a legal education equivalent to that offered by state to students of other races."); id. ("With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law school."); id. ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."); Leland B. Ware, Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930–1950, 52 MERCER L. REV. 631, 632 (2001) (Charles Hamilton Houston led Howard students to challenge the "law that provided the basis for segregation," and that separate but equal did not actually mean equal.

330 See generally McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 160 (1914) (determining the state requirement of separate but equal accommodations for two races is not an infraction of the 14th amendment); See generally Carr v. Corning, 182 F.2d 14, 22 (D.C. Cir. 1950) (affirming separate but equal in; "it appears that the treatment accorded these Negro plaintiffs, of which they complain, would have been accorded them had they been white. If the separation of the races in and of itself is not constitutionally invalid, such treat-
The question for the Supreme Court in *Brown* was whether, after *Plessy* and fifty years of reinforcing legal precedent, “separate” could sometimes be equal or whether it was inherently unequal. The Court ultimately held the latter,331 but the outcome in the case was far from obvious. Shared opposition to many Jim Crow policies did not necessarily translate to a shared belief332 that state laws be declared “unconstitutional” and that established precedent (*Plessy* and its progeny) be overruled.333

Those were among the jurisprudential challenges Earl Warren faced when he joined the court as its new Chief Justice in 1954 and was presented with the first *Brown v. Board* opinion in November of that year. To understand why Warren came out as he did (choosing justice over precedent), some more context will be helpful.

Around 1954, the United States was at its height of hegemonic power internationally and was racially segregated domestically. Nearly a decade after achieving victory in World War II, the U.S. had transitioned from global power to global superpower economically, militarily, and politically, with other formerly major economies, militaries and nations still recovering from wartime devastation and depletion.

As the U.S. strengthened its political authority and significance around the world, there was also a problem. The nation’s legitimacy and influence were significantly limited by the salient injustices and hypocrisies of U.S. domestic policies, particularly the human-rights-violating Jim Crow segregation. The U.S. purported to be a beacon of liberty and democracy, but the visible oppression of its own population did not square with those high-minded values.334 The gap was spotlighted and exploited by proponents of communism domestically and abroad, and constituted a source of vulnerability in light of the emerging power and influence of the Soviet Union.335 In
Derrick A. Bell, Jr.’s terminology, at the time that *Brown v. Board* was decided, the “interests of the races converged.” To gain more respect and influence internationally, the United States needed to take visible steps toward resolving racial inequality within its own boundaries. After decades of litigation battles challenging segregation, *Brown* was finally decided at a moment when some amount of racial integration and equality benefited the U.S. on the global stage and, thus, White elite interests. Chief Justice Warren and his fellow justices on the Supreme Court appear to have detected and responded to that shifting zeitgeist.

Several related factors also contributed to the *Brown* decision (and other racially progressive Warren Court opinions). For example, national and international attitudes about racial inequalities were then rapidly evolving owing in part to revelations about the Holocaust and war crimes emerging in the post-war era. The unspoken national embarrassment and dissonance was perhaps heightened by the inspiration that early twentieth century U.S. race sciences, racist discourse, and Jim Crow policies gave to some of the most horrific ideas, laws, and practices of Nazi Germany. Powerful interests seeking to promote American exceptionalism were eager to distance themselves and their national identity from genocidal practices of our evil enemy.

In 1948, for instance, the United Nations—under the leadership of Eleanor Roosevelt—passed the non-binding Universal Declaration of Human Rights.
Rights, that urged member nations to promote a variety of inextricably linked rights—human, civil, economic, and social. As the Declaration made clear in the opening line of its preamble, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” For that end it is “essential” the preamble stressed, “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” By this account, the legal system must ultimately serve to protect the fundamental rights that ensure “freedom, justice and peace” lest those oppressed by laws turn to rebellion.

The Declaration suggested that justice and freedom, not oppression and order, must be the priorities and ends of law. Because “[a]ll human beings are born free and equal in dignity and rights” and because all “are endowed with reason and conscience and should act towards one another in a spirit of brotherhood,”

“[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . . [and without] distinction [based upon] the political, jurisdictional or international status of the country or territory to which a person belongs . . . .”

The milestone document reveals a great deal about the U.S mindset, following the horrors of two world wars, regarding norms of equality, justice, and freedom for all human beings, and both the role of, and the rule of, law in ensuring the protection of human rights.

More generally, this was a time in which philosophers, social scientists, artists, and the cognoscenti would begin grappling in earnest with the racial stereotypes that had dominated prior to World War II. Specific racial stereotypes as well as the psychological tendency to stereotype were increasingly

---

341 Id.
342 Id. Art. 1
343 Id. Art. 2. As the Declaration clarified, any limits on the exercise of those rights “shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Id. Art. 29.
345 Brown v. Bd. of Educ., 347 U.S. 483 (1954), was written between the international Nuremberg Trials (1946), which set the stage for the Universal Declaration of Human Rights, and the Adolf Eichmann Trial (1961), when the excesses of rigid allegiance to law, without a transcendent norm above the law—a higher law—was acute.
occupy justice

2021]

read as immoral and one of the origins of evil. Chief Justice Warren himself was implicated in this dramatic reevaluation of cultural understandings and attitudes: he had played a major and outspoken role in calling for and justifying the internment of tens of thousands of Japanese Americans during the war, a role that he came deeply to regret.346

The legal system’s personnel, in particular, had much to ponder in the wake of the Holocaust about the role of law. Legal scholars in that period similarly—and not coincidentally—struggled with the question of law as it “is” in contrast with law as it “ought to be”—between legal positivism, that is, and legal normativism.347

That is the global, cultural, and legal context in which Warren and his judicial brethren were operating.

2. Text

In his opinion for the ultimately unanimous Court,348 Chief Justice Warren declared the unconstitutionality of “separate but equal.” In explaining the outcome, Warren emphasized that it was not based upon the original intention of the framers of the 14th Amendment.349 That question had come up—indeed, it was the topic of extended oral argument before the Court350—but the relevant historical evidence was neither clear nor help-

346 G. Edward White, one of Earl Warren’s several biographers, describes Warren’s role in the internment policy, how Warren “must have come to the realization that the Japanese evacuation, even in wartime, was offensive to America’s libertarian and egalitarian traditions and conspicuously racist,” how he “probably confronted the element of racial and ethnic stereotyping in his own thought,” and “began to realize, with the Brown case, that racial segregation in public schools was based on stereotypes that were unfair, unequal, and offensive to his ideal of American life.” G. Edward White, The Unacknowledged Lesson: Earl Warren and the Japanese Relocation Controversy, 55 VQR, Autumn 1979, https://www.vqronline.org/essay/unacknowledged-lesson-earl-warren-and-japanese-relocation-controversy [https://perma.cc/GQ9E-2RFE]. According to White, Warren “deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens,” explaining in his memoirs that “[w]henever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience stricken” and came to understand that “[i]t was wrong to react so impulsively, without positive evidence of disloyalty.” Id. Warren’s regret with his role in internment created a heightened sense that judges need to be particularly committed to seeing the big picture of justice, rather than being moved by the war-time pressures and passions of the moment. Id.

347 See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958); Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958); see generally A. H. Chroust, The Philosophy of Law of Gustav Radbruch, 53 Phil. Rev. 23–45 (1944) (claiming that if a judge encounters a statute that they believe to be unjust, the legal concept must be unbearably unjust or deliberately disregard human equality to choose the more just outcome. Radbruch’s legal theory derives from his experience in Nazi Germany).


349 The question in Brown was whether state-required racial segregation of public schools violated the Fourteenth Amendment’s Equal Protection Clause. See U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

ful. A truly robust originalism might even have required upholding Plessy's “separate but equal” standard. “At best,” Warren explained, the pertinent legislative history was “inconclusive.” Capitulating to the ambiguity and the inability to “turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written,” the Court moved forward based upon a different sort of argument and evidence.

The opinion was—like a sense of injustice is—born of intuition and emotion. From the outset, Warren’s personal reaction and sense of how the case should come out had been determined by his aversion for Plessy’s message and the segregation that it blessed. In his view, the segregation policies reflected and reinforced racial hierarchy and, as he put it, the “basic premise that the Negro race is inferior.”

Warren summarized some of those subtle, intangible, but powerfully unequal and “detrimental” (and therefore unjust) effects of separation and segregation. They included, “qualities which are incapable of objective measurement” such as the “ability to study, to engage in discussions and exchange views with other students” as well as the “feeling of inferiority” produced by forced separation that “has the sanction of the law”—a “sense of inferiority” that “affects the motivation of a child to learn” and that can affect ratifiers intended for there to be segregation; John W. Davis argued that the framers of the Fourteenth Amendment were not anti-segregation because of the segregated schools in the District of Columbia when the Fourteenth Amendment was ratified); David Tatel, Judicial Methodology, Southern Desegregation, and the Rule of Law, 79 N.Y.U. L. Rev. 1071, 1076–77 (2004) (criticizing desegregation decisions as flawed for departing from stare decisis).

Some scholars have reached similar conclusions. See Charles A. Lofgren, The Plessy Case 65 (1987) (“The evidence points both ways.”); William E. Nelson, The Fourteenth Amendment 134–35 (1988) (pointing to “evidence that at least some members of Congress and the state legislatures may have appreciated the capacity of the Fourteenth Amendment to promote desegregation[,]” but noting further that “Congress never institutionalized this judgment in its debates on the Fourteenth Amendment”). Most, however, have concluded that the 14th Amendment was not intended to prohibit public school segregation.

The court looked to social science, which it described as the “modern authority” for such epistemic matters. See Brown, 347 U.S. at 494. No doubt, had the traditional legal foundation—as revealed through the advocacy process (including briefs, oral argument, pertinent scholarship, and so on)—been available, then the Court would have built its opinion upon it. But, alas, the inconvenient truth cut the other way.

351 See McConnell, supra note 327, at 949 (observing that the Brown opinion “made no pretense that its interpretation was an authentic translation of what the Fourteenth Amendment meant to those who drafted and ratified it,” and, if anything strongly implied “that in the cold, hard eye of objective historical examination, the sources point the other way”); id. (describing the opinion “arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution’s text, history, and interpretive tradition—not on considerations of modern social policy.”).

352 347 U.S. 483, 492 (1954). Some scholars have reached similar conclusions. See Charles A. Lofgren, The Plessy Case 65 (1987) (“The evidence points both ways.”); William E. Nelson, The Fourteenth Amendment 134–35 (1988) (pointing to “evidence that at least some members of Congress and the state legislatures may have appreciated the capacity of the Fourteenth Amendment to promote desegregation[,]” but noting further that “Congress never institutionalized this judgment in its debates on the Fourteenth Amendment”). Most, however, have concluded that the 14th Amendment was not intended to prohibit public school segregation.

353 Brown, 347 U.S. at 492 (referring to Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown).

354 The court looked to social science, which it described as the "modern authority" for such epistemic matters. See Brown, 347 U.S. at 494. No doubt, had the traditional legal foundation—as revealed through the advocacy process (including briefs, oral argument, pertinent scholarship, and so on)—been available, then the Court would have built its opinion upon it. But, alas, the inconvenient truth cut the other way.

355 See infra notes 361–409 and accompanying text.

356 KLARSMAN, supra note 333, at 302.
“hearts and minds” for a lifetime. Furthermore, Warren continued, “[s]egregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”

By bringing that variety of unequal and harmful consequences into relief, Warren highlighted the imbalance among power, inequality, and legitimacy. He argued that the effect of segregation, imposed through the power of law under the authority of *Plessy*, lacked legitimacy. By that account, *Plessy v. Ferguson* had advanced and hidden injustice, which is why it had to be overturned, notwithstanding the legitimacy courts generally assign to precedent.

Warren, however, employed neither “justice” nor “injustice” expressly in his canonical opinion. In fact, those words showed up only rarely in the opinions for which Warren and the jurisprudential era he helped to shape has been both celebrated and denounced.

Still, justice appears to have been his ultimate, if implicit, norm and the driving force for overturning *Plessy*. After hearing oral arguments, Warren began the Justices’ conference with this observation: “I can’t escape the feeling that no matter how much the court wants to avoid, it must now face the issue. The Court has finally arrived at the place where it must determine whether segregation is allowable in public schools.” Given existing precedent, he seems to have said, the injustice dissonance associated with the practice of segregation placed the court in a bind. Either the injustice or the precedent of *Plessy* had to yield. Regarding his view on the merits, Warren confessed that “the more I’ve read and heard and thought, the more I’ve come to conclude that the basis of segregation and ‘separate but equal’ rests upon a concept of the inherent inferiority of the colored race”; he then rejected the very notion of setting “any group apart from the rest and say[ing] that they are not entitled to exactly the same treatment as all others.” In terms of the injustice framework, in other words, Warren perceived the legally enforced race-based inequality of segregation as illegitimate.

Warren offered no legal-doctrinal exegesis of the matter. He did not describe the structure of the federal government or the role of the different branches. He made no mention of the historical meanings or intentions of the framers Fourteenth Amendment. Instead, in the opening moments of that first meeting, Warren shared with his colleagues his intuitions of “right and wrong” effectively appealing to “the law beyond the law” which was

---

358 *Cf.* Stanton, *supra* note 165 (“He has endeavored, in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.”).

359 *Id.*

360 The injustice of the outcome trumped the apparent justice of the legitimating process of deferring to precedent. See *id.* at 495 (announcing that “[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected.”).


362 *Id.* at 281.
accessed, initially at least, outside the words and instruments of law: “My instincts and feelings lead me to say that, in these cases, we should abolish the practice of segregation in the public schools. . . .” As biographer Ed Cray describes, Warren had thus “framed the argument in moral terms rather than legal. He looked to the root issue, brushing aside as unimportant the legal questions that had ensnared the Vinson Court. . . .” Warren’s injustice-overturning appeal resonated with his colleagues in part because of the cultural mindset of that period, in part because of Warren’s personality and leadership style, and in part because of the particular collection of perspectives of the justices, who had themselves confronted some form of prejudice and exclusion.

Consistent with the injustice framework Warren highlighted inequality by redefining the applicable measure of inequality. Specifically, he shifted the focus from analysis of “equal facilities”—“buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors”—to the inequality inherent in separation, averring that “[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Employing that new point of comparison allowed Warren to explicate psychological harms that Justice Brown had brushed aside in Plessy’s “separate but equal” opinion.

Warren also elucidated the power behind the existing state of affairs. He explained that “[t]he impact [of segregation] is greater when it has the sanction of the law,” thereby shifting attention away from individual choices—through which situational, institutional, and systemic forms of power often operate obscurely—to the “group,” and the “law” and other situational forces that often shape or determine those “choices.”

---

363 Id. Cray, supra note 361, at 282.
364 See supra text accompanying notes 338–347.
366 See Morton J. Horwitz, The Warren Court and the Pursuit of Justice, 50 WASH. & LEE L. REV. 5, 10 (1993) (attributing the Warren Court’s sensitivity to injustice and “pursuit of justice” in part to the fact that “[t]he core of the liberal majority responsible for most of the Warren Court’s egalitarian decisions was a group of men, who although prominent figures at the time of their appointments, had risen from humble origins” and were, in a variety of ways, themselves outsiders who had themselves experienced considerable prejudice (emphasis added)).
368 Id. at 492.
369 Id. at 494.
370 See infra text accompanying notes 376–384.
371 Brown, 347 U.S. at 494.
372 Id.
373 Id.
374 For a collection of articles detailing how and why situational forces obscurely shape behavior and “choices,” see Hanson & Yosifon, The Situation, supra note 84; Hanson &
2021] Occupy Justice 405
court, in contrast, had repeatedly emphasized individual choices and the 
converse powerlessness of the law, referring to “the act of a mere individ-
ual,”376 claiming that “[l]egislation is powerless to eradicate racial instinc-
ts,”377 and that if “the enforced separation of the two races stamps the 
colored race with a badge of inferiority . . . it is not by reason of anything 
found in the act, but solely because the colored race chooses to put that 
construction upon it.”378 Warren, in contrast, emphasized the role of the law 
in sanctioning segregation, and therefore “generat[ing] a feeling of inferior-
ity,”379 assigning agency to the law and not to the children.380

Warren’s straightforward assertions about the effects of segregation on 
Black children were supported by an appeal to new forms of legitimacy: 
“modern [scientific] authority”381 and “psychological knowledge.”382 Warren’s 
citations to Kenneth B. Clark, Isidor Chein, E. Franklin Frazier, Gunnar 
Myrdal and others served to legitimate his own assertion of power which 
could not be based on precedent (and which he was overturning) or legisla-
tive history (which he had dismissed).383 Warren grounded his justice-based 
analysis firmly in the present, and in the facts of “public education in the 
light of its full development and its present place in American life through-
out the Nation.”384 The latest science, applied to contemporary facts, would 
determine whether legally sanctioned exertions of power to create inequali-
ties were legitimate.

3. Warren on Justice

Looking beyond Brown v. Board, historians and biographers have explic-
cated the centrality of justice in Warren’s jurisprudence more generally.

Yosifon, The Situational Character, supra note 84; Benforado, Hanson & Yosifon, supra note 91; Adam Benforado & Jon Hanson, The Great Attributional Divide: How Divergent View of Human Behavior Are Shaping Legal Policy, 57 EMORY L. J. 311, 315 n.3 (2008); Adam Benforado & Jon Hanson, Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights, 57 EMORY L.J. 1087 (2008); Adam Benforado & Jon Hanson, Na¨ıve Cynicism: Maintaining False Perceptions in Policy Debates, 57 EMORY L.J. 499 (2008); Hanson & Han-
son, supra note 48.

376 Plessy v. Ferguson, 163 U.S. 537, 542 (1896), overruled by Brown, 347 U.S. at 483, in 
the context of summarizing the Civil Rights Cases, although Plessy concerned Louisiana state 
legislation.

377 Id. at 551.

378 Id.; see also Hanson & Hanson, supra note 48, at 440–41 (discussing this aspect of
Plessy opinion).

379 Brown, 347 U.S. at 494.

380 Warren also emphasized power with a stark statement that “[t]he doctrine of ‘separate 
but equal’ did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson,” id. at 491, an implicit reminder that that was a doctrine that had been invented by courts 
and was therefore an instantiation of power (and one subject to being undone by the same 
court).

381 Id. at 494.

382 Id.

383 See id. at 489 (“[A]lthough these sources cast some light, it is not enough to resolve the 
problem with which we are faced. At best, they are inconclusive. . . . What others in Congress 
and the state legislatures had in mind cannot be determined with any degree of certainty.”).

384 Id. at 492.
Among such authorities, the consensus is strong: Warren’s judicial touchstone was his own active and empathetic sense of justice combined with a resolute willingness to act upon it. One biographer, G. Edward White, for instance, explained that “Warren’s contribution . . . was not as an ideologue . . . He did not act from the perspective of a considered system of thought, but from his instinct for what was fair, honorable, politically feasible and sensible at the time.” White encapsulated the Chief Justice’s jurisprudential goal as follows: “[I]n a society fraught with injustices, he sought to use the power of his office to promote decency and justice.”385 “Warren’s greatest strengths,” White explained, “were intangibles,” including “decency” and “inner conviction” the possession of which allowed him to “function[] as a symbol for a large inarticulate body of the American public: he pursued Everyman’s instinctive ideal of fairness and justice.”386

As another biographer summarized, Warren “never forgot that people, individuals, stood behind each case.”387 Warren’s judicial opinions reflected his approach, philosophy, and priorities.388 In the words of a third biographer, Warren’s opinions possessed a “simple power” which spoke “with the moral decency of a modern Micah.” Still another summarized Warren’s attachment to justice this way:

[Warren] consciously conceived of the Supreme Court as a . . . residual “fountain of justice” to rectify individual instances of injustice, particularly where the victims suffer from racial, economic, or similar disabilities. He saw himself as a present-day Chancellor, who secured fairness and equity in individual cases, particularly where they involved his ‘constituency’ of the poor or underprivileged.389

The consensus on the driving force behind Chief Justice Warren’s jurisprudence is similarly captured in the very titles of several biographies: D.J. Herda’s 2019 profile is titled “Earl Warren: A Life of Truth and Justice,”390 Paul Moke’s 2015 offering is titled “Earl Warren and the Struggle for Justice.”

---

386 Id. (emphasis added). Similarly, the editors’ epilogue for the collection of Warren’s papers described the Chief Justice’s steadfast commitment to fundamental values that grew out of “his hard-working, injustice-hating, proletarian childhood.” Anon., Epilogue to EARL WARREN, THE MEMOIRS OF EARL WARREN 376 (anon. eds., 1977) (emphasis added).
387 CRAY, supra note 361, at 440.
389 SCHWARTZ, supra note 327, at 263; see also id. at 264 (“To the Chief Justice, the Court functioned to ensure fairness and equity in all cases where they had not been secured by other governmental processes. . . . The alternative as Warren saw it was an empty Constitution, the essential provisions of which were rendered nugatory because they could not be enforced.”).

In addition to those third-party accounts, there is at least one revealing first-person account that Chief Justice Warren, while on the Court, offered of his jurisprudential philosophy. Only a few months after authoring the second Brown v. Board opinion, this one providing for the infamous “all deliberate speed” remedy, the Chief Justice published an essay in Fortune magazine as part of a series, titled “New Goals.” In his essay, Warren speculated about the likely direction and importance of law and the legal system in the next quarter century. Before reviewing the text itself, some context may help shed light upon Warren’s essay, the factors contributing to Brown v. Board, and the subsequent jurisprudence for which Brown was a harbinger.

Peering into the global future, Warren speculated that “[t]he world’s chief need in these next decades will be peace and order; and of all human institutions, law has the best historical claim to satisfy this need.” Warren was calling for “peace and order” specifically because it was the product of a just system. As he explained, “Isaiah said that peace is the work of justice. It was an English axiom, framed by Coke, that certainty is the mother of quiet. Justice and certainty are twin aims of the law.”

395 There may appear to be a tension between this emphasis on justice motivations, and the earlier discussion about interest convergence driving the Brown decision. Supra text accompanying notes 334–337. However, the two stories are reconcilable in the sense emphasized in Part II if justice is sensed, and those perceptions are shaped by cultural factors. Supra text accompanying notes 338–347. The earlier discussion is more situational, looking to the convergence of interests that shaped the culture, sense of right and wrong, and motivations of Warren (and Warren Court). Here we look to the dispositional motivations of the actors, in this case a commitment to justice. See Hanson & Yosifon, The Situation, supra note 84. In other words, the convergence of interests was among the factors shaping perceptions of injustice.
398 On the influential periodical’s 25th anniversary, the editors’ published a series of solicited essays from ten prominent Americans who shared their opinions about national and global goals for the next 25 years.
399 Warren, supra note 397, at 106.
400 Id. (emphasis added).
According to Warren, a key explanation for why law should be more significant in taking on “the great mid-century challenges” was that law, properly conceived and applied, responds to and satisfies a profound human yearning, a universal craving, in “the nature of man,” for justice.\footnote{Id.} Warren wrote:

In all times and places he has had a sense of justice and a desire for justice. Any child expresses this fact of nature with his first judgment that this or that “isn’t fair.” A legal system is simply a mature and sophisticated attempt, never perfected but always capable of improvement, to institutionalize this sense of justice and to free men from the terror and unpredictability of arbitrary force.\footnote{Id. (emphasis added).}

But, Warren cautioned, law’s vigilance was necessitated by a second, conflicting human impulse: “[T]he same human nature that craves justice and freedom under law is too often willing to deny them to others. Thus, the struggle for law is never-ending, and our generation is inevitably engaged in it.”\footnote{Id. (emphasis added).} Centering “justice” as the paramount goal of law, Warren saw the tendency of the privileged classes and groups of society to deny justice to the powerless as the most urgent threat to that end. Law’s purpose, in short, was to facilitate the first element of human nature (that is, the urge to provide justice to some) by preempting the second (that is, the urge to deny justice to others). To mediate that struggle for that purpose, Warren suggested, was the Supreme Court’s role.

Clearly, the charge was difficult, requiring sound judgment honed by experience and a commitment to higher ends. As Warren would later put it, the pursuit of ethically sound judicial decision making requires “discernment of right from wrong” and the ability do so “in the midst of great confusion.”\footnote{G. Edward White, Earle Warren as Jurist, 67 Va. L. Rev. 461, 472 (1981) (quoting Chief Justice Earl Warren, Address at Louis Marshall Award Dinner at the Jewish Theological Seminary of America (Nov. 11, 1962) 1, 8–9 (transcript available in Earle Warren Papers, Manuscript Division, Library of Congress, Box 809)).} G. Edward White, one of Earl Warren’s biographers, summarized Warren’s approach as follows:

There were three imperatives in Warren’s calculus of judging. The judge needed to search for the “law beyond the law,” to discern right from wrong “in the midst of great confusion,” and to discover the ethical path. The judge needed to do these things because American society was founded on basic distinctions between right and wrong, justice and injustice, freedom and arbitrariness. The Constitution embodied those distinctions. The judge had a duty to articulate them.\footnote{Id. (emphasis added).}
Although Chief Justice Warren’s *Fortune* essay is one of the few public places in which he describes his big-picture view of the law (and, implicitly, his role and approach to judging), there is widespread agreement among scholars that a driving force behind the unanimous *Brown* decision, was Chief Justice Earl Warren’s (and the entire Court’s) strong justice- or morality-based approach. Warren, in fact, was calculated in producing a unanimous decision to help legitimate reversing a long-established precedent and a controversial holding. He achieved that end by framing the question as a moral one, building a moral consensus among the justices, and altering or omitting certain doctrinal or constitutional questions.

4. Post-Text

The direct effects of *Brown v. Board* were arguably a bust—or worse. The principles of educational equality, however, may have helped to reset expectations and baselines, heightening the sense of injustice of African Americans and contributing to the rise of the civil rights movement. Still, in other areas, the Warren Court’s focus on justice as a judicial North Star arguably led to judicial advances in racial justice, stimulating a wide collection of justice-oriented, egalitarian holdings, and creating a potential point

---

406 See *HORWITZ*, supra note 394, at 23–25 (“After *Brown* was reargued in 1953 with Chief Justice Warren presiding, the Court decided unanimously to overrule *Plessy*. It was as clear to the justices then, as it continues to seem in retrospect, that only a unanimous decision could provide sufficient legitimacy for so grave and far-reaching a reversal of constitutional precedent.”).

407 See id. at 24 (explaining that Warren achieved an anonymous decision through a compelling opening statement “which frame[d] the question before the Court as a moral issue, in this case a moral challenge to America to fulfill its unkept promises to its black citizens” and by “balancing the competing claims of policy and principle”).

408 See id. at 24–25 (describing how Warren created “as extensive a legal and moral consensus as possible.”).

409 See *White*, supra note 404, at 472 (“The precise doctrinal steps that the [Warren] Court took to justify the eradication through constitutional analysis were far less important to Warren than the Court’s reaching the result of eradication unequivocally and unanimously. He did not want any justice equivocating about the result because of doctrinal technicalities; if doctrinal analysis offended, he would modify it or delete it. He himself saw no equivocation possible on the ethical issues . . . , but he did not want to present potential wafflers with a technical way out.”).


411 See id. (“Without *Brown*, Congress most likely would not have enacted civil rights legislation when it did. No such bill had been passed since 1875, and since the 1920s many proposed measures had succumbed to the threat or reality of Senate filibuster. *After Brown* raised the salience of race, many northerners—white and black—demanded civil rights legislation. Liberals in both parties endorsed the concept as the 1956 elections approached.”).


413 Cf. Mark Tushnet, *The Warren Court in Historical and Political Perspective* 3 (1993) (suggesting that justices on “the Warren Court accepted and then elabo-
of legal leverage that helped enliven and sustain a variety of social movements.  

While the landmark opinion eventually ended the explicit legal segregation of public schools and arguably helped to spark the civil rights movement, it also prompted an inegalitarian backlash and “massive resistance” from defiant White leadership. Many White people in the South mobilized to nullify the decision by intimidating Black families, abusing the system to challenge the use of public funds, and closing some public schools. The ensuing conflict helped catalyze major civil rights protests and, eventually, the Civil Rights Act of 1964.

rated the proposition that in our constitutional system all Americans are entitled to the benefits of formal equality”).


418 See infra Part II(F) (highlighting the protests in Birmingham, Alabama in 1963); see also KLARMAN, supra note 333, at 366–67 (“After the epic Birmingham street demonstrations in spring of 1963 and the administration’s introduction of landmark civil rights legislation the pace of school desegregation accelerated significantly.”); Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown, 117 HARV. L. REV. 1470, 1501 (2004) (“The civil rights movement’s efforts to enforce and expand Brown through boycotts and sit-ins elicited violent opposition in the South, which in turn began to discredit Southern resistance and build sympathy for the movement in the North.”).
“Letter from Birmingham Jail”—Modern Racial Injustice

Roughly a century after Frederick Douglass’s famous speech, Dr. Martin Luther King, Jr.—like many others had in the interim—joined a larger movement, known today as the civil rights movement, in the hope of finally realizing—or further advancing—the promise of justice. Despite their temporal distance, King and Douglass shared much in common, including their strategy of exposing injustice and appealing to justice to promote change and racial equality. To illustrate, we turn to King’s 1963 “Letter from Birmingham Jail.”

1. Context

Again, some context may be useful. A decade after the Supreme Court’s watershed decision in Brown v. Board, the waters remained stagnant. Responding to sustained segregation, the Southern Christian Leadership Conference, the national organization King led, joined forces with the Alabama Christian Movement for Human Rights, a local Birmingham organization led by Fred Shuttlesworth. The two organizations came together in the hope of making change locally and nationally.

The potential for change in Alabama seemed especially strong, though resistance was intensifying and tending toward violence. In the political realm, White supremacist George C. Wallace had just won the governor’s seat in a landslide victory, following a campaign of vociferous opposition to racial integration, and lawless disregard for the mandates of Brown v. Board. If necessary, he vowed, he would “stand in the schoolhouse door” to prevent desegregation. And, in his inaugural address in January of that year, Wallace forcefully articulated his policy priorities, proclaiming “segre-

---

419 David Howard-Pitney begins his longer comparison this way:
No Afro-American leaders in American history have so successfully pressed the grievances and demands of [B]lacks on the American nation as did Frederick Douglass in the Civil War-Reconstruction era and Martin Luther King, Jr., in the decades following World War II. Although separated by 100 years, important similarities exist in their styles of moral and political leadership and in the national conditions which aided their notable success in creating a moral consensus in the United States committed to the abolition of slavery and racial segregation.

David Howard-Pitney, Wars, White America, and The Afro-American Jeremiad: Frederick Douglass and Martin Luther King, Jr., 71 J. NEGRO HIS. 23, 23 (1986).


422 See JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION 94 (2001).

423 See Brown, 347 U.S. at 486–96.

Harvard Law & Policy Review

[Vol. 15

gation now . . . segregation tomorrow . . . segregation forever.” In Birmingham, the equally segregationist Theophilus Eugene “Bull” Connor was the Commissioner of Public Safety. Connor commanded Birmingham’s police and fire departments, inspiring admiration from some and disdain from others for his impulsive brutality.

King and his fellow organizers were thus entering a highly volatile environment. In a way, as we’ll see, that was an advantage. Hoping to draw national attention to Birmingham’s Jim Crow policies and customs, their tactics included boycotting the city’s White-owned downtown businesses during the Easter season, an otherwise bustling and profitable shopping period. Under King’s guidance, a growing number of locals participated in coordinated, non-violent protests—marches, sit-ins, kneel-ins at churches, and the like—leading to many arrests under Bull Connor’s direction.

With protests and boycotts gaining momentum, the city sought to short-circuit the process by obtaining a state court injunction against all “parading, demonstrating, boycotting, trespassing and picketing.” King, Shuttlesworth, and other campaign leaders decided to protest anyway. As King explained: “We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process.” He believed that any harsh or violent reactions to their direct action could, if captured by news media, elicit national, perhaps global, reactions, and that such negative press might move President Kennedy and the federal government to acknowledge and address the underlying racial injustices behind such violence. So, despite depleted funds for cash bonds, King moved forward, understanding that he would likely be targeted, arrested, and jailed.

And so he was. Police promptly arrested King for violating the injunction, placing him in solitary confinement and initially depriving him of contact with his lawyers his wife. It was from that cell that he composed

---

430 Birmingham Campaign, supra note 428.
431 Id.
432 Garrow, supra note 427, at 227–28 (1986); see also supra notes 334–339 (discussing the convergence of interests).
433 Id.
434 Id.
435 Birmingham Campaign, supra note 428.
his famous letter, much of it by scribbling around the margins of a local newspaper.\footnote{Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), in \textit{King}, supra note 426, at 76 (“Begun on the margins of the newspaper in which the statement appeared while I was in jail, the letter was continued on scraps of writing paper supplied by a friendly Negro trusty, and concluded on a pad my attorneys were eventually permitted to leave me.”).}

King framed his missive as a direct reply to an open letter, titled “A Call for Unity,” published in that very paper and co-authored by eight of the city’s most prominent ministers.\footnote{\textit{A Call for Unity}, Letter from C. C. J. Carpenter et al. to Martin Luther King, Jr. (Apr. 12, 1963), https://kinginstitute.stanford.edu/sites/mlk/files/lesson-activities/clergybirmingham1963.pdf [https://perma.cc/GF9H-6P5B].} Their statement criticized King directly, characterized the protests as “unwise and untimely,” and called for unity among all residents of Birmingham—“both our white and Negro citizenry.”\footnote{\textit{Id.}} They implored locals to unite in opposition to the protests:

\begin{quote}
We . . . strongly urge our own Negro community to withdraw support from these demonstrations, and to unite locally in working peacefully for a better Birmingham. When rights are consistently denied, a cause should be pressed in the courts and in negotiations among local leaders, and not in the streets. We appeal to both our white and Negro citizenry to observe the principles of law and order and common sense.\footnote{\textit{Id.}}
\end{quote}

King was released on bail four days after being arrested, as the nation’s eyes turned increasingly to the growing tensions in Birmingham.\footnote{\textit{Birmingham Campaign, supra note 428.}} Journalists captured much of what happened next: Bull Connor’s aggressive deployment of the fire brigade and their high-pressure fire hoses, unmuzzled attack dogs, a billy-club-wielding police force, and the mass arrests of hundreds of (non-violent) children.\footnote{\textit{Id.}} Through their coverage, newspapers around the world helped transform national attitudes and, eventually, segregation policies. The protests and the ruthless backlash were having the very sort of effect for which King had hoped.

2. \textit{Text}

King’s letter—like the texts reviewed above—squares well with the injustice framework. King was responding both to a particular text and to a cultural narrative that had rationalized White supremacy for generations. Much like the authors of the declarations, King understood that he was writing not just to his purported audience (eight members of Birmingham’s clergy and the Birmingham locals) but also to the nation and beyond.\footnote{Cf. Bell, supra note 336; \textit{Mary Dudziak, Cold War Civil Rights: Race and the Image of American Democracy} 45 (2000).}
Drawing entirely from erudition, he wrote what could have been titled a “Declaration of Modern Racial Injustice.” Like the other declarations, King began by explaining that his case would be an appeal to reason—expressing a respect for his audience and presuming their allegiance to, as reasonable people, such persuasion. In his words: “[S]ince I feel that you are men of genuine good will and that your criticisms are sincerely set forth, I want to try to answer your statement in what I hope will be patient and reasonable terms.”

King’s letter is deeply concerned with justice, containing timeless reflections on the relationships between justice and law and between justice and peace. For King, law must serve justice, and justice therefore precedes law. As he put it, “law and order exist for the purpose of establishing justice,” and “when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.” When the law—and the violence it wields—produces, enables, and camouflages systemic injustice, as was the case in Birmingham, then legal disobedience is justified. In those situations, there is no avoiding tension and violence; they are already baked into the system, even when concealed by surface-level “order” and “peace.” The protests were intended to “surface the hidden tension that is already alive.” In Why We Can’t Wait, King explained that the nonviolent protester was:

willing to risk martyrdom in order to move and stir the social conscience of his community and the nation. Instead of submitting to surreptitious cruelty in thousands of dark jail cells and on countless shadowed street corners, he would force his oppressor to commit his brutality openly—in the light of day—with the rest of the world looking on.

King also introduced complexity to the nature of any peace being shattered by the protests or, more accurately, the violent backlash to them. He defined a “positive peace,” not by the absence of tensions or open hostilities, but by “the presence of justice.” That was the peace worth protesting for. “Negative peace,” in contrast, provides the veil of social harmony, obscuring injustice beneath it. Indeed, that is often where systemic injustice thrives: behind the facade of peace, quiet indifference to injustice, and the suppression of outward tension. The illusion of peace and the “order” it maintains, King explained, is especially insidious:

444 King, supra note 437, at 76.
445 Id. at 85 (emphasis added).
447 King, supra note 437, at 85; see also Garrow, supra note 427, at 228 (describing King’s goal of “the surfacing of tensions already present”).
448 King, supra note 426, at 37; see also Stephen B. Oates, Let the Trumpet Sound: A Life of Martin Luther King, Jr. 211–12 (1994).
449 Id. supra note 437, at 84 (emphasis added).
I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice, who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice, who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action." 451

King specifically connected justice with the absence of injustice. Responding to the criticism that he should not be in Birmingham, he explained that he cannot "sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly." 452 By focusing on racial injustice in that way, King transformed himself from an interloper to an insider. 453 Completing the circle, King wrote: "Never again can we afford to live with the narrow, provincial 'outside agitator' idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds." 454

King justified his own actions and pleaded the justice of his cause by demonstrating the injustice of the existing situation. Blaming the protestors for violent backlash is, King observed, tantamount to "condemning a robbed man because his possession of money precipitated the evil act of robbery." 455 "Society," King insisted, "must protect the robbed and punish the robber." 456 Relatedly, King emphasized how the protests were a response to, not a cause of, injustice. Responding directly to the clergy, he wrote: "You deplore the demonstrations taking place in Birmingham. But your statement . . . fails to express a similar concern for the conditions that brought about the demonstrations." 457

King repeated the injustice theme throughout his letter. Thirteen times, King explicitly emphasized the "injustices" in Birmingham—injustices to which he and all those engaged in the direct actions were responding. 458 He

451 Id. (emphasis added); see also MAHATMA GANDHI, NON-VIOLENCE IN PEACE AND WAR (1948) (detailing the strategy and goals of nonviolent civil disobedience which Gandhi himself employed in his decades-long struggle for Indian Independence against British rule).

452 King, supra note 437, at 77 (emphasis added). Note that our definition of justice—and the notion of advancing justice by eliminating injustice—is arguably implied in the phrase "Injustice anywhere is a threat to justice everywhere." King's beautiful aphorism implicitly aligns with the injustice framework's position that the means to justice is through the end of eliminating injustice. See supra Part I(A).

453 The frame also helped him reconceptualize the pertinent groups. See infra notes 466–478 and accompanying text.

454 Id. at 85.

455 Id. at 86 (perhaps appealing to the traditional prioritization of property rights and the general cultural associations of African Americans).

456 Id. at 77–78.

457 Id. at 77–78.

458 See generally id.
described, for instance, the "racial injustice" that "engulfs this community" and pointed to the "racial and economic injustice," and "blatant injustices inflicted on the Negro." It was that "injustice," King stressed, that rendered urgent the need for its elimination and thereby the advancement of justice. Similarly, King used the modifier "unjust" nineteen times, describing, for example, the "unjust plight" of the Black members of the community, as well as the "unjust laws." King noted, as well, the "grossly unjust treatment" that "Negroes have experienced . . . in the courts," implicitly rebutting the claim by the Birmingham clergy that "racial matters" should "properly be pursued in the courts.

As indicated above, King highlighted the injustice by first redefining the relevant groups, providing an alternative to the Birmingham clergy’s invocation of the familiar ingroup–outgroup distinction between local citizens and outsiders entering Birmingham intent upon exploiting or creating division. In calling upon “both our white and Negro citizenry” and “our own Negro community” to “unite locally in working peacefully,” the ministers tapped into a deep-rooted southern “us” and “them” binary. The ministers expressed that ours is a community in general harmony that functions through formal and informal systems of place, order, dispute resolution, and, if necessary, reform. “However, we are now confronted by a series of demonstrations by some of our Negro citizens, directed and led in part by outsiders.” Theirs is a group of outside agitators seeking to create problems that don’t exist, to divide us, and to “incite to hatred and violence.”

Notably, the ministers’ statement made no mention of injustice or justice—selecting instead anodyne phrases like “racial problems” and “racial matters.” Regarding those “matters,” the appropriate response was for those local individuals who felt aggrieved to “unite locally in working peacefully for a better Birmingham,” and, if need be, press their cause “in the courts and in negotiations among local leaders, and not in the streets.” Put differently, the letter said that there was no problem with “us” or our local institutions; the problem was with the protests, the protestors, and the out-

459 Id. at 78.
460 Id.
461 See generally id.
462 Id. at 85.
463 Id. at 84.
464 Id. at 78.
465 A Call for Unity, supra note 438.
466 See supra text accompanying notes 451–454.
467 A Call for Unity, supra note 438.
468 Id.
469 See id. (explaining that, when rights are denied, the “cause should be pressed in the courts and in negotiations among local leaders, and not in the streets”).
470 Id.
471 Id.
472 Id.
473 Id.
siders who exaggerated problems, fomented distrust, and instigated protests “in the streets.”

King rejected that frame and emphasized the opposition between “the oppressor race” and “the oppressed race” or “the segregator” and “the segregated.” Group identities were determined not by one’s residency relative to Birmingham but by one’s role relative to the injustice. To make the point even clearer, he opened his letter by demonstrating his institutional, and not merely racial, connection to the local Black community. He pointed out that, as president of SCLC, an organization that operated throughout the south and collaborated with “eighty-five affiliated organizations” in the region, including the Alabama Christian Movement for Human Rights in Birmingham, he had institutional connections with, and obligations to, Birmingham. King continued:

Several months ago the affiliate here in Birmingham asked us to be on call to engage in a nonviolent direct-action program if such were deemed necessary. We readily consented, and when the hour came we lived up to our promise. So I, along with several members of my staff, am here because I was invited here. I am here because I have organizational ties here.

By redefining the groups, King could better enumerate the inequalities between those groups. In describing the “underlying causes” of the demonstrations, for example, he sketched “the hard, brutal facts of the case” regarding the inequalities and suffering. He called Birmingham “probably the most thoroughly segregated city in the United States.” In some of his more stirring prose, King illustrated the facts of injustice with a series of humanizing vignettes for those readers “who have never felt the stinging darts of segregation.” He urged those racially privileged readers to sense the injustice, helping them imagine themselves in the situation of the subordinate group who daily suffer the indignities of and disadvantages of racial injustice. How would it feel, he asked, to witness “vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim” or to watch “hate filled policemen [who] curse, kick and even kill your black brothers and sisters” or to know that “the vast majority of your twenty million Negro brothers [are] smothering in an airtight cage of poverty in the midst of an affluent society”? What about the agony of explaining “to your six year old

---

474 Id.
475 Id. at 89.
476 Id. at 83.
477 Id. at 77.
478 Id. at 86.
479 Id. at 78; cf. supra text accompanying notes 124–129 (recalling grievances in the Declaration of Independence).
480 A Call for Unity, supra note 438, at 88.
481 Id. at 87.
482 Id. at 91 (emphasis added).
483 Id. at 91.
daughter why she can’t go to the public amusement park that has just been advertised on television? 484 How would it feel to witness the “ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people”? 485 And what of the humiliation of taking “a cross country drive” and having to “sleep night after night in the uncomfortable corners of your automobile because no motel will accept you” or the indignity of “day in and day out” encountering “signs reading ‘white’ and ‘colored’”? 486 How would it feel, King asks, “living constantly at tiptoe stance, never quite knowing what to expect next,” and coping with the exhausting struggle of “forever fighting a degenerating sense of ‘nobodiness?’” 487

King also sought to reveal the power underlying and creating the inequalities he identified. He described the background “power structure,” that is “the city’s white power structure,” which caused and maintained the unequal conditions that produced the urge to protest. 488 He highlighted Birmingham’s “ugly record of brutality” and the fact that “[t]here have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in the nation.” 489

Similarly, he noted the “power” of one group to “compel[ ] a minority group to obey” a law which it “does not make binding on itself.” 490 Echoing portions of Chief Justice Warren’s Brown opinion, King described the power of the racial categories and of laws of segregation to generate, not only harmful segregation, but also the “false sense of superiority” that it gives to “the segregator,” and “the false sense of inferiority” to the segregated, reinforcing the illegitimate subordination that leaves too many living in “the dark depths of prejudice and racism.” 491

King also explained that the protests themselves were intended to elicit the coercive power otherwise hidden behind negative peace, and, in the process, to expose as illegitimate the suffering and inequalities it produces. King wrote:

[W]e who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive. We bring it out in the open, where it can be seen and dealt with. Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural

484 Id. at 91–92.
485 Id. at 92.
486 Id.
487 Id.
488 Id. at 87.
489 Id. at 87–88.
490 Id. at 94.
491 Id. at 90–93.
medicines of air and light, injustice must be exposed to the light of human conscience . . . before it can be cured. 492

Direct action protests, in short, seek to expose injustice, "with all the tension its exposure creates." 493 Tension is not the end but the means. Exposing injustice is not the end but the means. The resultant injustice dissonance, in turn, is intended to awaken and galvanize the collective will of those whose complicity had been based on ignorance or lack of urgency. 495 It must be brought into "the air of national opinion before it can be cured." 496

Finally, King challenged the legitimacy of the legal system that exerted and reflected the background allocations of power. He noted, for instance, that African Americans had long "experienced grossly unjust treatment in
the courts.” Indeed, it was a court that had declared that even nonviolent protests were themselves illegal. Regarding the failures of legislative and democratic processes, King echoed Jefferson and Stanton by defining a law as “unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law” and asking:

Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters . . . despite the fact that the Negro constitutes a majority of the population. Can any law set up in such a state be considered democratically structured?

King, like Douglass and Stanton before him, also invoked the Declaration of Independence and the political axiom that a government that failed to uphold its grand promises was like a party that breached a contract—it lacked legitimacy. Promises, promises broken, and the norm of promise-keeping were a recurring theme in King’s writing and speeches. As noted above, King began his Letter by highlighting his own commitment to promises made, drawing an implicit contrast with the failure of Birmingham officials to keep their promise. Later, again like Stanton and Douglass, King leveraged the national promise of justice by emphasizing the contradiction between what we say and what we do. He highlighted, for instance, the “majestic words” that “Jefferson etched” “across the pages of history” “that all men are created equal.” And he called for “mak[ing] real the promise of democracy,” and “bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of . . . the Declaration of Independence.”

497 Id. at 87.
498 See supra text accompanying notes 430–435.
499 King, supra note 437, at 94.
500 Id.
501 See supra text accompanying note 478; see also King, supra note 437, at 86 (“We . . . consented, and when the hour came we lived up to our promise.” (emphasis added)).
502 See King, supra note 437, at 66 (“In the course of the negotiations, certain promises were made by the merchants—for example, to remove the stores’ humiliating racial signs. On the basis of these promises, the Reverend Fred Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to a moratorium on all demonstrations. As the weeks and months went by, we realized that we were the victims of a broken promise.” (emphasis added)).
503 Id. at 106.
504 Id. at 101.
505 Id. at 108–09. Three months later, the promise trope was even more central in his “I Have a Dream” speech, which was built around the metaphor of an unpaid “promissory note.” King, supra note 2. Highlighting the still-burning “flames of withering injustice,” King intoned, Black Americans are forced to live as if beached “on a lonely island of poverty in the midst of a vast ocean of material prosperity.” Id. Their shared purpose, King explained, was to mobilize for racial justice by calling it out and demanding its elimination—the long overdue repayment of national debt. In his words:

[We've come here today to dramatize a shameful condition. In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the
Throughout his writing, his speaking, and his direct-action protests, King sought to highlight inequality and suffering, to reveal the role of power in producing and maintaining those harms, and to challenge their legitimacy. Change, he argued, required a general awareness of an underlying injustice and a public recognition of "the deep groans and passionate yearnings of the oppressed race." He hoped to "arouse the conscience of the community" and through his words and deeds, to persuade White moderates to sense the injustice, to render it visible in the form of Bull Connor’s dogs and firehoses. Like water to fish, King encouraged readers to appreciate justice by confronting and contemplating its absence. Like Jefferson, Stanton, Douglass, and many others before and since, King moved others by tapping into the mobilizing sense of injustice.

3. Post-Text

Owing in part to its elegant composition, its significance at the time, and King’s historical and global legacy, the letter has been described as “a rhetorical masterpiece,” “a landmark document of the civil-rights movement,” “a classic work of protest literature,” and “the most important written document of the Civil Rights Era.” The letter, which would also magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men—yes, black men as well as white men—would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked “insufficient funds.”

Id.

506 King, supra note 437, at 101.
507 Id. at 95.
509 Watson, supra note 508, at 3.
511 S. Jonathan Bass, Letter from Birmingham Jail, ENCYCLOPEDIA OF ALABAMA (Nov. 15, 2019), http://encyclopediaofalabama.org/article/h-1389 [https://perma.cc/H8QQ-T2QP] (“The letter served as a tangible, reproducible account of the long road to freedom in a movement that was largely centered around actions and spoken words.”).
form the basis of King’s book, Why We Can’t Wait, continues to shape social attitudes toward the purposes and effects of direct action protests and civil disobedience.

King’s iconic letter has convinced many to appreciate the role of social protests in producing change. No doubt, it has also emboldened some to participate. King’s letter, like the theory of change it explicates, made the water of justice more visible by portraying its suffocating absence. The letter clarified how direct action can serve to expose the “sweltering heat of injustice.” As King would share that August, his “dream”—“deeply rooted in the American dream”—was to end centuries-old racial injustice and finally bring about the fulfillment of this country’s promise—that “promised land,” “an oasis of freedom and justice.”

The long-term effects of the Birmingham campaign are mixed. The movement is generally credited as having fostered changes in social attitudes and legal policies, including the passage of the Civil Rights Act of 1964. For many, the sort of outspoken racial animus embodied by Bull Connor and George Wallace came to define what stereotypical racism looks like: with all of its ugliness of brash ignorance, unalloyed hatred, unsayable epithets, and brooding violence. Such explicit expressions of racist attitudes largely faded from public view in the decades that followed; indeed, the old model became a convenient shadow behind which subtler forms of racism were eclipsed and provided a system-affirming marker of seeming progress.

By the late 1960s, concerted opposition, retrenchment and backlash was rapidly gaining momentum, revealing the limited and precarious nature of
those apparent gains. The updated machinery of racism took many new shapes including, for instance, the return of Jim Crow in new garb,\textsuperscript{520} the success of dog whistle politics and the “southern strategy,”\textsuperscript{521} the trumped up wars on crime and drugs,\textsuperscript{522} the distortion and cooptation of Martin Luther King’s message and legacy\textsuperscript{523} (including the abuse of “colorblindness”\textsuperscript{524}), unfounded claims of post-racialism,\textsuperscript{525} the refinement of inequality-enhancing policy ideologies and jurisprudential theories,\textsuperscript{526} and more recently, the mainstream re-emergence of open White supremacy, and the anti-Critical Race Theory (CRT) movement. The backlash following the late 1960s, as the civil rights (and anti-Vietnam war) protests subsided, also saw the beginning of a long era of relatively subdued activism.\textsuperscript{527}

King himself had worried about how shallow and ephemeral the changes he helped bring about would turn out to be. Shortly before his assassination, for instance, he confided to a friend that the seeming advancements toward a more just world may have been a mirage:

I’ve come upon something that disturbs me deeply. We have fought hard and long for integration . . . but I have come to believe that we are integrating into a burning house. . . . Until we commit ourselves to ensuring that the underclass is given justice . . . , we will continue to perpetuate the anger and violence that tears the soul of this nation.\textsuperscript{528}

\textsuperscript{520} See generally \textit{The New Jim Crow: Mass Incarceration in the Age of Colorblindness} (2010).

\textsuperscript{521} See generally \textit{Ian Haney Lopez, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class} (2014).

\textsuperscript{522} See generally \textit{Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America} (2006).

\textsuperscript{523} See generally \textit{Jeanne Theoharis, A More Beautiful and Terrible History: The Uses and Misuses of Civil Rights History} (2018).

\textsuperscript{524} See \textit{Munakawa, Naoki, The First Civil Right: How Liberals Built Prison America} 273 (K) (2014) (“If the problem of the twentieth century was, in W. E. B. Du Bois’s famous words, ‘the problem of the color line,’ then the problem of the twenty-first century is the problem of colorblindness, the refusal to acknowledge the causes and consequences of enduring racial stratification.”); see generally \textit{Keeanga-Yamahtta Taylor, FROM #BLACKLIVESMATTER TO BLACK LIBERATION} ch. 2 (2016).


\textsuperscript{526} See generally Hanson & Yosifon, \textit{The Situation, supra note 84; Chen & Hanson, supra note 96; Hanson & Hanson, supra note 48.}


King’s fear was prescient and his unanswered call for structural justice would yield yet another dream deferred.529

G. “Declaration of the Occupation of New York City”—Corporate Injustice

That, at last, brings us to the topic at the center of this volume: Occupy Wall Street, the social movement that took the country (or world) by storm for several months ten years ago.

1. Context

Occupy Wall Street began modestly on September 17, 2011.530 That was 235 years after Thomas Jefferson called for a violent revolution to establish an independent nation.531 It was 150 years after the war fought across the fault line of slavery began—one of the numerous failed efforts to address the racial injustices that Frederick Douglass described as the nation’s "revolting barbarity and shameless hypocrisy."532 It was nearly a century after Elizabeth Cady Stanton’s too-bold demand for women’s suffrage was answered in the affirmative on a national scale.533 It was roughly eighty years after Franklin D. Roosevelt introduced his New Deal promising to place the country back on the "path of real progress, of real justice, of real equality for all of our citizens, great and small." 534 It had been six decades since the complaint in Brown v. Board was filed.535 It was nearly a half-century after Martin Luther King, Jr. made his case for nonviolent protests to render nationally visible the continued racial apartheid still dividing the nation.536 And it was just a few years after President Barack Obama instilled in many Americans an audacious hope that the wait was over and nation was at last on the verge of fulfilling it’s promise. As the new president put it in his 2009 inaugural address:

531 See supra Part II(A).
532 See supra Part II(C).
533 See Elizabeth Cady Stanton, Suffrage: A Natural Right in The Open Court 1–10 (The Open Court Publ’g Co. 1894) (Stanton’s plea for universal suffrage); see also IDA HUSTED HARPER, STORY OF THE NATIONAL AMENDMENT FOR WOMAN SUFFRAGE 11 (1919) (on June 4, 1919, the Nineteenth Amendment, which granted women the right to vote, was passed).
534 See supra text accompanying note 241.
536 See supra Part II(F). It was exactly fifty years after the “Declaration of Indian Purpose” had been drafted at the American Indian Chicago Conference. The Declaration Project, 1961 Declaration of Indian Purpose, http://declarationproject.org/?p=32 [https://perma.cc/58Q7-YFPF]. The Declaration of Indian Purpose, like the other Declarations, contained the same allegations of injustice and calls for justice that we have emphasized.
On this day, we gather because we have chosen hope over fear, unity of purpose over conflict and discord. On this day, we come to proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas that for far too long have strangled our politics. We remain a young nation. But in the words of Scripture, the time has come to set aside childish things. The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.537

Two years after that rallying cry, disappointment and resentment eclipsed hope for change. Reaction to Obama on the right had already been stridently negative: within a month of the inauguration, TV commentator Rick Santelli, claiming to speak for the “silent majority,” ranted about the Obama Administration “promoting bad behavior” by “subsidiz[ing] the losers’ mortgages.”538 Santelli called on Obama to “reward people that can carry the water instead of drink the water.”539 Invoking the authority of “our Founding Fathers,” Santelli asserted that “what we’re doing in this country now” is making “people like Benjamin Franklin and Jefferson . . . roll over in their graves.” He ended his on-air tirade by inviting “capitalists” to a “Tea Party,” a suggestion that helped inspire a right-wing movement.540

Before long, frustrations with, and anger at, the federal government, including the Obama Administration, also characterized the left side of the political spectrum.541 In 2010, The U.S. Supreme Court was implicated, when the conservative majority handed down the Citizens United opinion.542

539 Id.
With the transparently political decision of *Bush v. Gore* still fresh, the 5–4 opinion in *Citizens United* further empowered corporations to spend unbounded fortunes on elections and, in the process, further undermined the Court’s claim to apolitical neutrality and legitimacy. In this new era of negative feelings and institutional delegitimation, Federal Reserve Chairman Alan Greenspan testified that he had “found a flaw in . . . [his] ideology” of trusting profit-seeking financial institutions in unregulated markets. By 2011, the dramatic and still-growing income and wealth inequalities began to be clearly and credibly documented and discussed. At the same time, scholars exposed how the rich were getting richer through a “winner-take-all” political system, how corporate behemoths had duplicitously acted as “merchants of doubt” knowingly causing climate disaster for profit, and how the criminal legal system had operated as the locus of a “new Jim Crow.” During the same period, as if to validate those scholars, the federal need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority’s rejection of this principle elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.” (internal quotations omitted) (citing First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, at 817 (1978)).

Michael Levitin describes the erosion of “people’s basic trust in the legitimacy of American institutions” beginning around 2000. Quoting historian Adam Hochschild, he highlights the “public anger” in response to “an election basically decided by the Supreme Court—which . . . awakened a lot of people to the fact that the court was . . . a very political instrument, which in this case decided to hand the election to George W. Bush.”


government was bailing out major banks and businesses that were culpably linked to the housing crisis and economic recession,\textsuperscript{550} while those companies' top executives received immense bonuses, enjoyed criminal immunity,\textsuperscript{551} stripped of basic civil and human rights, including the right to vote, the right to serve on juries, and the right to be free of legal discrimination in employment, housing, access to education, and public benefits.).

\textsuperscript{550} Major financial institutions' actions after the passage of the Sarbanes-Oxley Act (SOA) led to the recession; those institutions were later bailed out by the government. In 2002, after the SOA was passed, President Bush urged Congress to subsidize home down payments, so low-income Americans could afford housing, and pressed banks to make homeownership more affordable. Banks introduced interest-only, adjustable-rate mortgages that appeared risk-free, given derivative financial instruments like mortgage-backed securities and credit default swaps, which were sold by investment houses and insurance companies like American International Group (AIG). The inexpensive down payments and low rates lured people into buying homes with future payments that would likely be beyond their reach. In 2006, when the housing market reached a saturation point because there were not enough new buyers to keep house prices high, housing prices started to decline and mortgagees stopped making payments because they could not afford them, or because they realized that the housing market was rapidly losing value. In turn, financial institutions that had offered subprime loans and derivative financial instruments faced liquidity crises. Bear Stearns, one such institution, was saved from bankruptcy due to an emergency loan from the Federal Reserve. Other banks thought that the government would also find them “too big to fail.” In September 2008, the government bailed out AIG for over $180 billion. In October, President Bush asked for, and received, $700 billion to buy banks' mortgage-backed securities. JAMES HOOPES, CORPORATE DREAMS: BIG BUSINESS IN AMERICAN DEMOCRACY FROM THE GREAT DEPRESSION TO THE GREAT RECESSION 194–96 (2011). Bank of America, Citigroup, JP Morgan Chase, Wells Fargo, Morgan Stanley, Goldman Sachs, Bank of New York Mellon, State Street, and Merrill Lynch, which accounted for 55 percent of U.S. Banks’ assets, received a total of $125 billion dollars in federal assistance as the recession hit. Charles W. Calomiris and Urooj Khan, An Assessment of TARP Assistance to Financial Institutions, 29 J. ECON. PERSPS. 2, 55–56.

\textsuperscript{551} Between 2009 and 2015, 49 financial institutions paid government entities and private plaintiffs close to $190 billion in fines and settlements for their misconduct giving rise to the recession. Only one Wall Street executive went to jail: Kareem Serageldin, a senior trader at Credit Suisse, received a 30-month sentence for inflating the value of mortgage bonds in his trading portfolio. All the while, CEOs of banks, like Jamie Dimon of JPMorgan Chase, received high raises. See William D. Cohan, How Wall Street's Bankers Stayed Out of Jail, ATLANTIC, Sept. 2015, https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/ [https://perma.cc/DZW8-84FS]. Michael Levitin, describing the sense of injustice felt by Occupy Wall Street protestors, writes:

[T]he unforgivable sin for which history will judge Obama is clear: he let the banks off the hook. It was one thing to stuff his Treasury Department with executives and lobbyists from Citigroup and Goldman Sachs. But two months into his term, when President Obama sat down for a reckoning with the most powerful CEOs on Wall Street and issued them a slap on the wrist, he lost much of the public’s trust. Instead of facing retribution for high crimes committed, the banking chiefs received hundreds of billions of dollars in taxpayer-funded bailouts, few strings attached. From that bailout, they lavished tens of billions in bonuses on themselves, board members, and traders, and repurchased company stock rather than investing it to rebuild the economy. Finally, Obama’s Justice Department handed down exactly zero jail sentences against the bankers who unlawfully enriched themselves at the nation’s expense.

LEVITIN, supra note 527, at 8–9; see also id at 68 (quoting historian Adam Hochschild regarding how the crisis undermined the legitimacy of the system: “it was so evident that the banking and finance industry had sold a terribly destructive bill of goods to the American people. That it had been eased by deregulation under a Democratic administration in the nineties also fed the belief that there was something wrong with the system”).
and cut corporate costs by laying off workers.\footnote{Over the course of the recession, the unemployment rate dramatically increased. In December 2007, the unemployment rate was 5.0 percent, and it had remained at or near that rate for the previous 30 months. In June 2009, the national unemployment rate was 9.5 percent. Four months later, the national unemployment rate peaked at 10.0 percent. \textit{U.S. Bureau of Labor Statistics, The Recession of 2007-2009} 2 (2012).} Employed or not, many homeowners across the nation suddenly found themselves under financial water or worse.\footnote{In 2010, at the peak of the foreclosure crisis, one in every 10 mortgages was at risk of default, and between 2008 and 2015 nearly one in every 12 households entered the foreclosure process. Emily S. Taylor Poppe, \textit{Homeowner Representation in the Foreclosure Crisis}, 13 J. Empirical Leg. Stud. 4, 809 (2016).} In short, it was a period when many Americans perceived the system to be unjust— with powerful interests illegitimately producing inequality and suffering.

One measure of that perception of injustice can be found in the Financial Crisis Inquiry Report published in 2011.\footnote{See \textit{generally The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report} (2011), \url{https://permanent.fdlp.gov/gpo50165/fcic_final_report_full.pdf} [https://perma.cc/GCN8-QHKU].} The Report was authored by The Financial Crisis Inquiry Commission, charged by statute with “examining] the . . . crisis that ha[d] gripped our country and explain its causes to the American people.”\footnote{\textit{Id.} at xv; \textit{see also id.} at xi (“The Commission was established as part of the Fraud Enforcement and Recovery Act . . . passed by Congress and signed by the President in May 2009. This independent, 10-member panel was composed of private citizens with experience in areas such as housing, economics, finance, market regulation, banking, and consumer protection. Six members of the Commission were appointed by the Democratic leadership of Congress and four members by the Republican leadership. The Commission’s statutory instructions . . . called for the examination of the collapse of major financial institutions that failed or would have failed if not for exceptional assistance from the government.”).} The Commission devoted over a year to studying the causes of the crisis; it held extensive public hearings, interviewed over 700 witnesses, and processed millions of pages of documents.\footnote{\textit{Id.} at xi–xii.}

The Report, a hefty 633 pages, was published two years after Obama’s inauguration and offered the following synopsis of the economic devastation and people’s emotional response to the crisis:

[Currently,] there are more than 26 million Americans who are out of work, cannot find full-time work, or have given up looking for work. About four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments. Nearly $11 trillion in household wealth has vanished, with retirement accounts and life savings swept away . . . . There is much anger about what has transpired, and justifiably so. Many people who abided by all the rules now find themselves out of work and uncertain about their future prospects. The collateral damage of this crisis has been real people and real communities.
2021]  Occupy Justice 429

The impacts of this crisis are likely to be felt for a generation. And the nation faces no easy path to renewed economic strength.557

The people’s “anger,” the description suggests, reflected their sense that they had done nothing to deserve their suffering. But had anyone done anything wrong to cause widespread economic devastation? The Commission said yes:

We conclude this financial crisis was avoidable. . . . The captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public. Theirs was a big miss, not a stumble. . . . To paraphrase Shakespeare, the fault lies not in the stars, but in us.558

“The greatest tragedy,” the Report later admonished, “would be to accept the refrain that no one could have seen this coming and thus nothing could have been done.”559

With such an authoritative governmental commission concluding that catastrophic harms suffered by the American public were the consequence of intentional choices made by powerful “captains of finance” to serve their own interest, the widespread injustice dissonance was understandable. That was the fertile soil from which Occupy Wall Street would take root and bloom.

2. Protest

Despite the conditions for protest, quiescence continued into 2011. According to journalist, author, and occupier Michael Levitin,560 by the fall of that year, even as “the suffering mounted,” “[t]he silence around these injustices was deafening.”561 Something had to give. And so it did.

In New York City’s Zuccotti Park, the Occupy Wall Street movement began with a march of just a few hundred activists.562 Within weeks, the modest demonstration ballooned to more than 600 U.S. communities and 951 cities across 82 countries.563 This sub-section uses Levitin’s book, Generation Occupy, the most complete account currently available, to illustrate how

557 Id. at xv–xvi.
558 Id. at xvii.
559 Id. at xxviii.
561 LEVITIN, supra note 527, at 9 (emphasis added).
562 Brucato, supra note 530, at 79.  
the injustice framework helps explain the emergence of the movement as well as its goals and effects.

Implicitly highlighting the elements of the injustice framework, Levitin opens his book describing how Occupy Wall Street both responded to and “ignited” a sense of frustration about “wealth inequality, corporate greed and the corrupting influence of money in politics.” Occupancy Wall Street, that is, drew attention to, and further activated, a growing injustice dissonance—in this case, how the wealthiest “one percent” and the corporate entities they control illegitimately corrupted the political systems to further advantage themselves. The Occupy Wall Street movement concomitantly called for justice—that is, fundamental, systemic, egalitarian reform disempowering corporations and empowering “the people” through a vitalized democracy.

Throughout his book, Levitin returns repeatedly to those themes and others emphasized by the injustice framework, illustrating how perceptions of powerful actors reproducing inequality and suffering without legitimacy combined to yield a sense of injustice, anger, and demands for justice. To start, consider some numbers. Levitin uses the terms “justice” and “injustice” approximately 130 times, “power” and “powerful” around 150 times, and “inequality” more than 160 times.

In arguing that Occupy Wall Street was responding to perceived injustice he describes the period prior as one characterized by “widespread disbelief in the legitimacy of their elected governments” and a “generalized anger” and “economic frustration.” It was a moment when, all at once, there was “a new sense of clarity” that something was amiss, “as though a fissure had opened and suddenly we could all see through the cracks of capitalism and political corruption everywhere.” Suffering, angry, fed up—the people demanded justice. Occupy Wall Street was thus “[a] decentralized global economic justice movement” that “embodied the shared suffering and universal anger caused by . . . . corporate culprits [who] were never punished.”

Although the sense of systemic injustice was ripening, for many it remained unnamed and there was no clarity or shared narrative about its sources. That is where Occupy Wall Street came in. According to Levitin, the months-long protest produced the collective “awakening” and “crystalized the public’s shared sense of injury” by “reshap[ing] how Americans

564 LEVITIN, supra note 527, at 1–3.
565 Fairness,” “fair,” and “unfair” show up around 35 times.
566 LEVITIN, supra note 527, passim. By comparison, he refers to “Occupy Wall Street” and “democracy”—both in his book’s title—around 200 and 50 times, respectively. Id.
567 Although he uses the terms “legitimacy” or “legitimate” only a around a dozen times, he uses a variety of terms that indicate that an outcome or process lacks legitimacy. For example, “corrupt” and “corruption” show up roughly three dozen times. Id.
568 Id. at 11–12.
569 Id.
570 Id.
571 Id. at 9 (emphasis added).
572 Id. at 257 (emphasis added).
573 Id. at 25; see also id. at 30 (“It was . . . like a fog had cleared” (quoting Sarah Jaffe)).
viewed the economy, inspiring a long-overdue discussion of issues of income inequality, corporate greed, an unjust tax structure and capitalism itself.573 In short, Occupy Wall Street “awakening America to indefensible levels of economic inequality, injustice and unfairness”574 and gave them a place to “connect their lately realized experience of injustice with the corruption, oppression and resistance.”575

Providing a first-hand account of the protest, Levitin describes the sense of shared, transcendent purpose among the protesters:

We jumped feet first into the movement of our time and suddenly we were eating and sleeping alongside people we didn’t know a week or a day or even an hour ago; people we were nonetheless ready to give to and sacrifice for and go to jail with, if necessary. Because something more powerful than ourselves—an idea, a resolve, the desire for justice—bonded us together. 576

For a variety of reasons, the Occupy Wall Street’s justice-centered message captured public attention and extended across the globe. Levitin describes the galvanizing effect of several instances of visible, coercive, violent police force deployed in response to Occupy’s direct-action tactics. He highlights the moment, early in the protests, when bystanders videotaped a New York City police officer blasting a “stream of pepper spray into the faces of several unarmed White women who fell to the sidewalk shrieking in pain.”577 The visceral evidence of police brutality quickly spread on the internet and “generated an outpouring of sympathy that would catapult Occupy Wall Street onto the national stage.”578 The blatant exercise of power made visible the deeper power structures behind it and catalyzed injustice dissonance, providing energy, sympathy, and legitimacy to the nascent movement, precisely as Martin Luther King, Jr. theorized.579 Spray canisters on Wall Street, like fire hoses in Birmingham, manifested the latent violence girding

---

573 Id. at 25; see also id. at 19 (“inequality illuminated”).  
574 Id. at 96–97 (emphasis added).  
575 Id. at 201 (emphasis added); see generally id. at 28–30 (providing more extensive discussion of how Occupy encouraged an awakened sense of injustice and its effects).  
576 Id. at 50.  
577 Id. at 14.  
578 Id. at 14; see also id. at 54 (describing an encounter between police and protesters that led to “seven hundred arrests . . . on the Brooklyn Bridge,” captured on video and covered by media across the globe and calling it a “defining moment that made Occupy a household name” for revealing how “American law and order” would “assert itself” how, in the city anchored by Wall Street capitalism, disruptive peaceful dissent would be suppressed); id. at 195 (describing how that incident yielded “compassion and outrage,” and “igniting the movement”); id. at 116 (describing the how Occupy-inspired college campus protests gained “national support” when a “copy blasted bright orange pepper spray in to into the faces of a dozen nonviolent students seated cross-legged on the ground” at the University of California, Davis).  
579 See supra text accompanying notes 492–496. By implicitly exposing the underlying power dynamics and tensions inherent in unjust systems and revealing the role of the police in serving the powerful and maintaining those systems, such blatant violence unveils a deeper injustice. Michael Levitin, when describing the “the overdue debate around police reform,” quoted retired police officer Ray Lewis who called cell phones “the greatest invention for justice” because “[i]t brings out the truth.” Levitin, supra note 527, at 325. Lewis explains:
the system-affirming veil of a “negative peace” that otherwise concealed injustice.580

A second source of the movement’s success was its ability to shift narratives about the sources of inequality. The Occupy movement rejected the long-dominant neoliberal narratives depicting large corporations as subservient to lawmakers and as team players with—or obedient servants to—consumers, workers, and other stakeholders.581 It portrayed corporate interests instead as dominating, capturing, or corrupting those lawmakers582 and as adverse to, and exploitative of, those stakeholders.

The new narratives reframed the relevant groups. Occupy jettisoned conventional language of fluid, freeing, harmonious market identities, roles, and relationships, adopting instead stories of power asymmetries and group-based exploitation between the haves and have-nots. Levitin writes:

We abolished terms like consumers, constituents, taxpayers, voters, buyers, spenders, customers and the electorate, reclaiming the clearest definition of all: people. We described the power structure in layman’s terms because we weren’t talking to the elites; we were talking to each other and to the great mass of Americans who had been cheated of their future.583

Where groups were identified, their boundaries related to the dynamics of oppositional economic oppression.584 Rejecting victim-blaming ideologies of individualism and merit,585 Occupy pointed the finger of blame at systems and the institutions and individuals who construct, maintain, and benefit from those systems.586 Thus, Levitin writes: “Occupy posed an emphatic

Id.

580 See supra text accompanying notes 447–450 and 492–496.


582 LEVITIN, supra note 527, at 10 (describing the view among Occupy participants “that Wall Street was calling the shots, not our elected leaders in Washington”).

583 Id. at 28.

584 Levitin himself employed the words “worker” or “workers” 250 times (or thereabouts) and the phrases “the people” and “99 percent” around 60 times each. On the other side of the us vs. them divide, he used the words “corporations” or “corporate” roughly 130 times, the phrase “1 percent” nearly 100 times, and the word “wealthy” around 25 times.

585 LEVITIN, supra note 527, at 44 (“Occupy radically challenged our national economic myth of America as an egalitarian meritocracy”). For detailed descriptions of the sort of conventional ideologies that Occupy rejected, see Chen & Hanson, supra note 581, at 5–31 (describing the dominant economic “meta script” of legal discourse and policymaking in the late 20th and early 21st centuries); Hanson & Hanson, supra note 48, at 440–60 (describing the dominant attributional script or “blame frame” employed to justify racial inequality and racial injustice in the late 20th and early 21st centuries).

586 LEVITIN, supra note 527, at 4 (describing how protesters “targeted Wall Street, the source of our dysfunctional democracy”); id. at 8 (“Everyone knew who to blame for the corpo-
challenge to the status quo, pointing a finger directly at the wealthy as the source of the problem."

Levitin argues that, because of the Occupy movement, many Americans came to the realization that they were being exploited by the powerful and wealthy, "that they had stopped sharing in the rewards of the economy, and were getting the shaft at the expense of those at the very top."

They understood that "[o]ur problem was not simply that we were struggling, but that our struggling benefited someone else." They realized "how the upper classes exploited those below them in the economic system." They witnessed how "Wall Street got bailed out and Main Street was left to rot as Washington subverted instead of advanced the interests of the majority." Occupy, in those ways, re-told the story "around people not having enough. The narrative of inequality—that our country is now one where the majority of people are one paycheck away from not having food and living in their cars—is the biggest gift that Occupy gave to our country."

According to Levitin, “The movement didn’t merely change the national conversation: it opened Americans up to the realization that our crony capitalist system was created by design to enrich only a small fraction of the wealthiest Americans.” Through Occupy, in short, Americans came to recognize “the economic system is rigged for those at the very top.”

That new taxonomy of groups and the nature of their relationship was key to the movement’s success in naming, reframing, blaming, claiming. Employing those categories, the inequalities and other harms were understood as symptoms of injustice. Meme-worthy phrases and "visceral rhetoric" echoed through the streets and then across the globe with refrains like "Banks got bailed out, we got sold out" or "99 percent vs. 1 percent," "People Over Profits," "End Corporate Rule," and "We are the 99 percent." While creating a story to capture the feelings of injustice that many people already had, Occupy made the injustice framework explicit. As Levitin explains, Occupy "gave voice to the sense of outrage that millions felt but had not been
able to articulate. . . . The facts of economic injustice were plain enough to understand; people just needed to hear them spoken in clear words.\footnote{Id. at 30 (emphasis added).}

In an interview with Levitin, Richard Woolf described the importance of this naming and reframing—“The 1 percent versus the 99 percent”—as follows:

[With Occupy it became possible to be articulate and noisy about economics when that was precisely what you couldn’t be. One of the important things Occupy did was to crowbar back into the allowable consciousness of the left the vital term of capitalism: to name the system that is the problem. Granted, it’s an abstraction, a summary term, but it’s precisely because of those qualities that it is absolutely vital to name it—because it allows disparate complaints, criticisms, flaws, weaknesses and injustices to be gathered together and called a name that can become the target for what needs to be changed.\footnote{Id. at 41.}

As a consequence of the new “paradigm of thought,”\footnote{Id. at 30 (quoting Lee Camp).} including new narratives and redefined groups, Occupy Wall Street brought attention to “the fundamental injustice of how the system works,”\footnote{Id. at 41 (quoting Richard Woolf).} and “enabled people to confront economic injustice in a way that hadn’t been done during most of the preceding century,”\footnote{Id. at 26.} and it produced a “singular demand that was all of the demands: Justice. Fairness. Equality.”\footnote{Id. at 4}

As authoritative an insider’s perspective as Levitin’s book may be, it does not speak for the Occupy movement itself. The following section looks at a document that arguably does.

3. Text

The Declaration of the Occupation of New York City (the “Declaration of Occupation”) best encapsulates the rhetoric and goals of Occupy Wall Street.\footnote{See generally Internet Archive, Declaration of the Occupation of New York City, https://archive.org/details/DeclarationOfTheOccupationOfNewYorkCity [https://perma.cc/FF7T-JWZ]; see also LEVITIN, supra note 527, at 27 (describing how the declaration rendered explicit “[q]uestions that were on many people’s minds, yet never declared in the public sphere until the balmy night of September 29, 2011, when the movement’s NYC General Assembly convening in Zuccotti Park approved the Declaration of the Occupation of New York City.”).} By this point, we suspect our readers need no assistance identifying the injustice-highlighting frames and strategies employed by the authors of the Declaration of Occupation. Nonetheless, to complete our task, the remainder of this section analyzes that text through the injustice framework.
The text, composed and approved by the NYC General Assembly, wasted no words getting to all the main points of the injustice framework. The preamble, for instance, read: “As we gather together in solidarity to express a feeling of mass injustice, we must not lose sight of what brought us together. We write so that all people who feel wronged by the corporate forces of the world can know that we are your allies.”

The framework is right there. The two sentences pointed, not to abstract justice but to an emotional “feeling of . . . injustice.” The preamble defined two groups. The first was the vast majority or “mass” of people who “feel wronged” by the second group, the powerful “corporate forces of the world.” The opposition between the “mass” of humanity (the 99%), who are natural allies, and the powerful corporations and corporatists exploiting them (the 1%) drives the rest of the text, which included 10 uses of “we” or “us” and 24 instances of “they” or “them.”

The next paragraph, constituting the heart of the Declaration of Occupation, repeated and expanded upon those themes. The “we” included “the people,” “the human race,” “individuals . . . their neighbors . . . and the Earth.” “They” were defined by selfishness and exploitation, comprised of “corporations and governments” who sought to weaponize their “economic power,” “place profit over people, self-interest over justice, and oppression over equality,” to illegitimately “corrupt[]” the “system,” “run our governments,” and “extract wealth from the people and the Earth” without “consent.” We, in contrast, are motivated to collectively resist that injustice to help save “our system,” “rebuild a true democracy,” and preserve “the future of the human race” through “cooperation.”

After generally describing those essential elements of injustice, the Declaration of Occupation listed specific grievances, each illustrating how corporate interests had used their power to pursue profit in ways that exacerbated inequality and suffering for everyone else. For three reasons, we include the full list of 23 grievances below.

First, each grievance implicitly describes an injustice—the powerful causal agent oppressing a vulnerable group without legitimacy. The pattern is so unmistakable that we consider the full collection of grievances to be strong confirmation of the injustice framework, explicitly introduced as a

---

605 See Publisher’s Note, The Declaration of the Occupation of New York City (2011), https://sparrowmedia.net/declaration/ (The declaration, within, is a reflection of every voice amplified by the people’s mic at the NYC General Assembly at Liberty Square”).
606 Id. at 1.
607 Id.
608 Id.
609 Id. at 1–4.
610 Id. at 1.
611 Id. (emphasis added).
612 Id. (emphasis added).
613 Id. at 1–4.
catalog of the behaviors that give rise to the “feeling of mass injustice” that unified the protesters.

Second, we include the full list because many of the grievances relate, in some way, to one or more of the movements reviewed above,\textsuperscript{614} or to many of the urgent systemic injustices that plague us today,\textsuperscript{615} including those to which the other articles in this symposium are devoted. The grievances, in other words, provide a compelling benchmark for how far we have not come toward fulfilling the promise of achieving justice in the U.S. They suggest that the “long train of abuses and usurpations” continues unabated, and that those injustices are a feature, not a bug.\textsuperscript{616}

Third, the full list of grievances helps to round out a causal story that Franklin D. Roosevelt sketched in his New Deal Speeches regarding the role of hegemonic economic and corporate power. We agree with the argument that corporate interests play a major role in producing and enabling many of humankind’s most profound and intractable systemic injustices.\textsuperscript{617} And on this ten-year anniversary of Occupy Wall Street, we are eager to echo with high fidelity the Occupy movement’s efforts to “let these facts be known”:

- “They have taken our houses through an illegal foreclosure process, despite not having the original mortgage.
- They have taken bailouts from taxpayers with impunity, and continue to give Executives exorbitant bonuses.
- They have perpetuated inequality and discrimination in the workplace based on age, the color of one’s skin, sex, gender identity and sexual orientation.
- They have poisoned the food supply through negligence, and undermined the farming system through monopolization.
- They have profited off of the torture, confinement, and cruel treatment of countless animals, and actively hide these practices.
- They have continuously sought to strip employees of the right to negotiate for better pay and safer working conditions.
- They have held students hostage with tens of thousands of dollars of debt on education, which is itself a human right.
- They have consistently outsourced labor and used that outsourcing as leverage to cut workers’ healthcare and pay.
- They have influenced the courts to achieve the same rights as people, with none of the culpability or responsibility.
- They have spent millions of dollars on legal teams that look for ways to get them out of contracts in regards to health insurance.

\textsuperscript{614} See supra Parts II(A)–(F).
\textsuperscript{616} They further suggest that overcoming the injustices that plague us will require more effective, unified, and perhaps new forms of resistance.
\textsuperscript{615} See supra Parts III(A)–(B).
\textsuperscript{616} See, e.g., Hanson & Yosifon, The Situation, supra note 84; Chen & Hanson, supra note 581; Benforado, Hanson & Yosifon, supra note 91.
They have sold our privacy as a commodity.
They have used the military and police force to prevent freedom of the press.
They have deliberately declined to recall faulty products endangering lives in pursuit of profit.
They determine economic policy, despite the catastrophic failures their policies have produced and continue to produce.
They have donated large sums of money to politicians, who are responsible for regulating them.
They continue to block alternate forms of energy to keep us dependent on oil.
They continue to block generic forms of medicine that could save people’s lives or provide relief in order to protect investments that have already turned a substantial profit.
They have purposely covered up oil spills, accidents, faulty bookkeeping, and inactive ingredients in pursuit of profit.
They purposefully keep people misinformed and fearful through their control of the media.
They have accepted private contracts to murder prisoners even when presented with serious doubts about their guilt.
They have perpetuated colonialism at home and abroad.
They have participated in the torture and murder of innocent civilians overseas.
They continue to create weapons of mass destruction in order to receive government contracts.

* These grievances are not all-inclusive.618

4. Post-Text

On this, the tenth anniversary of Occupy Wall Street, the conventional wisdom about the movement’s net effects is still taking shape. As of 2012, Alisdair Roberts argued that “[t]he Occupy movement briefly flourished and then failed.” According to Roberts, it “burned itself out without moving the country substantially closer to remedies” in part because Occupy “refused to . . . issue demands directly and concretely.”619 That story has, in the meantime, only hardened. Michael Levitin, for instance, writes that, a decade on, the standard “story line”:

is that Occupy introduced the vocabulary of the 99 percent and the 1 percent, putting the crisis of inequality on the map. But that’s about it. The movement created no electoral organization,

618 Internet Archive, supra note 604, at 1–4.
619 Id. at 758.
achieved no legislative success and made no real impact on American political life, or so the story line went.\textsuperscript{620}

Elsewhere, he adds that “the movement [is] broadly acknowledged to have suffered from a lack of leadership, structure, direction and goals.”\textsuperscript{621}

More informed assessments recognize that Occupy’s effects were more significant than the standard account acknowledges. The bulk of Levitin’s book, as indicated above,\textsuperscript{622} is devoted to rejecting the conventional wisdom. He argues that, because of Occupy, “we are no longer the country we were.”\textsuperscript{623} The movement, by his account, revived the labor movement, remade the Democratic Party and reinvented activism, birthing a new culture of protest that put the fight for economic and social justice at the forefront of a generation. Far from a passing phenomenon, Occupy inaugurated an era of political change in which the demands of the majority continue to grow louder and more focused.\textsuperscript{624}

Historian Adam Hochschild, imagining a hypothetical history he might write fifty years from now of the early part of this century, describes Occupy as a “landmark[ ] . . . battle[ ] of justice” that “would certainly be one of a number of events that signaled a real reawakening of the left in this country.”\textsuperscript{625}

In sum, injustice dissonance and the goal of advancing justice was at the core of every element of the Occupy Wall Street protest. Injustice brought protesters together. Calling attention to that injustice and its sources became the primary goal of the movement—the thing that bonded protesters together. Occupy’s primary effects was and, we hope, will be to help achieve that goal. As Levitin puts it, Occupy was responsible for “birthing a new

\textsuperscript{620} LEVITIN, supra note 527, at 3; see also id. at 200 (quoting Adam Chadwick: “The haters like to say it was just a bunch of people in tents who had no demands and failed in their mission.”).

\textsuperscript{621} Id. at 127.

\textsuperscript{622} See supra Part II(G)(2).

\textsuperscript{623} LEVITIN, supra note 527, at 4.

\textsuperscript{624} Id.; see generally id. at chs. 3–9; see also Doug Henwood, Occupy Wall Street at 10: It Was Annoying, But It Changed the World, JACOBIN (Sept 17, 2021), https://www.jacobinmag.com/2021/09/occupy-wall-street-ten-year-anniversary-99-percent-new-york [https://perma.cc/8T92-CTRA] (writing “Occupy . . . petered out, but two years later came Black Lives Matter. BLM . . . persisted for years, and sparked the largest demonstrations in US history in the summer of 2020,” and “without Occupy, it’s hard to imagine the emergence of the Bernie Sanders campaign less than four years after Zuccotti was taken over and the subsequent growth of the strongest US socialist movement since the 1960s, or maybe even the 1930s.”); Taylor & Smucker, supra note 527 (“Occupy inaugurated a new era of defiant protest and was an early expression of the populist wave that continues to surge across the American political scene. It helped revitalize a moribund left, ushering in a social-movement renaissance across a range of issues, including racial justice, climate change, debt cancellation, and organized labor. And Occupy offered a crash course in collective action for a generation of organizers now in ascendance.”).

\textsuperscript{625} LEVITIN, supra note 527, 69.
III. JUSTICE-BASED MEANINGS OF FREEDOM AND DEMOCRACY

Part II looked at a variety of influential and iconic cultural texts in U.S. history—manifestos, speeches, and a legal decision that have helped to inspire or advance significant, if selective, egalitarian movements. Our goal was to examine whether, in practice and usage, the authors of those texts implicitly or explicitly employed the injustice framework outlined in Part I. In analyzing those texts, we found considerable support for the model, as each text highlighted particular inequalities or group-based harms, to demonstrate the role of powerful interests or actors in producing those inequalities or harms, and to challenge the legitimacy of that power or those outcomes. Each text, that is, helped activate a sense of injustice in the reader by identifying a particular site of (group) inequality, brought about by power, without legitimacy.

One goal of our textual analysis has been to provide more content to the cultural and legal value of “justice” by examining how the term has been used in sources that enjoy significant cultural currency—even if there is a debate about the actual motives behind, and consequences of, those documents and the movements they advanced. That analysis suggests that it is possible to understand the meaning of a norm or value like justice—to have a feel for or intuition about its meaning—without being able to articulate an analytically precise definition. Such a shared understanding can be valuable, and even indispensable, for governing social and institutional relationships and interactions. We have argued further that, by attending to the factors that lead us to perceive injustice, and to the emotions and behavioral tendencies that those perceptions elicit, it is possible to gain a deeper and more useful understanding of justice as a workable norm to which our political and legal systems should be accountable.

This Part loosely examines the meaning of two other political and legal values: “freedom” (or liberty) and “democracy.” These norms travel in the same circles of policy discourse with justice, and they enjoy the same sort of cultural significance. Like justice, though, the terms can also be characterized and dismissed as vacuous—mere fillers deployed to produce preferred conclusions and to evade more rigorous analysis.

This Part tentatively sketches an argument that the seemingly empty values of “freedom” and “democracy” have considerable content—at least when construed through the culturally significant political-legal texts that we have sampled. We suggest further that their meanings are interconnected, interdependent, and overlapping with each other in a sort of mutually reinforcing network. From that perspective, the concepts of freedom and democracy appear to comprise a family of values whose relationship is made visible through the injustice framework and whose bonds are built upon a shared commitment to advancing justice.\(^{627}\)

\section{“Freedom” as Liberation from Injustice}

The values of “freedom” or “liberty” and “justice” are commonly linked and have often been paired as the primary goals of the U.S. legal and political system. That has generally been true across the political spectrum. To pick two near contemporaneous examples, one year after Martin Luther King’s 1963 invocation of “an oasis of freedom and justice,”\(^{628}\) Barry Goldwater proclaimed: “Extremism in the defense of liberty is no vice. And moderation in the pursuit of justice is no virtue.”\(^{629}\) That connection seems especially evident in the sort of grand political discourse typified by the iconic documents reviewed above.\(^{630}\) This section suggests that the values of freedom and justice are not, at least when used in those contexts, two sepa-

\(^{627}\) This approach contrasts with a common tendency to see liberty and equality, or liberty and democracy, or liberty and social justice, as inherently in tension. \textit{See e.g.} \textit{R}awls, supra note 57, at 54 (describing principles of “basic liberties” and “social and economic inequalities,” and explaining that the “first principle [is] prior to the second.”); \textit{R}obert \textit{N}ozick, \textit{A}narchy, \textit{S}tate, and \textit{U}topia 163 (1974) (claiming that “no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people’s lives”); 1 \textit{F. A.} Hayek, \textit{L}aw, \textit{L}egislation and \textit{L}iberty: \textit{R}ules and \textit{O}rder 3 (1982) (arguing that the “type of democracy” which “now prevails in the Western world” has coincided with “a moving away from that ideal of individual liberty.”); 2 \textit{F. A.} Hayek, \textit{L}aw, \textit{L}egislation and \textit{L}iberty: \textit{T}he \textit{M}irage of \textit{S}ocial \textit{J}ustice 68 (1982) (denying that “it is possible to preserve a market order while imposing upon it (in the name of social justice or any other pretext) some pattern of remuneration based on the assessment of the performance or the needs of different individuals or groups by an authority possessing the power to enforce it.”); \textit{M}ilton \textit{F}riedman & \textit{Rose} \textit{F}riedman, \textit{F}ree \textit{T}o \textit{C}hoose 148 (1980) (“A society that puts equality—in the sense of equality of outcome—ahead of freedom will end up with neither equality nor freedom.”). For an ambitious effort to weave a unified conception of justice that integrates liberty and democracy, see \textit{R}onald \textit{D}workin, \textit{J}ustice \textit{F}or \textit{H}edgehogs 364–99 (2011). Here we attempt nothing nearly so grand, nor to address these arguments. Our goal is merely to propose that our review of the documents in this piece suggests such an integration of these values. We leave for future work or to others the task of building upon that possible relationship of meanings.

\(^{628}\) King, supra note 2.

\(^{629}\) Speech accepting nomination for president at Republican National Convention, San Francisco, Cal., 16 July 1964.

\(^{630}\) \textit{See also} supra text accompanying note 205 (quoting Douglass speaking of “the great principles of justice and freedom”).

Although the philosophical debates regarding the meaning and relationship of those concepts have been epic, we refer here to the more common usages of the sort exemplified in the documents reviewed above.
rate, independent values; rather, the values have much in common and their meanings are bound together and overlapping.

Like “justice,” the desire for freedom resounds throughout these documents. Similarly the meaning and desire for political freedom tends to be amplified by perceptions of its actual or threatened absence, which—like perceived injustice—often triggers a strong behavioral yearning to obtain or defend it. Social psychologists call that urge “reactance.” The invocation of “freedom” in political discourse commonly refers to liberation from injustice—the satisfaction and psychological relief of operating within a just regime and outside the grip of oppressive forces. Freedom, to put it another way, is the actual and perceived agency resulting from autonomy that is unconstrained by illegitimate power. The values of liberty and justice, so understood, are complements: promoting one involves promoting the other.

1. “Declaration of Independence”

That sense of freedom is consistent with how the term is used in all of the culturally significant texts reviewed above. It is there, for instance, in Jefferson’s articulation of the “self-evident” truth “that all men are created equal, that they are endowed . . . with certain unalienable Rights” including “Liberty.” According to Jefferson, the frustrated yearning for freedom renders intolerable the “[o]ppressions” of a royal “[t]yrant . . . unfit to be the ruler of a free people.” That frustration is what justified the declaration that “these United Colonies are, and of Right ought to be Free and Independent States.” In short, the right to liberty and the desire for freedom can be achieved for “all men” only in a just system. The justice of the system must be fully realized for the right to liberty to be fully achieved.

2. “Declaration of Rights and Sentiments”

Elizabeth Cady Stanton’s Declaration of Rights and Sentiments, which mimicked and mirrored Jefferson’s frame, employed a parallel conception of

631 See Alex Gourevitch & Corey Robin, Freedom Now, 52 POLITY 384, 385 (2020) (“Freedom is a global principle that reaches back to the birth of the left during the French Revolution and runs through various emancipation struggles since. It also has a special resonance in the United States. According to historian Eric Foner, freedom is ‘the central term in our political vocabulary.’” (quoting ERIC FONER, THE STORY OF AMERICAN FREEDOM xiii (1998))).


634 THE DECLARATION OF INDEPENDENCE, supra note 99, at para. 2 (emphasis added).

635 Id. at para. 30 (emphasis added).

636 Id. at para. 32 (emphasis added).
freedom, emphasizing the “self-evident” truth “that all men and women are created equal; that they are endowed . . . with certain inalienable rights,” including “liberty.”637 Her focus, of course, was on the liberation of women from the “repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her,” and on the role of the law in “giving him power to deprive her of her liberty.”638 In the same way, for “all men and women” to enjoy the liberty to which they are entitled, the system itself must achieve justice. Put differently, the fight for freedom entails a fight for justice.

3. “What to the Slave is the Fourth of July”

Frederick Douglass, too, echoed the same general conception, emphasizing the urgent need for liberation from the oppression or injustice of slavery. Those overlapping meanings were discernible, for instance, when Douglass highlighted this hypocrisy: “You boast of your love of liberty, . . . while the whole political power of the nation . . . is solemnly pledged to support and perpetuate the enslavement of three millions of your countrymen.”639 The connection was evident, too, when Douglass, alluding to Jefferson, asked rhetorically, “Would you have me argue that man is entitled to liberty? that he is the rightful owner of his own body? You have already declared it. . . .”640 In the following apophasis, when indignantly specifying some of the economic, psychological, social, and bodily impact of systemic oppression, Douglass again illustrates the interconnected meaning of freedom and justice:

What, am I to argue that it is wrong to make men brutes, to rob them of their liberty, to work them without wages, to keep them ignorant of their relations to their fellow men, to beat them with sticks, to flay their flesh with the lash, to load their limbs with irons, to hunt them with dogs, to sell them at auction, to sunder their families, to knock out their teeth, to burn their flesh, to starve them into obedience and submission to their masters? Must I argue that a system thus marked with blood, and stained with pollution, is wrong? No! I will not. I have better employments for my time and strength . . . .641

Douglass, in the name of not arguing the point, brilliantly humanizes the suffering and oppression that activates injustice dissonance in his audience. As we have argued, the case for “liberty” and “justice” is most powerfully rooted, not in logical argument, but in a felt sense. The wrongness or injustice of a system that steals people’s liberty is, in that way, self-evident.

637 Stanton, supra note 165, (emphasis added).
638 Id. (emphasis added).
639 Douglass, supra note 198 (emphasis added).
640 Id. (emphasis added).
641 Id. (emphasis added).
4. New Deal Speeches

That notion of freedom as liberation from unjust oppression was especially clear in Roosevelt's 1936 acceptance speech. The President began by highlighting the significance of the moment, "a time of great moment to the future of the Nation," a time “to reaffirm the faith of our fathers, to pledge ourselves to restore to the people a wider freedom.” To clarify, he defined the “very word freedom,” which “in itself and of necessity, suggests freedom from some restraining power.” Roosevelt described how the same yearning for “freedom from the tyranny of... the eighteenth century royalists who held special privileges from the crown” was, in 1936, being felt in response to the unjust power of “economic royalists.” In both instances, it was incumbent upon the oppressed to fight “for democracy, not tyranny” and “for freedom, not subjection.” It was because of that urgent need to fight against unjust oppression and for freedom that, according to Roosevelt, that “generation of Americans ha[d] a rendezvous with destiny.”

5. “Letter from a Birmingham Jail”

Chief Justice Warren did not employ the term “freedom” in Brown v. Board. Nor did the General Assembly in The Declaration of the Occupation of New York City. So, we turn last to Martin Luther King’s Birmingham letter, where the pattern was conspicuous. In fact, King uses “freedom” and overcoming “injustice” interchangeably, explaining, for example, that he had traveled to Birmingham “because injustice [wa]s there” and because he was “compelled to carry the gospel of freedom beyond his home town” and to help “reach the goal of freedom in Birmingham and all over the nation.” Similarly, he treated the quest for freedom as ultimately a quest for justice, writing, for instance, that “[t]he yearning for freedom eventually manifests itself, and that is what has happened to the American Negro” who is therefore “moving with a sense of great urgency toward the promised land of racial justice.”

---

642 Roosevelt, supra note 288, at 99–100 (emphasis added).
643 Id. at 100 (emphasis added).
644 See id. at 100–01 (emphasis added); see also id. ("It was natural and perhaps human that the privileged princes of these new economic dynasties, thirsting for power, reached out for control over government itself. They created a new despotism and wrapped it in the robes of legal sanction. . . . as a result the average man once more confronts the problem that faced the Minute Man").
645 Id. at 102 (emphasis added).
646 Id. at 103 (emphasis added).
647 King, supra note 437 (emphasis added).
648 Id. (emphasis added).
A third value that is prominent throughout many of these texts is “democracy.” We argue below that this value primarily concerns the processes that will produce the desirable or legitimate outputs of the political system. Again, however, we posit that the concepts of justice, freedom, and democracy, as defined through their use in culturally significant political discourse (including the texts we have analyzed), are all tightly intertwined.

In practice, the notion of “democracy” is generally used to refer to a process by which those subject to the mandates of a system have meaningful power to influence the system and its outcomes. Insofar as the people possess the sovereignty to govern themselves, they enjoy some ability to control or consent to the system’s outcomes or, at least, the governing personnel and processes that produce those outcomes. By responding to the will of the people, democracy helps ensure that a political system advances justice, offsetting power disparities that would otherwise shape the political process and outcomes. By relying on the consent of the governed, democracy helps legitimize political outcomes (including inequalities and suffering). Put differently, democracy, through the power-sharing, legitimizing effects of consent, is valued as a means to the ends of freedom and justice. To say that the democratic process is not itself the ultimate end, but a means to that end, implies that when a government fails to achieve the ultimate ends of freedom and justice, that government itself has failed and should be reformed. That, at least, is how the notions of democracy and consent were employed in the iconic texts reviewed above.


We shall not drive war from this world until we treat them as free and equal citizens in a world-democracy of all races and nations. Impossible? Democracy is a method of doing the impossible. It is the only method yet discovered of making the education and development of all men a matter of all men’s desperate desire. It is putting firearms in the hands of a child with the object of compelling the child’s neighbors to teach him, not only the real and legitimate uses of a dangerous tool but the uses of himself in all things. . . . [F]or a world just emerging from the rough chains of an almost universal poverty, and faced by the temptation of luxury and indulgence through the enslaving of defenseless men, there is but one adequate method of salvation—the giving of democratic weapons of self-defense to the defenseless.

Id. To be sure, there may be different versions of that argument. For example, in some instances, critics emphasize the limits of even a well-functioning democracy or of consent to produce justice or legitimate unjust outcomes. In other instances, critics challenge how effectively a nominally democratic or consent-determined process operates—whether, in fact, it is shaped by the will of the people whose voice it claims to manifest. Such limits or problems with democratic and consent-based processes relative to justice pose an inherent tension around which a great deal of legal, judicial, and policy discourse has been framed.
1. "Declaration of Independence"

Although the Declaration of Independence does not refer explicitly to "democracy," it does provide the ideological foundations of democracy, as we have defined the term. Jefferson's Preamble, for instance, centers the relationship of liberty, justice, and consent:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .651

Jefferson suggests that the purpose of governments is to "to secure" the rights of "all men," and that the power afforded to those governments charged with advancing those ends is legitimated through "the consent of the governed."652 Democracy, then, is the means to liberty (among other rights), which involves the elimination of injustice. Those ends ultimately take priority over the ostensible process of that government. As Jefferson put it, when "any Form of Government" that becomes "destructive of these ends," "the people" are rightfully entitled to "abolish" that government.653 Claims of consent are not enough, for the system that does not yield liberty (and therefore justice) may be overthrown.

2. "Declaration of Rights and Sentiments"

In her Declaration of Rights and Sentiments, Elizabeth Cady Stanton, again, reproduces Jefferson's frame and similarly calls for democracy as a means to sharing power and legitimating its exercise to yield just outcomes.654 Stanton's strategy, recall, is not to challenge Jefferson's values or consent-based processes, but to expand the circle of popular sovereignty to include "all men and women."655

651 THE DECLARATION OF INDEPENDENCE, supra note 99, para. 2 (emphasis added).
652 Id.
653 Id.
654 See Stanton, supra note 165. The pertinent language is as follows:
We hold these truths to be self-evident; that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of Government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government . . . .

655 Id. (emphasis added).
3. “What to the Slave is the Fourth of July?”

Frederick Douglass, too, appealed to the role of “democracy” and “consent” as legitimating means to freedom and justice, underscoring the failures of the U.S. political and legal system to live up to its procedural commitments and its values notwithstanding its hypocritical attacks on other systems. At one point, for instance, he pointed out how “[y]ou hurl your anathemas at the crowned headed tyrants of Russia and Austria, and pride yourselves on your Democratic institutions, while you yourselves consent to be the mere tools and body-guards of the tyrants of Virginia and Carolina.”⁶⁵⁶ Whatever the promise of democracy as a means to justice, Douglass argued, it is not enough to dress institutions under the cloak of “democracy” if in fact its processes serve as a tool for power, a foundation of racial enslavement, and a means to injustice.

4. New Deal Speeches

Similar themes and definitions can be found in Franklin D. Roosevelt’s New Deal speeches. Roosevelt, too, understood “democracy” not simply as an empty label or formal process, but as a mechanism for equalizing power and a means to freedom and justice.⁶⁵⁷ In his 1936 Re-Nomination Speech, he articulated the deep meaning and purposes symbolized by “the Flag and the Constitution,”⁶⁵⁸ declaring: “they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the over-privileged alike.”⁶⁵⁹ Roosevelt’s statement not only invokes the values of freedom, democracy, and justice but also suggests meanings that align with each other (and ours). “Democracy,” Roosevelt suggests, stands for the freedom-and justice-enhancing sharing of power⁶⁶⁰ among the people as a means to

⁶⁵⁶ Douglass, supra note 198.
⁶⁵⁷ In a 1940 radio address, for instance, Roosevelt emphasized the need to prioritize and protect democracy as a means of equalizing power and advancing freedom. In his words:

Democracy is not just a word, to be shouted at political rallies and then put back into the dictionary after election day.

The service of democracy must be something much more than mere lip service.

It is a living thing—a human thing—compounded of brains and muscles and heart and soul. The service of democracy is the birthright of every citizen, the white and the colored; the Protestant, the Catholic, the Jew; the sons and daughters of every country in the world, who make up the people of this land. Democracy is every man and woman who loves freedom and serves the cause of freedom.


⁶⁵⁸ Roosevelt, supra note 288, at 102 (emphasis added).
⁶⁶⁰ Id.
2021] Occupy Justice 447

less suffering and greater equality of opportunity and of material outcomes—as contrasted with the concentration of power and production of

power, but upon lodging it with those whom the people can change or continue at stated intervals through an honest and free system of elections. The Constitution of 1787 did not make our democracy impotent. In fact, in these last four years, we have made the exercise of all power more democratic; for we have begun to bring private autocratic powers into their proper subordination to the public’s government. The legend that they were invincible above and beyond the processes of a democracy—has been shattered. They have been challenged and beaten.


That summer, he repeated those themes by stressing the importance of democracy to protect against concentrated power:

My anchor is democracy—and more democracy. And, my friends, I am of the firm belief that the nation, by an overwhelming majority supports my opposition to the vesting of supreme power in the hands of any class, numerous but select. . . . Majority rule must be preserved as the safeguard of both liberty and civilization.

Franklin D. Roosevelt, U.S. President, Address at Roanoke Island, North Carolina (Aug. 18, 1937), https://www.presidency.ucsb.edu/documents/address-roanoke-island-nc [https://perma.cc/HDL8-3Q63]. The following year, summarizing the “truths about the liberty of a democratic people,” he insisted

that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is Fascism—ownership of government by an individual, by a group, or by any other controlling private power.


661 This, too, was a theme that he reiterated in other remarks. In a 1938 radio address, for instance, he observed: “Democracy in order to live must become a positive force in the daily lives of its people. It must make men and women whose devotion it seeks feel that it really cares for the security of every individual” and that it can “maintain liberty against social oppression.” Franklin D. Roosevelt, U.S. President, Radio Address in Favor of Voting for Liberals (Hyde Park, N.Y., Nov. 4, 1938), in Kaye, supra note 231, at 126. Later he stressed the importance of “American democracy” moving “forward as a living force, seeking day and night by peaceful means to better the lot of our citizens.” Id. at 127.

662 He sometimes used the word “democracy” to stand for equality across groups. In his 1936 re-nomination speech, for instance, he stressed that the government “has certain inescapable obligations to its citizens, among which are . . . the establishment of a democracy of opportunity.” See Roosevelt, supra note 288, at 102; see also Franklin D. Roosevelt, U.S. President, Campaign Address (Cleveland, Ohio, Nov. 2, 1940), in Kaye, supra note 231, 133, at 136 (“Democracy, to be dynamic, must provide for its citizens opportunity as well as freedom.”).

663 Roosevelt expanded upon that theme in his 1937 Second Inaugural Address in which he explained that “[t]he test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.” Roosevelt, Second Inaugural Address, supra note 660, at 107. Roosevelt then assured his audience that, through a well-functioning democracy a more equal, and generous, distribution was possible:

I see a great nation, upon a great continent, blessed with a great wealth of natural resources. . . . I see a United States which can demonstrate that, under democratic methods of government, national wealth can be translated into a spreading volume of human comforts hitherto unknown, and the lowest standard of living can be raised far above the level of mere subsistence.
inequality through “tyranny.”664 “Freedom” refers to liberation from the burden of “subjection.” And “dictatorship” by either “mob rule” or “the over-privileged,” implicitly invokes our notion of injustice (and stands as a contrast to a power-sharing, justice-yielding democracy).665

Later Roosevelt spoke of “government” as more than just “a mechanical implement.”666 The system is to be judged ultimately not by its processes, but by the justice of its outcomes.667 In the speech’s soaring peroration, he described the “ancient hope” and long “fight” “for freedom” and called upon his audience to recognize “we are waging a great and successful war” for freedom, “a war against want and destitution and economic demoralization,” and “a war for the survival of democracy.”668 For Roosevelt, the goals of government and the “form[s] of government”—freedom, justice, and democracy—were meant to operate harmoniously together, all part of the same system.669

Id. at 109. Roosevelt suggested, however, that the unequal distribution at the time indicated that the democratic system was dysfunctional, posing “the challenge to our democracy: In this nation I see tens of millions of its citizens—a substantial part of its whole population—who at this very moment are denied the greater part of what the very lowest standards of today call the necessities of life.” Id. at 110; see also Franklin D. Roosevelt, U.S. President, Address on Constitution Day (Washington, D.C., Sept. 17, 1937), in KAYE, supra note 231, at 113 (“To hold to that course our constitutional democratic form of government must meet the insistence of the great mass of our people that economic and social security and the standard of American living be raised from what they are to levels which the people know our resources justify. Only by succeeding in that can we ensure against internal doubt as to the worthwhileness of our democracy.”); Roosevelt, Curbing Monopolies, supra note 660 (explaining the “truth” “about the liberty of a democratic people” “that the liberty of a democracy is not safe if its business system does not provide employment and produce and distribute goods in such a way as to sustain an acceptable standard of living.”).

664 See also Roosevelt, Constitution Day Address, supra note 661, at 113 (“We have those who really fear the majority rule of democracy, who want old forms of economic and social control to remain in a few hands. They say in their hearts: “If constitutional democracy continues to threaten our control why should we be against a plutocratic dictatorship if that would perpetuate our control?”).

665 See also id. (making a similar distinction between “those . . . who want Utopia overnight and are not sure that some vague form of proletarian dictatorship is not the quickest road to it” and “those who really fear the majority rule of democracy, who want old forms of economic and social control to remain in a few hands” and are tempted by “a plutocratic dictatorship” for the sake of perpetuating their “control” and adding that the former “represents a reckless resolve to seize power” and the latter “represents cold-blooded resolve to hold power.”).

666 Id.; see also id. (arguing that government should have “the vibrant personal character that is the very embodiment of human charity,” by which he meant a “love” “that does not merely share the wealth of the giver, but in true sympathy and wisdom helps men to help themselves”); cf. Roosevelt, Voting for Liberals Speech, supra note 661, at 127 (“[D]emocracy will save itself with the average man and woman by proving itself worth saving. . . . Democracy should concern itself also with things as they ought to be.”); Franklin D. Roosevelt, U.S. President, Radio Address to Democratic National Convention (July 19, 1940), https://www.presidency.ucsb.edu/documents/radio-address-the-democratic-national-convention-accepting-the-nomination [https://perma.cc/26PK-AV8W] (“Democracy can thrive only when it enlists the devotion of . . . the common people. Democracy can hold that devotion only when it adequately respects their dignity by so ordering society as to assure to the masses of men and women reasonable security and hope for themselves and for their children.”).

667 Id.; see also id. (arguing that government should have “the vibrant personal character that is the very embodiment of human charity,” by which he meant a “love” “that does not merely share the wealth of the giver, but in true sympathy and wisdom helps men to help themselves”).
Chief Justice Earl Warren, in *Brown v. Board*, also appealed to democracy as a central value—and as the primary means to the system’s ends. The case, recall, involved the question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?” The justices’ answer, of course, is why this case is the crown jewel of Supreme Court jurisprudence.

The reasoning behind the result distilled to two considerations. First, Warren argued that the claim of equality was, even if factually correct, concealing an injustice. That is, the norm of “separate but equal” elided a variety of relatively subtle (at least to the Court), but no less important, inequalities and harms produced by racial segregation and separation. Second, Warren stressed the critical role that education plays, not just in the individual lives of those who receive it, but also for democratic society as a whole. As Warren emphasized, “education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”

By “democracy” Warren was referring in part to the functioning of the voting process, noting the role of education on “good citizenship.” But he was also referring to the connection between democracy and the end of justice—the just allocation of opportunities for flourishing and for participating in the system’s rewards. Detailing the significance of education on “our democratic society,” he wrote:

> Today [education] is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

struggle of democracy and a government that pushes toward justice and freedom was a constant and intergenerational struggle. See, e.g., Franklin D. Roosevelt, U.S. President, *Address at Los Angeles, California* (Oct. 1, 1935), https://www.presidency.ucsb.edu/documents/address-at-los-angeles-california [https://perma.cc/Y5GT-R2AX] (“Democracy is not a static thing. It is an everlasting march. When our children grow up, they will still have problems to overcome. It is for us, however, manfully to set ourselves to the task of preparation for them, so that to some degree the difficulties they must overcome may weigh upon them less heavily.”).


671 See supra note 326 and accompanying text.

672 Id. It was not; beginning with *Plessy*, and since, the claim of “separate but equal” was an injustice-erasing legal fiction.

673 See id. at 494; see also supra text accompanying notes 372–384 (summarizing Warren’s attention to psychological harms).

674 Id. at 493.

675 Id.
Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.676 Such are the goals of “our democratic society.” “Citizenship” is not enough. The vote is not enough. The equality of “physical facilities and other ‘tangible’ factors” across groups is not enough. No, the commitment to a “democratic society” includes a commitment to eliminating or preventing injustice—in this case, the illegitimate use of state power and resources to provide vital knowledge, experiences, and services unequally in ways that reinforce historical, social, and economic injustices.677

6. “Letter from a Birmingham Jail”

Martin Luther King also explicitly referred to democracy as a means to the ends of freedom and justice. For instance, he declared that “[n]ow is the time to make real the promise of democracy,” indicating that democracy was not an end in itself but was intended to produce an end—its promise.678 As reviewed in previous sections, that promise was justice and freedom. Elsewhere, he pointed to the non-violent protesters who were helping to “bring[ ] our nation back to” the “great wells of democracy.”679 By interrupting the racial power dynamics of Jim Crow, by highlighting the illegitimate inequalities of segregation, and by demanding to be liberated from the burden of those injustices, the protesters were advancing the ends of democracy.

7. “Declaration of the Occupation of New York City”

Finally, the Declaration of Occupation also emphasized democracy—indeed, the very production and ratification of the text was constructed by “democratic, consensus-based decision-making assemblies.”680 The commitment to direct democracy was intense. The pamphlet in which the Declaration of Occupation was originally disseminated offered the following description of that participatory democratic process:

Those who are tasked with collecting and transcribing the Occupy narrative have a difficult job on their hands. The radically inclusive nature of Occupy’s directly-democratic, horizontal, organizing model champions each individual voice accumulated into the collective. This process allows any individual to block a manifesto, a text, a proposal or a call to action if they take exception to

---

676 Id.
677 See supra text accompanying notes 360–362 (describing how Warren also prioritized justice over precedent, which would usually be controlling).
678 King, supra note 2.
679 King, Letter from Birmingham Jail, supra note 437.
680 The Declaration of the Occupation of New York City, supra note 604.
2021] Occupy Justice 451

the language of the document. Hence, the process is slow, deliberate, and at times, very frustrating. 681

The commitment to direct democracy reflected a deeper commitment to justice. The body of the Declaration indicated, for instance, that the “injustice” that “brought us together” was the product of unjust corporate power and the use of that power to “run our governments.” 682 Ours is therefore not a democracy, but an unjust “plutocracy,” for “no true democracy is attainable when the process is determined by economic power.” 683 To achieve justice, therefore, a government must respond to the people not to corporations, for “a democratic government derives its just power from the people, not from corporations.” 684

IV. RECENT MOVEMENTS FOR JUSTICE

Since Occupy, the United States and world have witnessed several major social movements. 685 The movements, as policy analyst Sara Burke explains, all reflect a growing thirst for justice. In many ways, they are continuations and expansions of Occupy Wall in the sense that they openly and expressly call out our system as unjust—as the product of powerful actors and interests producing inequalities and harm without legitimacy. In Burke’s words, what the movements all “have in common is . . . [the] sense of betrayal by the elites. It’s causing a lot of anger. Today’s generation . . . want[s] justice.” 686

This section loosely confirms that claim by reviewing key texts linked with several of those movements through the lens of the injustice framework. It illustrates how the movements are premised on and motivated by a shared sense of injustice and how they employ notions of freedom and democracy that align with the injustice framework.

A. #BLM—“State of the Black Union” 687

2014 witnessed numerous police killings of Black men and women, including Michael Brown, Tamir Rice, Ezell Ford, Laquan McDonald, Yvette Smith, and Eric Garner, killings that led to extensive protests around the

681 Id. For more on the consensus model employed by Occupy, see David Graeber, The Democracy Project 210–32 (2013).
682 Id. at 1.
683 Id.
684 Id.
685 See supra note 624.
686 LeVitin, supra note 527, at 287 (quoting Burke). Burke continued: “I think we’re going to see an era where we’re forced to focus on why people are upset, and the failure, again and again, to come up with a just economic system.” Id.
country.\textsuperscript{688} The injustice of those killings—the role of illegitimate power producing harm—was more or less self-evident while the inadequate official responses and lack of accountability only heightened the perception of injustice. In early 2015, the #BlackLivesMatter movement (BLM), frustrated with those responses, including Barack Obama’s State of the Union address in January of 2015—which “only grazed over the topic of racial justice”\textsuperscript{689}—published the State of the Black Union.

The text described the galvanizing effects of the unjust killing of Michael Brown in 2014 and the widespread “resistance” it “spark[ed]” against state violence that spread across the nation. For over 160 days we have been marching, shutting down streets, stopping trains and occupying police stations in pursuit of justice. We have stood united in demanding a new system of policing and a vision for Black lives, lived fully and with dignity.\textsuperscript{690}

The killing of Michael Brown and the events of 2014 cast a brighter light on the endless “train of [racial] abuses and usurpations”\textsuperscript{691} and the need for continued protest to make those oppressions visible to a nation in denial.\textsuperscript{692} In the words of BLM’s State of the Black Union, “2014 was a year that saw profound injustice . . . . Homicides at the hands of police sparked massive protests, meaning that America could no longer ignore bitter truths of the Black experience.”\textsuperscript{693} “This country,” the text continued, “must abandon the lie that the deep psychological wounds of slavery, racism and structural oppression are figments of the Black imagination. The time to address these wounds is now.”\textsuperscript{694}

As if following Martin Luther King, Jr.’s playbook of utilizing “direct action . . . to create . . . a crisis and foster . . . a tension” and to force “a community . . . to confront the issue,”\textsuperscript{695} BLM’s State of the Black Union called for “continu[ing] . . . the task of making America uncomfortable about institutional racism” as part of the project of demanding a new “vision for Black lives” and “build[ing] a system that is designed for Blackness to thrive.”\textsuperscript{696}

\begin{flushright}
\textsuperscript{690} Id. (emphasis added).
\textsuperscript{691} See supra text accompanying notes 116–132.
\textsuperscript{692} State of the Black Union, supra note 689.
\textsuperscript{693} Id. (emphasis added).
\textsuperscript{694} Id.
\textsuperscript{695} See supra text accompanying notes 492–496; see also supra Part I(D) (describing the theory of change suggested by the injustice framework).
\textsuperscript{696} State of the Black Union, supra note 689.
\end{flushright}
Also consistent with the injustice framework, the document draws on the concept of “freedom” to stand for liberation from injustice. For instance, the authors stressed that, although “[g]ains have been made,” “we who believe in freedom know we cannot rest until justice is won.” Employing a phrase reminiscent of King’s description of the “inescapable network of mutuality” such that “[i]njustice anywhere is a threat to justice everywhere,” the State of the Black Union committed to leaving no oppressed group behind in the pursuit of freedom: “None of us are free until all of us are free. Our collective efforts have exposed the ugly American traditions of patriarchy, classism, racism, and militarism. These combined have bred a violent culture rife with transphobia, and other forms of illogical hatred.” That use of the term freedom—as freedom from various intersecting forms of illegitimate oppression—implied freedom from injustice.

Finally, the text’s authors conceptualize a vision of “democracy” that aligns with the injustice model, by challenging the validity of “democracy” constructed upon fundamental injustices: “This corrupt democracy was built on Indigenous genocide and chattel slavery. And continues to thrive on the brutal exploitation of people of color.”

B. Obergefell vs. Hodges

The most culturally significant legal writing relating to LGBTQ justice was arguably the 2015 majority opinion in Obergefell v. Hodges. The text of the State of the Black Union highlighted several less publicized 2014 incidents at the interface of a brutalizing police force and black lives and at the intersection of vulnerable identities:

Gabriella Naverez, a queer Black woman was killed at 22 years old, unarmed. 37-year-old Tanisha Anderson’s family dialed 911 for medical assistance. Instead, Cleveland police officers took her life. Anyia Parker, a Black trans woman was gunned down in East Hollywood. This brutal attack was caught on camera, yet her murder, like so many murders of Black trans women, have gone unanswered.
landmark decision held that same-sex couples are guaranteed the fundamental right to marry under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We will not parse the legal-doctrinal elements of the opinion here; instead, our focus is on the crux of Kennedy’s reasoning, which turned upon his recognition of a previously overlooked “injustice” or “unjustified inequality.”

An essential portion in Justice Kennedy’s opinion, beyond the holding itself,704 was his observation that, although “[h]istory and tradition guide and discipline this inquiry” into fundamental rights, they “do not set its outer boundaries.” Here, Kennedy explicitly recognized what had once been an unperceived injustice—an inequality maintained by the power of law without legitimacy: “The nature of injustice is that we may not always see it in our own times.”705

Kennedy later drew out the elements of the injustice framework when discussing that such an injustice might be rendered visible. He explained that, “in interpreting the Equal Protection Clause,” such revelations are indeed possible: “the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”706 In language echoing Warren’s Brown v. Board description of the “detrimental effect” of segregation—particularly “when it has the sanction of the law” and “denot[es] . . . inferiority”—Kennedy wrote:

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.708

704 Of course, another key sentence in the opinion was Justice Kennedy’s conclusion that—regarding whether same-sex couples are given “equal dignity in the eyes of the law”—“[t]he Constitution grants them that right.” Obergefell, 576 U.S. at 681.

705 Id. at 664 (emphasis added). One scholar calls that language among “the most profound words uttered by the Court in recent years.” Elvia Rosales Arriola, Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection, 84 UMKC L. Rev. 617, 635 (2016).

706 Id. at 673 (emphasis added); cf. Nan D. Hunter, The Undetermined Legacy of ‘Obergefell v. Hodges,’ NATION (June 29, 2015), http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/ [https://perma.cc/EL9X-PC26] (explaining that “[t]he single most important theme in the opinion is that the Constitution provides not merely space but also support for expanding the perimeters of human rights. Obergefell recommits the Court to an understanding that ‘the nature of injustice is that we may not always see it in our own times’ and that the framers ‘entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.’”).

708 Obergefell, 576 U.S. at 671.
Once recognized, Kennedy argued, injustice must not stand—even if that means abandoning given legal rules. Consistent with the injustice framework, he called for the vindication of “freedom” as liberation from such injustices:

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Kennedy thus assumed that a particular kind of relationship exists between discovered “injustice” and the preservation of freedom or liberty. Addressing such an “injustice,” for Kennedy, effects an extension “of freedom . . . as we learn its meaning.” Similarly, a claim based upon newly discovered injustice is at its core “a claim to liberty.” Put differently, when the law imposes inequality upon a group without legitimacy, that is a source of injustice, and “freedom” requires liberation from that injustice.

Kennedy also challenged the assumption that the process of “democracy”—even if generally reliable as a means of achieving justice and freedom—was sufficient in this situation to alleviate the injustice perpetuated by democratically enacted laws or produce the freedom promised by the democratic system of governance. He explained:

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in Schuette, noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as Schuette also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of

709 The premise that we may not always “see” an injustice and that our vision may become clearer over time is key. See Elvia Rosales Arriola, Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection, 84 UMKC L. Rev. 617, 635–36 (2016) (arguing that Justice Kennedy’s opinion articulated a vision of a society arriving at an understanding, through a gradual political and legal process” and adding that when, as a consequence, a law is perceived to “unjustly strike[] at the basic core of a person’s right to human dignity, that law must be held as ‘repugnant to the Constitution’ and void” (footnote omitted)). Such a notion of an evolving appreciation for injustice was integral to (if sometimes only implicit in) the arguments made in all of the iconic texts reviewed above and the movements with which they are attached.

710 Obergefell, 576 U.S. at 664 (emphasis added).

711 See supra text accompanying note 710.

712 See supra Parts I(B) and III(A).
the individual not to be injured by the unlawful exercise of governmental power.” Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.\footnote{Obergefell, 576 U.S. at 677 (citing Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291 (2014)) (citations omitted) (emphasis added).}

Again, we see an expression of the relationship between justice, freedom, and democracy that we have posited.\footnote{See supra Part II.} For Kennedy, “democracy” is “most often” the means to the end of justice or liberty, but when that process fails for some reason, the Court is obliged to respond. More specifically, when “governmental power” is “exercise[d]” to violate “the right of the individual not to be injured” in a way that is “unlawful,” “the Constitution requires redress by the courts.”\footnote{Kennedy was immediately lambasted by conservative critics for this turn to justice and willingness to supplant his judicial opinion for that of the democratic legislative process. In his scathing dissent, for instance, Justice Scalia argued that the process of democracy takes priority over a sense of justice regarding the outcomes of that process. In his words, “[t]he law can recognize as marriage whatever sexual attachments and living arrangements it wishes,” but [t]oday’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves. Obergefell, 576 U.S. at 713 (Scalia, J., dissenting). Chief Justice Roberts dissented, in part, on similar grounds. Those who founded our country would not recognize the majority’s conception of the judicial role. They, after all, risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. . . . As a plurality of this Court explained just last year, “It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.” The Court’s accumulation of power does not occur in a vacuum. It comes at the expense of the people. . . . By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. . . . Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever; the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs. Obergefell, 576 U.S. at 709–11 (citing Schuette v. BAMN, 572 U.S. 291, 311–12 (2014)).}
In sum, consistent with the injustice framework, Justice Kennedy's Obergefell opinion appears to be motivated by his desire to address a perceived injustice and he employs the related notions of freedom and democracy in the process.\footnote{The 5–4 majority opinion in Obergefell has been criticized from the left for producing too little justice and from the right for producing too much. From the left, for example, some point out that the decision (and the litigation strategy that led to it) reproduced dominant heteronormative hierarchies while advantaging only a subset of the LGBTQ—White and affluent, mostly “gays and lesbians”—and leaving others behind. For summaries of that criticism, see Jeremiah A. Ho, Queer Sacrifice in Masterpiece Cakeshop, 31 YALE J. L. & GENDER 249, 260–61 (2020) and Russell K. Robinson, Justice Kennedy’s White Nationalism, 53 U.C. Davis L. REV. 1027, 1050–51 (2019).}

It is noteworthy that Scalia made no mention of “injustice” or “justice” as a norm of relevance in this debate, but instead focused on the priority of “democracy” as the pertinent end in itself. Instead he claims agnosticism and, therefore neutrality, on the question of the justice of the outcome. Neither did he suggest any exception or limit to the efficacy of the democratic process in theory or in practice. Scalia also invoked “liberty” but without attention to the injustice of the oppressor over the oppressed. Instead, he focused on the unexamined claim that the homophobic prohibitions reflected the more important liberty of the right for the people—as won by the founders—to “govern themselves.”

Similarly, Roberts appealed to founders for the same proposition. And, like Scalia, he implicitly framed the majority as operating unjustly: using their power to impose their will over the people’s will illegitimately. Roberts acknowledged the possible tension between “the justice of the [ ] cause” or “proponents of same-sex marriage” and the laws that had been produced by the “democratic” system prohibiting same-sex marriage. He was undisturbed by that tension, however, because of his assurance that the legislature was on the verge of responding—and that this result would only make matters worse.

Some critics on the left have made similar observations about the court’s role in a democracy. See e.g. Bowie, supra note 414, passim; Doerfler & Moyn, supra note 414, at 1720 (“It was hard to miss that conservative justices—in a series of high-profile dissents in areas like abortion rights and same-sex marriage—were allowed to associate themselves with the normative value of democratic choice, at least when they did not have enough votes on the bench.”) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part) and Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting); see also Nicolas Bowie, Assistant Professor of L., Harvard L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 5–12 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/R2KF-4G9J]; Samuel Moyn, Henry R. Luce Professor of Jurs. & Professor of Hist., Yale L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 5–12 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf [https://perma.cc/2L5W-9QM4]).
C. #Metoo

The #MeToo movement was born without a representative declaration, manifesto, speech, or legal opinion. The movement was founded by activist Tarana Burke in 2006,717 and exploded into global prominence in 2017 with a 151-character tweet: “If all the women who have been sexually harassed or assaulted wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem.”718 The tweet would trigger a social media explosion: the hashtag was “used 12 million times in the first 24 hours” as “millions of survivors across the globe” shared on social media “their own experiences of sexual harassment and violence.”719

Like most social movements, a primary goal of #MeToo was to render visible an injustice that had been culturally unseen. It did so in part by expanding dominant schemas for sexual violence and rape720 and highlighting the structural and institutional forms of power that facilitated and condoned ubiquitous suffering and reinforced longstanding inequalities that both reflected and reproduced that violence. Analyzing those interactions, scholars Bianca Fileborn and Rachel Loney-Howes have argued that the “flood” of social media responses and the resultant press coverage and public reaction721 made “all too apparent” “the ‘magnitude of the problem’ of sexual violence in women’s (and others’) lives.”722 “The flood of participation in #MeToo,” they continue, “reaffirmed publicly just how widespread sexual assault and harassment actually are; that most victim-survivors know the offender; and, significantly, that these experiences are routine and normalized, in short, confirming many feminist arguments about ‘rape culture.’”723 Legal scholar Jeannie Suk Gersen puts it this way: “A basic concept of #MeToo is the

Still most agree that the decision did turn on judicial conceptions of injustice and did expand, if slightly and problematically, the Court’s scope of justice.


719 Bianca Fileborn & Rachel Loney-Howes, Introduction: Mapping the Emergence of #MeToo, in #METOO AND THE POLITICS OF SOCIAL CHANGE 1, 2 (Bianca Fileborn & Rachel Loney-Howes, eds., 2019); see also id. (“Some disclosed incidents and their aftermath in intimate detail; others simply marked themselves as survivors.”).


721 See Fileborn & Loney-Howes, supra note 719, at 4 (“The movement generated substantive and sustained global media coverage and public debate . . . . Months of intensive media reporting culminated in the women who spoke out . . . being named TIME’s people of the year in 2017.” (citation omitted)).

722 Id. at 3; see also CARLY GIESELER, THE VOICES OF #METOO 2 (2019) 2 (Rowman & Littlefield eds., 2019) (“In using the #MeToo hashtag and Twitter as a medium of instantaneous response and public sharing, Milano sought to illustrate the scope of sexual violence and misconduct. Twitter became a megaphone for public outcry as women and men, public and private citizens alike answered the call. (footnote omitted)).

2021] Occupy Justice 459

power of numbers across time: the difference between a single victim, whose lone account might not be believed, and the choruses of ‘me too’ that make each individual’s account that much more believable.724 Speaking out en masse did more than raise awareness of the ubiquity of sexual violence; it also helped shift the norms regarding whose experiences and what experiences could be openly voiced in public.725 Put differently, it undermined the legitimacy of what “he said” and boosted the legitimacy of what “she said,” thus challenging “the ways in which public knowledge about sexual violence is constrained, contained and reinforced by political, legal, psychological, and cultural actors and institutions.”726 “[B]y individually declaring and collectively validating their experiences online, survivors were effectively challenging the institutional actors and undermining the power structures that typically function as gatekeepers for imparting recognition.”727

In sum, the significance of #Metoo as a social movement was in un-cloaking an injustice by expanding conception of illegitimate sexual violence,

---


725 See Fileborn & Loney-Howes, supra note 719, at 29 (discussing the disruptive role of speaking out: “Its disruptive potential lies in its ability to both challenge the silencing of women’s experiences of violence and redraw the boundaries that determine what is publicly permissible to say about those experiences”).

726 Id.; see also id. at 4 (noting that “#MeToo drove the development of more tangible activist movements and support for those experiencing sexual harassment and violence, particularly in the workplace”). Activist Noreen Farrell describes the “viral moment” of #Metoo as the origins of “an ongoing movement featuring demonstrations of power like never before in America.” Noreen Farrell, What does #MeToo have to do with Democracy in 2020? Everything, EQUAL RTS. ADVOCS. (Oct. 17. 2019), https://www.equalrights.org/viewpoints/what-does-metoo-have-to-do-with-democracy-in-2020-everything/ [https://perma.cc/V8WR-S6WW]. By her account, the “collective story sharing” led to a variety of notable shifts in power, including “the toppling of highly visible bad actors . . . , the rise of Time’s Up, and the growing influence of consumer pressure to exact financial consequences on the companies protecting them . . . .” According to Farrell:

On a grassroots level, we’ve seen the rising power of women workers coordinating across industries: Farmworkers joining arms with Hollywood actresses. Entrepreneurs sharing headlines with janitors. Gold miners, tech executives, legislative staffers, and food service workers coming together to expose the critical connections between sexual harassment, pay discrimination, and other economic justice issues that harm women across classes, races, sexualities, and abilities.

The conversation has moved far beyond whether sexual harassment happens to how do we make it stop?

A #MeToo policy revolution has responded. Over the past year, growing #MeToo community pressure has resulted in an 80% increase in the number of sexual harassment bills introduced in states across the country, from 83 in 2018 to 150 this year. Many of those will become law in 2020 (including three in California), transforming workplaces nationwide.

Id.

727 Fileborn & Loney-Howes, supra note 719, at 2 (citing Rachel E. Loney-Howes, Shift- ing the Rape Script: “Coming Out” Online as a Rape Victim, 39 FRONTIERS 26–52 (2018)).
making plain “the magnitude” of sexual violence, exposing the power dynamics that produced that violence, and disrupting that power.\(^{728}\)

D. “How Dare You!”

One of the most significant moments in the last several years in the movement for climate justice was the short speech delivered by climate activist Greta Thunberg at the United Nations’ Climate Action Summit in September of 2019.\(^{729}\) Thunberg’s message (in that speech and others\(^{730}\)) was so influential that *Time Magazine* identified her as the 2019 Person of the Year.\(^{731}\) As the magazine’s Editor-in-Chief explained:

> It became one of the most unlikely and surely one of the swiftest ascents to global influence in history. Over the course of little more than a year, a 16-year-old from Stockholm went from a solitary protest on the cobblestones outside her country’s Parlia-

\(^{728}\) Like most social movements, one effect of #Metoo was also to conceal and reinscribe other embedded injustices. Fileborn and Loney-Howes, for instance, describe how the social media movement, in several ways, reflected the longer history of feminism in which the voices and experiences of ‘white, middle-class women’ were centered and “the distinctive experiences of women of color and other marginalized groups” were neglected. Fileborn & Loney-Howes, *supra* note 719, at 6. They highlighted, for instance, the fact that hashtag #Metoo was itself co-opted from the work Tarana Burke, who had worked for “decades with African American survivors in disadvantaged communities” and how, “it was only when ‘me too’ was uttered by a privileged white woman that her efforts were acknowledged.” *Id.* In many ways, the sort of injustices that #Metoo helped expose, it simultaneously reproduced. As Fileborn and Loney-Howes put it, “#MeToo demonstrates that being seen and heard by a broader public remains determined by the parameters of socially approved scripts governing what can be said and who can say it—namely speech acts articulated by wealthy, white women with significant social capital.” *Id.* at 30.


ment to leading a worldwide youth movement; from a schoolkid conjugating verbs in French class to meeting with the Secretary-General of the United Nations and receiving audiences with Presidents and the Pope; from a solo demonstrator with a hand-painted slogan . . . to inspiring millions of people across more than 150 countries to take to the streets on behalf of the planet we share.

When Thunberg addressed the U.N., she was only sixteen years old. To be sure, Thunberg’s moral righteousness and preternatural eloquence were part of her appeal. Her teenager status, though, was also key, for she defined the harms of climate change in intergenerational terms. Thunberg emphasized how hers and the voiceless generations of the future will be forced to bear the catastrophic costs of climate change because of the current generation’s irresponsible leaders who downplay clear science to enrich themselves. In other words, the generation currently in power was producing harm to the relatively powerless future generations without legitimacy. She put it this way:

You have stolen my dreams and my childhood with your empty words. And yet I’m one of the lucky ones. People are suffering. People are dying. Entire ecosystems are collapsing. We are in the beginning of a mass extinction, and all you can talk about is money and fairy tales of eternal economic growth. How dare you!

For more than 30 years, the science has been crystal clear. How dare you continue to look away and come here saying that you’re doing enough, when the politics and solutions needed are still nowhere in sight.

The popular idea of cutting our emissions in half in 10 years only gives us a 50% chance of staying below 1.5 degrees [Celsius], and the risk of setting off irreversible chain reactions beyond human control.

Fifty percent may be acceptable to you. But those numbers do not include tipping points, most feedback loops, additional warming hidden by toxic air pollution or the aspects of equity and climate justice. They also rely on my generation sucking hundreds of billions of tons of your CO2 out of the air with technologies that barely exist.

So a 50% risk is simply not acceptable to us—we who have to live with the consequences.

---

732 Id.; see also id. (“But this was the year the climate crisis went from behind the curtain to center stage, from ambient political noise to squarely on the world’s agenda, and no one did more to make that happen than Thunberg.”).

733 Phil Stubbs, Greta Thunberg—the Future Speaks, THE ENVIRONMENT SHOW (Apr. 3, 2020), https://www.environmentshow.com/greta-thunberg-speeches/ [https://perma.cc/3ELJ-53AE] (explaining that “Thunberg’s speeches are grounded in the science of climate change. And her persistent message is to remind politicians, business leaders, journalists and others to listen to the science.”).
How dare you pretend that this can be solved with just “business as usual” and some technical solutions? With today’s emissions levels, that remaining CO2 budget will be entirely gone within less than 8 1/2 years.

There will not be any solutions or plans presented in line with these figures here today, because these numbers are too uncomfortable. And you are still not mature enough to tell it like it is.

You are failing us. But the young people are starting to understand your betrayal. The eyes of all future generations are upon you. And if you choose to fail us, I say: We will never forgive you.734

One commentator summarized the effects of Thunberg’s message this way: “Such powerful speeches from someone so young has helped the world think more clearly about the world our kids and grandkids will inherit. They have starkly reminded those with the power to make things better in the present to take responsibility for that future.”735 Thunberg’s speech, that is, was a call for recognizing and ending an intergenerational injustice.736

V. LESSONS AND LOOKING FORWARD: A FOREWORD

A. The Water of Justice

One goal of this Article has been to explore and illustrate how the injustice framework illuminates the concepts of injustice and justice and how those concepts have been used in culturally significant and historically influential texts in ways that generally comport with our injustice framework. Our analysis suggests that, in several ways, justice is like water. We are immersed and operating in a collection of shared, if unconscious, understandings of justice. Justice, like water, is important to all of us—though its significance is often best perceived and appreciated in its absence.

As reflected in the collection of canonical texts reviewed above, when suffering or inequality are perceived to be produced by power without legitimacy, people experience a catalyzing sense of injustice. Each of the declarations, speeches, and legal opinions reviewed above is associated with a significant justice movement. And each seemed built upon a theory of change that involves highlighting an injustice dissonance by clarifying and

735 Stubbs, supra note 733.
736 By highlighting how powerful actors had engaged in a long train of abuses to oppress those without representation or remedy, Thunberg offered yet another rendition of Jefferson’s injustice frame. See supra Part II(A)(2).
responding to imbalances in the relationship between power, inequality, and legitimacy.

Indeed, the efficacy and historical significance of those texts, we believe, is a consequence of how well they delineated that very relationship. Put differently, those documents are culturally and historically celebrated in part because they created a compelling sense of injustice and thereby promoted justice-advancing change. By intensifying injustice dissonance, the texts helped activate and justify the sort of emotional and behavioral reactions needed to propel a movement. They fueled pressure for change by illuminating harms and inequalities, by exposing the power dynamics at their root, and by challenging the sources of legitimacy—such as the authorities, arguments, procedures, or precedents—employed to legitimate the status quo. The lasting legacy of those documents reflects, in part, how successful each was in flipping the justice valence of the practice, custom, or system to which they were directed.

The language and effects of those texts help validate our assertion that there is more meaning to the norm of justice than conventionally supposed. Moreover, they make sense of the ubiquitous use and valorization of the norm in the law and legal system. Justice is the most prominent value associated with our legal system not because it is devoid of meaning but because of its meaning. There appears to have been a consensus, at least since the once-colonial states identified as the United States, that the exercise of power by one group or interest to produce harm to another without legitimacy is unjust and unacceptable. The goal of advancing justice, so understood, has remained paramount, and shared, salient, and sustained perceptions of injustice have been an engine of the nation’s most significant (if often selective and short-lived) egalitarian revolutions, revolts, and reforms ever since.737

737 In many cases, those moments and movements have stood the cultural test of time reasonably well; that is, there continues to be a widely held (though not uncontroversial) sense that the changes that those texts fostered did promote justice. By the same token, the historical spans of injustice—when, by today’s assessment, powerful interests produced harm and inequality without legitimacy—are generally viewed as eras of national shame periods and practices from which we have progressed. Culturally dominant histories of those eras are often told as if the unjust practices were performed by some unenlightened, otherized “them.” We are not they. No, we identify with those who stood up for justice—our cultural heroes as currently understood.


Such appeals can be found in the texts reviewed above, from Thomas Jefferson’s submitting facts “to a candid world” out of “a decent respect to the opinions of mankind,” *See supra* text accompanying notes 99 and 124, to Greta Thunberg’s beginning her message warning “that we’ll be watching you,” and ending it with this admonishment: “The eyes of all future genera-
B. Foreword

Occupy Wall Street and the movements since appear to be the cause and consequence of shifting public perceptions of injustice. They have, in other words, reflected and amplified the dissonance created by the perceived imbalance among power, inequality, and legitimacy. The resultant justice-oriented zeitgeist appears to have found its way into legal scholarship as well. For example, Westlaw searches suggest that the number of law review articles containing the terms “wealth inequality,” “income inequality,” “economic inequality,” or “racial inequality” rose from 4,977 in the years 2002-2012 to 9,486 in the years 2012-2022. In the same years, the number of articles mentioning “economic injustice,” “social injustice,” or “racial injustice” rose from 1,958 to 6,016. More legal scholarship seems to have been devoted to the elements and different types of injustice in the decade since Occupy than they had in the decade prior. This symposium and the articles in it illustrate those trends.

1. Veena B. Dubal on Gig Workers

Professor V.B. Dubal’s article, “The New Racial Wage Code” applies a historically grounded racial justice lens to analyze the passing of California’s Prop 22. The proposition, which passed in 2020, classified many gig workers as independent contractors rather than employees, depriving them of employee benefits. Dubal contrasts the rideshare corporation’s claims to racial justice, articulated within a frame of racial liberalism, with gig worker declarations that economic justice is racial justice, especially in the context of an industry dominated by Black and immigrant labor. In doing so, Dubal combines and elaborates on at least two of the claims in the Declaration of Occupation: first that “corporations” “have perpetuated inequality and dis-

---

734. This data is from the following Westlaw searches filtered in their “secondary sources” and “law reviews & journals” collections: “wealth inequality” & DA(aft 12-31-2001 & bef 01-01-2012); “wealth inequality” & DA(aft 12-31-2011 & bef 01-01-2022); “income inequality” & DA(aft 12-31-2001 & bef 01-01-2012); “income inequality” & DA(aft 12-31-2011 & bef 01-01-2022); “economic inequality” & DA(aft 12-31-2001 & bef 01-01-2012); “economic inequality” & DA(aft 12-31-2011 & bef 01-01-2022).

739. This data is from the following Westlaw searches filtered in their “secondary sources” and “law reviews & journals” collections: “systemic injustice” & DA(aft 12-31-2001 & bef 01-01-2012); “systemic injustice” & DA(aft 12-31-2011 & bef 01-01-2022); “economic injustice” & DA(aft 12-31-2001 & bef 01-01-2012); “economic injustice” & DA(aft 12-31-2011 & bef 01-01-2022); “social injustice” & DA(aft 12-31-2001 & bef 01-01-2012); “social injustice” & DA(aft 12-31-2011 & bef 01-01-2022); “racial injustice” & DA(aft 12-31-2001 & bef 01-01-2012); “racial injustice” & DA(aft 12-31-2011 & bef 01-01-2022).

740. Dubal, supra note 322.
2021] Occupy Justice 465

criminal in the workplace based on age, the color of one’s skin, sex, gender identity and sexual orientation,” and, second, that “they have continuously sought to strip employees of the right to negotiate for better pay and safer working conditions.”

Dubal elucidates the injustice by making “clear the ways in which a third category of work . . . is constituted by and through racialized inequalities.” The article in that way is a direct effort to push back against the subtle power exerted by the rideshare companies, who “leveraged the discursive power of liberalism to make their case, while rendering invisible the racialized economic structures and injustices experienced in the everyday lives of many workers.” As well as identifying the power, Dubal also describes the way in which the resulting inequality is legitimated: the ability to draw lines, to focus on acts of racism in particular spheres of life but not in others is enabled by a liberal individualist worldview that fails to recognize the epistemic structures that inconspicuously produce racially unequal outcomes. This liberal individualist worldview gives plausibility to “the freedom narratives” of labor platform companies like Uber and Lyft which have served to suppress mass democratic struggle—not just in the workplace, but also beyond.

By drawing on the historical interrelationships between racial and economic inequalities and law, with a particular focus on facially race-neutral exclusions of Black workers from the New Deal, Dubal reframes the current racialized economic inequalities in a way that might otherwise be obscured for many, though not from the workers whose voices she centers.

2. Shi-Ling Hsu on Climate Change

Professor Shi-Ling Hsu’s article, “Carbon Taxes and Economic Inequality,” argues that “[t]he case for a carbon tax for the sake of economic justice is . . . compelling if nonobvious.” Engaging topics at the heart of the Occupy Wall Street movement, including climate change, economic inequality, taxes, and justice, Hsu seeks to correct the “misapprehension[s]” that have led many “progressive groups concerned with social and economic justice, in addition to climate change,” to give carbon taxes at best “tepid support.”

741 Id. at 515.
742 Id. at 542.
743 Id. at 518.
744 Id. at 517.
745 Id. at 549.
746 Id. at 545.
748 Id. at 552.
749 See supra text accompanying notes 604–618.
750 Hsu, supra note 747 at 551.
751 Id.
The article focuses on “economic justice,” defined in terms of “economic inequality being reduced,” and, perhaps “poor households . . . in general not being made worse off,” but is addressed to “justice advocates of all kinds—economic, environmental, and climate.”

Hsu’s strategy, mirroring many of the texts discussed in this Article, is to uncover the “nonobvious” relationship between a carbon tax and justice. To do so, Hsu canvasses the distributive consequences of a carbon tax, including the effect of a tax on shareholders, the potential spending of carbon tax revenues, the offsetting effect of inflation-indexed government benefits to higher energy prices for recipients of those benefits, and the unequal consequences of climate change itself, and therefore the benefits of its mitigation. Given that “[c]limate change is the most brutal segregator of have and have-nots,” “carbon taxation is,” Hsu concludes, “vital to preserving economic justice.” After all “reforming human civilization to achieve economic justice depends upon saving human civilization from climate change. Without that, there is no justice for anyone at all.”

3. Lisa Alexander on Housing Insecurity

Professor Lisa Alexander’s article, “Tiny Homes: A Big Solution to American Housing Insecurity,” examines a potential solution to the dearth of affordable housing, resonating with the first item in Occupy’s list of grievances: “They have taken our houses through an illegal foreclosure process, despite not having the original mortgage.” Alexander proposes “tiny homes” as a significant potential source of either permanent or transitional housing, describing successful existing models as well as the legal and regulatory barriers to building more.

Alexander describes how the COVID-19 pandemic has exacerbated the already “growing affordable housing crisis in America,” such that affordable housing is not solely an issue for “low income, and very low income” households, but “[m]oderate-income households, who historically have not suffered cost burdens, also experienced increased cost burdens prior to the pandemic.” The situation is closer to Occupy’s 99% than to a small poverty-stricken minority.

752 Id. at 564.
753 Id. at 561.
754 Id. at 552.
755 Id. at 568.
756 Id.
757 Id. at 553.
759 See supra text accompanying note 618.
760 Alexander, supra note 476, at 706.
761 Id. at 477.
762 Id. at 476.
Although nowhere employing the language of justice, Alexander addresses the inequalities of power that have enabled NIMBYs to block affordable tiny home developments, and the network of local, state, and federal laws, regulations, and ordinances that disempower municipalities and nonprofits, among others, from engaging in this attractive solution. Alexander draws attention to “the flaws and distributional inequities of the American system of housing provision” along “[r]ace and class” lines, and the fact that often disproportionately White “[t]iny homes villages have not substantially ameliorated these disparities.” She also describes the efforts some cities and projects are taking to be “intentional about affirmatively furthering fair housing . . . in order for the tiny homes projects to combat systemic racism and equitably distribute tiny homes opportunities.”

Alexander gives a compellingly description of the features of some tiny home communities. Ironically, given that tiny homes are explicitly presented as an alternative to “tent cities,” her descriptions evoke some of the practices and norms of Occupy encampments. Like those encampments, many tiny home communities offer alternative economic arrangements, with a focus on empowering those excluded from participating in conventional economic structures. Some tiny home communities employ a “stewardship model,” allowing residents to contribute “sweat equity” as an alternative to monetary investment. Some prioritize shared access and contribution to communal facilities and resources as well as democratic governance. Alexander suggests that with an appropriate policy framework, tiny homes have the potential to make a significant contribution to justice at a variety of scales and across a range of inequalities.

* * *

Together this insightful collection of articles exemplifies how some legal scholars are, owing in part to the awakening that Occupy Wall Street helped to foster, taking up many of the policy problems highlighted by that movement and developing the very sort of concrete, detailed policy proposals that the movement itself lacked. Anyone who cares about the injustices

---

763 NIMBY is the acronym for “Not In My Back Yard.”
764 Alexander, supra note 505, at 735.
765 Id. at 506.
766 Id. at 507.
767 Id. at 473.
768 Id. at 788.
769 Id. at 474.
770 Id. Again resonating with the values of the Occupy movement, Alexander also addresses public-private partnerships and questions of land ownership as both practical and policy concerns.: at the same time as Occupy's declaration of injustices includes many items on the intersection of private and governmental injustice, the selection of Zuccotti park was partly based on it being a “Privately Owned Public Space” and therefore “not subject to city park curfews” and “required to be open twenty-four hours a day.” See Mattathias Schwartz, Map: How Occupy Wall Street Chose Zuccotti Park, NEW YORKER (Nov. 18, 2011), https://www.newyorker.com/news/news-desk/map-how-occupy-wall-street-chose-zuccotti-park [https://perma.cc/WN6Q-KG92].
caused by the gig economy, student debt, climate change, or housing policy will benefit from reading this symposium.

C. Why Not “Injustology”?

This Article is premised upon our belief that justice matters. In our view, the U.S. legal system has long hidden unaccountably behind the unfulfilled promise of “justice.” In part for that reason, our system is plagued by intersecting systemic injustices. Put differently, the legal system is itself unjust—a tool and source of power that produces inequalities and harm without legitimacy. The time has come either to take justice seriously or to make clear to the public that the law is a fraud.771

As noted above, two of the most influential jurists in history—Judge Richard Posner and Justice Oliver Wendell Holmes, Jr.—each abandoned justice for lack of a clear definition.772 Holmes and Posner were really speaking for most lawyers, judges, and legal scholars who tend to pay no mind to justice beyond occasional platitudes. If anything, as Bill Quigley has lamented, “justice is a counter-cultural value in our legal profession.”773

The requirement that justice be non-tautologically defined in order to have meaning and to serve as a useful normative goal has effectively been a conversation stopper, an excuse for disregarding justice. Through such misdirection, justice deniers have, consciously or not, obscured a fundamental feature of experience and its significance to our laws and our system as a whole. They are confusing the unseen for unreal, like fish myopically scoffing at the notion of water while floating toward arid perils.

As both Holmes’s and Posner’s legal-theoretical and jurisprudential legacies make clear, the law is not an island unto itself, and neither are its formal boundaries so impermeable as to exclude the development of new and improved understanding of law or norms for governing legal decisions.

By changing the frame and attending to the feelings of injustice, we have argued, it is possible to disarm the critique that justice lacks content. It is possible to occupy justice with meaning. Beyond providing a framework for understanding justice (as well as freedom and democracy), we have also argued that justice and injustice matter. That should not be a difficult case to make, especially among the personnel of a system ostensibly devoted to justice. And yet, again, very few lawyers consider the topic of much interest.

As central as justice might appear to be in our entire legal and political system, there has been no field devoted to studying how people experience

771 We do not offer this latter option rhetorically. Absent a genuine commitment to justice, it would be highly appropriate for the legal system to shed the unearned legitimacy it derives from association with that term. Such a project would implicate every aspect of the legal system, including law schools, bar associations, and courts, all of which gladly accept the prestige and rewards that flow from the legal system’s association with—and even claimed monopoly over—justice. See supra Part I(B).

772 See supra text accompanying notes 10–11.

injustice, what the goal of justice means in practice, what are the causal roots of injustice, and how might the legal system be reformed or remade better to achieve its nominal goal of justice.774

Assuming the law’s justice rhetoric is not solely designed to deceive, it is puzzling that deeper questions of justice and injustice have, in practice, been so irrelevant and so easily marginalized. Why has so little attention been given to the study of injustice, the normative value that the law claims as its paramount concern? Why has “injustology,” to give it a name, not been the most important field of study within law and legal theory?

Consider, by way of contrast, the sorts of topics to which scholars do devote themselves. According to Wikipedia, there are now thousands of “ologies.”775 There are more than 100 “ologies” that begin with the letter “a” alone. They include abiology (the study of inanimate things), acanthochronology (the study of cactus spines grown in time ordered sequence), accentology (the study of accentuation in language), acyerology (the study of incorrect use of language), agnoiology (the study of things of which humans are by nature ignorant), agnotology (the study of culturally induced ignorance or doubt), alethiology (the study of the nature of truth), anarcheology (the study of how people throughout history have progressed and thrived with limited or no government), anatripsology (the study of friction as a remedy in medicine), aphnology (the study of wealth), and arkeology (the study of the story of Noah’s Ark), many others that are similarly esoteric, and a dozen or so that are part of common parlance. Wikipedia’s compendium, however, includes none involving “justice.”

If, as we’ve argued, the injustice framework provides valuable insight into the meaning of justice (and, perhaps also, freedom and democracy), there is still an immense amount to learn about those concepts. What is power, how does it operate, how is it understood? Which are the inequalities and harms that we attend to and which do we overlook or look away from and why? What are the mechanisms of perceived legitimacy? What should be the measure of real or normative legitimacy? How are our institutions and structures—both physical and psychological—constructed to conceal power

774 See West, supra note 13, at 56–92; Robin L. West, Normative Jurisprudence (2011).

At least since the early days of legal realism, thoughtful legal scholars have understood that factors and intuitions operating outside and beneath express legal reasoning drive legal outcomes and that some of those are related to jurists’ sense of justice. A common response to that realization has been—especially since the 1970s—to eschew justice as an explicit norm and to embrace other decision standards that purport to be objective including law and economics and textualism. See supra text accompanying notes 10–11. Justice Holmes’s and Judge Posner’s remarks reflect both the understanding and the response. Their prescription of disregarding justice—expressly or otherwise—has been the norm. As we have argued, perceptions of justice are often in play even when cloaked behind claims of neutrality and legal-theoretic abstractions. In our view, those injustice intuitions should not be concealed and ignored; rather, they should be brought into the open and rigorously examined along the dimensions of power, inequality, and legitimacy.

and inequality or to provide a false sense of legitimacy? How might perceptions of power, inequality, and legitimacy be biased, motivated, and manipulated? What are the psychological dynamics shaping processes of self-deception and rationalization? What are the social and economic dynamics shaping cultural norms and baselines on all of these sorts of questions? Why do we tend to perceive and respond only to certain types of injustice? How might we design institutions and structures in ways that help us detect, discern, and respond to less visible and more systemic injustices?

That, of course, is only a small sample of potential injustological inquiry. Our point is simply that the search for answers to those questions, and many more like them, should be a central priority of any person, institution, social group, or nation that genuinely seeks to act in accordance with its own purported commitment to justice.

CONCLUSION

The pursuit of justice should be the legal system’s primary—perhaps even its sole—purpose. Given that goal, those most responsible for creating, interpreting, and applying the law should not be permitted to evade that responsibility behind the cover of mystifying doctrine or inaccessible theory. Nor should they get away with dismiss ing the norm on the ground that it lacks definition. Those in the legal profession, including legal educators, have a special obligation—a fiduciary or near-sacred duty—to occupy justice with meaning. Until our system’s purported commitment to justice is paramount in practice, the unbroken cycles of injustice will continue—in which, again and again, through evolving means, the powerful will oppress the vulnerable—perhaps leading to anger-fueled violence and destruction or nominal reforms that leave the roots of injustice intact.

If justice truly lacks meaning, or if justice cannot be used as a normative metric for our legal system, then we should strip the word off of the facades of courthouses and publicly renounce it as our shared purpose. After all, if justice is meaningless, how can the law advance it?

Whether one finds our injustice framework useful or not, justice must not be ignored. No, we cannot “be satisfied until justice rolls down like water.”776 And, if justice continues to run dry, and “[i]f we do not now dare everything,” we can expect “the fire next time.”777

776 See supra text accompanying note 2 (quoting Martin Luther King, Jr.).
777 See supra text accompanying note 3 (quoting James Baldwin).