

Occupy Justice: Introducing the Injustice Framework

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“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.”

~ Introduction to the Declaration of the Occupation of New York City¹

“[W]e will not be satisfied until justice rolls down like waters.”

~ Rev. Martin Luther King Jr.²

“If we do not now dare everything, the fulfillment of that prophecy, re-created from the Bible in the song by a slave, is upon us: God gave Noah the rainbow sign, No more water, the fire next time.”

~ James Baldwin.³

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 inequalities⁴ and “mass injustice” that had grown salient at that time.⁵ 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.⁶

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

¹ Occupy Wall Street, *Declaration of the Occupation of New York City*, LATERAL (2013), <https://csalateral.org/issue/2/manifestos-occupy-wall-street/> [<https://perma.cc/P3Z6-RDCK>].

² Martin Luther King, Jr., *I Have a Dream Speech at the March on Washington* (Aug. 28, 1963), <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety> [<https://perma.cc/F2N7-5A6P>].

³ JAMES BALDWIN, *THE FIRE NEXT TIME* 4 (1963); see also Jerome Weeks, ‘O Mary Don’t You Weep’ *From Gospel to Protest Song to Rockin Stomp* (<https://artandseek.org/2021/02/15/o-mary-dont-you-weep-from-gospel-to-protest-song-to-rockin-stomp/> [<https://perma.cc/X62U-DSCG>]) (explaining that Baldwin’s title is taken from a 1960s version of an African American spiritual with roots in a slave song titled “O Mary Don’t You Weep”).

⁴ See *infra* text accompanying notes 560-563.

⁵ See *infra* text accompanying notes 604-618.

⁶ See *infra* Part II(G) (describing some of the context, strategies, and effects of the Occupy movement).

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]

⁷ See THE SYSTEMIC JUST. PROJECT, <https://systemicjustice.org/> [<https://perma.cc/TG7S-68VH>]; Dick Dahl, *Systemic Justice: At a Harvard Law School Conference, Students Reimagine the Role of Lawyers in Addressing Societal Problems*, HARVARD LAW TODAY (Apr. 22, 2015), <https://today.law.harvard.edu/systemic-justice-at-a-harvard-law-school-conference-students-reimagine-the-role-of-lawyers-in-addressing-societal-problems/> [<https://perma.cc/H62M-XRFH>].

⁸ See *About Us*, <https://systemicjustice.org/about-us/> [<https://perma.cc/D7KM-BBE5>].

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.¹⁰ Richard Posner similarly complained that terms “like fairness and justice. . . have no content.”¹¹ The prevailing view, particularly in law,¹² 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.¹³ 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,¹⁴ 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.”).

¹² 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.*

¹³ See ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM (2013).

¹⁴ 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-MC8Z>], in bar association logos, see e.g. AMERICAN BAR ASSOCIATION, *Logo*, https://commons.wikimedia.org/wiki/File:American_Bar_Association.svg [<https://perma.cc/SB3R-QBRF>] (“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].

¹⁶ David Foster Wallace, “This Is Water” Speech at Kenyon College Commencement (May 21, 2005) <https://fs.blog/2012/04/david-foster-wallace-this-is-water/> [https://perma.cc/V97E-F6QF].

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 a injustice dissonance and the problem of invisible injustice).

C. Preview

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."²² 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."²³ John Stuart Mill wrote that "justice . . . is best defined by its opposite."²⁴ Thomas Hobbes argued that "whatsoever is not unjust, is just."²⁵ 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."²⁶ 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."²⁷ Legal scholar Martha Minow notes that "it is easier to know what injustice is" than to define justice.²⁸ 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!"²⁹ 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).

²⁵ THOMAS HOBBS, *LEVIATHAN* 95 (Oxford Univ. Press 1998) (1651).

²⁶ EDMOND N. CAHN, *THE SENSE OF INJUSTICE: AN ANTHROPOCENTRIC VIEW OF LAW* 13–14 (1949).

²⁷ SHELBY, *supra* note 12, at 14.

²⁸ Martha Minow, *Introduction: Seeking Justice, in OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA* 1–6 (Susan Richards Shreve & Porter Shreve eds., 1997).

²⁹ TOM R. TYLER AND HEATHER J. SMITH, *SOCIAL JUSTICE AND SOCIAL MOVEMENTS* 2 (1995).

ing, and remedying 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

³⁰ RICHARD A. HUGHES, PRO-JUSTICE ETHICS: FROM LAMENT TO NON-VIOLENCE 10 (2009).

³¹ AMARTYA SEN, THE IDEA OF JUSTICE vii (2009).

³² ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT xv (1995).

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.

³⁶ Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 48 (Joseph Sanders & V. Lee Hamilton, eds., 2002) (citing Phoebe Ellsworth & Sam Gross, *Hardening the Attitudes: Americans’ Views on the Death Penalty*, 50 J. SOC. ISSUES 19–52 (1994)).

³⁷ Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger’s Influence on Cognition*, 19 J. BEHAV. DECISION MAKING 115, 116 (2006) (reviewing evidence regarding the effect of anger on judgment).

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.

⁴⁷ ROBERT C. SOLOMON, *A PASSION FOR JUSTICE* 27 (1995).

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 *legitimacy*⁵⁰ (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, strictures, 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:

[w]hen 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, governmental 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.”

⁵⁴ David Miller, *Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/justice/> [<https://perma.cc/7KM9-7DB2>].

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”⁵⁸ 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.”⁵⁹ 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.⁶⁰ 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,”⁶¹ and terms like extortion and oppression often evoke the elements of injustice—power producing suffering or inequality without legitimacy.⁶² 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.⁶³ 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 133–35.

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.

Sukaina Hirji, *Oppressive Double Binds*, 131 *ETHICS* 643, 648 (2021).

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.⁶⁴

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”⁶⁵ Her definition of “domination and oppression” aligns with what we mean by “injustice.” For instance, Young explained that oppressive “exploitation”⁶⁶ 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.⁶⁷

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.”⁶⁸ 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.⁶⁹

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

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).

⁶⁸ Iris Marion Young, *Five Faces of Oppression*, in *RETHINKING POWER* 174, 183 (Thomas Wartenberg, ed., 1992) (footnotes omitted).

⁶⁹ YOUNG, *JUSTICE*, *supra* note 65, at 50.

group through the exercise of power”⁷⁰ 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.⁷¹

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.”⁷²

Political philosopher Tommie Shelby, in his 2016 book *Dark Ghettos*, described the mechanisms of “systemic injustice,”⁷³ 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.⁷⁴

Elsewhere Shelby makes explicit his concern with the “legitimacy” of “unjust institutions” with “power.”⁷⁵ 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.⁷⁶

⁷⁰ Jane Mansbridge, *Introduction, in* OPPOSITIONAL CONSCIOUSNESS: THE SUBJECTIVE ROOTS OF SOCIAL PROTEST 2 (Jane J. Mansbridge & Aldon Morris, eds. 2001).

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 of

macy—“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 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.” ROUSSEAU, *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 justifi[ed]”) 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.

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,”⁷⁸ that “much exercise of power depends on a social conditioning that seeks to conceal it,”⁷⁹ that “the purposes for which power is being sought will often be extensively and thoughtfully hidden by artful misstatement,”⁸⁰ and that, indeed, “neither those exercising [power] nor those subject to it need always be aware that it is being exerted.”⁸¹ 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.”⁸² Power is, he argues, “more effective the less perceptible its workings to agents and observers alike.”⁸³ 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.⁸⁴ 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.⁸⁵

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.⁸⁶ 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

⁷⁸ JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER*, 2 (1983).

⁷⁹ *Id.* at 12.

⁸⁰ *Id.* at 9.

⁸¹ *Id.* at 24.

⁸² Steven Lukes, *Power* in *ENCYCLOPEDIA OF PHILOSOPHY AND THE SOCIAL SCIENCES* 748, 749 (Byron Kaldis, ed., 2013).

⁸³ *Id.* at 748.

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*].

⁸⁵ Ann E. Cudd, *Oppression*, in *INTERNATIONAL ENCYCLOPEDIA OF ETHICS* (2013).

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 large portion of the morality of the country emanates from its class interests”).

group.”⁸⁷ 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

⁸⁷ ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 12 (Quinton Hoare and Geoffrey N. Smith trans. and ed., 1971).

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.”⁹³ 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.⁹⁴

⁹³ See *supra* text accompanying note 45.

⁹⁴ 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.

D. Advancing Justice by Highlighting Injustice

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.⁹⁵ 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, 100; 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:

[T]he 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.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.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.¹⁰⁵

The opening sentence also introduces a notion, implied throughout the document, that the revolution is imposed on, not chosen by, us.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.”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.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.

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).

¹⁰³ *See supra* text accompanying note 99.

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”).

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”).

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 & Laramie D. Taylor, *The Blame Game: Elements of Causal Attribution and its Impact on Siding with Agents in the News*, 35 *COMMUN. 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).

¹⁰⁷ *See supra* text accompanying note 99.

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."¹⁰⁹ 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."¹¹⁰

judges of the causes of others. This is not to say that we all always act as reasonable judges but only that everyone has, at some basic level, the potential to be a reasonable judge. We have, Jefferson would say, moral sense. By nature, in the Declaration's argument, all people have an intuitive sense of fairness.

.....

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.

¹⁰⁹ See *Declaration of the Causes and Necessity of Taking Up Arms*, in 1 Documents of American History 92 (Henry Steele Commager ed., 9th ed. 1973) [hereinafter *Declaration of the Causes*].

The "Declaration of the Causes and Necessity of Taking Up Arms" is a shortened title for "A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms." Compare ALLEN, *supra* note 104, at 51 (referring to the document by its shorthand name) with *A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking up Arms*, Yale Law School Lillian Goldman Law Library, https://avalon.law.yale.edu/18th_century/arms.asp#1 [<https://perma.cc/VM9C-26CZ>] (referring to the document by its full title).

¹¹⁰ *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: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-01-02-0113-0001> [<https://perma.cc/9P9L-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*, DEP'T 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 Government¹¹¹

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 invari-

need military support from France if they were to beat the British armed forces, provisional colonial governments started allowing congressional delegates to vote for independence. Months later, the Declaration of Independence was drafted, reflecting the colonists’ frustrated sentiments and their unresolved grievances with King George III, the Parliament, and the British people. Harold B. Wolford, *Lead up to the Declaration of Independence*, DEL. GAZETTE, July 1, 2021, <https://www.delgazette.com/opinion/columns/91025/lead-up-to-declaration-of-independence> [<https://perma.cc/47JT-YL8N>].

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.

bly 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.”¹¹⁶ The “long train of abuses” is thus taken as evidence of an intention, or “design,”¹¹⁷ of the existing governmental powers to harm the people. Such “absolute Despotism”¹¹⁸ is succinctly contrasted with legitimate governmental actors whose ends must be “to secure” “unalienable Rights,”¹¹⁹ and whose means must include “the consent of the governed.”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.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”¹²²) without legitimacy (in the form of “an absolute Tyranny”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.”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:

- “[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.”¹²⁵
- “[He has] impos[ed] Taxes on us without our Consent.”¹²⁶

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).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at para. 12 (the tenth grievance listed).

¹²⁶ *Id.* at para. 19 (the seventeenth grievance listed).

- “[He has] tak[en] away our Charters, abolish[ed] our most valuable Laws, and alter[ed] fundamentally the Forms of our Governments.”¹²⁷
- “[He has] suspend[ed] our own Legislatures, and declar[ed] themselves invested with power to legislate for us in all cases whatsoever.”¹²⁸
- “He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.”¹²⁹

In short, the King has, again and again, deployed his power to harm us without legitimacy.¹³⁰

The list of grievances—the “long train of abuses and usurpations”¹³¹—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.¹³²

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 British 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”¹³⁶—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 “Brittish brethren”¹³⁷ 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.”¹³⁸

Having defined the groups, the Declaration reveals an exercise of power—the “long train of abuses and usurpations”¹³⁹—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.¹⁴⁰

To be clear, the point of this section is not to suggest that the Declaration of Independence succeeded in achieving its high-minded aspirations.¹⁴¹ If anything, the Declaration exposes the deep hypocrisies of privileged founders “overlooking” and reifying profound injustices as they claimed to abhor all injustice.¹⁴² 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 each (man) was “equal to the greatest, and subject to no body,” *Id.*, or the broader social contractarian 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.

about the equality of “all men” against him, pointing out the obvious contradictions in his rhetoric.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

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 impotence,” 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,”¹⁴⁶ Abigail Adams penned a letter to her husband, John Adams.¹⁴⁷ In it, perhaps moved by the spirit of the times, she entreated John to “Remember the Ladies.”¹⁴⁸ Their budding nation’s larger ideals of justice could not be realized, Abigail warned, without reforming the laws that already gave husbands “unlimited power.”¹⁴⁹ A “new Code of Laws” must counteract the unfortunate truth that “all Men would be tyrants if they could.”¹⁵⁰ 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.”¹⁵¹

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.¹⁵²

Within a broader cultural zeitgeist of rebellion and revolution,¹⁵³ 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.

¹⁴⁷ Letter from Abigail Adams to John Adams (Mar. 31, 1776), <https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa> [<https://perma.cc/NSD3-CGAP>].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Letter from Abigail Adams to John Adams (Nov. 27, 1775), <https://www.masshist.org/digitaladams/archive/doc?id=L17751127aa> [<https://perma.cc/7MUN-PQA2>].

¹⁵² *The Women’s Rights Movement, 1848–1917*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/No-Lady/Womens-Rights/> [<https://perma.cc/JKT7-2R6C>].

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, to 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. FEHRENBACHER, *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 tradition, 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:

[A]bove 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.¹⁵⁵ Three hundred women and men¹⁵⁶ attended the two-day event.¹⁵⁷ It was the first of many women's rights conventions and the birth of what would, waves later, be dubbed "first-wave feminism."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,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,"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"¹⁶¹ with an appeal to a sense of injustice.¹⁶² In her opening remarks, she

¹⁵⁵ Stanton and Mott first met at the World Anti-Slavery Convention in London in 1840. Nancy A. Hewitt, *From Seneca Falls to Suffrage? Reimagining a "Master" Narrative in U.S. Women's History*, in *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. *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. *Id.*

¹⁵⁶ See WELLMAN, *supra* note 153, at 201.

¹⁵⁷ The event took place on July 19–20, 1848. See *id.* at 189.

¹⁵⁸ See Frederick Douglass, Speech Before the International Council of Women (Apr. 1888), <https://socialwelfare.library.vcu.edu/woman-suffrage/frederick-douglass-woman-suffrage-1888/> [<https://perma.cc/7CG9-3HHF>] (describing Seneca Falls convention where "organized suffrage movement was born"); see generally VIRGINIA BERNHARD & ELIZABETH FOX-GENOVESE, *THE BIRTH OF AMERICAN FEMINISM: THE SENECA FALLS WOMAN'S CONVENTION OF 1848* (1995); MIRIAM GURKO, *THE LADIES OF SENECA FALLS: THE BIRTH OF THE WOMAN'S RIGHTS MOVEMENT* (1974).

¹⁵⁹ Originally, the first day was supposed to include only women, with men joining on the second day. Jone Johnson Lewis, *A History of the Seneca Falls 1848 Women's Rights Convention*, THOUGHTCO (Mar. 11, 2019), <https://www.thoughtco.com/seneca-falls-womens-rights-convention-3530488> [<https://perma.cc/X826-5PRD>]. At the conference, however, the women decided to admit men on the first day, but not to allow them to speak until the second. 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.").

¹⁶⁰ Elizabeth Cady Stanton, Introductory Address at the Seneca Falls Convention (July 19, 1848) (available at <https://teachingamericanhistory.org/library/document/address-delivered-at-seneca-falls/> [<https://perma.cc/H9BW-RRZX>]).

¹⁶¹ See generally Barbara Welter, *The Cult of True Womanhood: 1820-1860* 18 *AMER. Q.* 151 (1966).

¹⁶² 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:

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."

called upon each woman in the audience to “understand the height, the depth, the length, and the breadth of her own degradation.”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.¹⁶⁴ And so she did. In a deliberate echo of Jeffersonian rhetoric and reasoning, she read aloud her own “Declaration of Rights and Sentiments.”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.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).¹⁶⁷ To appreciate those effects, it is helpful to read the document’s opening paragraphs:

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. Whenever any form of Government becomes destructive of

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). *See id.* at 11.

¹⁶³ Stanton, *supra* note 160.

¹⁶⁴ *Id.*

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

¹⁶⁶ *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. *See infra* text accompanying notes 184–226.

¹⁶⁷ *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."¹⁷²
- "He has compelled her to submit to laws, in the formation of which she had no voice."¹⁷³
- "He has made her, if married, in the eye of the law, civilly dead."¹⁷⁴
- "[H]e has taxed her to support a government which recognizes her only when her property can be made profitable to it."¹⁷⁵
- "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."¹⁷⁶

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.¹⁷⁷

3. *Post-Text*

The manifesto was well received that morning and would, by the end of the day, garner one hundred signatures.¹⁷⁸ 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*"¹⁷⁹ 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."

Frederick Douglass, *The Rights of Women*, THE NORTH STAR, (July 28, 1848), <https://www.loc.gov/exhibits/treasures/images/vc006197.jpg> [<https://perma.cc/2K4B-8H9K>].

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.”¹⁸⁰ 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.¹⁸² 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.”¹⁸³

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.

¹⁸⁹ FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 424 (John Lobb ed., 1882) (emphasis added).

¹⁹⁰ WELLMAN, *supra* note 153, at 202–03.

and administering the laws of the land. Our doctrine is, that “Right is of no sex.”¹⁹¹

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.¹⁹² 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.”¹⁹³ 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.¹⁹⁴

Douglass’s recollection thus captured the transcendence of the selfless motivation behind, and satisfaction of, the pursuit of justice.¹⁹⁵

Douglass’s 1848 experience at Seneca Falls may have helped inspire what was to become his most moving, important, and celebrated speech.¹⁹⁶ 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.¹⁹⁷ 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/393ae428732c4cc8905f3e3af01128d7> [<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.

2. *Text*

On July 5th, 1852, Douglass opened his remarks by humbling himself, much as Stanton had done at Seneca Falls,¹⁹⁸ reminding the “ladies and gentlemen” of the “considerable” “distance between this platform and the slave plantation, from which [he] escaped.”¹⁹⁹

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.”²⁰⁰ 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.²⁰¹

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,”²⁰² 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,”²⁰³ 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).

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 country²²³ was “glaring.”²²⁴ 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.²²⁵ “The freedom gained is yours,” he underscored, “and you, therefore, may properly celebrate this anniversary.”²²⁶

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.²²⁷ First, however, we turn to an effort to address economic injustice, though one much criticized for its relationship to racial inequality.²²⁸

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.

a league with the founding and the Civil War.²²⁹ It is known as well for the more thoroughgoing changes it avoided or preempted.²³⁰

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”²³¹ and “a date which will live in infamy”²³²—needs no introduction. His weekly “Fireside Chats,” for instance, famously crackled over 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.²³³

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 Franklin D. Roosevelt, U.S. President, *Speech to a Joint Session of Congress* (Washington, D.C., December 8, 1941), in KAYE, *supra* note 231 at 163.

²³³ 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.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.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."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

²³⁴ Later portions of this Article will refer to this collection, taken together, as the New Deal speeches.

²³⁵ DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* 91 (1999).

²³⁶ *Id.* at 91.

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,

²³⁷ *Id.*

²³⁸ See *id.* at 94 (describing Hoover at the end of his term as “the most loathed and scorned figure in the country”).

²³⁹ *Id.* at 91; see also *id.* (explaining that pulled-out empty trouser pockets were called “Hoover flags”).

²⁴⁰ Franklin D. Roosevelt, U.S. President, *A New Deal for the American People Speech to the Democratic National Convention* (Chi., Ill., July 2, 1932), in KAYE, *supra* note 231 31, at 37.

²⁴¹ *Id.* at 32 (emphasis added).

²⁴² *Id.* at 33.

²⁴³ *Id.*

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.”²⁴⁹ That is why the government was obliged to alleviate the suffering for the “millions of our people who have suffered so much.”²⁵⁰ And that is why, to achieve that end, Roosevelt paid “tribute” to his “countrymen” experiencing “crushing want,” by offering “a new chance”²⁵¹ and pledging “a new deal.”²⁵² 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.”²⁵³

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.²⁵⁴ 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.²⁵⁵

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. . . .²⁶¹

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.²⁶²

Thus the opposing sides—the oppressor and the oppressed—were clear. The industrialist and the “financial titan” posed a “danger”²⁶³ 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.”²⁶⁴

The echoes of Jefferson's case against an unjust and unrepresentative monarchy were heightened when Roosevelt called for “an economic declaration of rights.”²⁶⁵ 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.²⁶⁶ 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.”²⁶⁷ Born of perceived injustice, theirs was an understandable, if combustible, anger.²⁶⁸ 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 ended²⁶⁹

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.”²⁷⁰

While FDR’s first nomination acceptance speech announced the New Deal, the candidate was at that moment “vague and inscrutable” regarding its concrete meaning.²⁷¹ 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.”²⁷² 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.²⁷³ 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.²⁷⁴

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

testimony of the president of the Farm Bureau Federation, who warned: “Unless something is done for the American farmer we will have revolution in the countryside within twelve months”). Revolutionary ferment would only intensify toward the end of that first term.

²⁶⁷ Roosevelt, *supra* note 260, at 44.

²⁶⁸ See *supra* text accompanying notes 33–45.

²⁶⁹ Roosevelt, *Commonwealth Club*, *supra* note 260, at 44.

²⁷⁰ *Id.*

²⁷¹ KENNEDY, *supra* note 235, at 245.

²⁷² *Id.*

²⁷³ *Id.* at 123.

²⁷⁴ *Id.* at 244–45.

structured and durable social philosophy” at “the ideological heart of the New Deal.”²⁷⁵

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.”²⁷⁶ 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,²⁷⁷ formed the Union Party to contest the 1936 election.²⁷⁸ From the right, business interests working to undermine the New Deal formed “the American Liberty League,”²⁷⁹ 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.’”²⁸⁰ 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.

²⁷⁹ *See* KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 10* (2009).

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 elites²⁸¹ and doubling down on his egalitarian policy objectives (though in ways that deliberately excluded African Americans).²⁸²

In what would be one of the most important speeches of his career,²⁸³ often referred to as his “Rendezvous with Destiny” speech, FDR made the clearest case he ever would for the New Deal.²⁸⁴ In doing so, he delivered what one historian calls “the most radical speech ever given by a serving president.”²⁸⁵

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

²⁸¹ In one 1936 speech, Roosevelt responded to the American Liberty League in all but name. Speaking about such critics, he responded by shifting the groups—powerful oppressor and vulnerable oppressed—and the alliances back into alignment with his larger narrative. He cautioned his audience, for instance, to recognize how “[w]ithin our borders . . . popular opinion is at war with a power-seeking minority,” by which he meant the “numerically small but politically dominant” “financial and industrial groups.” Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1936), in KAYE, *supra* note 231 91, at 94. He called for seeing through to the autocratic motives behind their criticisms:

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.”).

²⁸² 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* ROTHSTEIN, *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.”).

²⁸³ *See* Peter Canellos, *What FDR Understood About Socialism That Today’s Democrats Don’t*, POLITICO (Aug. 16, 2019), <https://www.politico.com/magazine/story/2019/08/16/democrats-socialism-fdr-roosevelt-227622/> [<https://perma.cc/WN85-VABS>] (“[H]istorians rank [the speech] among the greatest of his career.”); Jack Beatty, *Conventions In History*, ON POINT (Jul. 8, 2016), <https://www.wbur.org/onpoint/2016/07/08/1936-democratic-convention-fdr> [<https://perma.cc/75T5-E9K7>] (calling it “one of his greatest speeches”).

²⁸⁴ *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”).

²⁸⁵ KAYE, *supra* note 231, at 99.

stadium²⁸⁶ and a national radio audience,²⁸⁷ 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.²⁸⁸

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 injustice²⁸⁹: “[F]reedom,” he proclaimed, “in itself and of necessity, suggests freedom from some restraining power.”²⁹⁰ 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, 1776.²⁹¹

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 won²⁹²—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”).

²⁸⁸ Franklin D. Roosevelt, *Acceptance Speech for the Re-nomination for the Presidency*, (Phila., Pa., June 27, 1936), in KAYE, *supra* note 231, 99 at 100.

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.²⁹⁶

Through their economic power, “the privileged princes of these new economic dynasties,”²⁹⁷ “thirsting” for more, expanded their empire to include “control over Government itself.”²⁹⁸ With mutually reinforcing economic and political power, the new tyrants “created a new despotism,” which they legitimized by “wrapp[ing] it in the robes of legal sanction.”²⁹⁹ With the same old wine repackaged in new bottles, “the average man once more confront[ed] the problem that faced the Minute Man.”³⁰⁰

This new form of tyranny, though distinct from the political tyranny on which Jefferson focused, was no less unjust.³⁰¹ 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.” *Id.* 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.”³⁰² 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.³⁰³

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.”³⁰⁴ 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: “Necessitum 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.*

what it was. The election of 1932 was the people's mandate to end it. Under that mandate it is being ended."³⁰⁵

Responding to the criticisms of New Deal policies by the American Liberty League and other spokespeople for corporate interests,³⁰⁶ 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.³⁰⁷

By Roosevelt's telling, those fighting to enhance corporate interests and corporate power were "the resolute enemy within our gates."³⁰⁸ They disingenuously sought legitimating cover behind "the Flag and the Constitution."³⁰⁹ This powerful and formidable enemy, he warned, would succeed unless, those committed to justice and freedom fought back "in greater courage."³¹⁰

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."³¹¹ Ours was "a war for the survival of democracy," a "[f]ight for freedom,"³¹² and a battle "to save a great and precious form of government for ourselves and for the world."³¹³

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.³¹⁴ The New Deal policies his administration had begun would continue—at

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 101; *see also supra* text accompanying notes 277–282.

³⁰⁷ Roosevelt, *supra* note 288, at 102.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 103.

³¹² *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").

³¹³ *Id.* at 104.

³¹⁴ 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).

least until the date that has “live[d] in infamy”³¹⁵ and the wars for “ourselves and for the world”³¹⁶ 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, 133, at 135.

³¹⁹ See ROTHSTEIN, *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.³²¹ Similarly, the National Labor Relations Act, Social Security Act, and Fair Labor Standards act all, while facially neutral, excluded most African American workers.³²² As V.B. Dubal summarizes (in this symposium), the New Deal “conspicuously created differential wages and wholesale legal exclusions for majority African American workforces.”³²³

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*,³²⁴ 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*³²⁵ stands as the most important and

³²¹ 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.”).

³²² 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.

Contemporary activists and critics pointed out that the New Deal benefits were disproportionately allocated to White Americans. See, e.g., *id.* (“As Charles Houston, a board member of the NAACP testified in relationship to the Social Security Acts’ exclusion of agricultural and domestic workers, the more the NAACP studied the bill “the more it began to look ‘like a sieve with holes just big enough for the majority of Negroes to fall through.’”); KATZNELSON, *supra* note 230, at 37–39 (describing how W.E.B. Du Bois understood the New Deal shift as an experience for Black America that was “mired in difficulty despite any bounty offered by the New Deal: Negro children are systematically denied education; when the National Education Association asks for federal aid to education it permits discrimination to be perpetuated by the present local authorities.”).

³²³ 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.

³²⁴ 347 U.S. 483 (1954).

³²⁵ *Id.*

celebrated Supreme Court decision of the 20th century, perhaps ever,³²⁶ 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.³²⁷ As much as *Brown* has been celebrated for its outcome, it has

³²⁶ See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 74 (1990) (calling *Brown* “the defining event of modern American constitutional law”); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* xii (2004) (“Probably no case ever to come before the nation’s highest tribunal affected more directly the minds, hearts, and daily lives of so many Americans.”); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 13 (2004) (*Brown* “is appropriately viewed as perhaps the most significant case on race in America’s history.”); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 81 (1994) (“Constitutional lawyers and historians generally deem *Brown v. Board* . . . to be the most important United States Supreme Court decision of the twentieth century, and possibly of all time.”); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000) (calling *Brown* “the sacred cow of American constitutional law”); Robert Justin Lipkin, *Constitutional Revolutions: A New Look at Lower Appellate Review in American Constitutionalism*, 3 J. APP. PRAC. & PROCESS 1, 4 (2001) (“*Brown* was a quintessential constitutional revolution, creating a new constitutional paradigm of equal protection and thereby abandoning the reigning paradigm enunciated in *Plessy v. Ferguson*.”); Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 547 (1995) (“The conventional view holds that *Brown* is one of the two or three most important cases in American legal history.”); Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court’s Quest for Equality*, 50 WAYNE L. REV. 863, 885–86 (2004) (“*Brown v. Board* . . . was a big case”); Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court Decision*, 61 FORDHAM L. REV. 9, 9 (1992) (describing *Brown* as “of overriding historical, social, and political significance in the life of the nation.”); Thomas B. McAfee, *The Brown Symposium—An Introduction*, 20 S. ILL. U. L.J. 1, 1 (1995) (“*Brown* symbolizes not only a legal and social revolution, namely the dismantling of the Jim Crow system, it also embodies the spirit of modern constitutional law.”).

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 UCLA L. REV. DISCOURSE 170, 175 (2014) (“Much rides on the 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

nell, *supra* note 327); BORK, *supra* note 326, at 77 (1990) (“Brown has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not logical necessity, account for the result in Brown.”); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1242–43 (1993) (“No one questions *Brown's* result (anymore). Indeed, so completely has the legal system reoriented itself after the decision that it may not even be possible to find the legal material with which to mount a serious challenge to its conclusion. . . . no theory of interpretation can survive as a theory of interpretation of this Constitution unless it can justify *Brown*.”); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF JUDICIAL INTERPRETATION* 280 (2006) (“Some have claimed that any respectable account of constitutional adjudication must be able to justify *Brown*. In view of such claims, theorists have gone to implausible lengths to square their accounts with *Brown*.”); *but see id.* (2006) (arguing that “the view that accounts of constitutional interpretation and judicial review should be tested against any particular decision is seriously misguided”).

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 *Sweatt 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

ment, indiscriminate as to race, is not the unequal extension of privileges which violates constitutional prohibitions.”).

³³¹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“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? We believe that it does.”).

³³² See *supra* note 329.

³³³ See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 54–56 (2001); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 292–302 (2004); KLUGER, *supra* note 326, at 592–618 (2004); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1907–08 (1991).

³³⁴ See Laurie B. Green, Book Review, 20 L. & HIST. REV. 219, 219 (2002) (reviewing MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000)) (“[T]he problem of race attracted so much foreign attention in the early Cold War that it threatened to undermine U.S. claims to the superiority of democracy over communism”).

³³⁵ See Mary L. Dudziak, *Brown and the Idea of Progress in American Legal History: A Comment on William Nelson*, 48 ST. LOUIS U. L.J. 851, 855 (2004) (“In a world divided by the Cold War, it was frightening to see the Soviet Union capitalize on America’s ‘Achilles heel.’ Soviet propaganda exploited U.S. racial problems, arguing that American professions of liberty and equality under democracy were a sham.”).

Derrick A. Bell, Jr.'s terminology, at the time that *Brown v. Board* was decided, the "interests of the races converged."³³⁶ 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.³³⁷ 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.³³⁸ Powerful interests seeking to promote American exceptionalism were eager to distance themselves and their national identity from genocidal practices of our evil enemy.³³⁹

In 1948, for instance, the United Nations—under the leadership of Eleanor Roosevelt—passed the non-binding Universal Declaration of Human

³³⁶ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) (explaining that "for a brief period, the interests of the races converged to make the *Brown* decision inevitable" and arguing that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

³³⁷ See William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 24 (2011) (explaining Mary Dudziak's expansion of Bell's idea by uncovering "historical documents showing that the United States government's intervention on the side of the plaintiffs in *Brown* was largely driven by geopolitical concerns: 'The international focus on U.S. racial problems [in the years following World War II] meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.'").

³³⁸ See Hanson & Hanson, *supra* note 48; see generally JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW, *passim* (2018) (drawing the connection between racial oppression in the U.S. on the Nuremberg Laws and Hitler's Germany); see, e.g., *id.*, at 70 ("America may have been the global leader in the creation of racist law, well known and much cited long before Hitler came to power; but as the Nazis regularly observed, American law was not open about its racist goals, at least when it came to citizenship and immigration. . . . In their citizenship and immigration law, Americans had to work around the requirements of the Fourteenth Amendment, and more broadly around their announced traditions of equality; and in consequence their law was a law of covert devices and legal subterfuges.").

³³⁹ *But see* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 7 (2010) ("Contrary to conventional assumptions, there was no widespread Holocaust consciousness in the postwar era, so human rights could not have been a response to it."). For criticisms of Moyn's dismissal of such a post-war effect, see Sarita Cargas, *Questioning Samuel Moyn's Revisionist History of Human Rights*, 38 HUM. RTS. Q. 411, 413–17 (2016).

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.”³⁴⁰ 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.”³⁴¹ 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,”³⁴²

“[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”³⁴³

The milestone document³⁴⁴ 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.³⁴⁵

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

³⁴⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights pmbl. (Dec. 10, 1948).

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.

³⁴⁴ “Drafted by representatives with different legal and cultural backgrounds from all regions of the world” the document was translated into more than 500 languages. *Universal Declaration of Human Rights*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/udhr/pages/udhrindex.aspx> [<https://perma.cc/Q3E8-567G>].

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 (1960), when the excesses of rigid allegiance to law, without a transcendent norm above the law—a higher law—was acute.

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 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]henver 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).

³⁴⁸ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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.”).

³⁵⁰ Leland Ware, *Brown at 50: School Desegregation from Reconstruction to Resegregation*, 16 U. FLA. J.L. & PUB. POLY 267 (2005) (debating within the Supreme Court on whether

ful.³⁵¹ 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.”³⁵² 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,”³⁵³ the Court moved forward based upon a different sort of argument and evidence.³⁵⁴

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.³⁵⁵ 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.”³⁵⁶

Warren summarized some of those subtle, intangible, but powerfully unequal and “detrimental” (and therefore unjust) effects of separation and segregation.³⁵⁷ 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).

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 KLARMAN, *supra* note 333, at 302.

³⁵⁷ 347 U.S. at 495.

“hearts and minds” for a lifetime.³⁵⁸ 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.”³⁵⁹

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.³⁶⁰

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.”³⁶¹ 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.”³⁶² 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.”).

³⁶¹ ED CRAY CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 281–82 (1997).

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. . . .”³⁶³ 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. . . .”³⁶⁴ Warren’s injustice-overturning appeal resonated with his colleagues in part because of the cultural mindset of that period,³⁶⁵ in part because of Warren’s personality and leadership style,³⁶⁶ and in part because of the particular collection of perspectives of the justices, who had themselves confronted some form of prejudice and exclusion.³⁶⁷

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”³⁶⁸—“buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors,”³⁶⁹—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.”³⁷⁰ 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.³⁷¹

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,”³⁷² thereby shifting attention away from individual choices—through which situational, institutional, and systemic forms of power often operate obscurely—to the “group,”³⁷³ and the “law”³⁷⁴ and other situational forces that often shape or determine those “choices.”³⁷⁵ The *Plessy*

³⁶³ *Id.*

³⁶⁴ CRAY, *supra* note 361, at 282.

³⁶⁵ See *supra* text accompanying notes 338–347.

³⁶⁶ See JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 9–11 (2007).

³⁶⁷ 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 Warren Court was the first, and so far, the only Court in American history that empathized with the outsider” and attributing that compassion 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 *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

³⁶⁹ *Id.* at 492.

³⁷⁰ *Id.* at 494.

³⁷¹ See *infra* text accompanying notes 376–384.

³⁷² *Brown*, 347 U.S. at 494.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ 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 &

court, in contrast, had repeatedly emphasized individual choices and the converse powerlessness of the law, referring to “the act of a mere individual,”³⁷⁶ claiming that “[l]egislation is powerless to eradicate racial instincts,”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 inferiority,”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 legislative 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 throughout the Nation.”³⁸⁴ The latest science, applied to contemporary facts, would determine whether legally sanctioned exertions of power to create inequalities were legitimate.

3. *Warren on Justice*

Looking beyond *Brown v. Board*, historians and biographers have explicated 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 Views 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, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008); Hanson & Hanson, *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 Jus-

³⁸⁵ G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 369 (1982) (emphasis added).

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.

³⁸⁸ Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 *TULSA L.J.* 477, 485, 502 (1997) (explaining that Warren's opinions tended to be brief "short" and "nontechnical," written with "direct and straightforward" language, free of unnecessary "legalisms" and "well within the grasp of the average reader.").

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.").

³⁹⁰ D.J. HERDA, *EARL WARREN: A LIFE OF TRUTH AND JUSTICE* (2019) (emphasis added).

Justice;³⁹¹ Jim Newton's 2006 biography is named "*Justice for All: Earl Warren and the Nation He Made*";³⁹² Christine Compston titled her 2001 biography "*Earl Warren: Justice for All*,"³⁹³ and Mort Horwitz named his "*The Warren Court and the Pursuit of Justice*."³⁹⁴ Warren, it seems, pursued, struggled for, and lived for justice for all.³⁹⁵

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,³⁹⁶ the Chief Justice published an essay³⁹⁷ in *Fortune* magazine as part of a series, titled "New Goals."³⁹⁸ 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."³⁹⁹ 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."⁴⁰⁰

³⁹¹ PAUL MOKE, *EARL WARREN AND THE STRUGGLE FOR JUSTICE* (2015) (emphasis added).

³⁹² JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* (2007) (emphasis added).

³⁹³ CHRISTINE L. COMPSTON, *EARL WARREN: JUSTICE FOR ALL* (2001) (emphasis added).

³⁹⁴ MORTON HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1999) (emphasis added).

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 that 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.

³⁹⁶ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (emphasis added).

³⁹⁷ Chief Justice Earl Warren took no compensation for his essay, where he speculated on the direction of law post-*Brown*. See generally Earl Warren, *The Law and the Future*, *FORTUNE*, Nov. 1955, at 106.

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.⁴⁰¹ 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.⁴⁰²

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.”⁴⁰³ 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 to do so “in the midst of great confusion.”⁴⁰⁴ 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.⁴⁰⁵

⁴⁰¹ *Id.*

⁴⁰² *Id.* (emphasis added).

⁴⁰³ *Id.*

⁴⁰⁴ G. Edward White, *Earl 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 Earl Warren Papers, Manuscript Division, Library of Congress, Box 809)).

⁴⁰⁵ *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.⁴⁰⁶ He achieved that end by framing the question as a moral one,⁴⁰⁷ building a moral consensus among the justices,⁴⁰⁸ and altering or omitting certain doctrinal or constitutional questions.⁴⁰⁹

4. *Post-Text*

The direct effects of *Brown v. Board* were arguably a bust—or worse.⁴¹⁰ 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.⁴¹¹ Still, in other areas, the Warren Court's focus on justice as a judicial North Star arguably led to judicial advances in racial justice,⁴¹² stimulating a wide collection of justice-oriented, egalitarian holdings,⁴¹³ 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.”).

⁴¹⁰ See generally KLARMAN, *supra* note 333, at 366–67.

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.”).

⁴¹² See ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 5–6* (1968) (identifying “the demand for racial justice” as “[t]he strongest force in current constitutional development”); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60 (2010) (arguing that the Justices’ “concerns over racial injustice and regional failure to deal fairly with race exercised a gravitational pull on the evolution of constitutional doctrine”).

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.⁴¹⁴

While the landmark opinion eventually ended the explicit legal segregation of public schools and arguably helped to spark the civil rights movement,⁴¹⁵ it also prompted an inegalitarian backlash and “massive resistance” from defiant White leadership.⁴¹⁶ 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.⁴¹⁷ The ensuing conflict helped catalyze major civil rights protests and, eventually, the Civil Rights Act of 1964.⁴¹⁸

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

⁴¹⁴ See Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 885 (2004) (describing the wide implications of *Brown v. Board* including how “[i]t launched the Warren Court’s broad campaign against a variety of legal inequities and injustices” (emphasis added)); see generally MARTHA MINOW, IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK (2010) (describing the results and legal architecture of *Brown* as inspiring mass political and social movements). But see generally Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (downplaying the significance of *Brown* for achieving racial justice); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021) (arguing for reforms that shift power away from the court and towards elected bodies); Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 202 (2021) (arguing that Supreme Court review of federal legislation does not facilitate democracy, while acknowledging that *Brown* is an example of the Court “facilitating democracy at the state level.”); but cf. Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit* (May 15, 2013) <https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit> [<https://perma.cc/R8ZX-LCDA>] (quoting Justice Ginsburg remarking “My criticism of *Roe* is that it seemed to have stopped the momentum on the side of change.”).

⁴¹⁵ See Klarman, *supra* note 414, at 13; see generally KLARMAN, *supra* note 333, at 363–442 (describing context surrounding the U.S. Supreme Court’s civil rights decisions).

⁴¹⁶ See Klarman, *supra* note 414, at 11; NAACP LDF, *The Southern Manifesto And “Massive Resistance” To Brown*, <https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/> [<https://perma.cc/LL7W-627X>].

⁴¹⁷ See NAACP LDF, *supra* note 416 (describing the southern White population of the United States as “mobiliz[ing] en masse to nullify the Supreme Court’s decree” along with “legislative and legal efforts.” In Southern states, “whites set up private academies to educate their children, at first using public funds to support the attendance of their children in these segregated facilities, until the use of public funds was successfully challenged in court. In other instances, segregationists tried to intimidate black families by threats of violence and economic reprisals against plaintiffs in local cases. . . . the most egregious violators simply closed the public schools.”).

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.”).

F. “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,⁴¹⁹ 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*,⁴²⁰ 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.⁴²¹ 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,⁴²² and lawless disregard for the mandates of *Brown v. Board*.⁴²³ If necessary, he vowed, he would “stand in the schoolhouse door” to prevent desegregation.⁴²⁴ 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]lack 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).

⁴²⁰ 347 U.S. 483 (1954).

⁴²¹ See, e.g., JOHN KYLE DAY, *THE SOUTHERN MANIFESTO MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION* (2014); see also MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT 175–88* (2007) (describing the reasons for the resistance).

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

⁴²³ See *Brown*, 347 U.S. at 486–96.

⁴²⁴ See Debbie Elliott, *Wallace in the Schoolhouse Door*, NPR (June 11, 2003), <https://www.npr.org/2003/06/11/1294680/wallace-in-the-schoolhouse-door> [<https://perma.cc/D96P-EDLQ>].

gation now . . . segregation tomorrow . . . segregation forever.”⁴²⁵ In Birmingham, the equally segregationist Theophilus Eugene “Bull” Connor was the Commissioner of Public Safety. Connor commanded Birmingham’s police and fire departments,⁴²⁶ inspiring admiration from some and disdain from others for his impulsive brutality.⁴²⁷

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.⁴²⁸ 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.⁴²⁹

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.”⁴³⁰ King, Shuttlesworth, and other campaign leaders decided to protest anyway.⁴³¹ 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.”⁴³² 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.⁴³³ So, despite depleted funds for cash bonds, King moved forward, understanding that he would likely be targeted, arrested, and jailed.⁴³⁴

And so he was. Police promptly arrested King for violating the injunction,⁴³⁵ placing him in solitary confinement and initially depriving him of contact with his lawyers his wife.⁴³⁶ It was from that cell that he composed

⁴²⁵ Governor George C. Wallace, Inaugural Address at the Capitol in Montgomery, Alabama (Jan. 14, 1963), <https://digital.archives.alabama.gov/digital/collection/voices/id/2952> [<https://perma.cc/3GNG-QJfZ>].

⁴²⁶ See MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 35–43 (2000).

⁴²⁷ See *id.*; DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 227 (1986).

⁴²⁸ *Birmingham Campaign*, THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, <https://kinginstitute.stanford.edu/encyclopedia/birmingham-campaign> [<https://perma.cc/SG4Z-M9RL>].

⁴²⁹ *Id.*

⁴³⁰ *Walker v. City of Birmingham*, 388 U.S. 307, 322 (1967).

⁴³¹ *Birmingham Campaign*, *supra* note 428.

⁴³² *Id.*

⁴³³ GARROW, *supra* note 427, at 227–28 (1986); see also *supra* notes 334–339 (discussing the convergence of interests).

⁴³⁴ *Id.*

⁴³⁵ *Birmingham Campaign*, *supra* note 428.

⁴³⁶ *Id.*

his famous letter, much of it by scribbling around the margins of a local newspaper.⁴³⁷

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.⁴³⁸ 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.”⁴³⁹ They implored locals to unite in opposition to the protests:

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.⁴⁴⁰

King was released on bail four days after being arrested, as the nation’s eyes turned increasingly to the growing tensions in Birmingham.⁴⁴¹ 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.⁴⁴² 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. *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.⁴⁴³

⁴³⁷ Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), in 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.”).

⁴³⁸ *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>].

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Birmingham Campaign*, *supra* note 428.

⁴⁴² *Id.*

⁴⁴³ Cf. Bell, *supra* note 336; 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.”⁴⁴⁴

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.”⁴⁴⁵ When the law—and the violence it wields⁴⁴⁶—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.”⁴⁴⁷ 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.⁴⁴⁸

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*.”⁴⁴⁹ That was the peace worth protesting for. “Negative peace,” in contrast, provides the veil of social harmony, obscuring injustice beneath it.⁴⁵⁰ 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).

⁴⁴⁶ See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

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 King, *supra* note 437, at 84 (emphasis added).

⁴⁵⁰ *Id.*

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 Council 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 King, *supra* note 437, at 77.

⁴⁵⁵ *Id.* at 85.

⁴⁵⁶ *Id.* at 86 (perhaps appealing to the traditional prioritization of property rights and the general cultural associations of African Americans).

⁴⁵⁷ *Id.* at 77–78.

⁴⁵⁸ See generally *id.*

described, for instance, the “racial injustice” that “engulfs this community”⁴⁵⁹ and pointed to the “racial and economic injustice,” and “blatant injustices inflicted on the Negro.”⁴⁶⁰ 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,⁴⁶¹ describing, for example, the “unjust plight”⁴⁶² of the Black members of the community, as well as the “unjust laws.”⁴⁶³ King noted, as well, the “grossly unjust treatment” that “Negroes have experienced . . . in the courts,”⁴⁶⁴ implicitly rebutting the claim by the Birmingham clergy that “racial matters” should “properly be pursued in the courts.”⁴⁶⁵

As indicated above,⁴⁶⁶ 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.⁴⁶⁷ In calling upon “both our white and Negro citizenry” and “our own Negro community” to “unite locally in working peacefully,”⁴⁶⁸ 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.⁴⁶⁹ “However, we are now confronted by a series of demonstrations by some of our Negro citizens, directed and led in part by outsiders.”⁴⁷⁰ There is a group of outside agitators seeking to create problems that don’t exist, to divide us, and to “incite to hatred and violence.”⁴⁷¹

Notably, the ministers’ statement made no mention of injustice or justice—selecting instead anodyne phrases like “racial problems” and “racial matters.”⁴⁷² 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.”⁴⁷³ 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.”⁴⁷⁴

King rejected that frame and emphasized the opposition between “the oppressor race” and “the oppressed race”⁴⁷⁵ or “the segregator” and “the segregated.”⁴⁷⁶ 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.⁴⁷⁷ 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.⁴⁷⁸

By redefining the groups, King could better enumerate the inequalities between those groups. In describing the “underlying causes”⁴⁷⁹ of the demonstrations, for example, he sketched “the hard, brutal facts of the case”⁴⁸⁰ regarding the inequalities and suffering. He called Birmingham “probably the most thoroughly segregated city in the United States.”⁴⁸¹ 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.”⁴⁸² 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”⁴⁸³ 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.⁴⁹⁴ 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

⁴⁹² *Id.* at 96–97 (emphasis added).

⁴⁹³ *Id.* at 97.

⁴⁹⁴ The threshold step in deciding whether to engage in direct action is to carefully collect “the facts to determine whether injustices exist.” *Id.* at 87.

⁴⁹⁵ In the 1960s, the general public largely disfavored even the protests that have since been celebrated. The public often views protests as illegitimate and expresses negative views toward mass movements. See BENJAMIN I. PAGE AND ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES* 350 (1992) (“The public tends to be uninfluenced—or negatively influenced—by the statements of certain groups, namely, those whose interests are perceived to be selfish or narrow or antisocial.”); *id.* at 351–52 (same attitudes regarding rule for student demonstrations and the women’s movement). In 1961, for instance, just 24% approved of the “Freedom Riders” traveling to the South and 64% disapproved. Hazel Erskine, *The Polls: Demonstrations and Race Riots*, 31 *PUB. OP. Q.* 655, 656 (1967). Similarly, by a roughly two-to-one margin, Americans opposed the upcoming March on Washington in August 1963 (63% to 22%) and the 1964 Freedom Summer movement (57% to 31%). *Id.* at 656–57.

The Sixties generally witnessed growing public pessimism regarding the efficacy of the protests. For example, Gallup asked if “mass demonstrations by Negroes are more likely to help or more likely to hurt the Negro’s cause for racial equality.” *Id.* at 660. In less than a year, between July 1963 and June 1964, attitudes shifted from 60% saying the demonstrations would hurt the cause to 74% in May 1965. *Id.* Harris asked whether previous demonstrations “have helped more or hurt more the advancement of Negro rights.” *Id.* Again, the trend was clear. Roughly half of White respondents (49%) stated in June 1963 that the demonstrations had hurt the movement, but by October of 1966, that share rose to 85%. *Id.* at 659.

Federal intervention in those matters, on the other hand, were remarkably popular, which might have informed King’s efforts to draw Kennedy’s attention and assistance. In 1957, according to Gallup, 64% of the public approved of President Dwight Eisenhower’s decision to summon federal troops to Little Rock Central High School (just 26% disapproved). *Id.* at 672. In 1961, fully 70% thought President John F. Kennedy “did the right thing” in sending U.S. marshals to Montgomery, Alabama, to protect the Freedom Riders. *Id.* Asked during 1964’s Freedom Summer about a hypothetical federal intervention, 71% thought that President Lyndon Johnson should send federal troops to Mississippi if shootings broke out. *Id.* at 673.

Perhaps most relevant for King were the public attitudes toward peaceful demonstrations that were met with White Southern violence. Those encounters often tilted attitudes in favor of the protestors—we would suggest because of the salient power being employed to harm peaceful protestors. Two months after Bloody Sunday, for instance, Harris asked, “In the recent show-down in Selma, Alabama, over Negro voting rights, have you tended to side more with the civil rights groups or more with the State of Alabama?” *Id.* at 658. By a two-to-one margin, the public chose the civil rights groups.

⁴⁹⁶ King, *supra* note 437, at 97. King’s understanding of “injustice,” as sensed, and, when activated, as producing an emotional and behavioral response, aligns with the injustice framework.

the courts.”⁴⁹⁷ Indeed, it was a court that had declared that even nonviolent protests were themselves illegal.⁴⁹⁸ 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”⁴⁹⁹ 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?⁵⁰⁰

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,⁵⁰¹ drawing an implicit contrast with the failure of Birmingham officials to keep their promise.⁵⁰² 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”⁵⁰³ “that all men are created equal.”⁵⁰⁴ 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.”⁵⁰⁵

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:

[W]e’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

Through 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.”⁵⁰⁶ He hoped to “arouse the conscience of the community”⁵⁰⁷ 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,⁵⁰⁸ its significance at the time, and King’s historical and global legacy, the letter has been described as “a rhetorical masterpiece,”⁵⁰⁹ “a landmark document of the civil-rights movement,”⁵¹⁰ “a classic work of protest literature,”⁵¹¹ and “the most important written document of the Civil Rights Era.”⁵¹² 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.

⁵⁰⁸ See, e.g., Edward Berry, *Doing Time: King’s “Letter from Birmingham Jail,”* 8 RHET. & PUB. AFF. 109 (2005) (reviewing the letter’s rhetorical lessons); Michael Leff & Ebony A. Utley, *Instrumental and Constitutive Rhetoric in Martin Luther King Jr.’s “Letter from Birmingham Jail,”* 7 RHET. & PUB. AFF. 37 (2004) (one of several articles in a symposium analyzing the power of the rhetoric in Dr. King’s letter); Michael Osborn, *Rhetorical Distance in “Letter from Birmingham Jail,”* 7 RHET. & PUB. AFF. 23, 26–30 (2004) (same); John H. Patton, *A Transforming Response: Martin Luther King Jr.’s “Letter from Birmingham Jail,”* 7 RHET. & PUB. AFF. 53, 53–54 (2004) (same); Martha Solomon Watson, *The Issue Is Justice: Martin Luther King Jr.’s Response to the Birmingham Clergy,* 7 RHET. & PUB. AFF. 1, 3–17 (2004) (same).
⁵⁰⁹ Watson, *supra* note 508, at 3.

⁵¹⁰ Martin Luther King Jr., *Martin Luther King Jr.’s “Letter from Birmingham Jail,”* ATLANTIC (Aug. 1963), <https://www.theatlantic.com/magazine/archive/2018/02/letter-from-a-birmingham-jail/552461/> [<https://perma.cc/9ZNS-SY5J>].

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.”).

⁵¹² Jack Brymer, *MLK’s “Letter from Birmingham Jail” Called Most Important Document of Civil Rights Era*, SAMFORD UNIVERSITY (Apr. 17, 2014), <https://www.samford.edu/news/2013/MLKs-Letter-from-Birmingham-Jail-Called-Most-important-Documents-of-Civil-Rights-Era> [<https://perma.cc/Y7BM-SVNC>] (“On the occasion of the 50th anniversary of Dr.

form the basis of King's book, *Why We Can't Wait*,⁵¹³ continues to shape social attitudes toward the purposes and effects of direct action protests and civil disobedience.⁵¹⁴

King's iconic letter has convinced many to appreciate the role of social protests in producing change.⁵¹⁵ 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."⁵¹⁶ 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."⁵¹⁷

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 1964.⁵¹⁸ 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.⁵¹⁹

By the late 1960s, concerted opposition, retrenchment and backlash was rapidly gaining momentum, revealing the limited and precarious nature of

Martin Luther King's 'Letter from Birmingham Jail,' Samford University history professor Jonathan Bass called it 'the most important written document of the Civil Rights Era.'")

⁵¹³ KING, *supra* note 426, at 76 (This memoir of the Birmingham Campaign reprints the letter together with King's commentary on the text.). The letter was initially circulated in mimeograph form before being reprinted in various publications. *See, e.g.*, Martin Luther King, Jr., *A Letter from Birmingham Jail*, EBONY, Aug. 1963, at 23; Martin L. King, Jr., *From the Birmingham Jail*, 23 CHRISTIANITY & CRISIS, May 27, 1963, at 89; Martin Luther King, Jr., *Letter from Birmingham Jail*, 80 CHRISTIAN CENTURY, June 12, 1963, at 767, <http://www.christiancentury.org/sites/default/files/downloads/resources/mlk-letter.pdf> [<https://perma.cc/NJK6-CZGB>]; Martin Luther King, Jr., *The Negro Is Your Brother*, ATLANTIC, Aug. 1963, at 78, <http://www.theatlantic.com/politics/archive/2013/04/martin-luther-kings-letter-from-birmingham-jail/274668/> [<https://perma.cc/P4E7-SVFJ>] (reprinting letter on 50th anniversary, April 16, 2013); Martin Luther King, Jr., *Letter from Birmingham City Jail*, AMERICAN FRIENDS SERVICE COMMITTEE (May 1963), <https://www.afsc.org/blogs/acting-in-faith/letter-birmingham-city-jail-what-would-king-say-today> [<https://perma.cc/7GPE-K5UM>].

⁵¹⁴ *See* Kathy Lohr, *50 Years Later, King's Birmingham 'Letter' Still Resonates*, NPR (APR. 15, 2013), <http://www.npr.org/2013/04/16/177355381/50-years-later-kings-birmingham-letter-still-resonates> [<https://perma.cc/E9J5-3R84>].

⁵¹⁵ *See supra* note 495.

⁵¹⁶ King, *supra* note 2.

⁵¹⁷ *Id.*

⁵¹⁸ There are several detailed histories available. *See, e.g.*, DIANE McWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION (2001); GLENN T.? ESKEW, BUT FOR BIRMINGHAM THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE (1997).

⁵¹⁹ *See* Hanson & Hanson, *supra* note 48, at 444–46.

those apparent gains. The updated machinery of racism took many new shapes including, for instance, the return of Jim Crow in new garb,⁵²⁰ the success of dog whistle politics and the “southern strategy,”⁵²¹ the trumped up wars on crime and drugs,⁵²² the distortion and cooptation of Martin Luther King’s message and legacy⁵²³ (including the abuse of “colorblindness”⁵²⁴), unfounded claims of post-racialism,⁵²⁵ the refinement of inequality-enhancing policy ideologies and jurisprudential theories,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.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.⁵²⁸

⁵²⁰ See generally THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

⁵²¹ See generally IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014).

⁵²² See generally ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2006).

⁵²³ See generally JEANNE THEOHARIS, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY (2018).

⁵²⁴ See NAOMI MURAKAWA, 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 KEEANGA-YAMAHTTA. TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION ch. 2 (2016).

⁵²⁵ See generally KAREN E. FIELDS & KAREN FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE Introduction (2012).

⁵²⁶ See generally Hanson & Yosifon, *The Situation*, *supra* note 84; Chen & Hanson, *supra* note 96; Hanson & Hanson, *supra* note 48.

⁵²⁷ See Astra Taylor & Jonathan Smucker, *Occupy Wall Street Changed Everything*, N.Y. MAG. (Sept. 17, 2021), <https://nymag.com/intelligencer/2021/09/occupy-wall-street-changed-everything.html> [<https://perma.cc/6LL9-LNDC>] (noting that “Occupy inaugurated a new era of defiant protest.”); MICHAEL LEVITIN, GENERATION OCCUPY: REAWAKENING AMERICAN DEMOCRACY 67–68 (2021).

⁵²⁸ Dr. Martin Luther King Jr: ‘I fear I Am Integrating my People into a Burning House’ N.Y. AMSTERDAM NEWS (Jan. 12, 2017), <https://amsterdamnews.com/news/2017/01/12/dr-martin-luther-king-jr-i-fear-i-am-integrating-m/> [<https://perma.cc/F6JK-KSC4>].

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 to fulfilling its promise. As the new president put it in his 2009 inaugural address:

⁵²⁹ Langston Hughes, *Harlem*, POETRY FOUND. (2002), <https://www.poetryfoundation.org/poems/46548/harlem> [<https://perma.cc/WF8Q-YMHU>].

⁵³⁰ Ben Brucato, *The Crisis and a Way Forward: What We Can Learn from Occupy Wall Street*, 36 HUMAN. & SOC'Y 1, 78 (2012).

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 I 1 (1919) (on June 4, 1919, the Nineteenth Amendment, which granted women the right to vote, was passed).

⁵³⁴ See *supra* text accompanying note 241.

⁵³⁵ See *Brown v. Board of Education*, NATIONAL ARCHIVES, <https://www.archives.gov/education/lessons/brown-v-board> [<https://perma.cc/M5FF-QUU6>].

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 inspired 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

⁵³⁷ Barack Obama, January 2009 Inaugural Address (Jan. 20, 2009), <https://obamawhitehouse.archives.gov/blog/2009/01/21/president-Barack-obamas-inaugural-address> [<https://perma.cc/8TW5-V2NK>].

⁵³⁸ Rick Santelli, quoted in JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* 3 (2010).

⁵³⁹ *Id.*

⁵⁴⁰ See THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 7–10 (2016).

⁵⁴¹ See Sara Murray, *Slump Over, Pain Persists*, WALL ST. J. (Sept. 21, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703989304575503691644231892> [<https://perma.cc/K9MS-N854>] (detailing American citizens’ lamentations on their personal exhaustion, deep disappointment, and feeling that the “American Dream” had died); see also Patti Davis, *Patti Davis: Our Disappointment with Obama*, NEWSWEEK (Sept. 9, 2010, 2:30 PM), <https://www.newsweek.com/patti-davis-our-disappointment-obama-72131> [<https://perma.cc/9GHV-CLFX>] (describing the author’s feeling of having been “betrayed” by President Obama given his delayed public response to the BP oil disaster, evoking a sense of the 1% having forgotten about the 99%); see also Derek Thompson, *Profiles of the Jobless: The ‘Mad as Hell’ Millennial Generation*, ATLANTIC (Sept. 5, 2011), <https://www.theatlantic.com/business/archive/2011/09/profiles-of-the-jobless-the-mad-as-hell-millennial-generation/244552/> [<https://perma.cc/AP4Q-B96C>] (exposing millennials’ widespread feelings of disillusionment, helplessness, and betrayal by the “stewards” of society).

⁵⁴² See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 478–79, 130 S. Ct. 876, 979, 175 L. Ed. 2d 753 (2010) (5–4 decision) (Stevens, J., dissenting in part) (“Today’s decision is backwards in many senses. . . . In a democratic society, the longstanding consensus on

With the transparently political decision of *Bush v. Gore*⁵⁴³ still fresh,⁵⁴⁴ 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.⁵⁴⁵ By 2011, the dramatic and still-growing income and wealth inequalities began to be clearly and credibly documented and discussed.⁵⁴⁶ At the same time, scholars exposed how the rich were getting richer through a "winner-take-all" political system,⁵⁴⁷ how corporate behemoths had duplicitously acted as "merchants of doubt" knowingly causing climate disaster for profit,⁵⁴⁸ and how the criminal legal system had operated as the locus of a "new Jim Crow."⁵⁴⁹ During the same period, as if to validate those scholars, the federal

the 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)).

⁵⁴³ See *Bush v. Gore*, 531 U.S. 98, 128-29 (2000) (7-2, 5-4 decision) (Stevens, J., dissenting) ("The endorsement of . . . the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.")

⁵⁴⁴ 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." LEVITIN, *supra* note 527, at 68.

⁵⁴⁵ *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 11-20, <https://www.govinfo.gov/content/pkg/CHRG-110hhrg55764/html/CHRG-110hhrg55764.htm> [<https://perma.cc/6M2D-8FM4>].

⁵⁴⁶ See, e.g., Joseph Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR, May 2011, <https://www.vanityfair.com/news/2011/05/top-one-percent-201105> [<https://perma.cc/RN44-K7FD>]; Thomas Piketty & Emmanuel Saez, *The Evolution of Top Incomes: A Historical and International Perspective*, 96 AMER. ECON. REV. (2006); see also Kathleen Macla, *Wall Street Protests Echo Researcher's Findings on Growing Income Gap*, BERKELEY NEWS, Oct. 7, 2011, <https://news.berkeley.edu/2011/10/07/wall-street-protests-echo-researchers-findings-on-growing-income-gap/> [<https://perma.cc/7PWL-YW3T>].

⁵⁴⁷ See generally Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class* (2011).

⁵⁴⁸ See generally NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBLITERATED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* (2011).

⁵⁴⁹ See David Remnick, *Ten Years After "The New Jim Crow,"* *The New Yorker* Radio (2020) (Michelle Alexander, describing the United States criminal legal system during the beginning of President Obama's presidency, stated, "Our nation has, in fact, done it again. We have birthed a system of mass incarceration unlike anything the world has ever seen. Millions of people have been relegated yet again to a permanent second-class status in which they are

government was bailing out major banks and businesses that were culpably linked to the housing crisis and economic recession,⁵⁵⁰ while those companies' top executives received immense bonuses, enjoyed criminal immunity,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.”)

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. Both did so. 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.

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.⁵⁵² Employed or not, many homeowners across the nation suddenly found themselves under financial water or worse.⁵⁵³ 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 2011.⁵⁵⁴ The Report was authored by The Financial Crisis Inquiry Commission, charged by statute with “examin[ing] the . . . crisis that ha[d] gripped our country and explain its causes to the American people.”⁵⁵⁵ 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.⁵⁵⁶

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.

⁵⁵² 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. U.S. BUREAU OF LAB. STATS., *THE RECESSION OF 2007-2009 2* (2012).

⁵⁵³ 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, *Homeowner Representation in the Foreclosure Crisis*, 13 J. EMPIRICAL LEG. STUD. 4, 809 (2016).

⁵⁵⁴ See generally THE FIN. CRISIS INQUIRY COMM’N, *THE FIN. CRISIS INQUIRY REPORT* (2011), https://permanent.fdlp.gov/gpo50165/fcic_final_report_full.pdf [<https://perma.cc/GCN8-QHKU>].

⁵⁵⁵ *Id.* at xv; 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.”).

⁵⁵⁶ *Id.* at xi–xiii.

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.

⁵⁶⁰ He participated in Occupy Wall Street as a protestor and journalist before becoming a co-founder and editor of *The Occupied Wall Street Journal* and *Occupy.com*. Levitin has extensively about the Occupy Movement including its causes and consequences. See, e.g., LEVITIN, *supra* note 527; Michael Levitin, *Occupy Wall Street Did More Than You Think*, ATLANTIC (Sept. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/how-occupy-wall-street-reshaped-america/620064/> [https://perma.cc/LP3Y-Y8FR]; Michael Levitin, The Triumph of Occupy Wall Street, June 10, 2015, <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/> [https://perma.cc/J2VB-26EA].

⁵⁶¹ LEVITIN, *supra* note 527, at 9 (emphasis added).

⁵⁶² Brucato, *supra* note 530, at 78.

⁵⁶³ Library of Congress, Web Archive: Occupy Together, <https://www.loc.gov/item/lcwaN0006224/> [https://perma.cc/3YA9-R3KT].

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.”⁵⁶⁴ Occupy 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,⁵⁶⁵ “power” and “powerful” around 150 times, and “inequality” more than 160 times.⁵⁶⁶

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”⁵⁶⁷ and a “generalized anger” and “economic frustration.”⁵⁶⁸ 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.”⁵⁶⁹ “Suffering, angry, fed up—the people demanded *justice*.”⁵⁷⁰ 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.”⁵⁷¹

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 “crystallized the public’s shared sense of injury”⁵⁷² 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.*

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.*

⁵⁶⁷ *Id.* at 11–12.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.* at 9 (emphasis added).

⁵⁷¹ *Id.* at 257 (emphasis added).

⁵⁷² *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 “awaken[ed] America to indefensible levels of economic inequality, *injustice* and unfairness”⁵⁷⁴ and gave them a place to “?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’ 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,” quotes 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

White people before never believed Black people. They believed their own police department, their own politicians. With cell phones, white people are now saying, ‘My God, I’m seeing this with my own eyes, I’m hearing it, I can’t deny this anymore—I cannot deny that police are brutal, I cannot deny white privilege.’ People seeing the atrocity can no longer say, ‘Well, he must have deserved it.’ George Floyd did not deserve it.

Id.

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

⁵⁸¹ See generally Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004).

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.”⁵⁸⁷

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.”⁵⁸⁸ They understood that “[o]ur problem was not simply that we were struggling, but that our struggling benefited someone else.”⁵⁸⁹ They realized “how the upper classes exploited those below them in the economic system.”⁵⁹⁰ 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.”⁵⁹¹ 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.”⁵⁹²

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.”⁵⁹³ Through Occupy, in short, Americans came to recognize “the economic system is rigged for those at the very top.”⁵⁹⁴

That new taxonomy of groups and the nature of their relationship was key to the movement’s success in naming, reframing, blaming, claiming.⁵⁹⁵ 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”⁵⁹⁶ “99 percent vs. 1 percent,” “People Over Profits,” “End Corporate Rule,” and “We are the 99 percent.”⁵⁹⁷ 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

rate greed and criminal profiteering that wrecked so many lives and destroyed the economy: Wall Street.”); *id.* (because of the lack accountability among the powerful, a common “refrain” among protesters was: “Banks got bailed out, we got sold out”).

⁵⁸⁷ *Id.* at 25.

⁵⁸⁸ *Id.* at 39.

⁵⁸⁹ *Id.* at 30 (quoting Sarah Jaffe).

⁵⁹⁰ *Id.* at 39–40 (quoting Marc Armstrong).

⁵⁹¹ *Id.* at 25.

⁵⁹² *Id.* at 26 (quoting organizer Marianne Manilov).

⁵⁹³ *Id.* at 25.

⁵⁹⁴ *Id.*

⁵⁹⁵ We are here alluding to the classic article mapping how experiences transform into legal disputes. See William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC’Y REV. 623 (1981) (breaking the evolution of disputes into stages of to naming, blaming, and claiming).

⁵⁹⁶ LEVITIN, *supra* note 527, at 8; see also *supra* notes 550–552 and accompanying text.

⁵⁹⁷ *Id.* at 28; see also *id.* at 26 (quoting historian Adam Hochschild: “I think framing it as the 99 percent and the 1 percent was tremendously important because the creation and the growth of any kind of political movement needs a vocabulary, it needs images. The rhetoric of the 99 percent was important branding and that vocabulary has stayed with us ever since.”).

able to articulate. . . . The facts of economic *injustice* were plain enough to understand; people just needed to hear them spoken in clear words.”⁵⁹⁸

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

[W]ith 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.⁵⁹⁹

As a consequence of the new “paradigm of thought,”⁶⁰⁰ including new narratives and redefined groups, Occupy Wall Street brought attention to “the fundamental injustice of how the system works,”⁶⁰¹ and “enabled people to confront economic injustice in a way that hadn’t been done during most of the preceding century,”⁶⁰² and it produced a “singular demand that was all of the demands: Justice. Fairness. Equality.”⁶⁰³

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.⁶⁰⁴ 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.

⁵⁹⁸ *Id.* at 30 (emphasis added).

⁵⁹⁹ *Id.* at 41.

⁶⁰⁰ *Id.* at 30 (quoting Lee Camp).

⁶⁰¹ *Id.* at 41 (quoting Richard Woolf).

⁶⁰² *Id.* at 26.

⁶⁰³ *Id.* at 4.

⁶⁰⁴ See generally Internet Archive, *Declaration of the Occupation of New York City*, <https://archive.org/details/DeclarationOfTheOccupationOfNewYorkCity> [https://perma.cc/FF7T-JJWZ]; 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.”).

The text, composed and approved by the NYC General Assembly,⁶⁰⁵ 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.”⁶⁰⁶

The framework is right there. The two sentences pointed, not to abstract justice but to an emotional “feeling of . . . injustice.”⁶⁰⁷ 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.”⁶⁰⁸ 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.”⁶⁰⁹

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.”⁶¹⁰ “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.”⁶¹¹ 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.”⁶¹²

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.⁶¹³ 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/> [<https://perma.cc/YR7E-CFRC>] (“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,⁶¹⁴ or to many of the urgent systemic injustices that plague us today,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.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.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.

⁶¹⁴ See *supra* Parts II(A)–(F).

⁶¹⁵ See *infra* Parts III(A)–(B).

⁶¹⁶ They further suggest that overcoming the injustices that plague us will require more effective, unified, and perhaps new forms of resistance.

⁶¹⁷ 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.⁶²⁰

Elsewhere, he adds that “the movement [is] broadly acknowledged to have suffered from a lack of leadership, structure, direction and goals.”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,⁶²² is devoted to rejecting the conventional wisdom. He argues that, because of Occupy, “we are no longer the country we were.”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.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.”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

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.”).

⁶²¹ *Id.* at 127.

⁶²² *See supra* Part II(G)(2).

⁶²³ LEVITIN, *supra* note 527, at 4.

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.”).

⁶²⁵ LEVITIN, *supra* note 527, 69.

culture of protest that put the fight for economic and social *justice* at the forefront of a generation.”⁶²⁶

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.

⁶²⁶ *Id.* at 4 (emphasis added); see also Barack Obama, President, Remarks on Economic Mobility (Dec. 4, 2013) (available at *Speeches & Remarks*, OBAMA WHITE HOUSE ARCHIVES.GOV, <https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-president-economic-mobility> [<https://perma.cc/824R-SDD5>]) (“I believe [economic inequality] is the defining challenge of our time.”); *Remarks by President Barack Obama on Economic Mobility*; Pope Francis (@Pontifex), TWITTER (Apr. 28, 2014, 4:28 AM), <https://twitter.com/Pontifex/status/460697074585980928> [<https://perma.cc/5AJK-RP2A>] (“Inequality is the root of social evil.”).

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

A. “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. See e.g. RAWLS, *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.”); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 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 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 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 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 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.”); MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 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 RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 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 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.⁶³¹ 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.⁶³² Social psychologists call that urge “reactance.”⁶³³ 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*.”⁶³⁴ 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.”⁶³⁵ That frustration is what justified the declaration that “these United Colonies are, and of Right ought to be *Free and Independent* States.”⁶³⁶ 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))).

⁶³² See *supra* Part I(A). As Gourevitch and Robin argue: “The promise of freedom begins with the fact of unfreedom.” Gourevitch & Robin, *supra* note 631, at 386.

⁶³³ See generally Jack W. Brehm, *Responses to Loss of Freedom: A Theory of Psychological Reactance*, in CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY 53, 55 (J. Thibaut et al. eds., 1976) (“[P]sychological reactance consists of pressure directed toward re-establishing whatever freedom has been threatened or eliminated.”); SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 1–10 (1981) (providing an overview of reactance theory and its relationship to freedom and control).

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 apophysis, 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 strength⁶⁴¹

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*."⁶⁴² To clarify, he defined the "very word *freedom*," which "in itself and of necessity, suggests *freedom from some restraining power*."⁶⁴³ 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."⁶⁴⁴ In both instances, it was incumbent upon the oppressed to fight "for democracy, not tyranny" and "for *freedom*, not *subjection*."⁶⁴⁵ 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."⁶⁴⁶

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."⁶⁴⁷ 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*."⁶⁴⁸

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).

B. "Democracy" as the Primary Means to Freedom and Justice

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.⁶⁴⁹ 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.⁶⁵⁰

⁶⁴⁹ W.E.B. DuBois idealized "democracy" as a method of addressing the "injustice" of "the white man . . . ruling black Africa for the white man's gain." W. E. Burghardt Du Bois, *The African Roots of War*, ATLANTIC (May 1915), <https://www.theatlantic.com/magazine/archive/1915/05/the-african-roots-of-war/528897/> [<https://perma.cc/ST9M-LGWZ>]. He wrote:

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.

⁶⁵⁰ 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 Government⁶⁵¹

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

Id. (emphasis added).

⁶⁵⁵ *Id.*

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.

Franklin D. Roosevelt, U.S. President, *Radio Campaign Address* (Hyde Park, N.Y., Nov. 4, 1940), <https://www.presidency.ucsb.edu/documents/radio-campaign-address-hyde-park-new-york> [<https://perma.cc/YWG8-UQNQ>].

⁶⁵⁸ Roosevelt, *supra* note 288, at 102 (emphasis added).

⁶⁵⁹ *Id.*

⁶⁶⁰ Roosevelt expanded upon that theme in other speeches. In his second inaugural address, for instance, he discussed the relationship of power to democracy:

Nearly all of us recognize that as intricacies of human relationships increase, so *power* to govern them also must increase *power* to stop evil; *power* to do good. The essential *democracy* of our nation and the safety of our people depend not upon the absence of

less suffering⁶⁶¹ and greater equality of opportunity⁶⁶² and of material outcomes⁶⁶³—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.

Franklin D. Roosevelt, U.S. President, *Second Inaugural Address* (Washington, D.C., Jan. 20, 1937), in KAYE, *supra* note 231, 107, at 108 [hereinafter Roosevelt, *Second Inaugural Address*].

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.

Franklin D. Roosevelt, U.S. President, *Message to Congress on Curbing Monopolies* (Apr. 29, 1938) [hereinafter Roosevelt, *Curbing Monopolies*], <https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies> [<https://perma.cc/HB3X-44H3>].

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 Roosevelt, *supra* note 288, at 103.

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”); *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.”).

⁶⁶⁸ Roosevelt, *supra* note 288, at 103–04.

⁶⁶⁹ Support for the conclusion that Roosevelt understood democracy not as a primary end in itself, but as a means to the end of other values like freedom and justice can be found in the previous footnotes in this section. Elsewhere Roosevelt made the related argument that the

5. *Brown v. Board of Education*

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?”⁶⁷⁰ The justices’ answer, of course, is why this case is the crown jewel of Supreme Court jurisprudence.⁶⁷¹

The reasoning behind the result distilled to two considerations. First, Warren argued that the claim of equality was, even if factually correct,⁶⁷² 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.⁶⁷³ 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.”⁶⁷⁴

By “democracy” Warren was referring in part to the functioning of the voting process, noting the role of education on “good citizenship.”⁶⁷⁵ 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-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.”).

⁶⁷⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)

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.

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.*

⁶⁸⁷ *Black Lives Matter Declaration—State of the Black Union*, Declaration Project (2015) [hereinafter *State of the Black Union*], <http://declarationproject.org/?p=1654> [<https://perma.cc/77BX-9RMM>].

country.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”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.⁶⁹⁰

The killing of Michael Brown and the events of 2014 cast a brighter light on the endless “train of [racial] abuses and usurpations”⁶⁹¹ and the need for continued protest to make those oppressions visible to a nation in denial.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.”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.”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,”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.”⁶⁹⁶

⁶⁸⁸ See Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016), <https://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmstory.html#2014> [<https://perma.cc/3PWW-CTSZ>].

⁶⁸⁹ *State of the Black Union Released on Black Lives Matter*, EBONY (Jan. 21, 2015), <https://www.ebony.com/news/state-of-the-black-union-released-on-black-lives-matter-999/> [<https://perma.cc/Z5DQ-QMRP>].

⁶⁹⁰ *Id.* (emphasis added).

⁶⁹¹ See *supra* text accompanying notes 116–132.

⁶⁹² *State of the Black Union*, *supra* note 689.

⁶⁹³ *Id.* (emphasis added).

⁶⁹⁴ *Id.*

⁶⁹⁵ See *supra* text accompanying notes 492–496; see also *supra* Part I(D) (describing the theory of change suggested by the injustice framework).

⁶⁹⁶ *State of the Black Union*, *supra* note 689.

Also consistent with the injustice framework, the document draws on the concept of “freedom” to stand for liberation from injustice.⁶⁹⁷ 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.”⁶⁹⁸ 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,”⁶⁹⁹ 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.”⁷⁰⁰ 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,⁷⁰¹ 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.”⁷⁰²

B. *Obergefell vs. Hodges*

The most culturally significant legal writing relating to LGBTQ justice was arguably the 2015 majority opinion in *Obergefell v. Hodges*.⁷⁰³ The

⁶⁹⁷ See *supra* Part II(A).

⁶⁹⁸ *Id.* (emphasis added).

⁶⁹⁹ See *supra* note 452 and accompanying text.

⁷⁰⁰ *State of the Black Union*, *supra* note 689. 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.

Id.

⁷⁰¹ See *supra* Part II(B).

⁷⁰² *State of the Black Union*, *supra* note 689 (emphasis added).

⁷⁰³ *Obergefell v. Hodges*, 576 U.S. 644 (2015); see Jeremiah A. Ho, *Once We’re Done Honeymooning: Obergefell v. Hodges, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination*, 104 KY. L.J. 207 (2016) (calling the *Obergefell* decision “[u]ndoubtedly . . . the watershed civil rights decision of our time”); Rachel Johnson Hammersmith, *Equality Trumps Religion: Why Indiana’s Religious Freedom Restoration Act Is Inherently Promoting Discrimination Based on Sexual Orientation*, 48 U. TOL. L. REV. 109, 123 (2016) (“Perhaps the most significant case championing gay rights is *Obergefell v. Hodges*. In 2015, the Supreme Court legalized gay marriage” (footnotes omitted)); Ruben J. Garcia, *Workplace Law Cases in the Tenth Term of the Roberts Court: Between the Usual Ideological Lines*, 19 EMP. RTS. & EMP. POL’Y J. 125, 138 (2015) (calling the case “a watershed moment for the gay rights movement” and explaining that the “decision was rightfully seen as one of the more progressive decisions of the Court in recent years”). For readers interested in reviewing another replication of the Declaration of Independence and with its descriptions of injustice and appeals to justice, see Kyle Luebke, *An*

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 "de[n]ot[es] . . . inferiority"⁷⁰⁷—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

LGBT Declaration of Independence, LGBTQ NATION (July 4, 2012), <https://tjchase.wordpress.com/2012/07/04/an-lgbt-declaration-of-independence-lgbtq-nation/> [<https://perma.cc/82ND-7F4K>].

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 recommit[s] 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.'").

⁷⁰⁷ See *supra* text accompanying notes 357–359.

⁷⁰⁸ *Obergefell*, 576 U.S. at 671.

Once recognized, Kennedy argued, injustice must not stand—even if that means abandoning given legal rules.⁷⁰⁹ 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.⁷¹⁰

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.”⁷¹¹ 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.⁷¹²

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 *Schuetz*, 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 *Schuetz* 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.⁷¹³

Again, we see an expression of the relationship between justice, freedom, and democracy that we have posited.⁷¹⁴ 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.”⁷¹⁵

⁷¹³ *Obergefell*, 576 U.S. at 677 (citing *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291 (2014)) (citations omitted) (emphasis added).

⁷¹⁴ See *supra* Part II.

⁷¹⁵ 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.⁷¹⁶

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 Nikolas 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 Juris. & 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>].

⁷¹⁶ 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. & FEMINISM 249, 260–61 (2020) and Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1050–51 (2019).

From the right, some argue that the focus on “injustice” opens the door for unbridled judicial discretion in ways that contravene the Court's appropriate role. Chief Justice Roberts is among those critics. In his dissent, he wrote:

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire to remake society according to its own “new insight” into the “nature of *injustice*.” As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”

Obergefell, 576 U.S. at 687 (Roberts, C.J., dissenting) (emphasis added) (internal citations omitted).

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.

⁷¹⁷ Abby Öhlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase when She Created it—10 years ago*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [<https://perma.cc/CSY5-YUGJ>].

⁷¹⁸ Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 17, 2017, 4:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [<https://perma.cc/RT47-SAJ8>].

⁷¹⁹ Bianca Fileborn & Rachel Loney-Howes, *Introduction: Mapping the Emergence of #MeToo*, in *#MeToo AND THE POLITICS OF SOCIAL CHANGE* 1, 2–3 (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.”).

⁷²⁰ Cf. Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 782 (2001) (describing the role and evolution of rape prototypes and their biasing effects on law).

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)).

⁷²³ Fileborn & Loney-Howes, *supra* note 719, at 2.

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,

⁷²⁴ Jeannie Suk Gersen, *Bill Cosby’s Crimes and the Impact of #MeToo on the American Legal System*, *NEW YORKER* (Apr. 27, 2018), <https://www.newyorker.com/news/news-desk/bill-cosbys-crimes-and-the-impact-of-metoo-on-the-american-legal-system> [https://perma.cc/59Y5-DVY8].

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. ADVOC.* (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, *Shifting 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 others⁷³⁰) 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.

⁷²⁹ Philosopher Peter Singer called Thunberg’s intervention “the most powerful four-minute speech I have ever heard.” Peter Singer, *Greta Thunberg’s Moment*, PROJECT SYNDICATE (Oct. 7, 2019), <https://www.project-syndicate.org/commentary/thunberg-speech-civil-disobedience-climate-truth-by-peter-inger-2019-10> [<https://perma.cc/K6U8-AFDC>]; see also Daniel Kraemer, *Greta Thunberg: Who Is the Climate Campaigner and What Are Her Aims?*, BBC NEWS (Jul. 28, 2021), <https://www.bbc.com/news/world-europe-49918719> [<https://perma.cc/LFC9-43QA>] (describing the address as “probably her most famous speech”).

⁷³⁰ For a list and summary of Thunberg’s major speeches, see *Speeches of Greta Thunberg*, WIKIPEDIA, https://en.wikipedia.org/wiki/Speeches_of_Greta_Thunberg#cite_note-29 [<https://perma.cc/G5E4-HVYB>].

⁷³¹ Edward Felenshal, *The Choice: TIME 2019 Person of the Year*, TIME MAG., <https://time.com/person-of-the-year-2019-greta-thunberg-choice/> [<https://perma.cc/X62M-TVXB>].

There was widespread surprise and disappointment when she was not named the 2019 winner of the Nobel Peace Prize. See e.g. Alister Doyle, *Greta Thunberg Misses Nobel Prize Amid Green vs Peace Dispute*, CLIMATE HOME NEWS (Oct. 11, 2019, 10:02 AM), <https://www.climatechangenews.com/2019/10/11/greta-thunberg-misses-nobel-amid-green-vs-peace-dispute/> [<https://perma.cc/SEM4-GN83>]; Karla Adam, *Why didn’t Greta Thunberg win the Nobel Peace Prize?*, WASH. POST. (Oct. 11, 2019), https://www.washingtonpost.com/world/europe/why-didnt-greta-thunberg-win-the-nobel-peace-prize/2019/10/11/e84e6efc-eba4-11e9-9306-47cb0324fd44_story.html [<https://perma.cc/RK5A-ETVS>]; Rachel DeSantis, *Ethiopian PM Wins Nobel Peace Prize as Fans of Greta Thunberg React: The Fight Has Just Begun*, PEOPLE MAG. (Oct. 11, 2019, 6:15 AM), <https://people.com/human-interest/greta-thunberg-2019-nobel-peace-prize/> [<https://perma.cc/P5DU-KSWX>]; see also Kraemer, *supra* note 729 (noting that she has now been nominated three times).

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.⁷³²

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.⁷³³ 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 square 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

⁷³⁴ *Transcript: Greta Thunberg’s Speech at the U.N. Climate Action Summit*, NPR (Sep. 23, 2019, 1:58 PM), <https://www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-u-n-climate-action-summit> [<https://perma.cc/5UXA-ACNL>].

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.

A related dynamic—the possibility that posterity could shun “us”—seems to shape our relationship with the future as well. Indeed, a sensitivity to such intergenerational judgment is part of what activists and orators have appealed to, however problematically, when referencing the being on the “right” or “wrong” sides of history. See Jacob T. Levy, *The Idea of a “Wrong Side of History” Will Be Considered Unthinkable 50 Years from Now*, VOX, Apr 3, 2019, <https://www.vox.com/2019/3/27/18225578/progress-morality-conservatism-wrong-side-of-history> [<https://perma.cc/8LG6-7A2U>]; David A. Graham, *The Wrong Side of “the Right Side of History”*, ATLANTIC Dec. 21, 2015 <https://www.theatlantic.com/politics/archive/2015/12/obama-right-side-of-history/420462/> [<https://perma.cc/4BTC-8GY3>].

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 2012–2022.⁷³⁸ In the same years, the number of articles mentioning “economic injustice,” “social injustice,” or “racial injustice” rose from 1,958 to 6,016.⁷³⁹ 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”⁷⁴⁰ 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-

tions are upon you. And if you choose to fail us, I say: We will never forgive you.” See *supra* text accompanying note 734.

There is, of course, another intergenerational judgment that may matter, and that is today’s dominant conception of yesterday’s social movements. There are moments of mass mobilization that may or may not fare well in the judgment of hegemonic histories. From populism to prohibition and from nativism to McCarthyism, the retrospective attitudes toward many historical movements is commonly mixed or worse.

⁷³⁸ 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.

crimination in the workplace based on age, the color of one's skin, sex, gender identity and sexual orientation,"⁷⁴¹ and, second, that "[t]hey have continuously sought to strip employees of the right to negotiate for better pay and safer working conditions."⁷⁴²

Dubal elucidates the injustice by making "clear the ways in which a third category of work . . . is constituted by and through racialized inequalities."⁷⁴³ 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."⁷⁴⁴ 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.⁷⁴⁵ 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.⁷⁴⁶

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,"⁷⁴⁷ argues that "[t]he case for a carbon tax for the sake of economic justice is . . . compelling if nonobvious."⁷⁴⁸ Engaging topics at the heart of the Occupy Wall Street movement, including climate change, economic inequality, taxes, and justice,⁷⁴⁹ Hsu seeks to correct the "misapprehension[s]" that have led many "progressive groups concerned with social and economic justice, in addition to climate change,"⁷⁵⁰—to give carbon taxes at best "tepid support."⁷⁵¹

⁷⁴¹ *Id.* at 515.

⁷⁴² *Id.* at 542.

⁷⁴³ *Id.* at 518.

⁷⁴⁴ *Id.* at 517.

⁷⁴⁵ *Id.* at 549.

⁷⁴⁶ *Id.* at 545.

⁷⁴⁷ Shi-Ling Hsu, *Carbon Taxes and Economic Inequality*, 15 HARV. L. & POL'Y REV. 551 (2021).

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 be[ing] reduced,” and, perhaps “poor households . . . in general not be[ing] made worse off,”⁷⁵² but is addressed to “justice advocates of all kinds—economic, environmental, and climate.”⁷⁵³

Hsu’s strategy, mirroring many of the texts discussed in this Article, is to uncover the “nonobvious”⁷⁵⁴ 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 haves and have-nots,”⁷⁵⁵ “carbon taxation is,” Hsu concludes, “vital to preserving economic justice.”⁷⁵⁶ 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.”⁷⁵⁷

3. *Lisa Alexander on Housing Insecurity*

Professor Lisa Alexander’s article, “Tiny Homes: A Big Solution to American Housing Insecurity,”⁷⁵⁸ 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.”⁷⁵⁹ 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,”⁷⁶⁰ such that affordable housing is not solely an issue for “low income, and very low income”⁷⁶¹ households, but “[m]oderate-income households, who historically have not suffered cost burdens, also experienced increased cost burdens prior to the pandemic.”⁷⁶² 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.

⁷⁵⁸ Lisa Alexander, *Tiny Homes: A Big Solution to American Housing Insecurity*, 15 HARV. L. & POLY REV. 471 (2021).

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 NIMBYs⁷⁶³ 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,⁷⁶⁴ and the fact that often disproportionately White “[t]iny homes villages have not substantially ameliorated these disparities.”⁷⁶⁵ 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.”⁷⁶⁶

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,”⁷⁶⁷ 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,”⁷⁶⁸ allowing residents to contribute “sweat equity”⁷⁶⁹ as an alternative to monetary investment. Some prioritize shared access and contribution to communal facilities and resources as well as democratic governance.⁷⁷⁰ 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 Wendall 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.

⁷⁷³ William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 10 (2007).

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.

⁷⁷⁵ *List of Words Ending in Ology*, WIKIPEDIA https://en.wikipedia.org/wiki/List_of_words_ending_in_ology [<https://perma.cc/PA75-XDXN>].

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 dismissing 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).