

The Justice Series: A Preface

Jon Hanson* and Dean A. Strang**

INTRODUCTION

"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."

— Martin Luther King, Jr. (1963).¹

Dr. King's elevation of justice over order named a distinction that our legal culture has spent at least half a century trying to avoid. His observation that white moderates preferred order to justice described a deeper, cultural—and perhaps human—tension between the yearning for justice and flinching from what its pursuit demands. That tension in King's time (and ours) often results in a substitution: the comfortable displacement of a harder value by an easier one. Calling out the kind of historically embedded injustice that King resisted endangers those who do it and threatens those who benefit from the arrangements being challenged.

Our shallow relationship with justice also owes something to the seeming malleability of its meaning. The idea of justice bridges narrative and conceptual thought; it bridges what James Boyd White calls the shift from primitive to analytic thought.² White does not use "primitive" dismissively. He recognizes that narrative—storytelling—remains as powerful and important as ever and sometimes can do much more than analytic or conceptual accounts of justice can.

In narrative form, humans easily grasp justice and injustice, fair and unfair, good and evil. Artists have relied on the emotional charge of injustice stories at least as far back as the great Athenian playwrights, who wove them to engage their contemporaries, and whose stories have continued to move readers across cultures and generations.³

Yet when we shift to conceptual or analytic thinking, justice eludes us. How shall we define it? Is there anything objective about it, or are we perpetually trapped in a world in which your justice is my injustice? Even if we can define it at some high level of generality, how do we apply or achieve it in practice? And, for lawyers, how do we translate the conceptual, analytic idea

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¹ Martin Luther King, Jr., LETTER FROM THE BIRMINGHAM JAIL (1963).

² JAMES BOYD WHITE, THE LEGAL IMAGINATION 862–63 (1973 & 45th anniv. ed. 2018).

³ See *infra* text accompanying notes 67–68.

of order, which for our purposes is synonymous here with the rule of law, into the narrative, primitive idea of justice? How do we link the two; how, in short, does law produce justice rather than injustice? How might law seek to cure the exercise of power to produce harm or inequality without legitimacy?

Those questions are essential and unavoidable for courts and for the legal profession as a whole. As we explore at the very beginning of this series, judges and lawyers incessantly link law to justice: we brand and market the entire profession and enterprise as seeking justice through law. Very often, though, we then deliver only law, which then begets more law through interpretations of statutes or constitutional rules and analogical thinking distinguishing one judicial precedent from others. Justice often gets lost. Indeed, even the promised linkage between law and justice gets lost. Or, worse, it gets buried deliberately.

We law people—those of us who spend our careers within the legal industry and its systems—could have spent the last half century or more trying to answer these broader questions of law’s linkage to, obligation to, justice as a central norm. Such a path would have been a continuation of exactly what the Warren Court was doing often—animating justice in landmark decisions like *Gideon v. Wainwright*⁴ and *Brown v. Board of Education*⁵—in the mid-twentieth century. But conservative indignation over justice-based jurisprudence frustrated these aims and moved the conversation away from justice entirely. Instead, decades ago, law people started focusing their legal energy onto a “Great Debate” between living constitutionalism and originalism,⁶ foreclosing any deeper discussion we might have had on justice. That was the “Great Debate that never was.” We hope to have it now.

The “Great Debate”⁷ that did happen began in the 1970s,⁸ initiated by critics of the Warren and early Burger Courts. Their motivations were political at their core but legalistic on the surface. The Warren Court’s jurisprudence provoked a broad coalition of conservative politicians, corporate interests, religious leaders, and legal academics who viewed it as a threat to existing arrangements of property, race, sex, and religious authority.⁹

⁴ 372 U.S. 335 (1963).

⁵ 347 U.S. 483 (1954).

⁶ The Federalist Society, *The Great Debate: Interpreting Our Written Constitution*: Foreword (Nov. 1, 1986), <https://fedsoc.org/commentary/publications/the-great-debate-interpreting-our-written-constitution> [<https://perma.cc/5E8F-SPWC>].

⁷ See *infra* note 35 and accompanying text.

⁸ For a deeper history of the emergence of originalism itself, see generally Jon Hanson & Dean A. Strang, *Justice Deferred*, 21 HARV. L. & POL’Y REV. (Issue 1, forthcoming 2026) [hereinafter Hanson & Strang, *Justice Deferred*] (tracing conservative movements’ use of judicial injustice stories to consolidate power in the judiciary).

⁹ For a fuller account, see *id.* at Part II; see also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 555 (2006) (arguing that originalism “empowered conservatives to criticize past Supreme Court decisions” while it “simultaneously advanced ‘nearly every plank in the conservative platform that might become involved in litigation’”) (quoting LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 374 (1988)); *id.* at 549 (concluding that originalism’s “current ascendancy does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement”); *id.* at 572 (identifying the conservative constituencies mobilized by originalism as responding to perceived threats to “religious beliefs, sexual mores, gender roles, family, or

Years prior, Richard Nixon's 1968 presidential campaign ran on blaming the Supreme Court for being soft on crime, and promising to appoint "strict constructionists" to the bench.¹⁰ Reagan, working with his long-term friend and eventual Attorney General, Edwin Meese III, expanded upon Nixon's strategy, complaining about an unprincipled, lawless, petty, and "political" Court to push for a jurisprudential mode that would loudly claim to respond to those criticisms while quietly justifying conservative outcomes.¹¹

Meese, judge and scholar Robert H. Bork, and their colleagues gave the effort an academic-sounding name: originalism.¹² What was needed, they and Reagan stressed, was a rigorous judicial philosophy that would hold justices true to the original meaning of the text and restore the Court to its historical status as the "least dangerous" branch. Beneath all that, Reagan and his allies sought to undo the Warren Court's stubborn legacy. They depicted the justices who had read the Constitution broadly to protect abortion, secure equal rights, and uphold dignity under Chief Justice Warren as lawless, unrigorous, and even tyrannical. And in their minds, justices following in the Warren Court's footsteps were making matters worse. By refusing to follow originalism, Reagan and his associates implied, those justices were putting themselves and their liberal worldview above the Founding Fathers and the American people.¹³

property"); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004) (describing originalism as "a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts").

¹⁰ MARK KOZLOWSKI, *THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS* 30 (2003) (recounting Nixon's promise to appoint "strict constructionists" to the federal bench as a signal that he would shift the courts from liberal activism toward conservative law and order, and noting that the phrase became a conservative buzzword for the preferred judicial style in the years that followed).

¹¹ Cf. MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 23 (2016) (comparing parallel positions of Nixon and Reagan on crime policy and, in response to the *Furman v. Georgia* opinion, the death penalty); *id.* (stating that "Richard Nixon made the death penalty a foot soldier in his war on crime."); *id.* (quoting Reagan's campaign comment that "our cities are jungle paths after dark" and explaining that Reagan supported the reinstatement of the death penalty).

¹² Frank Cross refers to "[o]riginalism . . . as a Reagan era conservative reaction to the Warren Court era and the desire to restrain what was perceived as judicial activism." Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 37 (2012). Mitch Berman explains that it was "conservative critics of the Warren Court who birthed modern Originalism . . ." Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 88 (2009). James Fleming describes originalism as "a conservative ideology that emerged in reaction against the Warren Court." James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997). Pam Karlan calls it "a primary theory of constitutional interpretation [that] had its origin in the conservative attack on various Warren Court decisions." Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 396 (2009); see also Whittington, *supra* note 9, at 599–601 (attributing originalism to reactions to the Warren Court).

¹³ That framing has been remarkably persistent. See Bernard Weinraub, *Reagan Says He'll Use Vacancies to Discourage Judicial Activism*, N.Y. TIMES (Oct. 22, 1985) (quoting President Reagan promising to appoint judges "who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism"); Edward Meese III, Remarks, Joseph Story Awards Banquet, at 3 (Mar. 24, 1988), <https://www.ojp.gov/pdffiles1/Digitization/110590NCJRS.pdf> [<https://perma.cc/KLL3-YBSY>] (attacking "non-interpretivism, a species of judicial activism" as "deeply anti-democratic" and claiming that "today's conservatives" were left "to do what yesterday's progressives did: defend democracy"); ROBERT H. BORK, *COERCING VIRTUE* 52 (2003) (criticizing "virulent judicial activism" and

Speaking to the House of Delegates of the American Bar Association in July 1985, Meese set out to exorcise the Warren Court from American jurisprudence. He cast the Court as an institution captured by *de facto* monarchs who deviated from the founding ideal of a “government of laws and not of men.”¹⁴ Instead, he argued, justices should follow a rigorous science of turning to the intentions of the founders to secure the single best meaning of the text that derives from a shared original meaning.

Meese’s tenure empowered conservatives to criticize the Court’s egalitarian bent—and the antiracist, justice-oriented decisions—under the guise of a neutral academic theory. The Department of Justice served as an effective instrument for realizing those political ends. Under Meese, the DOJ advanced originalism through filing cases and amicus briefs advocating for a resurrection of the “original meaning of constitutional provisions and statutes as the only reliable guide” for judicial interpretation.¹⁵ Meese additionally enlarged the DOJ’s public affairs department, hosting “regular internal seminars on constitutional interpretation attended by leading conservative thinkers,” and was instrumental in pushing public discussion about the appropriate method of constitutional interpretation.¹⁶

The Reagan Administration had set the terms of a major public and political battle. Whether consciously or not, those who joined the fray—such as Justice Brennan with his “living constitutionalism”¹⁷—did so on those methodological terms. Where the Warren Court had assumed that justices should actively pursue just outcomes, the Great Debate decoupled ends from means, shifting attention from the substance of judicial results to the methodology of judicial reasoning. Questions about judicial ideology—regarding a judge’s proper role and methods of interpretation—became central

complaining that “Americans are force-fed a new culture and a new definition of virtue, all in the name of a Constitution that neither commands nor permits such results”); George W. Bush, Remarks on a Proposed Constitutional Amendment To Protect Marriage, AM. PRESIDENCY PROJ. (June 5, 2006), <https://www.presidency.ucsb.edu/documents/remarks-proposed-constitutional-amendment-protect-marriage> [<https://perma.cc/G6RY-ZZ4D>] (supporting a constitutional amendment to restrict marriage to heterosexual couples in response to what Bush called “activist judges”); *Obergefell v. Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting) (condemning “constitutional revision by an unelected committee of nine” as robbing the People of “the freedom to govern themselves”); *id.* at 734 (Thomas, J., dissenting) (warning that the majority’s decision “short-circuits” the political process “with potentially ruinous consequences for religious liberty”); Sen. Cruz: We Must Not Submit Our Constitutional Freedoms, and the Promise of Our Nation, to Judicial Tyranny, TED CRUZ U.S. SEN. (June 6, 2015), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-we-must-not-submit-our-constitutional-freedoms-and-the-promise-of-our-nation-to-judicial-tyranny> [<https://perma.cc/M647-QEX8>] (claiming “the Constitution finds itself under sustained attack from an arrogant judicial elite”); *In His Own Words: The President’s Attacks on the Courts*, BRENNAN CTR. JUST. (Feb. 14, 2020), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts> [<https://perma.cc/GPA5-ZZMD>] (collecting President Trump’s complaints about “Judicial Activism and Interference”).

¹⁴ Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985), in ELIZABETH H. SLATTERY, WILLIAM H. PRYOR, JR., & EDWIN MEESE III, *THE ORIGINALISM REVOLUTION* (Turns 30: EVALUATING ITS IMPACT AND FUTURE INFLUENCE ON THE LAW 8 (Elizabeth H. Slattery, ed., 2016)).

¹⁵ Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986).

¹⁶ SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 504 (2010).

¹⁷ See *infra* Part II.

in our politics, our culture, and in legal education and the profession alike. The “Great Debate” became undebatable.

Debates about judicial ideology have been, by design, a distraction. The deeper question, and the one that interests us throughout this series, is what norms judges center and act upon in their work. In the last half century, that question has quietly narrowed to one of legal formalism: what is the correct methodology for interpreting legal text? Framed that way, the enterprise considers only law for law’s sake. Shall the judge adopt one method of interpreting text, or another? Either way, the exercise begins and ends with the rule of law for the sake of the rule of law. The method of arriving there becomes her norm. And that method, for fifty years, has been text-centered formalism.¹⁸ Note, too, that formalistic legal reasoning serves as cover, because unlike questions answered in terms of normative justice, lay people—the broader public—cannot evaluate coded, formal legal reasoning. That formalist cloak can shroud decisions that serve unstated interests (like existing power allocations or preserving inequities) from public accountability.

And so, the legal profession has opted for legalistic order over justice, fastidious procedure over the hard work of identifying and confronting illegitimate power and its consequences. The result has been a judiciary focused entirely on umpiring, calling balls and strikes,¹⁹ but disregarding the broader integrity and outcome of the game. Moreover, it shows no interest in the structural fairness of the league: in how resources are allocated among competing teams, in the advantages and disadvantages that persist over time. Distinguishing pitches has its place, but if that is all law people do, they miss entirely the context and consequence of the game, ignoring their impact on lives beyond the diamond. Like it or not, in a country that empowers judges—and by extension, the entire legal profession—to administer the rule of law and to link law to justice, law people are tied to injustice and justice inseparably.²⁰

This series treats justice not as empty decoration but as the essential point. In it, we place judicial philosophy or methodology where it belongs: in the background. We advance to the spotlight more vital questions about judicial accountability, the social contract (however non-ideal²¹), and the relationship of law to people and their quest for justice. The series calls for restoring justice as the law’s normative imperative and conceding that justice never

¹⁸ See *infra* note 26.

¹⁹ The prominent formalist and originalist Chief Justice John Roberts is just one of many who has relied on this analogy. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (“I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

²⁰ Law schools, courts, prosecutors’ offices, public defenders’ offices, law firms, regulatory agencies, and the legal academy form an interconnected system in which each institution shapes the others: law schools train the students who become the prosecutors, defenders, judges, regulators, and scholars who in turn shape the norms that law schools teach. Because every institution in that system both produces and is produced by the legal culture surrounding it, we consider the legal profession—law people—as a whole in our arguments, from law schools on up. At their broadest, our arguments divide society into just two groups: a larger group of lay people, and a smaller group of law people.

²¹ See *infra* text accompanying note 55.

held that place fully or securely. Judges, we argue, should strive to identify and redress injustice, and their opinions should speak to that effort and end. It is not enough to explain why rules, precedents, or procedural constraints dictate an outcome and call that “law.” Instead of cloaking or even denying their agency, judges must acknowledge that agency (and promissory obligation) and direct it toward justice. Judges and law people more broadly can and will disagree on what justice requires or means in a given case. But justice must be their end.

I. THE CONSERVATIVE LEGAL MOVEMENT’S SUCCESS

To understand any one of these articles individually or as a series, it is helpful to understand the recent intellectual history of the profession and its judicial institutions. In the last half century, more or less, that history has shifted away from the roughly two decades of an open, if inconsistent, acceptance of justice as a norm of law. We are not alone in calling that a liberal phase, for want of a better label, although it would not have to carry the current political or partisan valence of that term.²² It was “liberal,” if only sometimes, in the sense that it often was humanistic, centered on individual liberty rather than collective or institutional interests, and demonstrated a willingness to examine and alter power imbalances to reduce disadvantage to the poor and relative outsiders (effectively or not).

That brief liberal phase gave way to an intentional rejection of justice as a norm in favor of elevating law (or the rule of law, to dress it up) as a purportedly more objective norm, in a conservative backlash that continues today. That purported objectivity begins in a renunciation of the norm of justice itself. In its place, we see norms of textual fidelity and methodological consistency that ask everything about law and nothing about justice.

This conservative shift (by its proponents’ own description) in the recent intellectual history of law, and in the composition of its institutions, has been enormously successful. We turn now briefly to an overview of how it happened.

A. *The Right’s Dual Strategy: Offense and Defense*

The paradigm shift that now dominates American legal thought did not emerge from a single brilliant article, charismatic author, or great debater.

²² Whether praising it or condemning it, almost all commentary on the Warren Court has described that era as a “liberal” one for the Supreme Court. For just a few examples, see generally ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968); PETER P. SCHAUER, *THE WARREN COURT AND THE CONSTITUTION: A CRITICAL REVIEW OF JUDICIAL REVIEW* (1970); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* (1982); TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* (1992); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); MORTON J. HORWITZ, *THE WARREN COURT AND THE DEMOCRATIC CONSTITUTION* (2007); STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008); GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* (2020).

It was constructed in layers, the product of a movement, comprising prominent business people, benefactors, and corporate interests who organized to create coalitions, networks, and institutions.²³ All that took time. The right at first struggled to challenge the left's "moral monopoly"²⁴ and to root their aims in "a theory of justice that attracted people to the cause."²⁵ Eventually, however, the right landed on an effective dual strategy.

First, it disarmed the left and discredited the Warren Court by attacking and delegitimizing *justice* as a proper guide for constitutional interpretation. Conservative intellectuals and their political allies portrayed justice as subjective, vacuous, naïve, and partisan—an *unjust* threat to democracy itself.

Second, after neutralizing its opponents' guiding norm of justice, the conservative movement developed its own affirmative theories, including originalism, textualism,²⁶ and law and economics, that masqueraded as

²³ Elements of this history are elaborated in Hanson & Strang, *Justice Deferred*, *supra* note 8; see also Jon Hanson, *The Injustice Playbook, Part I: The Corporate Origins of the Counternarrative for Justifying Harm*, 70 How. L.J. (forthcoming 2026); Jon Hanson, *The Injustice Playbook, Part II: The Corporate Capture of American Law and the Authoritarian Crisis it Helped Produce*, 70 How. L.J. (forthcoming 2027) [hereinafter Hanson, *The Injustice Playbook, Part II*]. One important catalyst or call to arms for that movement was the 1971 confidential memorandum that Lewis F. Powell, Jr.—a prominent corporate lawyer, former president of the ABA, and soon an Associate Justice on the Supreme Court—sent to the U.S. Chamber of Commerce. Powell titled his memorandum "Attack on American Free Enterprise System" and argued that the business community collectively must defend capitalism and mount a counter-attack against not just the usual opponents on the far left, but also the media, universities and colleges, some religious groups, intellectual journals, and other cultural institutions that Powell viewed as increasingly captured by the political left. See Hanson, *The Injustice Playbook, Part II*, *supra*; see generally Lewis F. Powell, Jr., The Memo: Attack on American Free Enterprise System (Aug. 23, 1971), *reprinted by* Wash. & Lee U. Sch. of L. Scholarly Commons, <https://scholarlycommons.law.wlu.edu/powellmemo/1/> [<https://perma.cc/96BC-TVYS>].

²⁴ Michael Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms*, Sarah Scaife Found. 1 (1980) (on file with authors).

²⁵ DAVID DALEY, ANTIDEMOCRATIC: INSIDE THE FAR RIGHT'S 50-YEAR PLOT TO CONTROL AMERICAN ELECTIONS 41 (2024).

²⁶ Throughout this series, we use "originalism" and "textualism" as related but distinct terms. Modern originalism, sometimes called "new originalism," holds that constitutional provisions should be interpreted according to their original public meaning at the time of ratification. Textualism holds that legal texts should be interpreted according to the ordinary meaning of their words, without resort to legislative history or other extra-textual sources. In practice, the two overlap considerably: both reject judicial appeals to justice, evolving values, or contemporary social needs as legitimate grounds for interpretation, and both claim to constrain judicial discretion through fidelity to fixed textual meaning. Indeed, leading proponents have embraced both labels. Justice Scalia described himself as "first of all a textualist, and secondly an originalist," explaining that he takes the words of the Constitution as bearing "the fairly understood meaning of those words" as "promulgated to the people of the United States." James Burling, *What Is the Difference Between Originalism vs. Textualism vs. Living Constitutionalism?*, PAC. LEGAL FOUND. (Apr. 27, 2022), <https://pacificlegal.org/originalism-vs-textualism-vs-living-constitutionalism/> [<https://perma.cc/G4LV-7Q59>] (quoting Justice Scalia). Justice Gorsuch has similarly identified as both a "proud textualist" and a proponent of originalism as "the best approach to the Constitution." *Id.* Under modern originalism, as even proponents acknowledge, "the theory maps very neatly onto textualism" and "[t]he difference between them is one of scope, not philosophy." *Id.* Because the two approaches share normative commitments and interpretive methods to such a degree, our criticisms of one generally apply to the other, and we often refer to them together. Where the distinction matters to a particular argument, we note it.

For one illustration of how the two can diverge, consider a claim that trespassing police officers searched for evidence of a crime in areas of a farm or yard that were outside the curtilage of a home. To the textualist, this might well be a "search" within the meaning of the Fourth

objective, determinative modes of finding and interpreting law. While those views varied in emphasis, they shared legalist and formalist commitments: they rejected justice in favor of formal norms that purported to restrain judicial discretion, all serving social *stasis*. In the intervening decades, many key decisions of the United States Supreme Court have tended to preserve or restore a prior social order and power hierarchy.²⁷

B. *How the Right Built Its Intellectual Infrastructure*

Beginning in the 1970s, the conservative legal movement succeeded through sustained, coordinated funding and institution-building: the Heritage Foundation, the American Legislative Exchange Council, the Cato Institute, and the Federalist Society were among the many politically aligned institutions that sprung up between 1972 and 1982. The network created workshops, peer-reviewed journals, and law school courses that put originalism and law-and-economics on the map, gave these ideas credibility, and made them seem both brilliant and inevitable.

That momentum built off the theoretical groundwork laid by conservative advocates in law reviews and casebooks. Robert Bork's first major piece on originalism appeared in the *Indiana Law Journal* in 1971, the published version of a lecture he delivered there.²⁸ Richard Posner's groundbreaking casebook, *Economic Analysis of Law*, was published in 1973.²⁹ Foundational law-and-economics scholarship appeared at about the same time in the

Amendment, which then would have to be assessed for its reasonableness. But to the originalist, the common law rule as to "open fields," which would have been familiar (and perhaps uncontroversial) to the Framers, puts that trespass outside the scope of a "search" for Fourth Amendment purposes. See *Hester v. United States*, 265 U.S. 57, 59 (1924) (summarily adopting that distinction between a house and open fields for it is "as old as the common law"; combing open fields is not a "search"). For the originalist, the issue is not the plain meaning of the word, "search," but rather its accepted legal meaning at the time of the framing—with a subsidiary issue being what historical evidence the originalist considers and accepts on that issue.

²⁷ For four examples from the 1970s to today, consider *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) ("[A] primary effect of these [campaign] expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates."); see also *id.* at 49 ("[T]he concept that [the] government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."); *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982) ("[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. . . . [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights"); *Citizens United v. FEC*, 558 U.S. 310 (2010) (finding that corporations are "persons" for purposes of the First Amendment's protection of political speech); *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) (overturning *Roe* because nineteenth century state statutes did not establish a tradition of a right to abortion), see also *id.* at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The majority's core legal postulate, then, is that we . . . must read the Fourteenth Amendment just as its ratifiers did But, of course, 'people' did not ratify the Fourteenth Amendment. Men did.").

²⁸ See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing for the adoption of a general theory of neutral principles derived from the Constitution over judicial value judgments to preserve the Supreme Court's legitimacy).

²⁹ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Little Brown and Co. 1973).

peer-reviewed *Journal of Law and Economics* and the *Journal of Legal Studies*,³⁰ both of which were housed at the University of Chicago and funded by the conservative John M. Olin Foundation.³¹ A floodtide of derivative and repetitive support for these first broad efforts followed over the years since. Ideas led; infrastructure came next; and mainstream acceptance followed.³²

The movement also succeeded in building an institutional pathway to the judiciary. The Federalist Society, since soon after its founding in 1982, has been the juggernaut of that success. Funded primarily by conservative foundations, large corporations, and wealthy right-leaning philanthropists,³³ it created both lawyers' chapters and student chapters at law schools, actively recruited, groomed, and mentored potential federal judicial nominees, and built networks within the judiciary, Congress, and the executive branch that propelled its candidates to the federal bench.³⁴

³⁰ See, e.g., William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & Econ. 249 (1976) (developing an empirical method for analyzing legal precedent derived from the analysis of capital formation and investment); Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527 (1979) (arguing that the common law approach to false advertising is consistent with the principle of efficiency).

³¹ See *The Olin Foundation and Support for Law and Economics Research*, U. CHI. L. SCH. (Oct. 11, 2011), <https://www.law.uchicago.edu/news/olin-foundation-and-support-law-and-economics-research> [<https://perma.cc/E26X-GHCS>]. Centers for Law and Economics were similarly established at, e.g., Harvard and Yale. *Id.*

³² See, e.g., AMANDA L. HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 10–11 (2015) (describing the Federalist Society as a “political epistemic network” meaning “an interconnected network of experts with policy-relevant knowledge who share certain beliefs and work to actively transmit and translate those beliefs into policy”); Amanda Hollis-Brusky, *Making Fusionism Great Again: Authoritarian Means to Christian Nationalist Ends*, 713 ANNALS AM. ACAD. POL. & SOC. SCI. 16 (2025) (explaining a central function of the Federalist Society as “legitimizing conservative legal thought” by building “credibility capital” so that “when judges and justices make revolutionary rulings that align with these ideas or draw on these conservative theories, the legal profession and wider publics don’t view them as completely ‘off-the-wall’ or ‘positively loony’”); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001) (arguing that “[t]he more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from ‘positively loony’ to ‘positively thinkable,’ and ultimately to something entirely consistent with ‘good legal craft.’”).

³³ These have included, among others, the John M. Olin Foundation, *John M. Olin Foundation (1953–2005)*, Duke Sanford Ctr. for Strategic Philanthropy and Civ. Soc’y, <https://cspcs.sanford.duke.edu/cspcs-publication/john-m-olin-foundation-1953-2005/> [<https://perma.cc/5YAH-XYBJ>] (“Prominent grants: ... Established the Federalist Society.”); the Sarah Scaife Foundation, *Sarah Scaife Foundation Inc., 2021 Form 990-PF*, ProPublica, <https://projects.propublica.org/nonprofits/organizations/251113452/202223189349101212/full> [<https://perma.cc/K2RG-KX7M>]; Koch Industries, Inc., *2023 Annual Report* 56, The Federalist Soc’y (2023), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/E8hyL8jt2iPPUEC2pKukNVoaAar3V0h2VABg25wG.pdf> [<https://perma.cc/RD4B-928R>] (listing Koch Industries under \$100,000 or more in donations); and corporate donors like ExxonMobil, *id.* (\$100,000 or more in donations); Meta, *id.* (\$50,000 to \$99,999 in donations); Google, *2019 Annual Report* 48, FEDERALIST Soc’y (2019), <https://s3.documentcloud.org/documents/20500582/federalist-society-2019-ar.pdf> [<https://perma.cc/RD4B-928R>] (\$100,000 or more in donations); and others. Organizations including the Bradley Impact Fund have funded the broader conservative legal infrastructure to which the Federalist Society belongs. See Isabela Dias, *How a Few Secret Donors Are Fueling the New Right-Wing Infrastructure*, MOTHER JONES (Apr. 30, 2024), <https://www.motherjones.com/politics/2024/04/bradly-impact-fund-michael-flynn-stephen-miller-culture-war-project-veritas-american-first-legal-cpi/> [<https://perma.cc/56G6-TSBG>].

³⁴ Less than fifty years after the Federalist Society’s founding in 1982, the organization currently boasts approximately 90,000 members, over 200 law school chapters, and over 100 metropolitan lawyers chapters. See *About Us*, FEDERALIST Soc’y, <https://fedsoc.org/about-us>

II. THE PROGRESSIVE VACUUM

Since the conservative legal movement successfully discredited justice as a judicial value, those opposed to the pro-corporate and conservative trends have lacked what one American Constitution Society (ACS) blog post termed an “ism”: an affirmative theory to rally around and use to advance just outcomes. Instead, they have been playing defense, struggling to shore up Warren and Burger Court precedent, poking holes in originalism, exposing contradictions in textualism, and decrying the hypocrisy of transparently political decisions masked as neutral.

[<https://perma.cc/9QW2-DT5Q>]. The Federalist Society’s 2024 Annual Report—the most recent report publicly available—includes statistics like the following: in 2024, the Student Division of the organization hosted 1,374 speaker events and over 700 social events with a total of over 74,000 attendees; and the Lawyers Chapter was comprised of 125 chapters, hosted sixteen state conferences, and held over 480 programs. *See 2024 Annual Report*, FED. SOC’Y (2024), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/SuKMo8FadwYcNCN-7zDQlSjQgZJ43dGlxCyl4fAV.pdf> [https://perma.cc/3THB-Y85X].

This influence extends to judicial appointments. The Federalist Society offers “the definitive endorsement of a potential judge’s conservative bona fides.” *See* The Week Staff, *How conservatives built a powerful judicial pipeline*, THE WEEK (Aug. 27, 2018), <https://theweek.com/articles/791928/how-conservatives-built-powerful-judicial-pipeline> [https://perma.cc/LF5E-H3TL]. All six of the current conservative Supreme Court justices have at some point been members. *Id.* During his 2016 presidential campaign, Donald Trump promised that if elected president, his judicial nominees would all be “picked by the Federalist Society.” *See* Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html> [https://perma.cc/3UEG-QGM5]. Of the 51 new appellate judges confirmed during Trump’s first term as of March 2020 (with the final number at 54), all but eight had ties with the Federalist Society. *See* Rebecca Ruiz, Robert Gebeloff, Steve Eder, & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [https://perma.cc/WH5X-XCH4]. The conservative movement’s effort to create and advance conservative judges starts in law school: Curt Levey, the president of the conservative group Committee for Justice, stated that “[y]ou have to have that army before you can credential them,” in reference to developing a generation of younger legal conservatives that would assume positions of power. *See* Peter Baker, *A Conservative Court Push Decades in the Making, With Effects for Decades to Come*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/supreme-court-conservatives-trump.html> [https://perma.cc/4L73-VBNH]. The Federalist Society acts covertly vis-a-vis non-members regarding their clerkship process, but it has been noted that affiliation with the Federalist Society is often correlated with accelerated clerkship attainment with conservative judges. Sierra R. Pape & Uy B. Pham, *Conservative Judges’ Early Hiring Fuels Two-Track Clerkship System at Harvard Law*, HARV. CRIMSON (Apr. 14, 2026), <https://www.thecrimson.com/article/2026/4/14/federal-clerkships-earlier-timeline/> [https://perma.cc/PL5J-PANP].

Further, the Federalist Society benefits from shadow funding. The conservative legal movement tends to operate in secrecy where possible regarding their funding sources. A Washington Post investigation published in 2019 revealed that Leonard Leo—the Federalist Society’s former vice president and current co-chairman of the board of directors—and his allies “collected more than \$250 million in [donations for nonprofits under IRS rules did not have to be disclosed]” “between 2014 and 2017 alone.” *See* Robert O’Harrow Jr. & Shawn Boburg, *A conservative activists’ behind-the-scenes campaign to remake the nation’s courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/> [https://perma.cc/92D8-T96N]. Leo was also the subject of controversy in 2023, when it was reported that he “obtained a historic \$1.6 billion gift for his conservative legal network via an introduction through the Federalist Society.” Heidi Przybyla, *Leonard Leo used Federalist Society contact to obtain \$1.6B donation*, POLITICO (May 2, 2023), <https://www.politico.com/news/2023/05/02/leonard-leo-federalist-society-00094761> [https://perma.cc/DK9P-3QME]. The Federalist Society “received \$5.6 million in grants in 2020 and \$3.5 million in 2021 from The 85 Fund,” a conservative organization associated with Leo. *Id.*

To be sure, opponents of the rightward trends have tried to produce an alternative to the new formalisms. Indeed, the “Great Debate” is shorthand for the few years in which Justice William J. Brennan expounded his “living constitutionalism” as the answer to Attorney General Edwin Meese’s originalism. That those few exchanges earned the label “The Great Debate” is an artifact of the victor’s privilege. The debate was “great” to those who named it, we believe, only because it marked the moment that originalism was recognized within elite legal circles as a plausible theory that could be openly advocated while serving as cover for political ends, and then became dominant.³⁵

Since then, every other contender meets a similar set of criticisms. There is originalism and textualism—framed as neutral and apolitical—and there is the laundry list of potential, putatively plastic alternatives developed by the left: living constitutionalism,³⁶ living originalism,³⁷ democratic constitutionalism,³⁸ pragmatism,³⁹ popular constitutionalism,⁴⁰ inclusive constitutionalism,⁴¹ liberal common-good constitutionalism,⁴² and anti-oligarchy constitutionalism.⁴³ Given that frame, the conservative legal movement’s infrastructural

³⁵ The Federalist Society published the collected speeches under the title “The Great Debate” and now celebrates the exchange as originalism’s founding triumph. See *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* (Federalist Society Occasional Paper No. 2, 1986). The exchange between Attorney General Meese and Justice Brennan was unprecedented. As one contemporaneous account noted, it had been “rare” for executive branch officials to assail the Court directly, and “virtually unheard of for members of the Court off the bench to criticize the constitutional views of top executive branch officials.” Stuart Taylor Jr., *Administration Trolling for Constitutional Debate*, N.Y. TIMES, Oct. 28, 1985, at A12. That conservatives have claimed the moniker as their own and now celebrate the exchange as a vindication of originalism, is itself telling. See Josh Blackman & John Malcolm, *How “Originalism” Became the Prevailing View at the U.S. Supreme Court*, HERITAGE FOUND. (Oct. 8, 2025) (declaring that “we can pronounce a winner” and that “Justice Brennan and living constitutionalism lost”); Josh Blackman, *The Inaugural Edwin Meese III Originalism Lecture*, HERITAGE FOUND. (Mar. 24, 2022) (making the same declaration nearly verbatim three years earlier); see also STEVEN G. CALABRESI & GARY LAWSON, *THE MEESE REVOLUTION: THE MAKING OF A CONSTITUTIONAL MOMENT* (2024) (arguing that Meese was “the most significant attorney general in American history” and that his speeches began a “constitutional moment” culminating in an originalist Supreme Court majority).

³⁶ See, e.g., David A. Strauss, *The Living Constitution*, UNIV. CHI. LAW (Sept. 27, 2010), <https://www.law.uchicago.edu/news/living-constitution> [<https://perma.cc/WE5U-3UAG>].

³⁷ See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

³⁸ See, e.g., David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEX. L. REV. 1969 (2013); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

³⁹ See, e.g., STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* (2024). Judge Posner, a founder and giant of the Law & Economics school and its purported objectivity, declared himself a pragmatist relatively late in his judicial career. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2005). The 2008 financial crisis a few years later reinforced that break with his earlier efficiency-based work. See RICHARD A. POSNER, *A FAILURE OF CAPITALISM* (2009).

⁴⁰ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).

⁴¹ See, e.g., MADIBA K. DENNIE, *THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK* (2024).

⁴² See, e.g., Linda C. McClain & James E. Fleming, *Toward a Liberal Common Good Constitutionalism for Polarized Times*, 46 HARV. L. & POL’Y REV. 1123 (2023).

⁴³ See, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (2022).

advantages, and the intuitive appeal of the claim that words have precise, discernible, and definitive meaning, no challenger has gained traction.

“[T]he liberal legal academy hasn’t come up with an easily digestible rival idea [to originalism],” explains Professor Evan Mandery.⁴⁴ Many preeminent scholars, including Professors Reva Siegel and Jack Balkin, have attempted to unify constitutional interpretation for the left, most notably through their book, *The Constitution in 2020*.⁴⁵ But progressives remain fractured. Dahlia Lithwick notes that instead of affirmatively putting forward a constitutional theory, the left has been stuck “saying, ‘Whatever we’re for, we know we’re not for [Supreme Court Justice Antonin] Scalia and originalism.’”⁴⁶ As Justice Goodwin Liu has put it with pithy brevity, the left has not come up with its “bumper sticker.”⁴⁷

Without uniting around an alternative theoretical framework, progressives have lacked the tools to implement an affirmative vision; they have lacked the tools for playing offense. Admittedly, justice can be hard to make concrete in an analytic or conceptual mode of writing or speech—its rhetorical strength often is expressed through storytelling. And it is not the case that all progressives accept justice as a central norm of law or recognize its absence from most judicial work. Many progressives, too, have become inured to formalism and to the rule of law as the only end. As Post and Siegel observe, progressives have been “maneuvered into upholding the very detachment of law from politics that is the central premise of the jurisprudence of originalism.”⁴⁸

Ideologically, we will suggest in the articles that follow several reasons for this defensive, and sometimes passive, posture. As we noted above, progressives have not coalesced around one counter-theory to originalism: they have advanced several over time, most of which just add an adjective that softens originalism and formalist philosophies. In part, we suspect that many have been spooked by the success of conservatives in presenting justice as taboo; as a hopelessly subjective, empty norm that would leave judges wholly unconstrained and ruling only on their sense of the “feels.”

More specifically, progressives have split on how to frame injustice stories themselves. Should they adopt judicial or legalist injustice narratives that invariably are incrementalist? That may address a surface or obvious

⁴⁴ Evan Mandery, *Why There’s No Liberal Federalist Society*, POLITICO (Jan. 23, 2019), <https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033/> [https://perma.cc/BTV5-3ECA].

⁴⁵ Ari Shapiro, *Conservatives Have ‘Originalism’; Liberals Have . . . ?*, NPR (June 23, 2009, at 10:00 ET), <https://www.npr.org/2009/06/23/105439966/conservatives-have-originalism-liberals-have> [https://perma.cc/5HLG-DM4X] (discussing *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel, eds. 2009)).

⁴⁶ *Id.*

⁴⁷ *Id.* Some interpretation theories from the left have focused on addressing particular injustices. For example, Professors Joseph Fishkin and William E. Forbath have proposed an “Anti-Oligarchy Constitution,” that focuses on interpreting the constitution with an eye to economic inequality specifically. See FISHKIN & FORBATH, *supra* note 43, at 19–21. But other proposals have focused on the meta scripts of injustice and constitutional interpretation. Liberal Common Good Constitutionalism, proposed by Professors Linda McClain and James Fleming, focuses on developing a theory of constitutional interpretation that addresses systemic injustices as they relate to a plethora of social issues. See McClain & Fleming, *supra* note 42, at 1128.

⁴⁸ Post & Siegel, *supra* note 9, at 572.

concrete injustice but leave deeper, structural causes of injustice unchallenged? Reformers and moderates usually have taken this approach. Or should they instead look beneath the surface and question patterns and structural imbalances that foreordain, as a practical matter, more pervasive injustice? In general, this has been the approach of critical theorists of all stripes and some others. With that schism, the left has not in the last half century achieved anything like the methodological consensus that the right has, on originalism or at least textualism.⁴⁹

There also are institutional factors working against the liberal or progressive side. The American Constitution Society itself began overtly as a counterweight to the Federalist Society; as a reaction, not an independent action.⁵⁰ It never has achieved the funding or membership levels of the Federalist Society, either.⁵¹ Perhaps for some combination of these reasons, or others, the ACS also has not proven to be the same wide-bore pipeline to the judiciary that the Federalist Society has.⁵²

III. THIS PROJECT AS A RESPONSE

This serial collection of articles is an attempt to fill a void and to bridge the gap between law or legalism and justice. This void is one that has long vexed the progressive legal community and progressives more generally: an affirmative vision of justice that negates injustice as workably defined, rather than a purely defensive plaint bemoaning dishonest legalism. In all, the series seeks to challenge or even repel the right's attack on justice while, more importantly, offering justice itself as a revived goal, a framework for legal theory that can function both as sword and shield.

The stakes are existential. As our series describes, the abandonment of real justice has had predictable consequences on people's lives and attitudes. Public confidence in legal institutions has reached historic lows, with many

⁴⁹ ACS President Phil Brest said as much in February 2026: "We have to have an affirmative message around constitutional interpretation in the same way there has to be an affirmative message around elections and politics," he told me. "And it can't just be, 'We're not originalists' in the same way that A.C.S. can't just be, 'We're not the Federalists.' That's not how I view the organization, and that's not how I want to be part of the solution to countering originalism. There has to be an affirmative piece there." Jeffrey Toobin, *The Plan for a Radically Different Supreme Court is Here*, N.Y. TIMES (February 16, 2026), <https://www.nytimes.com/2026/02/16/opinion/alternative-federalist-society.html> [<https://perma.cc/8B45-DLYQ>].

⁵⁰ Charlie Savage, *Liberal Legal Group Is Following New Administration's Path to Power*, N.Y. TIMES (Dec. 10, 2008), <https://www.nytimes.com/2008/12/11/us/politics/11network.html> [<https://perma.cc/SQW4-XGY5>].

⁵¹ By 2008, ACS had 165 student chapters, 30 city chapters, and about 22,000 affiliates, around half the number claimed by the Federalist Society. *Id.* Today, the Federalist Society continues to dominate ACS. In 2024, it drew \$22.5 million in revenue, as compared to ACS's less than \$6 million. *See* Toobin, *supra* note 49.

⁵² Obama placed less of an emphasis on judicial nominations than ACS and other progressives had hoped, making its goal to rival the Federalist Society in curating judges more difficult. Even as Biden mirrored Obama's efforts, his judicial appointments reflected a weaker loyalty than Republican presidents had for the Federalist Society: Only twenty-five percent of Biden's appointees were recommended by or affiliated with ACS. *Id.* Further, none of the three Democratic appointees now sitting on the Supreme Court were ever ACS members.

viewing the courts less as guardians of justice than as instruments of power. The social contract that depends on perceived legitimacy frays further with each promise made and broken.⁵³

Obviously, we cannot replicate the right's wealth and infrastructure. But we can offer a systematic alternative theory, grounded in cross-disciplinary scholarship. Our work draws on history, psychology, sociology, political science, philosophy, and law itself. Each of these disciplines illuminates different aspects of the problem of justice, and helps us to see how the legal profession and its institutions promise and then either pursue or abandon a norm of justice.

Our project at heart, then, is to insist that there is and must be a North Star in the legal constellation, and that it is and must be justice. Mostly, for fifty years (and indeed, for most of American history before the Warren Court) it has been lost or obscured.

That claim should not suggest any disrespect for the judicial philosophies and methodologies we discuss. Indeed, our own injustice framework touches on many of those ideas. But law is not a refuge from justice or a knock-off that will suffice in its place. Law and the entire structure of the legal profession should be simplifying the effort to achieve justice and always pressing justice as the central norm of the whole enterprise. In doing that, law and courts should be helping people to expand their conception of justice, rather than inviting their cynicism about, or despair of, its possibility.

For us, that project starts where our series does: with the "injustice framework." As we will explain at greater length—and one of us has in earlier foundational work⁵⁴—the injustice framework is a reciprocal relationship in which *power produces harm or inequality without legitimacy*. Today, this framework rests on social contract theory, and draws most from the non-ideal social contract work of people like Charles W. Mills and Carole Pateman.⁵⁵ But the injustice framework also would thrive on, and support, more ideal social contract theory, like the one that John Rawls spent a lifetime refining.⁵⁶

We recognize, too, that there are both cognitive and structural social obstacles to implementing our injustice framework. Injustice is difficult to talk about, let alone to reach agreement on entirely: power often is hard to see and operates invisibly through institutions and systems (which we think of as composed of interlocking or sequential institutions). Further, people who gain advantage—or at least do not suffer disadvantage—from institutions

⁵³ Jon Hanson & Mara Kipnis, *Courting Injustice: The Roberts Court and the Justice Crisis*, 21 HARV. L. & POL'Y REV., Part I.A.2 (symposium issue, forthcoming 2027) [hereinafter Hanson & Kipnis, *Courting Injustice*]; Jon Hanson & Lica Porcile, *The Law Crisis and the Authoritarian Turn*, 21 HARV. L. & POL'Y REV., Part II (symposium issue, forthcoming 2027) [hereinafter Hanson & Porcile, *The Law Crisis*]; Jon Hanson, Mara Kipnis, Matt Kristoffersen, & Lica Porcile, *Inside the Justice Crisis*, 21 HARV. L. & POL'Y REV., Part II.D.2 (symposium issue, forthcoming 2027) [hereinafter Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*].

⁵⁴ Jon Hanson & Jacob Lipton, *Occupy Justice: Introducing the Injustice Framework*, 15 HARV. L. & POL'Y REV. 333 (2015).

⁵⁵ CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

⁵⁶ JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001).

and systems are prone to attribution error and commonly construct legitimizing stories that focus on some harms or power while ignoring others. This is human. The problem becomes not so much accepting justice as a norm, but digging deeper and managing both discomfort and outright cognitive dissonance.

In overview, then, the series is this. *The Justice Promise* begins where the legal system begins, with a promise. The Article reviews the universal lure of the legal profession and its institutions. These are courts of justice; this is the Department of Justice; some of the judges are, literally, “Justices”; the statues outside the courthouses and the inscriptions inside assert justice as the goal; and the public comments of judges, prosecutors, law school deans, and other lawyers assure the world that justice is the mission. These promises start in law school and culminate in the judiciary, with everyone in between, all of the law people, parroting them continually. Yet even as we promise justice, we substitute law for it at every opportunity and then implicitly (or explicitly) pass them off as the same. Students drawn to the profession by the prospect of pursuing justice learn only law. The justice promise, in practice, amounts to a bait-and-switch: an insincere offer to sell one item in order to induce the buyer to purchase another.⁵⁷

That observation raises a question: why does the gap between promise and performance matter? *The Justice Imperative* answers by establishing that the genuine pursuit of justice is necessary for any legal system that hopes to or deserves to maintain authority. Drawing on social psychology, anthropology, history, and political philosophy, the Article introduces “justiphilia,” our description of the deep and widely shared human craving for justice that shapes how people evaluate institutions and decide whether to accept or resist authority. That craving operates regardless of whether people agree on what justice requires, and institutions that ignore it do so at their peril. From there, the Article reconstructs social contract theory on non-ideal foundations, showing how the government’s failure to honor its justice commitments has historically provoked resistance and rebellion, and explaining why the judiciary’s breach of the justice promise represents a particularly consequential betrayal.⁵⁸

Justice Deferred then asks what happened to justice as a judicial end. During the Warren Court era, justice served as an explicit, if inconsistent, goal of the legal system. The Article traces the campaign to discredit justice as a guide for legal decision-making and to supplant it with a purportedly objective legalism, principally originalism. That campaign, we argue, was at its roots racial. Opponents of desegregation reframed their resistance in constitutional language even before the 1970s, arguing that the Court had exceeded its authority rather than that racial equality was wrong. That coded strategy found expression in originalism. King’s moderates had

⁵⁷ See Jon Hanson & Dean A. Strang, *The Justice Promise*, 20 HARV. L. & POL’Y REV. 335 (2026).

⁵⁸ See Jon Hanson & Dean A. Strang, *The Justice Imperative*, 21 HARV. L. & POL’Y REV. (Issue 1, forthcoming 2026).

discovered jurisprudence. Bork, Meese, Scalia, and other thought leaders on the ideological right refined it into a sophisticated theory, telling an injustice story of illegitimate judicial conduct as cover for preserving the substantive injustices their preferred jurisprudence helped to protect.⁵⁹

Courting Injustice examines what that conservative backlash produced. By rejecting justice as a judicial norm, the Roberts Court made itself vulnerable to three interconnected forms of capture: political, corporate, and theoretical. Political capture operates through anti-democratic biases in constitutional design, compounded by strategic manipulations like the Garland blockade and the Barrett rush confirmation. Corporate capture, financed through dark money networks and coordinated largely through the Federalist Society, has produced the most business-friendly Court in over a century. Theoretical capture has established originalism as both a legitimating narrative and a gatekeeping credential, serving as a proxy for ideological commitments while masking the injustices it helps produce. Together, those forms of capture produced systematic patterns of injustice that favored power for power's sake, existing allocations of wealth, and existing distributions of social advantage. Injustice dissonance became increasingly visible during that era, as justices sensed a need to contrive improbable explanations to justify or deny the widening gap between law and justice. The Court reached what we call a justice tipping point, where an institution moves from being perceived as imperfect at pursuing justice to being recognized as an active abettor of injustice, producing a legitimacy debt evident in historically low public confidence.⁶⁰

Inside the Justice Crisis turns from institutional analysis to the justices themselves, examining how they navigated the crisis through their rhetoric, opinions, and public remarks. The Article treats judicial language as motivated performance designed to manage injustice dissonance: the psychological discomfort of promising justice while facing mounting claims that the Court is enabling large-scale injustice. Conservative justices responded by foregrounding selective injustice stories offered to redirect attention from the systemic harms their rulings help produce. Liberal justices sharpened their dissents by exposing contradictions in conservative claims and highlighting the broader injustices those claims obscured. By refusing to confront the consequences of the Court's own decisions and insisting that questioning judicial authority was itself the problem, the conservative majority created the conditions for what came next: a law crisis, in which law has lost much of its independent hold over both the powerful and the wider population.⁶¹

The Law Crisis and Authoritarian Turn takes up that deterioration and brings us up to today. The Article focuses on the Supreme Court's role in producing the ongoing law crisis, a condition in which law itself loses its normative grip except where compliance happens to align with the interests of the powerful. Central to this account is the concept of justice capital: the accumulated trust that institutions earn through just outcomes, which the Court drew down over decades until a point of insolvency. *Trump v. United States*, granting

⁵⁹ See Hanson & Strang, *Justice Deferred*, *supra* note 8.

⁶⁰ See Hanson & Kipnis, *Courting Injustice*, *supra* note 53.

⁶¹ See Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*, *supra* note 53.

a former president broad immunity from prosecution, marks a critical turning point, the moment when the Court's accommodation of executive power visibly accelerated the transition from the justice crisis into a law crisis.⁶²

Inside the Law Crisis continues the analysis of the current Court through the lens of "deep stories," felt injustice narratives that shape how justices understand the present moment and what paths they see forward. The displacement injustice story harnesses state power to restore a prior order, treating the crisis as the product of cultural usurpation. The legal injustice story, in both conservative and liberal versions, appeals to law itself as a bulwark, seeking to restore legitimacy through legalistic constraint. The outcome injustice story looks to justice as the touchstone from which law must derive its authority, urging courts to confront power and harm directly. Together, those narratives reveal how a captured Court operates: vacillating between openly serving consolidated power and selectively resisting it to protect the image of both the Court and the powerful actors it serves.⁶³

Why Not Justice? returns to specific objections that have long been leveled against justice as a judicial norm. For decades, originalists and their allies have argued that justice lacks shared meaning, that it reduces to subjective preference, that people disagree about it too much for it to constrain judges, and that unelected judges lack democratic warrant to pursue it. The Article takes up each objection and finds that none withstands scrutiny, particularly when compared to the alternatives. The arguments that rendered justice taboo were never as compelling as their repetition made them seem. With those objections cleared away or reduced to their proper size, the path forward becomes visible.⁶⁴

The series concludes with *Taking Justice Seriously*, which makes the affirmative case for a justice-centered jurisprudence and finds signs that one already is emerging. Justice and its pursuit, in some form, always has operated beneath the surface of legal reasoning, even when judges claimed otherwise. The acceptance and application of legalistic abstractions are every bit as incomplete, contradictory, and shaped by worldviews as justice is alleged to be. The difference is that justice moves to the foreground factors that formalism conceals, frames its ends in a language that engages rather than excludes the public, and fosters the popular movements and democratic accountability that pure legalism forecloses. The Article points to the opinions of current dissenters, particularly Justices Sotomayor and Jackson, as modeling what that justice-centered jurisprudence looks like in practice: identifying forms of power and inequality as causal forces, attending to consequences, and deciding cases in ways that reduce institutional capture and create conditions for democracy and equality.⁶⁵

⁶² See Hanson & Porcile, *The Law Crisis*, *supra* note 53.

⁶³ See Jon Hanson & Matt Kristoffersen, *Inside the Law Crisis: Deep Injustice Stories Driving the Law*, 21 HARV. L. & POL'Y REV. (symposium issue, forthcoming 2027).

⁶⁴ See Jon Hanson & Dean A. Strang, *Why Not Justice?*, 21 HARV. L. & POL'Y REV. (symposium issue, forthcoming 2027).

⁶⁵ See Jon Hanson & Dean A. Strang, *Taking Justice Seriously*, 21 HARV. L. & POL'Y REV. (symposium issue, forthcoming 2027).

IV. WHY THE *HARVARD LAW AND POLICY REVIEW*?

If there is one publication equipped to develop progressive legal theory systematically, it should be and is the *Harvard Law & Policy Review* (HLPR). As the American Constitution Society's journal, HLPR is understood as the progressive counterpart to the Federalist Society's *Harvard Journal of Law & Public Policy*. It has the mission and the credibility to carry this kind of theory-building project, and its audience, from progressive law students and practitioners to academics and judges, is the one we hope to reach.

For nearly two decades, ACS has undertaken the formidable task of serving as an intellectual counterweight to the Federalist Society and the movements it has spawned.⁶⁶ We believe that egalitarian law people have always had more in common than their opposition to the capture and politicization of the judiciary. What unites them, whether consciously or not, is the norm of justice. In a landscape where those law people tend to be fractured, and at a moment when inequality and authoritarianism have swelled, we are committed to strengthening the institutions already serving that cause. This series represents our effort to help fill a debilitating gap by offering a theory that can give that shared commitment a common framework, vocabulary, and a direction toward justice.

We attempt to provide a version of what justice-oriented legal scholarship has lacked: an affirmative theory of justice that moves past the selective preoccupation with legalistic abstraction and recenters the law's relationship with, and consequences for, those subject to its authority. We mean a theory that can reorient judicial reasoning and outcomes, reshape legal education and the profession, and help ensure that the legal system fulfills its promise and the social contract upon which its legitimacy depends. HLPR, we believe, is where that theory belongs.

A serial publication of this scope in a single law journal, comprising what might otherwise fill a book, has no precedent that we know. We chose that form because the moment, too, is unprecedented. The institutions and norms this series examines are under siege, and the pace at which they are being dismantled or distanced from democratic accountability outstrips the ordinary

⁶⁶ See Crystal Nix Hines, *Young Liberal Law Group is Expanding*, N.Y. TIMES (June 1, 2001), <https://www.nytimes.com/2001/06/01/us/young-liberal-law-group-is-expanding.html> [<https://perma.cc/FDK7-RQ4J>].

In 2007, ACS launched HLPR. The inaugural issue's introduction framed the journal as a response to an era dominated by "ideology." Recognizing the consequences of law on people's lives, HLPR would serve as a needed "arena for frank debate" rooted in pragmatism and progressive principles "founded upon the universal respect for human dignity and rights, a commitment to equal access to justice and opportunity, and the proposition that where an individual starts in life must not determine where she finishes." Michael Negron & James Weingarten, *By Way of Introduction*, 1 HARV. L. & POL'Y REV. 1 (2007). One of its first published articles more explicitly outlined the stakes at hand and called progressives to action. In "Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century," Professor Dawn Johnsen argued that, in the face of a rightward shift in judicial appointments and constitutional doctrine, progressives "must articulate even more clearly and persuasively their own theories of constitutional interpretation and change," and appoint judges rooted in those theories. Dawn E. Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 239 (2007).

timeline of academic publishing. Books take years. Articles in a coordinated series can move faster, reaching readers while the arguments still have a chance to matter. Although the U.S. has abandoned any semblance of a commitment to justice, there may still be benefits to understanding that history and to taking justice seriously beginning now. And even if that commitment to democracy and justice continues to unravel, we hope this collection of articles will offer useful lessons to future generations willing to take up the great experiment again: constructing democratic government and a legal system with justice as their paramount norm.

We have designed the series so that readers can follow its arc from beginning to end or enter at any point. The articles follow a chronological and causal logic, and we have tried to ensure that each piece is in conversation with the others, both forward and backward. Footnotes in each article make reference to the other eight articles and connect related arguments and evidence across them. The series also introduces and develops a set of recurring concepts and terms, so we offer definitions and cross-references within each piece.

At the same time, each article is meant to stand on its own, offering independent contributions as we draw on different academic disciplines from one piece to the next: psychology and anthropology in some, political philosophy and history in others, constitutional law and judicial behavior throughout.

CONCLUSION

Narrative or primitive speech makes it easy to grasp injustice and justice. Readers feel the bite, the loneliness and internal corrosion, of racial discrimination in Lorraine Hansberry's *A Raisin in the Sun*; we know the cruelty, arbitrariness and abuse of power that the unwanted suffers individually in Arthur Miller's *The Crucible* or that an unwanted whole ethnic group suffers in Khaled Hosseini's *The Kite Runner*. We grasp the structural doom and desperation of social position, the alienation and craving for meaning, of Willy Loman in Miller's *Death of a Salesman*.⁶⁷ We know the intrinsic wrong of it all in these narratives. They make injustice visceral. And more, they make it universal: cutting across all the superficial accidents of race, place, sex, and more.

For James Boyd White, Aeschylus' three plays that compose *The Oresteia* capture the transition from narrative to conceptual speech (and thinking) about the idea of justice. They did that at an active time in Athenian intellectual history, as they traced generations of vengeance—cycles of retaliatory justice—to the emergence of a “foundation of a public institution for trial and punishment, a way in which the community can bring the narrative of perpetual destruction to a close.”⁶⁸ Together, those plays used narrative to deliver us to the conceptual and analytic.

⁶⁷ LORRAINE HANSBERRY, *A RAISIN IN THE SUN* (Methuen Drama 2009) (1959); ARTHUR MILLER, *THE CRUCIBLE* (Penguin Book 2015) (1953); KHALED HOSSEINI, *THE KITE RUNNER* (2003); ARTHUR MILLER, *DEATH OF A SALESMAN* (Penguin Books 1996) (1949).

⁶⁸ WHITE, *supra* note 2, at 862–63. Aeschylus wrote *The Oresteia* trilogy in the middle of the fifth century BCE. AESCHYLUS, *THE ORESTEIAN TRILOGY* (Philip Vellacott trans., Penguin Classics 1956).

Aeschylus' push to produce an analytic account of justice suggests a recognition that injustice narratives by themselves offer only an imperfect way to confront the complex, interlinked, and sometimes layered injustices of the real world. People's sense of injustice can be manipulated, manufactured, or mistaken. Injustice stories can be weaponized to serve powerful interests, and the injustices suffered by less privileged groups are often normalized or ignored, creating unseen injustices. That, we show, is not a reason not to engage seriously with questions of justice.

Readers fairly can—and should—ask why, when history's greatest philosophers⁶⁹ and theologians⁷⁰ have failed to achieve consensus on the meaning or content of justice, we would suppose that we could succeed. More, we have promised a conceptual and analytic approach, not a narrative one, which only makes the task of building consensus on justice and injustice harder. The ideas of "order" or "rule of law" are easy to grasp in conceptual or analytic speech, as we noted at the outset and as Dr. King demonstrated in one letter from a jail cell. Not so the idea of justice.

While we do think that the injustice framework and viewing justice as negating injustice are invaluable tools for advancing justice, our effort is not to define justice forever. Nor is it to insist that any person's or institution's intuitions about what counts as injustice, including our own, should be given undue deference. Rather, our goal is to describe why the pursuit of justice is essential to judicial legitimacy—in the deep, normative sense—and the legal profession as a whole. Courts and law people cannot renounce justice as the central norm of our work; they must embrace it. Put differently, justice, and not mere order, must be the goal.

Our account of justice operates on two levels. The first is the injustice framework itself. The second is prescriptive: how courts should engage with questions of justice, openly and in dialogue with the public. A judiciary committed to outcome justice, one that engages seriously with questions of power, harm, and legitimacy, and aims that engagement towards the *demos*, would build on the legacy of the Warren Court rather than repudiate it. A court that renders its thinking legible to the public would be more humble, accountable, and democratic, than a court that shields its motivations beneath doctrine,

⁶⁹ See, e.g., PLATO, *THE REPUBLIC* (Benjamin Jowett trans., Oxford Univ. Press 1894); ARISTOTLE, *NICOMACHEAN ETHICS BK. V* (W.D. Ross trans., Oxford Univ. Press 1925); CONFUCIUS, *THE ANALECTS* (D.C. Lau trans., Penguin Books 1979); MENCIUS, *MENGZI* (Bryan W. Van Norden trans., Hackett Publ'g Co. 2008); ALFARABI, *THE PRINCIPLES OF THE OPINIONS OF THE PEOPLE OF THE VIRTUOUS CITY* (Richard Walzer trans., Oxford Univ. Press 1985); IBN KHALDUN, *THE MUQADDIMAH: AN INTRODUCTION TO HISTORY* (Franz Rosenthal trans., Princeton Univ. Press 1967); John Stuart Mill, *Utilitarianism* (George Sher ed., Hackett Publ'g Co. 2001); MOHANDAS K. GANDHI, *HIND SWARAJ* (Anthony J. Parel ed., Cambridge Univ. Press 1997); JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed., Harvard Univ. Press 1999); AMARTYA SEN, *THE IDEA OF JUSTICE* (Harvard Univ. Press 2009).

⁷⁰ See, e.g., AUGUSTINE OF HIPPO, *CITY OF GOD* (Harvard Univ. Press 2014) (426); THOMAS AQUINAS, *SUMMA THEOLOGIAE* (Brian Davies & Brian Leftow eds., Cambridge Univ. Press 2006) (1274); HOWARD THURMAN, *JESUS AND THE DISINHERITED* (Beacon Press 1996) (1949); ABRAHAM JOSHUA HESCHEL, *THE PROPHETS* (1962); SHMULY YANKOWITZ, *PIRKEI AVOT: A SOCIAL JUSTICE COMMENTARY* (2018); SAYYID QUTB, *SOCIAL JUSTICE IN ISLAM* (Islamic Publications Int'l 2000) (1949); KAUTILYA, *ARTHASASTRA* (L.N. Rangarajan ed., Penguin Books India 1992) (150).

jargon, and legal formalism. The ultimate arbiter of whether courts honor the promise of justice must be the people.

We offer this series in the hope that it can contribute, however modestly, to a judiciary, profession, and education system willing to face that judgment. Law people must not remain what Dr. King warned of: more devoted to order than to justice. And, indeed, even a negative peace—with all its seductive stability for those not harmed—cannot hold indefinitely when justice is abandoned.⁷¹

So we end here where we will begin the articles that follow. Every court, indeed every member of the legal profession, faces a choice. Will we pursue justice through law or not? The judiciary and the profession have promised incessantly that we will, linking law to justice at every public opportunity. If instead we choose another central norm—objectivity, neutrality, economic efficiency, whatever—still we cannot avoid that promise of justice. Or if we elevate a methodology that abjures or even renounces justice as a goal in favor of, for example, fidelity to yesterday's conceptions of textual meaning, again we cannot avoid that public desire for, and expectation of, justice today and tomorrow. If we choose not to pursue justice through law, then, we unavoidably choose to pursue, perpetuate, or at very least permit injustice through law.

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⁷¹ As one of us has written before, "the rule of law is essential, yes; but law without justice is only rule, and oppression awaits there also." DEAN A. STRANG, *KEEP THE WRETCHES IN ORDER: AMERICA'S BIGGEST MASS TRIAL, THE RISE OF THE JUSTICE DEPARTMENT, AND THE FALL OF THE IWW* 259 (2019).

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