The History, Meaning, and Use of the Words Justice and Judge

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ARTICLE

THE HISTORY, MEANING, AND USE OF THE WORDS JUSTICE AND JUDGE

JASON BOATRIGHT*

Abstract. The words justice and judge have similar meanings because they have a common ancestry. They are derived from the same Latin term, jus, which is defined in dictionaries as “right” and “law.” However, those definitions of jus are so broad that they obscure the details of what the term meant when it formed the words that eventually became justice and judge. The etymology of jus reveals the kind of right and law it signified was related to the concepts of restriction and obligation. Vestiges of this sense of jus survived in the meaning of justice and judge.

Although justice and judge have similar meanings rooted in a shared ancestry, they are not quite the same. There are two reasons for this. First, they are constructed from the addition of different Latin suffixes to jus, and those suffixes had different meanings. Second, justice and judge entered the English language at different times; people began to use the word justice when England’s legal system was different from how it was when they started to use judge. Centuries ago, these two facts combined to make justice refer to one who embodies the law and judge to mean one who speaks the law.

There are more similarities than differences between the words justice and judge, but the differences are important. For example, justices may insist they

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are not judges, and judges sometimes correct people who call them justices. These distinctions can be difficult to keep straight. Trial and intermediate appellate court judges in most states and in the federal judicial system are called judges, while those on the highest courts are justices. But that is not the case in New York, where some trial judges are known as justices, or in Texas, where intermediate appellate judges are called justices, and some of the highest court judges are judges.

The similarities and differences between justices and judges are not just matters of title or courtesy, they are also important matters of law. A justice of a final court of appeal might make new law through a judicial decision, while another justice might consider this an unconstitutional usurpation of legislative power.

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I. INTRODUCTION

The words *justice* and *judge* are closely related, but they are not quite the same. The term *judge* “is sometimes held to include all officers appointed to decide litigated questions,”¹ while a *justice* is “a judge, esp[ecially] of an appellate court or a court of last resort.”² Although justices are often called “judges” in informal settings,³ judges whose titles do not include the word *justice* are not referred to as “justices,” even informally. Some judges and justices can be very particular about these distinctions, scolding lawyers who refer to judges as “justices” and even, on occasion, admonishing those who call judges “justices.”⁴

The similarities and differences between the two words follow from their origins, which are similar but distinct. Both *justice* and *judge* came from the Latin word *jus*,⁵ which meant “that which is sanctioned or ordained, law[,]”⁶ a “right,” or “that which is just.”⁷ The differences in appearance and meaning between *justice* and *judge* come, first, from the fact that different suffixes were added to *jus* to form *justice* on the one hand,

¹. *Judge*, BLACK’S LAW DICTIONARY (9th ed. 2009); accord *Judge*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (explaining that the term *judge* has been held to refer to “magistrates, justices of the peace, judges in other courts of inferior and superior jurisdiction, equity judges, coroners, members of courts-martial, and receivers in making reports to the courts appointing them” (citations omitted)).

². *Justice*, BLACK’S LAW DICTIONARY, supra note 1; accord *Justice*, BALLENTINE’S LAW DICTIONARY, supra note 1 (defining *justice* as the “title of a judge, especially the judge of a high court, such as the United States Supreme Court or the highest court of a state”).

³. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 480 (2d ed. 1995).

⁴. See id. ("Judges often look unkindly on mistakes in their titles, as by inserting ['sic'] after mistakes . . . ." (citing Tenzer v. Lewittin, 599 F. Supp. 973, 974 (S.D.N.Y. 1985))). In Tenzer, the court added the notion “sic” after the word “justice” in a litigant’s motion that was addressed to a judge who was not a justice. Id. Additionally, Chief Justice Rehnquist has corrected counsel who mistakenly refer to him as “judge.” Id. (citing David Margolick, At the Bar, N.Y. TIMES, Apr. 26, 1991, at B9).

⁵. See 8 OXFORD ENGLISH DICTIONARY 292–93, 325–26 (2d ed. 1989) (providing etymological histories of the words *judge* and *justice*). The word *jus* is sometimes spelled with an i, but j appears to be the more common initial letter. See A LATIN DICTIONARY 1009 (Charlton T. Lewis ed., 1998) (listing ancient sources spelling the word with a j). The letter was pronounced like the German j or the modern English y. Id. The j letter and sound in *jus* came from the combination of the Greek letters Δ and E, the way the letters D, I, and E in the English word *soldier* are pronounced as a j. F.E.J. VALPY, AN ETYMOLOGICAL DICTIONARY OF THE LATIN LANGUAGE 213 (1838).

⁶. OXFORD LATIN DICTIONARY 984 (P.G.W. Glare ed., 1982).

⁷. Cf. A LATIN DICTIONARY, supra note 5, at 1019–20 (defining *jus* as “justice” and *justus* as “just, upright, righteous”).
and judge on the other.\(^8\) Second, the words did not enter the English language at the same time, the word justice arrived when the English legal system was less developed than it was when judge came along.\(^9\)

II. JUS, THE ROOT OF JUSTICE AND JUDGE, INDICATED “RESTRICTION”

Etymology can explain both of these processes: the lexical development of justice and judge, as well as the historical evidence of their use.\(^10\) Concomitantly, etymology can help reveal details in the meaning of those words.\(^11\) Consider, then, the historical development of the meanings of jus, the root word of justice and judge. There are four competing etymologies of the origin of jus, each indicating a nuance of meaning that is different from the meaning suggested by the other etymologies.

A. Jus As “Command, Fear, and Violence”

The first of the four etymologies for jus posits that it came from the Latin word jussi, meaning “that which is ordained by laws human or

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8. See 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 326 (noting that justice comes from ius and –itia); cf. OXFORD LATIN DICTIONARY, supra note 6, at 977, 968 (explaining that index is ius and dice “[IVS+-dex]”, meaning “to speak”, and further detailing that the –ia in iustitia “[IVSTVS+-IA]” meant “justice personified”). But see WALTER W. SKEAT, A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 228 (4th ed.1895) (posing that iudex is ius and dicare, meaning “to point out”). The suffixes to jus are discussed in detail in Part IIIA, III.B.

9. See 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 292–93, 325–26 (noting historical examples of judge and justice); see also DAVID M. WALKER, THE OXFORD COMPANION TO LAW 693 (1980) (describing the duties of early English justices). The history of the words’ usage and the English legal system is discussed in detail in Part III.C, III.D.

10. Many dictionaries introduce definitions of words with a brief etymology. See, e.g., WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1343 (William Allan Neilson et al. eds., 1940) (showing the term “judge” is a noun “influenced by juger to judge”). The Oxford English Dictionary also begins each of its definitions with etymologies, and the definitions themselves are then organized by the historical development of the usage of each word. See, e.g., 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 292–93, 325–26 (defining judge and justice).

11. Many courts have used etymology to help determine the meaning of words, including the U.S. Supreme Court, see Muscarello v. United States., 524 U.S. 125, 126–29 (1998) (studying the phrase “carries a firearm”), the U.S. Court of Appeals for the Fifth Circuit, see Portillo v. Comm’t, 932 F.2d 1128, 1132 (5th Cir. 1991) (defining the word “determine”), the Texas Supreme Court, see Stringfellow v. Sorrells, 18 S.W. 689, 689 (Tex. 1891) (deciding the meaning of the phrase “the increase of the lands”), and the Texas Court of Criminal Appeals, see Keagan v. State, 618 S.W.2d 54, 57 (Tex. Crim. App. 1981) (using etymology to understand the meaning of the word “advance”). This does not mean that a word’s etymology controls its meaning, but rather, that etymology can aid in understanding language. See In re Unified Control Systems, Inc., 586 F.2d 1036, 1037 (5th Cir. 1978) (observing that the meaning of statutory language “depends more upon its context than on its etymology”).
divine.”12 Jussi is a form of the Latin verb *jubeo*, meaning “I command.”13 In turn, there are two plausible etymologies of *jubeo*.14 One is that it comes from the Greek verb *φοβεω*, “to frighten, and so frighten with menaces, menace, then to command in a menacing manner,”15 as in the modern English words that end in the suffix “–phobia.”16 The other possible etymology for *jubeo* contends that it is related to the Greek noun *υςμινη*, meaning “battle, fight.”17

Under both etymologies of *jubeo*, it is said to have come from a word in a hypothesized language called Proto-Indo-European, which would have been spoken around 6,500 years ago; this language is thought to be the basis for many European and Asian languages, including English, Latin, Greek, and Sanskrit.18 The Proto-Indo-European source for *jubeo* is *Hioudh-eie/o*- meaning “to cause to move,” which is related to the Sanskrit *yudhya* “to fight.”19 This unites the two plausible explanations of *jubeo* to form a single, general sense of the word *jus* as “causing to move, or commanding, in a fight.” In this way, the ancestral meaning of the Latin word *jus*, which is the root word of both *justice* and *judge*, could be related to command, fear, and violence.

13. Id. at 212.
14. Scholars proffer two other etymologies for *jubeo*, but neither is likely. Under the first, *jubeo* is said to come from *jus + habeo*, meaning “I have the right.” Charles S. Halsey, An Etymology of Latin and Greek 70 (1889); D.D. Raphael, Concepts of Justice 129 (2001). There is, however, no apparent reason to think that the verb *habeo* is older than *jubeo*. The other etymology theorizes that *jubeo* came from the Greek *ζαβιω*—i.e. *διαβιω*, *διαβιαω*, from *υπεω*, “to be above”—however, *υπεω* should mean to be under, not over. Valpy, supra note 5, at 212 n.1. Valpy cites “Haigh” for this proposition, which presumably refers to Arthur Elam Haigh, a classical scholar at Oxford University. Dictionary of National Biography 1912–1921, at 609 (H.W.C. Davis & J.R.H. Weaver eds., 1927).
15. Valpy, supra note 5, at 212.
19. De Vaan, supra note 17, at 312.
B. Jus As “Need” and, Perhaps, “Request, Distribution, and Receipt”

A second explanation for the origin of jus is that it came directly from the Greek adjective δεος, meaning “right.” This word for “right” does not signify what is just, or proper, or legal, but instead what is binding or necessary. Put differently, δεος or “right,” is about what someone must do, rather than what someone may or should do. The way the word came to have this meaning of “right” paints a vivid picture of the ancient idea of law and justice. The adjective δεος comes from the Greek verb δεω, which can mean “to bind,” and “to want, need, beg, [or] ask.” The two senses of the word are combined in the concept of being bound by desire, or wanting what one is bound, or obligated, to have. The adjective δεος is also related to δαω “to divide,” as a nail splits two pieces of wood in order to keep them together. Those dual meanings—binding and division—lead to colloquial senses of the word δαω, like giving a banquet (i.e., distributing food), teaching (dispensing knowledge), and knowing (acquiring what was dispensed). This etymology of the Latin word jus indicates that justice and judge might be related to a peculiar concept of “right,” signifying what is needed and, perhaps, what is then requested, divided, and distributed.

C. Jus As a “Binding, a Yoke”

Like the second etymology for the Latin word jus, the third posits that it came from the idea of “joining” or “binding,” but not from the Greek δεω. This etymology contends jus is descended from the Sanskrit verb yu, meaning “to join.” In turn, yu is related to the Greek word σω, meaning “to sew,” which is the root of the Greek word ζυγνυμι, “binding, obliging.” These words are the root of the Old English yeoc, which is

20. VALPY, supra note 5, at 213.
22. Id.
23. Id. at 37.
24. Id.
25. Id. at 34.
26. A LATIN DICTIONARY, supra note 5, at 1019; SKEAT, supra note 8, at 229. Sanskrit is an ancient language of the Indian subcontinent, slightly older than Greek and Latin. See TARINICHARAN CHAUDHURI, AN OUTLINE OF THE HISTORY OF SANSKRIT LITERATURE 74–77 (1916) (delineating the history of the Sanskrit language); see also DAVID CRYSTAL, THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE 301 (indicating Sanskrit can be traced to 1000 B.C., while Greek and Latin are traced to the eighth and sixth centuries B.C., respectively).
27. VALPY, supra note 21, at 54.
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the modern English “yoke.”

In this way, *jus*, *justice*, and *judge* are descendants of the idea that we are bound or joined to the law, and therefore obligated by it.

This is different from the second etymology, which relates to binding in the sense of needing, and therefore begging and receiving. Here, in the third etymology, *jus* relates to binding in the sense of being harnessed to it—bound by physical restraint. Put differently, under the second etymology, *jus* would be something we need to be given, but under the third, *jus* is something to which we are chained.

D. *Jus* As “Life” and, Probably, “Limitation”

The fourth etymology is probably the most favored today. It explains that *jus* came from the Proto Indo-European noun *h2oiu* or *h2i-eu-s* meaning “vital force, eternity,” and that it is related to the Sanskrit nouns *jok*, meaning “health,” *yos* meaning “of life,” and *ayus* meaning “lifetime.”

The Proto-Indo-European word *h2oiu* or *h2i-eu-s* is also the root of the Greek word *ov*, meaning “not.” At first glance, this is a paradox because *ov* is simple, abrupt, and purely negative, while *h2oiu*, *ayus*, and *jus* are complex, expansive, and possibly positive. However, the way in which *h2oiu* became *ov*, *ayus*, and *jus* suggests there is no paradox; each meaning complements the others. The relationship between those meanings reveals important nuances in the meaning of both *justice* and *judge*.

The word *h2oiu* or *h2i-eu-s* was part of a Proto-Indo-European term, *ne h2oiu*. The *ne* meant “not,” and when combined with *h2oiu*, meaning “eternity,” created a term that meant “never.” The sound of *h2oiu* was,
During the long transition from Proto-Indo-European to Greek, the sound of *ne* and the meaning of *h₂oiu* dropped from the term, and the sound of *h₂oin* gained the meaning of *ne*. In this way, the Greek word *ouv* came to mean “not,” even though it is directly descended from the word signifying “vital force, eternity.” So, the etymology of the Greek word *ouv* suggests it developed from the concept of the negation of energy, and a limitation on eternity.

The Sanskrit words descending from *h₂oin* or *h₂i-eu-s* show faint traces of this idea. *Yoh*, *yos*, and *ayus* refer to health, life, and lifetime, each of which denotes a temporary expression of energy and existence before its inexorable decay and destruction. These words signify something that is necessarily finite.

*Jus* carries the same suggestion of limitation that the Sanskrit words do. No dictionary defines *jus* in terms that embrace the concept of limitless energy or eternity. It is a “right”; “justice” (meaning “that which is just,” rather than a person who serves as a justice); or “law” in the specific sense that it is “that which is sanctioned or ordained”; a “legal system or code”; a “judicial pronouncement”; a “court”; what is “good and just, the principles of law, equity, the right”; “obligations, bonds, or claims . . . arising out of a . . . relationship”; what “one is entitled to”; the “right [to do something]”; and “jurisdiction.” Each of these definitions is predicated on a requirement, privilege, forum, or judgment dictated by someone else. They are inextricably linked to *h₂i-eu-s*, or “vital force,” and to *yos*, “life,” but only in the sense that *jus* is the promulgation of rules for living, and the punishment or reward for following or breaking those rules. In this way, the fourth etymology of the word *jus* suggests it descended from words relating to restriction.

All of the etymologies, not just the fourth, are about restriction. If *jus* came from words meaning command, fear, and violence, it would be

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37. See Michael Meier-Brügger, Indo-European Linguistics 106 (2003) (explaining that *h₂* was a laryngeal, which is a fricative consonant that came to be represented by *b* and showing the diphthong *oa* became *ia*).
39. See De Vaan, supra note 17, at 316 (explaining the etymology of the word *h₂oin*).
40. See id. (defining *yoh*, *yos*, and *ayus*).
41. Caselli’s New Latin Dictionary 331 (D.P. Simpson ed., 1960); see also De Vaan, supra note 17, at 316 (defining *ius* as “law”); Valpy, supra note 5, at 213 (describing *jus* as “law, right, justice”); Webster’s New International Dictionary of the English Language, supra note 10, at 1348 (defining *justia* as “that which is just”).
42. Oxford Latin Dictionary, supra note 6, at 984–86.
about forcing someone to do something he wouldn’t otherwise do. If *jus* came from words denoting a distribution of rights and remedies, it would be about who gets them and who doesn’t get them. If *jus* were descended from words signifying obligation, it would be about the restriction of freedom. And if *jus* meant life, it would be about limitations imposed on living. Under all of the four competing etymologies, *jus* is the notion that rights, justice—in the sense of what is just—and laws limit what people can do.

III. THE JOURNEY OF *JUS* TO *JUSTITIA* AND *JUSTICE*, AND TO *JUDEX* AND *JUDGE*

Our modern words for people who adjudicate—*justice* and *judge*—were built on the foundation of *jus* and the nuances of its meaning. The words *justice* and *judge*, however, were constructed in different ways. The combination of their common ancestry in *jus*, and their distinct development from it, indicate the details of the meaning of each word today.

A. *Jus* to *Justitia*: Justices Embody Jus

The English noun *justice* came from the Old French *justice* or *jostise*, meaning “uprightness, equity, vindication of right, administration of law,” and “amenable to justice.” The French word *justice* is a form of the Latin abstract noun *justitia*; the French suffix –ice is equivalent to Latin –itia. Like the French word “justice,” the Latin word *justitia* did not mean “judge,” but rather “justice, equity, righteousness, uprightness,” or “justice, fairness, equity.” Those are general concepts embracing many philosophical and legal ideas, but the way the word *justitia* was formed indicates it signified those concepts in a particular kind of way.

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43. 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 325–26. Old French was the language of northern France before about 1400. E. EINHORN, OLD FRENCH: A CONCISE HANDBOOK 1 (1974). The word is the same in Provençal, and it is similar to Spanish *justicia*, Portuguese *justiça*, and Italian *giustizia*. 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 327.


45. 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 325–26.


47. A LATIN DICTIONARY, supra note 5, at 1020.

48. OXFORD LATIN DICTIONARY, supra note 6, at 986; accord CASSELL’S NEW LATIN DICTIONARY, supra note 41, at 331 (providing a definition of “just, equitable, fair”).
Justitia came from the Latin adjective justus, and the suffix –itia; in justitia meant the “quality of being,” so justitia meant “the quality of being justus.”\(^49\) In turn, justus came from jus, and the suffix –tus; in justus meant “provide with,” so justus meant “provided with jus.”\(^50\) Therefore, justitia meant the “condition of being provided with jus.” The pairing of those two concepts—the condition of being and being provided with—suggests justitia was something given or granted, and once received, it established a state or condition of being in the recipient.

The Old French word justice or jostise—the word bridging Latin justitia and English justice—captures that particular meaning: being “amenable to justice” is a condition or state of being susceptible to justice.\(^51\) Being susceptible to justice indicates justice is necessarily something that is applied to or impressed upon the recipient by someone or something else.

This points to the likely reason the meaning of justitia expanded from signifying the abstract notion of “justice” to representing the flesh and bone “justice”: the word justitia could mean the “embodiment of justice,” and was sometimes used to refer to a person or goddess named Justitia who dispensed, or even was, justice.\(^52\)

Thus, justitia was the embodiment or dispensation of a right, or what was legal or just.

B. Jus to Judex: Judges Show People Jus

The lexical history of judge is different from that of justice. The word judge comes from the Old French word jug or juge, which means “judge.”\(^53\) Juge is the French form of the Latin word judex, which also means “judge.”\(^54\) The ju– in judex is a short version of jus, but there is

\(^{49}\) See 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 325–26 (noting that justice comes from jus and –itia); cf. OXFORD LATIN DICTIONARY, supra note 6, at 986 (providing “[IVSTVS+-IA]” as justice “personified”).

\(^{50}\) Cf. OXFORD LATIN DICTIONARY, supra note 6, at 986 (presenting “[IVS+-TVS]” as the source of the word).

\(^{51}\) A DICTIONARY OF THE NORMAN OR OLD FRENCH LANGUAGE, supra note 44, at 130; see 17 OXFORD ENGLISH DICTIONARY 314 (2d ed. 1989) (defining susceptible to mean “[c]apable of taking, receiving, being affected by, or undergoing something”).

\(^{52}\) For example, the Roman poet Horace wrote a dirge for his friend Quintilius c. 24 B.C. that included the line, “Cui Pudo r et Iustitiae soror, Incorrupta Fides, nudaque Veritas, Quando ullum inveniet parem?” HORACE, ODES AND EPODES, 32 (Charles E. Bennett ed., 1999). In English this means, “When shall Honor, and Justice’s sister, Loyalty unshaken, and candid Truth ever find a peer to him?”

\(^{53}\) 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 292.

disagreement about what, exactly, the suffix –dex means. Some sources argue it comes from the verb dicere, which meant to “speak” or “declare,” and others contend it is a version of dicare, meaning “to indicate, show” or “proclaim, make known.” However, those meanings are similar, and both words are descended from the Greek verb δεικνυμαι, meaning “to show.” A judex, then, is someone who shows or proclaims jus.

Contrast that with justitia, which is the condition, or state of being provided with jus. A judex tells people what jus is—revealing it, proclaiming it—but justitia is a representation of jus itself. When justice and judge were adopted in the English language, each retained the distinct meaning of its root word, so a judge told people what the law was, while a justice was himself a kind of law.

C. Justitia to Justice: The Word Justice Is Older than Judge

The first written record of justice in England dates from 1137, almost 200 years before the earliest record of judge. An entry of the Anglo-Saxon Chronicle, attributed to “A Monk of Peterborough,” explains that the King of England arrested three nobles suspected of treason, then released and forgave them when they paid him homage. After the King released them, the traitors double-crossed him, taking advantage of his...

55. See OXFORD LATIN DICTIONARY, supra note 6, at 977 (explaining that indicis is ius and dico, ~ere); see also id. (defining dico, ~ere); accord De Vaan, supra note 17, at 169 (proclaiming dico, ~ere means “to talk, speak; declare”); OXFORD DICTIONARY OF WORD HISTORIES 286 (Glynnis Chantrell ed., 2002) (“Judge is from Old French juge, from Latin judex, a combination of jus ‘law’ and dicere ‘to say’”); 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 292 (”[F]. jus-right, law + -dic-us speaking, speaker.”); WEBSTER’S WORD HISTORIES 256 (1989) (“A study of English legal terms reveals the great influence of the French language in this area. For more than a century after the Norman Conquest in 1066, England’s legal language was French; thus, most of the technical terms of the law, especially of the private law, are of French (and ultimately Latin) origin.”); THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY, supra note 54, at 499 (”L. judicem, nom. judex, f. jus right, law + -dicus speaking[”]).

56. See, e.g., SKEAT, supra note 8, at 228 (citing to “dicare, to point out”).

57. OXFORD LATIN DICTIONARY, supra note 6, at 537.

58. A LATIN DICTIONARY, supra note 5, at 570.

59. De Vaan, supra note 17, at 169–70; Halsey, supra note 14, at 45; cf. A.L. Meissner, THE PHILOLOGY OF THE FRENCH LANGUAGE 8 (1874) (indicating a “remnant” of δεικνυμαι exists in the French word juge); Valpy, supra note 5, at 122 (positing that dicare came from δεικνυμαι “I judge,” and that dicere came from δεικνυμαι “I show”).

60. Valpy, supra note 5, at 212.

61. 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 326.

failure to punish them. The Chronicle reports, “Tha the suikes
undergaeton that he milde man was and softe and god and na justise ne
dide, tha diden hi alle wunder[.]”\(^{63}\) which means, “When the traitors
perceived that he [i.e., the king] was a mild man and soft and good, and
enforced no justice, then they did all wonder.”\(^{64}\)

Here, the word *justice* does not refer to a judge, but rather the “[e]xercise
of authority or power in maintenance of right.”\(^{65}\) The Chronicle goes on
to explain that the King’s failure to punish the traitors encouraged other
nobles to defy him, which undermined royal authority for the rest of his
reign.\(^{66}\) In this way, the first recorded use of the word *justice* in English
retains the original, precise meaning of *jus*: restrictive or corrective action,
the absence of which promoted behavior that would have required more
restriction or correction.

The earliest surviving record of the use of the word *justice* to mean “a
judicial official” was written in French in 1172.\(^{67}\) A biography of Saint
Thomas of Canterbury in England included a story about Philip de Broi, a
priest who had been accused of killing a knight in London.\(^{68}\) Philip was
acquitted after a lengthy trial, but the king thought he was guilty and, the
biographer writes, “E par lei s’en aveit nepurquant espurgié. Or li ot la
justise le plait recomencié[,]”\(^{69}\) which means “lo and behold! Now the
judge reopened the case against him.”\(^{70}\) The biographer explains that
Philip was innocent and insulted the judge for trying the case again.\(^{71}\)
The biographer continues, “E Symon le fiz Piere fu justise del plait ki
volentiers l’oüst, s’il poüst, a mort treit. Philosophes s’en ira, si li dist mult
grant lait. Li reis dist qu’altretant li aveit cil mesfet, Cum se a lui meisme
oüst cel dit u fait.”\(^{72}\) In English, this means, “Now the judge had

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63. Id. Other sources use the word *iustise*. E.g., *The Anglo-Saxon Chronicle* 382
(Benjamin Thorpe ed. 1861).
66. See *The Anglo-Saxon Chronicle, supra* note 63, at 230 (describing the cruel actions
of the traitors in response to the lack of discipline).
67. *8 Oxford English Dictionary, supra* note 5, at 326. The first recorded use of *justice of
the peace* was in 1320. Id.
68. GUERNES DE PONT-SAINTE-MAXENCE, *La Vie de Saint Thomas Becket* 43 (Ian
Short trans., 2013) (1170) [hereinafter SAINT THOMAS BECKET].
69. GUERNES DE PONT-SAINTE-MAXENCE, *La Vie de Saint Thomas Le Martyr* 28
(E. Walberg ed., 1922) (1170) [hereinafter SAINT THOMAS LE MARTYR].
70. SAINT THOMAS BECKET, *supra* note 68, at 43.
71. Id.
72. SAINT THOMAS LE MARTYR, *supra* note 69, at 28.
reopened the case against him. Simon fitz Peter had been the judge appointed for the trial, and if he had had his own way, he would have sentenced Philip to death. . . . The king was of the opinion that Philip’s offensive behavior to the judge was tantamount to his having insulted the king himself.73

Here, the word *justice* refers to a judge who is representing the king; the justice was, while in court, the same as the king himself. Indeed, justices during this stage of the English legal system were simply aristocrats and churchmen who were members of the royal court, or Curia Regis.74 Justice Simon Fitzpeter was one of these amateurs.75 The early justices were not learned in the law, but loyal administrators imposing the king’s will.76

That began to change just two years after the trial of Philip. Beginning in 1176, the King divided England into six circuits, with three justices appointed to each.77 In 1179, six were specifically assigned to hear complaints in the Curia Regis at Westminster.78 By 1188, the King is said to have referred to civil suits being heard in the Curia Regis by “iusticiis meis” or “my justices,”79 and in front of “justiciis in banco sedentibus,”80 meaning “justices sitting on the bench.”

These justices sitting on the bench became the Court of King’s Bench (known as the Court of Queen’s Bench when the monarch is a woman).81 Civil pleas between private individuals, known as Common Pleas, were tried by justices who were specifically selected for their legal knowledge

73. SAINT THOMAS BECKET, supra note 68, at 43.
74. 1 EDWARD FOSS, THE JUDGES OF ENGLAND 91 (1848).
75. EDWARD FOSS, BIOGRAPHIA JURIDICA: A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND 265 (1870) (noting that before Simon became assidente justiciae regis, or “a sitting justice of the king,” he was a deputy sheriff of Buckingham and Bedford).
76. See WALKER, supra note 9, at 693 (indicating justice was a “general term” and functioned in both business and judicial capacities); see also FOSS, supra note 74, at 171 (stating justices “consisted of dignitaries of the church, barons, and officers of the Court”).
77. FOSS, supra note 74, at 171.
78. Id.
79. 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 326. Other sources recite the reference differently. See, e.g., 2 RANULPH DE GLANVILLA, TRACTATUS DE LEGIBUS ET CONSUEUDINIO 81 (J. White & E. Brooke eds., 1780) (providing, “Pone coram me vel Justiciis meis . . . . ”).
80. DE GLANVILLA, supra note 79, at 33.
81. See LUKE OWEN PIKE, A CONSTITUTIONAL HISTORY OF THE HOUSE OF LORDS 35–36 (1894) (recognizing the change in the name of the court).
and experience.\(^{82}\) This is the beginning of professional judging in England. Today, the judges in the High Court of Justice, which include the courts formerly known as the Court of Queen’s Bench and Court of Common Pleas, are still called “justices.”\(^{83}\)

D. Judex to Judge: *The Word Judge Entered a Changed English Legal System*

The first recorded use of *judge* in English dates to 1303, when Robert Manning of Brunne wrote a poem that included a line about a person who sits in judgment over a sinner: “Before þe Iuge was he broghte.”\(^{84}\) Here, “Iuge” does not refer to a judge in an English court of law, but to a being who would judge moral character. The word does not signify a title, or a particular class of judicial official, but a judge of right and wrong.

The word *judge* continued to be used as a generic descriptive term, rather than a title of particular judicial office, throughout the 14th century.\(^{85}\) In 1382, the word still referred to an ordinary judicial officer, as in John Wycliffe’s translation of Luke 18:2, “Sum iuge was in sum cite, which drede no God, nether schamede of men.”\(^{86}\) The word *sum* served the same purpose then that *some* would serve today: signifying the noun it modifies is unimportant, unworthy of detailed description.\(^{87}\)

By the middle of the 15th century, English literature had begun to recognize that a judge was a particular kind of judicial figure. The judiciary was no longer filled with aristocratic or priestly amateurs; functioning

\(^{82}\) Cf. Foss, supra note 74, at 171 (“But both in 1176, and more particularly in 1179, a new selection appears to have been made from those who had attained a profounder knowledge of the law.”).


\(^{84}\) 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 293 (citing Robert of Brunne, Handlong Synne 184 l.5637 (Frederick J. Furnivall ed., 1901).

\(^{85}\) See id. (discussing the different contexts in which the word *judge* has been used in). In 1362, for example, William Langland used the word *judge* in Piers Plowman to describe someone who keeps an account of who breaks the Ten Commandments. William Langland, Piers Plowman: The Vision of a Peoples Christ 131 (Arthur Burrell ed., 1912). The judge performs a function similar to that of a mayor. *Id.*

\(^{86}\) 8 OXFORD ENGLISH DICTIONARY, supra note 5, at 293 (citing Luke 18:2 (John Wycliffe trans., 1848)).

\(^{87}\) See 15 OXFORD ENGLISH DICTIONARY 990 (2d ed. 1989) (defining *sum* as “[o]ne or another; an undetermined or unspecified.”).
courts could decide legal matters on legal principles and were able to impose the requirements of law, not just the will of the king.88

In 1440, Thomas Malory completed his poem Le Morte d’Arthur, which included the following line: “Audytours and offycers ordayne thy seluen, Bathe jureez and juggez and justicez of landes.”89  The word both—“Bathe” in this poem—indicates the author intentionally listed each of the terms juries, judges, and justices,90 which also indicates a justice was different from a judge.

The difference in meaning between justice and judge survived Middle English. In 1612, Francis Bacon wrote, “Ivdges ought to remember, that their Office is Ius dicere, and not Jus dare, to Interprete Law, and not to Make Law, or Gue Law.”91  To Bacon, a judge was someone who found the law someone else had made. Thus, the nuance of meaning indicated by the etymology and early English usage of judge was preserved in early modern English: a judge merely noted the law.

IV. JUSTICE AND JUDGE TODAY: RETAINING ANCIENT DIFFERENCES

The difference in meaning between the words justice and judge have survived to the present day.

A. The General Rule: Judges on the Highest Court Are Justices

Generally, judges on the highest court in a jurisdiction are called justices, while trial judges and intermediate appeals court judges are not.92 This is the case in both the federal and state judicial systems.93

In the federal system, judges on the United States Supreme Court are called justices, while judges on the federal district courts and courts of

88. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 183 (1895) (“It was no longer expected of the judge that he should be a statesman, or of the statesman that he should be an expert in the law. . . . Some of the judges of Henry’s reign were known to their contemporaries merely as great lawyers and seem to have earned the respect of all parties in the state.”).

89. J.1 MIDDLE ENGLISH DICTIONARY 418 (Hans Kurath ed., 1969) (citing MORTE ARTHURE 20 l.662 (Erik Björkman ed., 1915)).

90. See 2 OXFORD ENGLISH DICTIONARY 428–29 (2d ed. 1989) (“Preceding two homogenous words . . . or phrases, coupled by and, both adds emphasis to the sentence by suggesting a contrast with the words as it would have been had one of the terms been omitted.”).


92. GARNER, supra note 3, at 480.

93. See infra notes 102–06 for exceptions to this general rule.
appeals are judges.\textsuperscript{94} Federal trial and appellate judges have the same designation because they have much the same history. The intermediate federal appellate courts are arranged by geographic circuits consisting of neighboring states. For example, the federal appellate court for Texas, Louisiana, and Mississippi is called the Court of Appeals for the Fifth Circuit.\textsuperscript{95} Originally, federal circuit courts were trial courts with only very limited appellate jurisdiction,\textsuperscript{96} similar to how a state county court might have appellate jurisdiction over justice of the peace cases.\textsuperscript{97} At that time, there were no intermediate federal appeals courts, just circuit trial courts and the United States Supreme Court—the justices of which were assigned to serve as trial judges on the circuits.\textsuperscript{98} When federal intermediate appellate courts were established in 1891,\textsuperscript{99} the circuit judges retained their designation as judges, and the judges of the newly created federal district courts, being the new trial courts, naturally retained the federal trial court judges’ designation as judges.\textsuperscript{100}

State judicial systems tend follow the same pattern, with justices on the highest appellate court, and judges on the trial and intermediate appellate courts.\textsuperscript{101} There are exceptions to this, however. In forty-nine states, judges of the highest appellate court are legally designated as justices,\textsuperscript{102} but in Texas, there are two final courts of appeal—a civil court with justices and a criminal court with judges.\textsuperscript{103} In forty-six states, judges on intermediate courts of appeal are designated as judges,\textsuperscript{104} but the laws of


\textsuperscript{98} See Wheeler & Harrison, supra note 96, at 7–8 (“The [Judiciary Act of 1789] directed the two Supreme Court justices assigned to each circuit to travel to the designated places of holding circuit court, to be joined there by the district judge.”).


\textsuperscript{100} See id. (using the term “judges” when referring to the new appellate courts).

\textsuperscript{101} See, e.g., Mich. Const. art. VI, §§ 2, 8 (establishing “justices” of the state’s high Supreme Court and “judges” of the state’s intermediate court of appeals).

\textsuperscript{102} See, e.g., Idaho Const. art. V, § 6 (referring to Supreme Court “justices”).

\textsuperscript{103} Tex. Const. art. V, §§ 2–5.

\textsuperscript{104} See, e.g., Idaho Const. art. V, § 17 (referring to “judges of the court of appeals”).
four states refer to intermediate court judges as justices,105 and the laws in four states refer to trial judges as justices.106

The processes by which state judicial systems came to have final court judges, or intermediate or trial court justices, tend to confirm the usual distinction between justices and judges. Even the few exceptions to this rule tend to prove it. Consider, for example, the curious case of the judges who sit on the Texas Court of Criminal Appeals,107 which is the highest court of appeal for criminal matters, and the justices who sit on today’s Texas Courts of Appeals,108 the intermediate courts of appeal. This apparent paradox can be resolved by examining the origins of those courts.

The Texas Court of Criminal Appeals was created by an amendment to the Texas Constitution in 1891,109 but it is derived from a court created earlier. During the constitutional convention which drafted the Texas Constitution of 1876; the committee tasked with drafting the constitution’s article on the judiciary proposed the creation of a Supreme Court with “justices,” and district courts with “judges.”110

The judiciary committee of the constitutional convention advised that Supreme Court justices would have civil and criminal appellate jurisdiction and that there would be no intermediate appellate courts.111 A minority of the committee feared that the Supreme Court would have too many cases, so they suggested that district court judges have appellate jurisdiction over county courts.112 The minority then recommended the creation of an intermediate Court of Appeals with judges,113 followed by the majority’s proposal to elevate the Court of Appeals—again, comprised of “judges”—from an intermediate appellate court to a final one with

105. The states with intermediate appellate court judges who are designated as justices are California, Massachusetts, New Hampshire, New York, and Texas. See, e.g., N.H. REV. STAT. ANN. § 49:1:1 (stating the New Hampshire Superior Court—an intermediate court—shall consist of “justices”).
106. The states with trial court judges who are called justices are Maine, Massachusetts, and New York. E.g., N.Y. CONST. art. VI, § 20(a) (calling the judges of New York’s Supreme Court—the state’s trial court—“justices”).
108. Id. § 6.
109. TEX. S.J. RES. 16, 22d Leg., R.S., 1891 TEX. GEN. LAWS 197, 197.
111. Id. at 407.
112. Id. at 437, 440–41.
113. Id. at 457–58.
criminal jurisdiction over district courts and civil jurisdiction over county
courts. Which is to say that the highest court hearing criminal appeals
in Texas has judges, rather than justices, because it began as a proposed
trial court and developed into a proposed intermediate appellate court,
before it became a final court of appeals.

The constitutional convention approved the judiciary committee’s
proposal, and Texas voters ratified it a few months later. In 1891,
Texas voters approved a constitutional amendment that replaced the Court
of Appeals with the Court of Criminal Appeals, the jurisdiction and judges
of the former becoming those of the latter. The judges on the Court of
Criminal Appeals—the highest appellate court hearing criminal matters in
Texas—continue to be called judges, not justices, to this day.

In contrast, the Texas Courts of Appeals—not to be confused with the
defunct Court of Appeals—have always had “justices.” In 1891, Texas
voters ratified a constitutional amendment creating the Texas Courts of
Civil Appeal, which were intermediate courts of appeal hearing civil
matters. The courts were created to relieve the Texas Supreme Court
of a backlog of cases; the new courts would accomplish this, it was
thought, because their decisions would usually be final.

The 1891 constitutional amendment required the legislature to establish
the new courts, which would sit in “supreme judicial districts” with

114. Id. at 648–49; see also Debates in the Convention of the Constitutional
Convention of the State of Texas of 1875, at 422 (Seth Shepard McKay ed., 1930)
(explaining, in the entry for Nov. 11, 1875, that relying on just a commission of appeals would force
an amendment just two years later, and that the Supreme Court needed permanent relief, which he
contended would be provided by the Court of Appeals).

115. CONSTITUTIONAL CONVENTION, supra note 110, at 648–49.

116. RESEARCH DIV., TEX. LEGISLATIVE COUNCIL, AMENDMENTS TO THE TEXAS

117. Id. at 62.

118. See, e.g., TEX. CODE CRIM. PROC. ANN. § 4.04 (West 2015) (“The Court of Criminal
Appeals and each judge thereof . . . .”).

119. See TEX. S.J. RES. 16, 22d Leg., R.S., 1891 TEX. GEN. LAWS 197, 197 (proposing a
revision of the Judicial article of the Texas Constitution, ratified Aug. 11, 1891).

120. GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN
ANNOTATED AND COMPARATIVE ANALYSIS 399 (1974) (citing W.O. Murray, Our Courts of Civil
Appeals, 25 TEX. B.J. 269, 269 (1962)); see also Charles L. Black, Importance of the Courts of Civil Appeals,
9 TEX. B.J. 426, 427 (1946) (“[T]he docket of the Supreme Court . . . became greatly congested . . . .”).

121. See BRADEN ET AL., supra note 120, at 399 (“The theory in creating the courts of civil
appeals apparently was that their decisions would be final in most civil cases.”).
“justices” whose decisions on all questions of fact would be final.\textsuperscript{122} Thus, justices sat on the Texas Courts of Civil Appeals because those courts functioned as appendages of the Texas Supreme Court. The Courts of Civil Appeal gained criminal jurisdiction and were designated as the Courts of Appeals in 1980.\textsuperscript{123} Justices, rather than judges, sit on the Courts of Appeals today.\textsuperscript{124}

B. Policing the General Rule that Justices Sit on the Highest Court and Judges Sit on Others

The paradox of judges sitting in a court of last resort and justices sitting in an intermediate appellate court has created confusion in Texas, even among Texas judges. In \textit{Jones v. State},\textsuperscript{125} a panel opinion of the Dallas Court of Appeals referred twice to a “Justice Campbell” on the Court of Criminal Appeals.\textsuperscript{126} The Court of Criminal Appeals reversed the Dallas Court two years later.\textsuperscript{127} There were two dissents to the Court of Criminal Appeals opinion, one of which quoted from the Dallas Court’s opinion and added the notation “(sic)” after each of the Dallas Court’s several references to “Justice Campbell.”\textsuperscript{128} In this way, a judge of the Court of Criminal Appeals, who agreed with the justices of the Dallas Court of Appeals, insisted on correcting the justices who had addressed a judge as a justice.

Sometimes, judges try to correct other departments of government about the correct use of the words \textit{justice} and \textit{judge}. For example, the Rhode Island Supreme Court admonished the state’s legislature for using \textit{judge} in the title of a bill instead of the word \textit{justice}.\textsuperscript{129} Similarly, legal

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\textsuperscript{122} TEX. S.J. RES. 16, 22d Leg., R.S., 1891 TEX. GEN. LAWS 197, 198–99.
\textsuperscript{123} TEX. S.J. RES. 36, 66th Leg., R.S., 1979 TEX. GEN. LAWS 3223, 3224–25.
\textsuperscript{124} TEX. CONST. art. V, § 6.
\textsuperscript{126} Id. at 11.
\textsuperscript{128} Id. at 677 (McCormick, J., dissenting).
\textsuperscript{129} The Rhode Island Supreme Court responded to the governor and the legislature with the following:

To His Excellency, Edward D. DiPrete, Governor of the State of Rhode Island, The Honorable Matthew J. Smith, Speaker of the Rhode Island House of Representatives, and The Honorable John C. Revens, Jr., Majority Leader of the Rhode Island Senate: We have received your request seeking the advice of the justices of this court as to whether the General Assembly may act on a joint resolution such as 85-S16 entitled “Joint Resolution Vacating the Judgeship of Chief Judge [sic] Joseph A. Bevilaqua” if the 1985 General Assembly session is reconvened
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scholars sometimes correct judges, journalists, and others who refer to
judges as justices, and have argued that this distinction is related to the
difference between what justices and judges do—the former being free to
make the law, the latter not.131

Some judges have contended it is the nature of their judicial offices, not
simply their titles, that make them judges rather than justices. For
example, William J. Bauer, former judge of the United States Court of
Appeals for the Seventh Circuit, explained that the constitutional
distribution of judicial power made him a judge, not a justice. “Under
Article 3, Section 1, ‘The judicial power of the United States shall be
vested in one Supreme Court and in such inferior courts as the Congress
may from time to time ordain.’ So, I’m an inferior judge working in an
inferior court.”132

But some justices read Article III a different way. United States
Supreme Court Justice Scalia thought that Article III constrained the
power of his fellow justices to make law, and that the Court had
recognized this constraint in Marbury v. Madison.133 As Justice Scalia noted
in James B. Beam Distilling Co. v. Georgia:134

I think “[t]he judicial Power of the United States” conferred upon this Court
and such inferior courts as Congress may establish, Art. III, § 1, must be
deemed to be the judicial power as understood by our common-law
tradition. That is the power “to say what the law is,” not the power to
change it.135

pursuant to joint resolution 85-S1065 in light of the provisions of section 4 of article X of the
Rhode Island Constitution, which states that “such resolution shall not be entertained at any
other than the annual session for the election of public officers.”

Advisory Op. to Governor re Chief Justice, 500 A.2d 1298 (R.I. 1985)
n.22 (1996) (noting Michael A. Hammer and George Will, among others, called Judge Learned Hand
a “justice”).
131. See Eric J. Segall, Ideology and the Supreme Court: A Conversation with Judge Richard Posner and
Professor Eric Segall, 2013 CARDOZO L. REV. DE NOVO 258, 259–61
http://www.cardozolawreview.com/content/denovo/POSNER_2013_258.pdf
[https://perma.cc/J5Z6-WXX6] (noting Professor Segall had “long argued that Justices don’t act like
judges, meaning they don’t take prior law seriously”).
135. Id. at 549 (1991) (Scalia, J., concurring) (citations omitted) (quoting Marbury, 5 U.S. at
177).
Nevertheless, Justice Scalia acknowledged justices sometimes do far more than merely say what the law is. In *Hodgson v. Minnesota*, a case about parental notification requirements for minors seeking abortions, Justice Scalia observed one justice reached one conclusion, three Justices reached another, four justices concluded something else, and six justices reached a different conclusion still. He reasoned that this was evidence that the justices were not acting as judges must:

One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society’s tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer’s—and hence not in the judge’s—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.

The practice Justice Scalia described—that some U.S. Supreme Court justices do not simply interpret the law but make it—is consistent with the difference between the etymology and early English usage would indicate: a justice on an ultimate court of appeals is sometimes the law. Justice Scalia’s criticism of this notion reveals he thought a justice must be only a judge, who in Bacon’s formulation, is merely *ius dicere*, not *ius dare*, someone who interprets the law that someone else makes.

For Justice Scalia, the notion a justice and judge cannot make the law, but must only interpret it, comes from the principle of separation of powers, implied by the United States Constitution’s assignment of the judicial power in an article separate from those addressing the legislative and executive powers. The theory of separation of powers in the United States Constitution is mirrored in the many state constitutions that expressly forbid judges from wielding legislative power. In these states

137. Id. at 479–80 (Scalia, J., concurring in the judgment in part and dissenting in part).
138. Id. at 480.
139. A Harmony of the Essays, etc., of Francis Bacon, supra note 91, at 451.
140. James M. Beam Distilling Co., 501 U.S. at 549 (Scalia, J., concurring).
141. The constitutional restriction of judicial power articulated in *Marbury* is echoed in many state constitutions, *e.g.*, Tex. Const. art. II, § 1, so even state justices and judges who do not
and in the federal legal system, the separation of powers would, under Justice Scalia’s conception of the judicial power, restrict a justice’s authority to make law.

Thus, current usage of the terms *justice* and *judge* suggests that justices can be different from judges, but some judicial opinions and constitutional provisions suggest they must not be.

V. Conclusion

The history and usage of the words *justice* and *judge* reveal justices were once the embodiment of law, deciding on behalf of the state how to restrict the lives of those under their jurisdiction, while judges simply said what the law was. Today, some justices maintain this distinction, while others think it is unconstitutional. In this way, the ancient similarities and differences between the words *justice* and *judge* accurately describe the different ways some modern justices and judges approach their duties, which is the subject of an important modern controversy. And understandably so: the power to make *jus*—law and right, restriction and limitation—is different from the power to interpret *jus* that someone else has made. Both the difference in the nature of those powers, and their common object, are rooted in the etymology and usage of the words *justice* and *judge*.

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derive their power from Article III of the U.S. Constitution are obligated to show, rather than make, the law.