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

Jason Boatright

*Texas Fifth Court of Appeals*

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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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\* Jason Boatright is a justice on the Texas Fifth Court of Appeals at Dallas. Previously, he was Division Chief of the Texas Attorney General’s Opinion Division, Director of the General Counsel Section of the Texas Railroad Commission, and Briefing Attorney to Presiding Judge Sharon Keller of the Texas Court of Criminal Appeals.

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,”<sup>1</sup> while a *justice* is “a judge, esp[ecially] of an appellate court or a court of last resort.”<sup>2</sup> Although justices are often called “judges” in informal settings,<sup>3</sup> 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.”<sup>4</sup>

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*,<sup>5</sup> which meant “that which is sanctioned or ordained, law[.]”<sup>6</sup> a “right,” or “that which is just.”<sup>7</sup> 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. Lewitinn*, 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 Ε, the way the letters D, I, and E in the English word *soldiery* 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.<sup>8</sup> 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.<sup>9</sup>

## 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.<sup>10</sup> Concomitantly, etymology can help reveal details in the meaning of those words.<sup>11</sup> 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

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 *dicere* “[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) (positing that *index* is *ius* and *dicare*, meaning “to point out”). The suffixes to *jus* are discussed in detail in Part III.A, 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’r*, 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.”<sup>12</sup> *Jussi* is a form of the Latin verb *jubeo*, meaning “I command.”<sup>13</sup> In turn, there are two plausible etymologies of *jubeo*.<sup>14</sup> One is that it comes from the Greek verb *φοβέω*, “to frighten, and so frighten with menaces, menace, then to command in a menacing manner,”<sup>15</sup> as in the modern English words that end in the suffix “-phobia.”<sup>16</sup> The other possible etymology for *jubeo* contends that it is related to the Greek noun *ὁρμή*, meaning “battle, fight.”<sup>17</sup>

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.<sup>18</sup> The Proto-Indo-European source for *jubeo* is *\*H<sub>1</sub>oud<sup>b</sup>-eie/o-* meaning “to cause to move,” which is related to the Sanskrit *yudhya* “to fight.”<sup>19</sup> 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.

12. VALPY, *supra* note 5, at 13.

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 *ζαβίω*—i.e. *διαβίω*, *διαβίω*, from *ὕπεω*, “to be above”—however, *ὕπεω* 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.

16. See 11 OXFORD ENGLISH DICTIONARY 693–94 (2d ed. 1989) (defining *-phobia*).

17. MICHIEL DE VAAN, ETYMOLOGICAL DICTIONARY OF LATIN AND THE OTHER ITALIC LANGUAGES, in 7 LEIDEN INDO-EUROPEAN ETYMOLOGICAL DICTIONARY SERIES 312 (Alexander Lubotsky ed., 2008).

18. See J.P. MALLORY & D.Q. ADAMS, THE OXFORD INTRODUCTION TO PROTO-INDO-EUROPEAN AND THE PROTO-INDO-EUROPEAN WORLD 103 (2006) (describing the stages of movement of Indo-European peoples and concluding, “One might then place a notional date of c. 4500–2500 BC on Proto-Indo-European”); HALSEY, *supra* note 14, at 1 (finding that “[n]early all the languages of Europe” and Sanskrit descended from the Indo-European language).

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."<sup>20</sup> This word for "right" does not signify what is just, or proper, or legal, but instead what is binding or necessary.<sup>21</sup> 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*,<sup>22</sup> which can mean "to bind," and "to want, need, beg, [or] ask."<sup>23</sup> 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.<sup>24</sup> 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).<sup>25</sup> 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 *यु*, meaning "to join."<sup>26</sup> In turn, *यु* is related to the Greek word *σωω*, meaning "to sew," which is the root of the Greek word *ζευγνυμι*, "binding, obliging."<sup>27</sup> These words are the root of the Old English *yeoc*,<sup>28</sup> which is

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20. VALPY, *supra* note 5, at 213.

21. F.E.J. VALPY, THE ETYMOLOGY OF THE WORDS OF THE GREEK LANGUAGE 35 (1860).

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.

the modern English “yoke.”<sup>29</sup> 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.<sup>30</sup>

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 *h<sub>2</sub>oiu* or *h<sub>2</sub>i-eu-s* meaning “vital force, eternity,”<sup>31</sup> and that it is related to the Sanskrit nouns *yoh*, meaning “health,”<sup>32</sup> *yoś* meaning “of life,” and *ayus* meaning “lifetime.”<sup>33</sup>

The Proto-Indo-European word *h<sub>2</sub>oiu* or *h<sub>2</sub>i-eu-s* is also the root of the Greek word *ou*, meaning “not.”<sup>34</sup> At first glance, this is a paradox because *ou* is simple, abrupt, and purely negative, while *h<sub>2</sub>oiu*, *ayus*, and *jus* are complex, expansive, and possibly positive. However, the way in which *h<sub>2</sub>oiu* became *ou*, *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 *h<sub>2</sub>oiu* or *h<sub>2</sub>i-eu-s* was part of a Proto-Indo-European term, *ne h<sub>2</sub>oiu*.<sup>35</sup> The *ne* meant “not,” and when combined with *h<sub>2</sub>oiu*, meaning “eternity,” created a term that meant “never.”<sup>36</sup> The sound of *h<sub>2</sub>oiu* was,

28. *Id.*

29. The Sanskrit root of ζευγνυμι is *yuga*, and that it is related to the Arab *zūg*, Russian *igo*, and German *joch*, all meaning “to join,” and the Ethiopian *zog*, “a pair.” *Id.* This how we get the English word *yoke*, to join a pair of oxen. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1423 (R.E. Allen ed., 8th ed. 1990).

30. Cf. HALSEY, *supra* note 14, at 69 (discussing *jus*, ζευγνυμι, and *yn*).

31. DE VAAN, *supra* note 17, at 316.

32. OXFORD LATIN DICTIONARY, *supra* note 6, at 984.

33. DE VAAN, *supra* note 17, at 316.

34. See Stephen Colvin, *The Modal Particle in Greek*, 62 CAMBRIDGE CLASSICAL J. 65, 72 (2016) (“[T]he Greek negative *ou* has its roots in an [Indo-European] phrase *\*ne H<sub>2</sub>oyu* (*ke<sup>id</sup>*) ‘never’, composed of *\*ne* ‘not’ . . . .”); DE VAAN, *supra* note 17, at 316 (noting *ou* and its roots in the etymological history of *jus*).

35. 2 ROBERT BEEKES, ETYMOLOGICAL DICTIONARY OF GREEK 1123 (2010). Beekes adds a third word to the phrase, *ke<sup>id</sup>*, which is an indefinite pronoun.

36. Colvin, *supra* note 34, at 72; see DE VAAN, *supra* note 17, at 316 (defining *h<sub>2</sub>oiu* as “eternity”).



roughly, “hoo.”<sup>37</sup> During the long transition from Proto-Indo-European to Greek, the sound of *ne* and the meaning of *h<sub>2</sub>oiu* dropped from the term, and the sound of *h<sub>2</sub>oiu* gained the meaning of *ne*.<sup>38</sup> In this way, the Greek word *ov* came to mean “not,” even though it is directly descended from the word signifying “vital force, eternity.”<sup>39</sup> So, the etymology of the Greek word *ov* suggests it developed from the concept of the negation of energy, and a limitation on eternity.

The Sanskrit words descending from *h<sub>2</sub>oiu* or *h<sub>2</sub>i-eu-s* show faint traces of this idea. *Yob*, *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.<sup>40</sup> 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”<sup>41</sup> 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.”<sup>42</sup> Each of these definitions is predicated on a requirement, privilege, forum, or judgment dictated by someone else. They are inextricably linked to *h<sub>2</sub>i-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

37. See MICHAEL MEIER-BRÜGGER, INDO-EUROPEAN LINGUISTICS 106 (2003) (explaining that *h<sub>2</sub>* was a laryngeal, which is a fricative consonant that came to be represented by *h* and showing the diphthong *oi* became *i*).

38. BEEKES, *supra* note 35, at 1123.

39. See DE VAAN, *supra* note 17, at 316 (explaining the etymology of the word *h<sub>2</sub>oiu*).

40. See *id.* (defining *yob*, *yos*, and *ayus*).

41. CASSELL'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 *justice* 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 *justise*, meaning “uprightness, equity, vindication of right, administration of law,”<sup>43</sup> and “amenable to justice.”<sup>44</sup> The French word *justice* is a form of the Latin abstract noun *justitia*;<sup>45</sup> the French suffix *-ice* is equivalent to Latin *-itia*.<sup>46</sup> Like the French word “justice,” the Latin word *justitia* did not mean “judge,” but rather “justice, equity, righteousness, uprightness,”<sup>47</sup> or “justice, fairness, equity.”<sup>48</sup> 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.

44. A DICTIONARY OF THE NORMAN OR OLD FRENCH LANGUAGE 130 (Robert Kelham ed., 1779).

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

46. *Cf.* Skeat, *supra* note 8, at 229 (indicating the French origin, *justice*, and the Latin origin, *justitia*).

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*.”<sup>49</sup> In turn, *justus* came from *jus*, and the suffix *-tus*; in *justus* meant “provide with,” so *justus* meant “provided with *jus*.”<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

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.”<sup>53</sup> *Juge* is the French form of the Latin word *judex*, which also means “judge.”<sup>54</sup> 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 *ius* 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 Pudor 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.

54. OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 499 (C.T. Onions ed., 1966).

disagreement about what, exactly, the suffix *-dex* means. Some sources argue it comes from the verb *dicere*, which meant to “speak” or “declare,”<sup>55</sup> and others contend it is a version of *dicare*,<sup>56</sup> meaning “to indicate, show”<sup>57</sup> or “proclaim, make known.”<sup>58</sup> However, those meanings are similar, and both words are descended from the Greek verb *δεικνυμαι*, meaning “to show.”<sup>59</sup> A *judex*, then, is someone who shows or proclaims *jus*.<sup>60</sup>

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*.<sup>61</sup> 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.<sup>62</sup> After the King released them, the traitors double-crossed him, taking advantage of his

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55. See OXFORD LATIN DICTIONARY, *supra* note 6, at 977 (explaining that *index* 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 (Glynis 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]. *ju-s* 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 *δικαζω*, “I judge,” and that *dicere* came from *δεικω*, “I show”).

60. VALPY, *supra* note 5, at 212.

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

62. ENGLISH PROSE AND POETRY 1 (John Matthews Manly ed., 1916).

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[.]”<sup>63</sup> 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.”<sup>64</sup>

Here, the word *justice* does not refer to a judge, but rather the “[e]xercise of authority or power in maintenance of right.”<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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[.]”<sup>69</sup> which means “lo and behold! Now the judge reopened the case against him.”<sup>70</sup> The biographer explains that Philip was innocent and insulted the judge for trying the case again.<sup>71</sup> The biographer continues, “E Symon le fiz Piere fu justise del plait ki volentiers l’ouïst, s’il pouïst, a mort treit. Philippes s’en ira, si li dist mult grant lait. Li reis dist qu’altretant li aveit cil mesfet, Cum se a lui meisme ouïst cel dit u fait.”<sup>72</sup> In English, this means, “Now the judge had

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63. *Id.* Other sources use the word *justise*. E.g., THE ANGLO-SAXON CHRONICLE 382 (Benjamin Thorpe ed. 1861).

64. ENGLISH PROSE AND POETRY, *supra* note 62, at 1.

65. 8 OXFORD ENGLISH DICTIONARY, *supra* note 5, at 326 (2d ed. 1989).

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 (Jan 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."<sup>73</sup>

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.<sup>74</sup> Justice Simon Fitzpeter was one of these amateurs.<sup>75</sup> The early justices were not learned in the law, but loyal administrators imposing the king's will.<sup>76</sup>

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.<sup>77</sup> In 1179, six were specifically assigned to hear complaints in the Curia Regis at Westminster.<sup>78</sup> By 1188, the King is said to have referred to civil suits being heard in the Curia Regis by "iusticiis meis" or "my justices,"<sup>79</sup> and in front of "*justiciis in banco sedentibus*,"<sup>80</sup> 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).<sup>81</sup> 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 iusticiae 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 RANULPHO DE GLANVILLA, TRACTATUS DE LEGIBUS ET CONSUECUDINI 81 (J. White & E. Brooke eds., 1780) (providing, "Pone coram me vel Iusticiis 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.<sup>82</sup> 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."<sup>83</sup>

#### 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."<sup>84</sup> 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.<sup>85</sup> 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 dredde no God, nether schamede of men."<sup>86</sup> The word *sum* served the same purpose then that *some* would serve today: signifying the noun it modifies is unimportant, unworthy of detailed description.<sup>87</sup>

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.")

83. WALKER, *supra* note 9, at 693; accord *High Court Judges*, CTS. AND TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/high-court-judges/> [http://perma.cc/NVU9-LSXH].

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 *some* 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.<sup>88</sup>

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.”<sup>89</sup> The word *both*—“Bathe” in this poem—indicates the author intentionally listed each of the terms *juries*, *judges*, and *justices*,<sup>90</sup> 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 *Ius dare*; to Interpret Law, and not to Make Law, or Giue Law.”<sup>91</sup> 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.<sup>92</sup> This is the case in both the federal and state judicial systems.<sup>93</sup>

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. . . . [S]ome 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.”).

91. A HARMONY OF THE ESSAYS, ETC., OF FRANCIS BACON 451 (Edward Arber ed., 1871).

92. GARNER, *supra* note 3, at 480.

93. See *infra* notes 102–06 for exceptions to this general rule.



appeals are judges.<sup>94</sup> 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.<sup>95</sup> Originally, federal circuit courts were trial courts with only very limited appellate jurisdiction,<sup>96</sup> similar to how a state county court might have appellate jurisdiction over justice of the peace cases.<sup>97</sup> 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.<sup>98</sup> When federal intermediate appellate courts were established in 1891,<sup>99</sup> 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.<sup>100</sup>

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

94. *E.g.*, *FAQs: Federal Judges*, USCOURTS.GOV, <http://www.uscourts.gov/faqs-federal-judges> [<https://perma.cc/FL73-YMCP>] (explaining the fundamentals of federal judiciary positions).

95. *See* 28 U.S.C. § 41 (2012) (setting forth the composition of the circuit courts).

96. *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, *FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM* 4 (3d ed. 2005) (“The [Judiciary Act of 1789] provided for two types of trial courts—district courts and circuit courts—and gave the circuit courts [] limited appellate jurisdiction.”).

97. *See, e.g.*, *TEX. CIV. PRAC. & REM. CODE ANN.* § 51.001 (West 2015) (providing for appeals from justice courts to county courts in Texas).

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.”).

99. *Judiciary (Evarts) Act of 1891*, ch. 517, 26 Stat. 826 (1891).

100. *See id.* (using the term “judges” when referring to the new appellate courts).

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).

102. *See, e.g.*, *IDAHO CONST.* art. V, § 6 (referring to Supreme Court “justices”).

103. *TEX. CONST.* art. V, §§ 2–5.

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,<sup>105</sup> and the laws in four states refer to trial judges as justices.<sup>106</sup>

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,<sup>107</sup> which is the highest court of appeal for criminal matters, and the justices who sit on today's Texas Courts of Appeals,<sup>108</sup> 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,<sup>109</sup> 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."<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup> The minority then recommended the creation of an intermediate Court of Appeals with judges,<sup>113</sup> 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).

107. TEX. CONST. art. V, § 4.

108. *Id.* § 6.

109. TEX. S.J. RES. 16, 22d Leg., R.S., 1891 TEX. GEN. LAWS 197, 197.

110. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 406–13 (1875) [hereinafter CONSTITUTIONAL CONVENTION].

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.<sup>114</sup> 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,<sup>115</sup> and Texas voters ratified it a few months later.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> The courts were created to relieve the Texas Supreme Court of a backlog of cases;<sup>120</sup> the new courts would accomplish this, it was thought, because their decisions would usually be final.<sup>121</sup>

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 CONSTITUTION SINCE 1876, at 62–63 (2016).

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.<sup>122</sup> 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.<sup>123</sup> Justices, rather than judges, sit on the Courts of Appeals today.<sup>124</sup>

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 *Jones v. State*,<sup>125</sup> a panel opinion of the Dallas Court of Appeals referred twice to a “Justice Campbell” on the Court of Criminal Appeals.<sup>126</sup> The Court of Criminal Appeals reversed the Dallas Court two years later.<sup>127</sup> 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.”<sup>128</sup> 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 *justice* and *judge*. For example, the Rhode Island Supreme Court admonished the state’s legislature for using *judge* in the title of a bill instead of the word *justice*.<sup>129</sup> Similarly, legal

122. TEX. S.J. RES. 16, 22d Leg., R.S., 1891 TEX. GEN. LAWS 197, 198–99.

123. TEX. S.J. RES. 36, 66th Leg., R.S., 1979 TEX. GEN. LAWS 3223, 3224–25.

124. TEX. CONST. art. V, § 6

125. *Jones v. State*, 774 S.W.2d 7 (Tex. App.—Dallas 1989), *rev’d*, 815 S.W.2d 667 (Tex. Crim. App. 1991).

126. *Id.* at 11.

127. *Jones v. State*, 815 S.W.2d 667, 671 (Tex. Crim. App. 1991).

128. *Id.* at 677 (McCormick, J., dissenting).

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. Bevilacqua” if the 1985 General Assembly session is reconvened

scholars sometimes correct judges, journalists, and others who refer to judges as justices,<sup>130</sup> 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.<sup>131</sup>

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.”<sup>132</sup>

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*.<sup>133</sup> As Justice Scalia noted in *James B. Beam Distilling Co. v. Georgia*:<sup>134</sup>

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.<sup>135</sup>

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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)

130. Cf. Michael Herz, “*Do Justice!*”: *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 117 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](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”).

132. Ted A. Donner, *Judicial Profile: Hon. William J. Bauer*, DCBA BRIEF, Apr. 2011, at 1, 31.

133. *Marbury v. Madison*, 5 U.S. 137 (1803).

134. *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

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*,<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup>

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.<sup>140</sup> 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.<sup>141</sup> In these states

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136. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

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. Bean 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, *see, 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.