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The Future of Legal Scholarship and the Search for a Modern Theory of Law

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Table of Contents

*Associate Professor of Law, University of Tulsa. It is customary in such places to acknowledge special funding and institutional support. I cannot. While this did make the effort more burdensome than it had to be, it made me appreciate my family even more. They took on more responsibilities so that I would have fewer. They sacrificed so that I would not have to and, when I needed it, they gave me the gift of time.

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In this Article, Professor Gjerdingen argues that the current crisis in legal scholarship can be traced to a change in the dominant concept of American law. He argues that virtually all of the significant schools of American legal thought during the last century, from Langdellian orthodoxy to realism to the legal process school, were dominated by a concept of law that separated law and politics. This concept of law, which he terms "conventionalism," presumed that law was an autonomous, apolitical discipline dominated by the study of adjudication and classical common law categories. In contrast, the new legal scholarship of the last decade—which includes not only critical legal studies but an as yet un-

recognized group of centrist scholars, which he terms the "legal theory" movement—is implicitly based on a new, modern theory of law that offers an alternative to conventionalism. This theory recognizes that a central concern of legal scholarship must be to understand the relation between law and politics and the role of legal culture. To explain this phenomenon, Professor Gjerdingen offers prolegomena for a "theory of legal consciousness" and for the "modern theory of law" as well as an assessment of the future of the new scholarship.

I. INTRODUCTION

Legal scholarship is in an unparalleled state of unrest. While earlier moments of turbulence, such as the introduction of *Langdellian orthodoxy*, the *realist* movement, and the *legal process* school centered on changes in legal technique, the present unrest implicates the very nature and legitimacy of legal thought itself. Under the various banners of *law and economics*,[1] *constructivism*,[2] and *critical legal studies*,[3] questions about the relationship between political values and legal thought, the determinacy of legal argument, and the nature and role of common law thought have become increasingly prevalent in legal scholarship. I shall argue in this Article that the source of the current unrest in legal scholarship is more fundamental and far-reaching than previously has been supposed. The debate is not just about such matters as the legitimacy of law and economics or critical legal studies. Rather, the debate ultimately is linked to a redefinition of the dominant American concept of law. What is at issue is what the very subject of law is, from the types of categories and techniques that constitute proper legal argument to the legitimacy of what lawyers do and to the relationship of law and politics.

To develop this argument, Section II of this Article elaborates the traditional concept of law—labeled here as *conventional-*

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1. *See Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) (discussing normative aspects of economics and "wealth maximization"); *The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983) [hereinafter *Economics in Legal Education*]. (survey of various authors on influence and use of economics in legal education).

2. *See* B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984) (proposing "Constructivism" as an alternative to critical legal studies and the Chicago school of law and economics).

3. *See* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) [hereinafter POLITICS OF LAW]; *Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239 (1984); *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984).

ism. According to the tenets of conventionalism, law is an autonomous enterprise separate from politics. Distinct legal techniques exist which are not only neutral and rational, but which separate legal from political or economic arguments. After describing the elements of conventionalism, I shall argue, first, that this concept supplies the framework for the "old" legal scholarship; second, that it is the basis for the dominant attitude about law for most legal practitioners and laypersons; and, third, that each of the schools of legal thought associated with the old scholarship, from Langdellian orthodoxy to realism to the legal process school, are either merely variants of conventionalism or incomplete critiques of it.

Section III considers the nature of the "new" legal scholarship. In addition to critical legal studies, the new scholarship includes an emerging yet previously unrecognized school of thought—labeled here as the *legal theory* movement. This movement confronts the transition in legal scholarship as a redefinition of the role of lawyers within an accepted liberal political framework. Although specific, detailed responses have yet to be mapped out, the most strident legal theory scholars take the position that change is necessary in legal thought to accommodate a new and developing political role for the legal culture.[4] In particular, these scholars view common law technique as undependable and perhaps irrelevant in guiding legal thought. After describing the nature and techniques of the legal theory movement, a brief description of the critical legal studies work is also given. Finally, the legal theory and critical legal studies movements are compared in an effort to assess the nature of the new legal scholarship. The legal theory and critical legal studies scholars agree that legal thought has a structure, that a connection exists between forms of legal thought and political structures, and that the legal culture is in a time of transition. Moreover, both groups agree that conventional legal thought is linked in some significant way to normative political values and that understanding the structure of modern liberalism and the role of legal thought in that enterprise is a central feature of modern legal scholarship. At the same time, however, neither group has yet been able to develop a theory that accounts for some of the central aspects of these relationships.

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4. *See, e.g.*, B. ACKERMAN, *supra* note 2.

Section IV argues that the new scholarship is best understood as an effort by the legal culture to articulate a new concept of law that would replace conventionalism. To explain this development, a number of assumptions about political theory, legal culture, psychology, and American liberalism are set out. Using these assumptions, I propose a prolegomenon for a *theory of legal consciousness* to explain the genesis and demise of classical common law thought and the present crisis in legal scholarship. Using the tenets of this theory of legal consciousness, this Section next sets out a prolegomenon for the *modern theory of law*. I argue that the modern theory of law provides a theory of law to replace conventionalism and, in fact, that it represents the theory of law implicit in the new scholarship of the legal theory and critical legal studies movements. In contrast to conventionalism, under the modern theory of law: (1) law must be political; (2) law is a semi-autonomous discipline; (3) law must be historical; (4) law does not necessarily give a determinate answer; (5) law is more than the study of adjudication; and (6) legal technique includes more than traditional common law methods and is not necessarily linked to classical common law categories. This Section concludes by discussing the elements of the modern theory of law, and the insight these elements provide for understanding the nature of the present debate in legal thought as well as the unity and the future of the new scholarship.

Section V provides an assessment of the present legal theory and critical legal studies work based on the modern theory of law. I argue that although the modern theory of law provides the normative framework behind the new scholarship and although this scholarship displays the influence of each of the elements of the modern theory of law, changes are needed in the work of each group if either is to be fully effective.

II. The Contours of Conventional Legal Scholarship

In the discussion that follows, modern legal scholarship is categorized in three groups—conventionalism, legal theory, and critical legal studies. The underlying assumption of this discussion is that the change in the nature of legal scholarship that is taking place is related to a significant change in the nature of the American political structure that has already taken place; however, the existence and nature of the political structure change has not

been fully appreciated by the legal culture. One purpose of this classification of modern legal scholarship is to point out the connections that exist in the conventional notions about law. A second purpose is to set out some previously unrecognized connections in the various forms of legal scholarship that have emerged in the last fifteen years. This will assist in defining the nature of the new scholarship and in distinguishing it from the old.

A. *The Nature of Conventionalism*

For the past one hundred years, American legal thought has been dominated by a concept of law that separates law and politics. Although drawn from several sources, this notion of law—termed here as conventionalism—displays a deep unity in basic structure.

When asked about the relationship between law and politics, conventionalists insist that the two are separate disciplines. This conclusion is supported by six central tenets of conventionalism, all of which relate to the division of law and politics. The first tenet of conventionalism is that the law is apolitical. It is neutral, dispassionate, and pure—the product of reason, not politics. What is conspicuously absent from the dialogue of the conventionalist is any assessment of the political implications of legal doctrine or any acknowledgment that political conditions might generate some of that doctrine. Policy is distinct from doctrine, and "hard" law is preferred over "soft" values.

The second tenet of conventionalism is that the law is autonomous.[5] It is a complete, self-contained system. Legal disputes generate the correct set of legal issues; legal reasoning, applied by lawyers, generates the correct set of legal answers. Other disciplines may inform the legal mind, but they do not otherwise influence it. Legal thought and legal concepts supply the necessary framework and ask all the relevant questions. At times, the law may overlap with psychology or economics; however, there is little doubt in the mind of the conventionalist that, if a conflict exists

5. For some of the best descriptions of this tenet of conventionalism by nonconventionalists, see R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 52-57 (1976); Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 736-39. One of the most developed theories on the autonomy of the law in conventionalist theory is H. KELSEN, THE PURE THEORY OF LAW (2d ed. 1967). For a useful, general description of certain aspects of conventionalism, see J. SHKLAR, LEGALISM (1964).

between the law and "something else," the law controls.[6] Thus, for the conventionalist, a legal question answered by an economist is, at the very worst, not law at all and, at the very best, only law and economics.[7]

Conventionalism's third tenet is that the law is ahistorical.[8] Conventionalists assume that legal technique has not changed over time. The way lawyers think now is the way lawyers thought in the past and is, therefore, the way lawyers will think in the future. As society changes, new legal issues certainly arise, but the techniques and methods used to resolve those issues remain the same; the "artificial reason of the law" remains static, even if the events it must consider do not.[9] For the conventionalist, this not only reinforces the idea that law is separate from politics but also that law saves people from politics.[10]

Fourth, conventionalism maintains that determinate answers exist for all legal problems.[11] The "rule of law" requires either

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6. *See* Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981). As Fried states:

> If judges are neither economists nor philosophers, what is it that they are good at; what is it that they know? What is their special competence? What judges know, what judges are expert at, is, not surprisingly, the law. My thesis holds that the law is a distinct subject, a branch neither of economics nor of moral philosophy, and that it is in that subject that judges and lawyers are expert; it is that subject which law professors should expound and law students study. Of course, I do not suggest the absurd proposition that the law does not have economic consequences, or that legal rules are without a history. And in the end, the law, like every other branch of human endeavor, must submit to moral judgment. My thesis is merely that law is a relatively autonomous subject, and that rights will be best and most reasonably respected if reasoning about them goes forward within its special discipline.

Id. at 38; *see also id.* at 57 ("So what is it that lawyers and judges know that philosophers and economists do not? The answer is simple: the law. They are the masters of 'the artificial Reason of the law.' There really is a distinct and special subject matter for our profession.").

7. Or, as it has been expressed to me by a few ardent conventionalists, merely "law and bananas."

8. *See* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J 1017 (1981) (discussing failure of conventional scholarship to confront problem of historical contingency of law).

9. Two of the best recent statements of this perspective are Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980), and Fried, *supra* note 6. As Epstein notes, "Social circumstances continually change, but it is wrong to suppose that the substantive principles of the legal system should change in response to new social conditions." Epstein, *supra* at 254.

10. *See* J. SHKLAR, *supra* note 5, at 111-23.

11. *See, e.g.*, Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 12-14 (1984) (discussing role of determinacy in conventional legal thought).

that people be able to predict what courts will do (and thus be able to plan their actions) or, in the case of actions that cannot be handled by consent, that people be judged by neutral standards that eliminate any possibility of personal prejudice or bias.[12] In either case, a single right answer is assumed to exist. The existence of more than one right answer would make planning difficult and would thus open the way for the manipulation of judicial standards—the contamination of law by politics.

The fifth tenet is that the proper subject of legal study is the legal rules generated by courts. The essence of the lawyer's role is derived from the results of adjudication. This affects not only what is studied but also how it is studied. The study of adjudication defines the boundaries of the autonomous subject of law and entrusts it to a single group—lawyers.

Conventionalism's sixth tenet is that proper legal technique centers on the study of common law categories and the techniques of conventional legal training. One technique, textual exegesis, is used to determine "meanings," whether of a rule, of words in other cases, or of accepted categories or concepts. Another technique is case-by-case analysis. The anatomy of a single case is analyzed in particular detail, one case is compared to another, and groups of cases are examined to determine rules. Case-by-case and interstitial developments are emphasized. A final technique is categorization. The answers to legal questions are determined by placing facts in their proper legal category. Many difficult questions turn on the marginal application of existing categories or the recognition of new ones.

B. *The Old Scholarship and its Relationship to Conventionalism*

Before the distinctive character of the new scholarship can be understood, the unifying features of the old scholarship must be discussed. Given my labeling conventionalism as the dominant conception of American law and the force behind the old scholarship, I will make two related, yet nonetheless distinct claims. First, I will argue that the sources of conventionalism are far more pervasive than is usually acknowledged. They range from a variety of assumptions held by laypersons about law to some of the most sophisticated jurisprudence of the last fifty years. This shall be

12. *See* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 363-66 (1973).

termed the *vertical* range of conventionalism. Second, I will argue that conventionalism has been at the heart of every significant school of legal thought during the last one hundred years. Although many supposed varieties of the old scholarship, such as Langdell's orthodoxy, sociological jurisprudence, realism, and the legal process school, were debated, significant links do exist between Langdellian orthodoxy and the other movements. Conventionalism in one or another of its forms has been part of every variety of the old legal scholarship. A common set of assumptions united American legal thought until the last decade. The debates concerning the different schools of legal thought were carried on within the framework of conventionalism. In one way or another, each of the more conservative schools of legal thought simply reaffirmed the elements of conventionalism. Moreover, even the most radical versions of the old scholarship, such as realism, attacked only some of the assumptions of conventionalism. Thus, what is here termed the *horizontal* range of conventionalism also has been of greater significance than previously supposed.

1. *The Vertical Range of Conventionalism—From the Assumptions of Laypersons to Analytical Jurisprudence.* Conventionalism in American legal thought has three principal ideological sources. The first is the dominant concept of law among the lay public.[13] Although typically presented to first-year law students as something entirely new, traditional legal education merely refines a core of preexisting notions that law students bring with them to the classroom.[14] Students enter law school assuming that law is some kind of ancient craft devoted to the study of rules and right answers. They also assume that the law is neutral, and that once they have been taught the special techniques of lawyers that they too can generate right answers. In addition, law students bring

13. I do not claim that the layperson's concept of law is identical to that of lawyers. Rather, I am arguing that a connection exists between the psychological structure of intuitionistic thought (i.e., the common sense of laypersons) and certain methods of analysis associated with common law thought. This connection will be addressed at length in a subsequent Article in this series. For some preliminary thoughts on this matter, see Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711 (1983).

14. *See generally* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (discussing "ordinary observing," a form of legal analysis linked to laypersons' perceptions); Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW & SOC'Y REV. 385, 392-93 (1974) (discussing belief in mechanical jurisprudence among laypersons).

with them a preexisting set of substantive concepts such as "possession," "causation," "promise," and "fairness," among many others,[15] which are refined in law school (particularly during the first year).

A second source of conventionalism is the dominant tradition of legal education and scholarship. Despite claims by some that "[o]nly the most backwater law schools harbor law teachers who believe that [law should be taught in isolation from the influence of the social sciences],"[16] a core of ideas nonetheless remains implicit in most of the dialogue that takes place (especially among students) in the classrooms, corridors, and law journals of American law schools[17] and is even advanced by some of the intellectual elite.[18] Traditional legal scholarship is based on conventionalism. The resulting form is well known.[19] Every textual statement must be justified by appropriate "authority" to reinforce the appeal to neutral method and objectivity. All evidence of personal style, from the manner of composition to the use of personal opinion, must be eliminated as a concession to "neutral" principles. To reflect the autonomy of the law, the authority relied upon must consist of cases and statutes (or other articles about cases and statutes) and may not include material from other disciplines. Moreover, only interstitial change is ever proposed. After a parsing of cases, the isolation of a balancing test, and a brief appeal to the "policy"

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15. *See generally* Gjerdingen, *supra* note 13 (relating structure of intuitionistic thought to legal thought); Lloyd-Bostock, *The Ordinary Man, and the Psychology of Attributing Causes and Responsibility*, 42 MOD. L. REV. 143 (1979) (relating common sense notions of responsibility to legal standards).

16. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 434 (1984).

17. *See* A. SMITH, COGNITIVE STYLES IN LAW SCHOOL 29-36 (1977) (discussing legalism as cognitive style among law students); Munger & Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL'Y 257, 260-61 (1984) (conventional legal scholarship as form of legal brief); Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1113-19 (1981) (describing "doctrinal analysis" as dominant form of legal scholarship); Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 107-08 (1984) (discussing dominance of notion of "law as rule" among law students and law professors); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1208-10 (1981) (case analysis and policy prescription as traditional legal advocacy).

18. *See, e.g.*, Fried, *supra* note 6.

19. Two of the best descriptions of this genre of legal scholarship are Atleson, *The Implicit Assumptions of Labor Law Scholarship*, 35 J. LEGAL EDUC. 395 (1985), and Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

behind the rules or doctrine discussed, all authority is reconciled (i.e., one right answer).

The third source of conventionalism is the dominant jurisprudential tradition of analytic positivism. This includes the work of H.L.A. Hart[20] and some of its modern variants, such as the work of Dworkin.[21] Analytic positivism represents some of the most sophisticated jurisprudence in Anglo-American legal thought. Nonetheless, analytic positivism is the jurisprudence of conventionalism. The subject of analytic jurisprudence is the science of law, a topic separate from politics, justice, or morality.[22] As a result, it is also ahistorical. The existence of a legal system or the enforceability of a norm is an extralegal fact to be assumed by lawyers[23] and to be investigated, if at all, by nonlawyers. Consequently, lawyers are not to be concerned with the prospects of sudden change in those extralegal facts or how those facts may have determined the response of the legal culture. Rather, the accepted corpus of rules is viewed as an autonomous product that somehow manages to respond to the public policy of the times while remaining impervious to the history of the past or the political structure of the present. Moreover, law is preeminently a study of rules.[24] The practitioners of analytic jurisprudence search for the single, right answers[25] and assume that core meanings exist, either in words or

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20. The main work remains H.L.A. HART, THE CONCEPT OF LAW (1961).

21. The most influential work is R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

22. *See* Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 44-45 (1941) (science of law separate from politics, philosophy of justice, and sociology).

23. *See* H.L.A. HART, *supra* note 20, at 107 (existence of rule of recognition is a matter of fact).

24. *See id.* at 77-96 (primary and secondary rules), 97-107 (rules of recognition).

25. One of the most prominent proponents of this position is Ronald Dworkin. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Dworkin, *No Right Answer?*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58 (P. Hacker & J. Raz eds. 1977); *see also* R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 199-204 (1975); Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

Much of the debate between Dworkin and Hart comes down to the source of authority for determinate answers. Hart does talk about the "penumbra of uncertainty" surrounding legal rules. H.L.A. HART, *supra* note 20, at 12; *see also id.* at 121-32 (open textured nature of language). Nonetheless, Hart also argues that a determinate set of standards existed on how to exercise that discretion. *See id.* at 141-42; *see also id.* at 97-107 (rules of recognition). In contrast, Dworkin argues that "principles" as well as "rules" exist, and that these principles provide the source of correct answers. *See* R. DWORKIN, *supra* note 21, at 279-90. *See generally* Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75

concepts, that can be defined by legal science.[26]

The vertical range of conventionalism, from some of the common sense concepts of laypersons to the sophisticated discourse of jurisprudes, makes this school of legal thought particularly pervasive. Moreover, this range of dialogue operates in a full circle. The laypersons look to the lawyers for specialized guidance. The lawyers, if pressed, may turn to the jurisprudes. The jurisprudes, in turn, appeal to that which comports with the deeply felt intuitions of laypersons for some of their most basic concepts.[27]

2. *The Horizontal Range of Conventionalism—From Langdellian Orthodoxy to Realism.* The old legal scholarship, even those forms of it that purported to be radical, only reshuffled the basic elements of conventionalism or, at best, attacked one element of it while accepting the rest. The labeling of Langdellian orthodoxy as conventionalism is not controversial.[28] What has not always been appreciated, however, is how little legal scholarship has changed since then. During the lifetimes of those now teaching in American law schools, three main waves of legal thought—sociological jurisprudence, realism, and legal process—followed Langdellian orthodoxy and preceded the most recent debates. Despite all that has been written about each of them, sociological jurisprudence and the legal process school offered little more than a reformulation of the basic elements of conventionalism, and realism, which is judged as the most radical, abandoned only some of the tenets of conventionalism.

a. *Sociological Jurisprudence and Legal Process.* Despite their differences with Langdellian orthodoxy, neither sociological juris-

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MICH. L. REV. 473 (1977) (general discussion of this aspect of Dworkin's and Hart's work); *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1977) (general discussion of this aspect of Dworkin's and Hart's work). Thus, in some ways, the dispute is not so much about whether some type of determinate answer exists but about what type of description best captures a notion that most conventionalists already seem to assume exists.

26. *See, e.g.*, Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-08 (1958).

27. It is also significant that both Dworkin and Sartorius find support for their arguments in the fact that lawyers and judges often speak of legal issues as if one right result existed. *See* Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 633 (1963); Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151, 157 (1971).

28. *See* Schlegel, *Langdell's Legacy Or, The Case of the Empty Envelope* (Book Review), 36 STAN. L. REV. 1517 (1984).

prudence[29] nor legal process[30] denied the central tenets of conventionalism. At the center of each movement was a firm commitment to the idea that courts remained the central focus of law study. Courts and judges performed a special role that was separate from the role of other disciplines.[31] Moreover, courts decided issues by using the special background of conventional legal method.[32] If the task was accomplished well enough in a lawyerly fashion, legal technique would provide appropriate answers.[33]

Scholars in both movements also strongly believed in the autonomy of the law. "Policy" or "political considerations" were to be distinguished from the work of the courts.[34] Each movement also held out the promise that some kind of consensus (i.e., a single right answer) existed beyond the decision-making power of the courts. The courts only read what the consensus was, either through the use of social science techniques to discover common moral values in the case of sociological jurisprudence[35] or through a direct, reasoned articulation of values in the case of legal process.[36]

Both movements also assumed that a neutral method of adjudication was always open to the courts. For sociological jurisprudence, it consisted of the use of such methodologies as statistics,[37] and for the legal process school, it meant that the Supreme Court should use the "passive virtues" at its disposal either to wait for a

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29. For general background on sociological jurisprudence, see 1 R. POUND, JURISPRUDENCE 291-358 (1959); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

30. For a general description of the legal process school, see Ackerman, *Law and the Modern Mind* (Book Review), 103 DAEDALUS 119, 128 n.26 (Winter 1974); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

31. *See* Pound, *The Theory of Judicial Decision* (pt. 3), 36 HARV. L. REV. 940, 945-59 (1923).

32. For a useful description of this concept in Pound's work, see Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 38-41 (1975); White, *supra* note 29, at 1009-12.

33. *See generally* Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (critique of Court's use of reasoned elaboration).

34. *See, e.g.*, Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (appeal to special function of adjudication and rationality not applicable to polycentric disputes); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

35. This general approach is elaborated in Pound, *supra* note 31, at 940.

36. *See* Wechsler, *supra* note 34.

37. *See, e.g.*, Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 HARV. L. REV. 489, 512-16 (1912).

consensus to appear or to help one emerge[38] (but never, of course, to use the individual values of a judge).

b. *The Special Case of Realism.* For some, the labeling of realism as a flawed variant of conventionalism borders on heresy. The conventional wisdom is that the realists were not only the most vocal critics of the prevailing orthodoxy but also the first proponents of the new legal scholarship. In the end, however, the realists were attacking the orthodox version of conventionalism rather than conventionalism itself. As a result, realism presented only a partial critique of conventionalism.[39] While the realists attacked Langdellian orthodoxy, they did not question some of the central tenets of conventionalism. The realists never abandoned the idea that the study of cases and courts was the central concern of lawyers[40] or the notion that conventional legal categories such as contracts, torts, or causation should be respected.[41] Similarly, the realists never abandoned the notion that rules existed. What distinguished the realists from the orthodox conventionalists they were attacking was the source they used for their rules. The orthodox brand of conventionalism assumed that rules could be derived by lawyers using neutral legal methods.[42] In contrast, the

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38. *See, e.g.*, Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

39. For related arguments about the nature of realism, see B. ACKERMAN, *supra* note 2, at 6-19 (describing realism as "a culturally conservative" movement); Munger & Seron, *supra* note 17, at 261-62 (characterizing realism as being unable to break out of the mold of conventional legal scholarship); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1219-59 (1985) (discussing continuity between classical legal thought and realism).

40. *See, e.g.*, J. FRANK, COURTS ON TRIAL (1949) (emphasis on trial courts rather than appellate courts); K. LLEWELLYN, THE BRAMBLE BUSH 25-69 (1930) (analysis of cases and use of precedent); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960) [hereinafter K. LLEWELLYN, COMMON LAW TRADITION] ("craft-styles" of opinions); Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938) ("case" as central focus of contract law). For a good discussion of the "case-law centeredness" of conventionalism, see Gordon, *supra* note 32, at 35-44.

41. Thus, realists typically fractured supposed self-defining concepts into a series of individual, situation-specific questions, yet they still retained the traditional legal categories and assumed that their techniques would be used to answer traditional legal questions. *See, e.g.*, Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). This basic point is also made in B. ACKERMAN, *supra* note 2, at 15-19, and G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 110-13 (1980).

42. *See, e.g.*, 1 J. BEALE, THE CONFLICT OF LAWS xiii-xiv (1935); Wambaugh, *How to Use Decisions and Statutes*, in BRIEF MAKING AND THE USE OF LAW BOOKS 66-118 (N. Abbot ed. 1906).

realists assumed that rules could be derived by social scientists using neutral scientific methods.[43] Thus, while the realists may have substituted the study of "real" rules for "paper" rules,[44] the notion of observable facts for a single legal answer,[45] and the use of social sciences for conventional legal methodology, they, like the Langdellians, never denied that a correct answer could be derived by some apolitical methodology.[46]

Perhaps most important, the realists were never able to detail the linkage between law and politics. Initially, much of their scholarship could be viewed as challenging the autonomy of the law. They constantly challenged the manipulability of orthodox legal methodology[47] and stressed the influence of other forces (such as psychology and anthropology)[48] on the behavior of those involved in the legal system. Yet, in the end, the realists merely substituted one autonomous system for another. They challenged the autonomy of the law but not the autonomy of the social sciences. They decried the manipulation of legal rules by lawyers but not the manipulation of economic rules by economists. Ultimately, this challenge to the nature of legal thought was self-defeating. Instead of questioning the autonomy of the law by linking it to politics, they denied the autonomy of the law, in essence, by saying that there was nothing special about conventional legal technique—that anything lawyers could do could be done equally well by other disciplines. Thus, the realists denied the autonomy of the law not by linking law to other disciplines so much as by saying that law was not so much different than other disciplines. Instead of trying to

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43. *See, e.g.*, Cohen, *supra* note 41, at 842-47; Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927); Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923); Peller, *supra* note 39, at 1240-52. *See generally* Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979) (general use of social science technique by realists).

44. *See, e.g.*, Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447-53 (1930).

45. *See, e.g.*, Peller, *supra* note 37, at 1240-50.

46. I do not suggest that politics in any form was absent from realist scholarship, particularly that by such persons as Arnold, Douglas, Sturges, or Hamilton. My point is simply that the realists did not deal with the connection between law and politics or law and ideology. *See* Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 355-58 (1985).

47. *See, e.g.*, Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) (canons of statutory construction).

48. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930); K. LLEWELLYN & F. HOEBEL, THE CHEYENNE WAY (1941).

explain why the Langdellians viewed the law as autonomous, they argued that the Langdellians were irrational for even thinking that autonomous law existed.[49] As a result, the realists never took seriously the notion of a legal culture or the social construction of reality within the legal culture.[50]

The realists also could not generate an adequate normative theory about the relationship between law and politics. Some of the realists argued that law was political in the sense that policy determined more decisions than did syllogisms. Similarly, other realists argued that common law property law or laissez-faire contract law was a creation of the state.[51] The realists were not able, however, either to describe the exact bridge between law and political theory or to generate a normative theory to critique the politics of the social sciences.[52] Thus, the realists ended up only substituting one autonomous system for another. They could neither explain why the law was perceived as autonomous by those within the legal culture nor generate a normative system to take the place of Langdellian orthodoxy. In the end, the inability of the realists to generate an adequate normative theory of law preordained their failure to gain widespread acceptance, particularly after the 1930's.[53]

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49. Perhaps the most prominent examples are J. FRANK, *supra* note 48; Cohen, *supra* note 41.

50. Two of the few realists who were concerned about culture were Llewellyn and Arnold. *See* T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937); T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935); Twining, *supra* note 46, at 346, 350, 365-71 (considering Llewellyn's work). Significantly, however, neither confronted the possibility of the social construction of reality within the legal culture itself, one of the significant concerns among both the legal theory and critical legal studies scholars.

51. *See* Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233-56 (1931). Thus, while even the most sophisticated realist treatments of law constantly stressed public policy, realists displayed little interest in defining what it meant. *See, e.g.*, Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943). For examples of work stressing the relationship between common law and the state, see Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (institution of private property a function of the state); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (laissez-faire system of freedom of contract dependent on power of the state).

52. *See, e.g.*, Peller, *supra* note 39, at 1219-74.

53. By this I do not mean to explain the decline of realism by its inability to distance itself from fascism, as is now usual. *See, e.g.*, Purcell, *American Legal Realism Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969). As Robert Gordon has pointed out, this is far from clear. *See* Gordon, *supra* note 32, at 38 n.85. Moreover, as John Henry Schlegel has pointed out, faculty and institutional politics

III. The Critics of Conventionalism—The Legal Theory Scholars and Critical Legal Studies

In sharp contrast to the conventionalists, the most prominent critics of convention—the scholars of the legal theory and critical legal studies ("CLS") movements—have increasingly questioned the traditional assumptions of autonomy and the separation of law from politics. The division of legal scholarship into the old scholarship associated with conventionalism and the new scholarship associated with legal theory and CLS is based on two fundamental assumptions.

First, the new legal scholarship offers more options and is more comprehensive than previously supposed. Over the last decade, the content of legal scholarship has changed drastically. To date, the economics of the conservatives and the neo-realist techniques of the CLS scholars have been given center stage. The new scholarship is not just a debate between law and economics and CLS, however. Another school of thought exists that uses some of the insights of both groups but accepts the politics of neither. Thus, the debate is not so much CLS versus law and economics as it is legal theory versus conventionalism.

Second, much of the new legal scholarship is different in kind from what preceded it. Rather than just a rehashing of old forms, the new scholarship is part of a fundamental restructuring of the dominant concept of American law. As much as the legal theory and CLS scholars differ among themselves, they differ more from conventionalism than from each other.

A. *The Legal Theory Movement*

While perhaps less visible than the critical legal studies group, the legal theory movement has emerged as a distinct strand of legal scholarship in the last decade.[54] The legal theory

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certainly had their share of influence as well. *See* Schlegel, *supra* note 43. Another, problem as yet unexplored, was the inability of realism to integrate law with the American political structure that emerged in the post-1937 era, a time when the relationship between law and politics took on a new, and particularly critical, dimension.

54. Designating a particular school of thought is necessarily a somewhat arbitrary process. Some scholars may be included who do not view themselves as part of the legal theory movement. Similarly, the work of other scholars may be as easily classed as legal theory work as it would CLS. The important point, however, is that the work of this group of scholars does, in its entirety, represent a commonality of concerns and techniques. These

movement designates the work of a group of scholars who are connected by the common task of reconstructing liberal legal thought in the wake of the decline of conventionalism. Their work can be perceived as an attempt to reconstruct the center of American legal thought. Although these scholars may not perceive themselves as a group (as do CLS scholars), their work nevertheless displays a vital set of connections. Three general features identify the work of the legal theory movement.

1. *The Transition from Common Law Thought to New Models.* Legal theory scholars assume that legal thought is presently undergoing a significant transition. Rather than focusing on variations within an accepted system of legal analysis, legal theory scholars argue that the most recent variations in legal thought represent a change in kind rather than one merely of degree. They argue that it is no longer profitable to view the change in legal analysis as merely new questions for common law thought, but rather that it should be viewed as a change from common law thought to a new variety of legal analysis.

Because of this focus on the transition in legal thought, the work of the legal theory scholars is often marked by a sense of

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scholars may not perceive themselves as a group as do CLS scholars. In fact, they may sometimes view themselves as academic adversaries. *See* White, Book Review, 34 J. LEGAL EDUC. 731 (1984) (reviewing B. ACKERMAN, *supra* note 2). Nonetheless, the work of this group of scholars displays a vital set of connections.

Perhaps, because of this, it is not surprising that CLS scholars have rarely addressed the specific arguments of the legal theory movement. Most CLS commentary tends to be directed towards either conventional legal thought or towards law and economics. *See, e.g.*, Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 207-08 (1984) (identifying appeal to conventional morality, fundamental rights, and economics as indicative of "mainstream legal thought"); Kelman, *Trashing*, 36 STAN. L. REV. 293, 305-21 (1984) (discussing law and economics, formalism, legal process, and hunches as examples of "mainstream legal thought"); Mensch, *The History of Mainstream Legal Thought*, in POLITICS OF LAW, *supra* note 3, at 34-37 (discussing only legal process school and law and economics as examples of recent legal scholarship); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (proposing interpretivism and neutral principles as the two leading dogmas of modern constitutional theory); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 574-75 (1983) (arguing that law and economics and "rights and principles" schools are the most influential legal theories).

A significant part of the future development of legal theory work will likely take place within the formal structure of the law and society movement. The focus of the law and society work over the past ten years has changed from a pure social science focus (as would be associated with the realists) to one more consistent with the demand for legal theory scholarship.

dualism. On the one hand, a major part of the work of legal theory scholars attempts to isolate the nature of common law thought. This has been done in two different ways. One approach, perhaps best exemplified by the work of Bruce Ackerman, has been to focus the general intellectual structure of common law thought. In two of his works, *Reconstructing American Law* and *Private Property and the Constitution*, Ackerman argues that the legal culture is in a state of transition and that traditional forms of legal thought are being supplanted by new forms of legal dialogue.[55] In the course of making his argument, Ackerman attempts to describe the nature of common law thought. For example, in *Private Property and the Constitution*, Ackerman associates common law thought with what he terms "ordinary observing," a method of analysis in which legal dialogue is grounded in the ordinary language of laypersons and normative legal standards are tied to dominant social expectations.[56] Similarly, in *Reconstructing American Law*, Ackerman associates common law thought with a narrow temporal framework[57] and a set of pleas and excuses grounded in idealized standards of conduct.[58]

A related approach by other legal theory scholars has been to isolate the intellectual model that governed common law thought.[59] Some of the most significant legal theory work in the area of civil procedure has focused on the intellectual framework that governed common law concepts of litigation. For example, work by Abram Chayes and Owen Fiss isolates the elements of a traditional common law model of private litigation.[60] In this

55. B. ACKERMAN, *supra* note 14, at 168-89; B. ACKERMAN, *supra* note 2, at 1-3, 105-09; *see also* Ackerman, *Four Questions for Legal Theory*, in NOMOS XXII: PROPERTY 351, 363-64 (J. Pennock & J. Chapman eds. 1980) (describing "profession torn between two legal cultures").

56. B. ACKERMAN, *supra* note 14, at 10-20, 88-97.

57. B. ACKERMAN, *supra* note 2, at 47-55.

58. *Id.* at 24-28, 47-48.

59. *See, e.g.*, J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 3 (1978) ("intellectual structure of law"); Mashaw, *"Rights" in the Federal Administrative State*, 92 YALE L.J. 1129, 1130 (1983) ("I want . . . to offer an explanation that focuses, not on general political or social movements, or on shifts in the personnel and personal philosophies of the Supreme Court, but rather on the intellectual structure of our dominant conceptions of rights.").

60. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (development and use of "structural injunctions"); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *Public Law*] (traditional model of procedure compared to "public law" model); Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litiga-*

model, bipolar disputes are the norm. The trial is a ritualistic reenactment of a disputed prior act involving the parties to the dispute. The judge maintains a passive role and generally acts only when requested to do so by one of the parties. Right and remedy are interdependent, and relief is granted on an all-or-nothing basis.

Similar work has been done by other legal theory scholars in administrative law. Richard Stewart and Cass Sunstein have identified a common law model of administrative law. In this model, government actions are judged by the same common law causes of action that would apply to actions by private persons, and common law models of procedure (much like those of Chayes and Fiss) govern the roles of the administrative agencies and the reviewing courts.[61] In a similar vein, Jerry Mashaw has proposed a common law model of administrative adjudication,[62] and Joseph Vining and Meir Dan-Cohen have identified the structure of common law models for the standing of organizations.[63] Other common law models have been proposed for criminal law[64] and for common law thought in general.[65]

Significantly, the treatment of common law thought by legal

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tion and the Burger Court, 96 HARV. L. REV. 4 (1982) [hereinafter Chayes, *Burger Court*] (traditional model of procedure compared to "public law" model); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (structure of lawsuits involved in "structural reform" of institutions).

61. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (traditional model of administrative law compared with model of modern administrative law as "interest representation"); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (court intervention in administrative process in common law framework contrasted with role in public law framework); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (1984) (shift in administrative law to public law divorced from traditional principles of private law).

62. Mashaw, *supra* note 59, at 1129 (contrasting "individualistic" and "statist" concepts of administrative law).

63. M. DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 13-21, 41-44 (1986); J. VINING, *supra* note 59.

64. *See* Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975) (analyzing relationship between "hierarchical" and "coordinate" models of authority and corresponding structure of criminal procedure in Anglo-American and Continental systems).

65. *See* B. ACKERMAN, *supra* note 14 (discussing relationship of ordinary observing to common law thought); B. ACKERMAN, *supra* note 2 (discussing changing nature of legal conversation in reactive versus activist state); Ackerman, *supra* note 55, at 366-72 (discussing nature of legal argument in invisibvle hand versus activist state). Other work has considered legal thought from the perspective of intellectual history. *See* G. WHITE, *supra* note 41; White, *supra* note 29; White, *supra* note 30, at 279-80.

theory scholars typically has the markings of a postmortem.[66] Traditional common law categories and techniques are variously labeled as "barriers to the development of an adequate theoretical perspective,"[67] as providing "an increasingly unhelpful, indeed misleading framework,"[68] or are simply being "call[ed] into question."[69] Thus, common law thought is perceived as something that lawyers "used to do." Likewise, this implies that what the legal culture is doing now is, in some significant way, different from what it used to do.

After isolating the nature of common law thought and the common law model, the legal theory scholars typically contrast them with a new form of legal thought and a new political model.[70] Common law thought is contrasted with modes of legal thought such as "scientific policymaking"[71] or "constructivism."[72]

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66. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 65 ("We find ourselves, then, in the midst of a very rare event in the life of the law: the rise to professional maturity of a new construction of the facts."); J. VINING, *supra* note 59, at 2 ("What we are witnessing is nothing less than the breakdown of individualism as a basis for legal reasoning."); Ackerman, *supra* note 55, at 363-64 ("The picture, then, I wish to draw is of a profession torn between two legal cultures.").

67. G. WHITE, *supra* note 41, at 213 (nature of recent torts scholarship "appears to rest on an inarticulate conviction that the traditional professional methodologies of legal scholarship have become barriers to the development of an adequate theoretical perspective in legal subjects.").

68. Chayes, *Public Law*, *supra* note 60, at 1282.

> We are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions upon which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model.

Id.

69. Stewart, *supra* note 61, at 1669 ("American administrative law is undergoing a fundamental transformation that calls into question its appropriate role in our legal system.").

70. *See, e.g.*, B. ACKERMAN, *supra* note 14, at 89, 168-69 (presence of both ordinary observing and scientific policy making indicates legal culture in transition); B. ACKERMAN, *supra* note 2, at 23-71 (comparison between common law analysis and constructivism); J. VINING, *supra* note 59, at 1 ("sense of intellectual crisis" in standing cases); Mashaw, *supra* note 59, at 1166-71 (current doctrine as example of "hybrid" between individualist and statist concepts); Stewart, *supra* note 61 ("traditional" model of administrative law contrasted with "interest representation" model); Stewart & Sunstein, *supra* note 61 (common law functions of court intervention in administrative process contrasted with recent "public law" functions); Sunstein, *supra* note 61 (shift in administrative law to public law divorced from traditional principles of private law).

71. B. ACKERMAN, *supra* note 14, at 15, 168-89.

72. B. ACKERMAN, *supra* note 2, at 46-71.

Similarly, the new political model is treated: (1) as already in place or at least emerging; (2) as coming into existence after the common law model, usually within the last fifteen or twenty years; and (3) as being incompatible with the common law model. For example, after identifying a common law model of civil procedure, Chayes and Fiss contrast it with a "public interest" model of litigation in which multipolar disputes and prospective concerns about the implementation of public policy predominate, right and remedy diverge, and remedies (instead of being all-or-nothing) are negotiated between the parties by an active judge.[73] Similarly, other legal theory scholars contrast common law political models with "interest representation,"[74] "public,"[75] "statist,"[76] or "activist state"[77] models. Despite the various terminologies, the work of the legal theory scholars displays a common concern that a change has taken place in the nature of legal thought and that new models are needed. In addition, the new political models isolated by legal theory scholars, although usually dealing with different subject areas, nonetheless seem applicable to a growing number of areas of the law.

2. *A Search for New Forms of Legitimacy.* Legal theory scholars also seem particularly uneasy about the legitimacy of the new legal and political forms they are describing. While they sense that the new models are desirable (if not inevitable), they also seem to sense that these models carry with them troublesome and fundamental questions about the legitimacy of legal thought. The new models of analysis seem appropriate; yet, because they are new, it is difficult to provide a normative justification for the new models within the framework of conventionalism. Thus, much of the work of the legal theory movement seems to suffer from an uneasy gap between the initial appeal of the new forms of legal thought and a total understanding of why they seem appropriate. As a result, when legal theory scholars shift from supplying merely a descriptive statement of these new models of legal

73. *See* Chayes, *Public Law*, *supra* note 60, at 1288-1304 ("public law" litigation model); Fiss, *supra* note 60, at 17-28 ("structural reform" model of litigation).

74. Stewart, *supra* note 61, at 1760-1802.

75. Sunstein, *supra* note 61, at 177-78, 209-13 (private law model of administrative law contrasted with emerging public law model of administrative law).

76. Mashaw, *supra* note 59, at 1152-58.

77. B. ACKERMAN, *supra* note 2, at 23-45; *see also* M. DAN-COHEN, *supra* note 63, at 185-98 (organizational state model).

thought to generating a normative framework that supports their use, their response is less uniform and less satisfactory. They seem caught between the demands of their present needs and the limits of their completed work. The models of legal thought seem to display a certain "logic of appropriateness,"[78] yet until a new theory of legitimation is generated, the new forms of legal thought must remain somewhat problematic. Thus, legal theory scholars tend to view the new models as either a new type of formalism[79] or as a new but not quite solid form of legal thought.[80]

From this perspective, the task of the legal theory scholars is a difficult one. On the one hand, the formalist cues associated with conventionalism offer some form of legitimacy within the general legal culture, but at the expense of being associated with the "wrong" political values.[81] On the other hand, while the new forms of legal thought are perceived to be more responsive to current political structures, they are not tied to the traditional sources of legitimacy within the legal culture.[82] Thus, at best,

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78. Few scholars, for example, ever challenge the descriptive accuracy of these models, even though they may debate the normative aspects that they raise.

79. *See, e.g.*, G. GILMORE, THE AGES OF AMERICAN LAW 107-08, 146-47 n.11 (1977) ("New Conceptualism"); R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 272 (1983) ("neoconceptualism"); G. WHITE, *supra* note 41, at 211-43 ("neo-conceptualism").

80. *See, e.g.*, B. ACKERMAN, *supra* note 14, at 89-90, 168-69 (scientific policy making not yet accepted as dominant form of analysis in legal culture); Mashaw, *supra* note 59, at 1150-73 ("hybrid" forms of analysis); Stewart, *supra* note 61, at 1802-13 (inadequacies of "interest representation" model as general theory of solution to treatment of agency discretion); Stewart & Sunstein, *supra* note 61, at 1322 (inadequacy of proposed "forms of action" for deficient administrative performance); Sunstein, *supra* note 61 (emerging notion of public law not tied to private law).

81. *See* Chayes, *Public Law*, *supra* note 60, at 1314 ("[Traditional] formalistic analysis [of adjudication] does not begin to capture the complexities of the way the legislature operates and of its relations with the courts."); Fiss, *supra* note 60.

> In truth, the individual participation axiom is rooted in a world that no longer exists. It is rooted in a horizontal world, in which people related to one another on individual terms and on terms of approximate equality. . . . Our world, however, is a vertical one; the market has been replaced by the hierarchy, the individual entrepreneur by the bureau. . . . A conception of adjudication that strictly honors the right of each affected individual to participate in the process seems to proclaim the importance of the individual, but actually leaves the individual without the institutional support necessary to realize his true self.

Id. at 44; Stewart & Sunstein, *supra* note 61, at 1202-46 (traditional model of administrative law ineffective in era of public law).

82. For examples of this struggle, see Chayes, *Public Law*, *supra* note 60, at 1313-16

claims of legitimacy tend to be linked to some general (almost free-floating) pleas for "fairness," "equal respect," or "equality";[83] at worst, claims of legitimacy are drawn into disappointed musings about the consistency of liberalism,[84] a groping for new sources of legitimacy, such as economics[85] or interest representation,[86] or drowned out entirely by cries of "nihilism."[87] The legal theory scholars thus seem unable to connect "correct" political values to accepted forms of legitimacy within the legal culture.

In addition, legal theory scholars typically seem ill at ease with the political aspects of their work. Some treat legal thought as an exercise in intellectual history and, thus, avoid any direct consideration of the relationship between legal thought and political values.[88] Others hint at the existence of a relationship between the growing inadequacy of common law thought and some underlying shift in political theory as explaining some of the changes in specific subject areas, such as administrative law,[89] standing,[90] or

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(problem of reconciling new models of adjudication with majoritarianism); Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1313-15 (1982) (activist role of judges in area of racial discrimination justified on grounds of administrative and political advantages of courts); Fiss, *supra* note 60, at 5-17, 28-58 (structural litigation as response to "legislative failure" and to values and text of Constitution); Stewart & Sunstein, *supra* note 61, at 1316-22 (role of courts as response to "government failure"). Both Cover and Fiss attempt to build arguments based on the *Carolene Products* "process" perspective. *See* Cover, *supra*, at 1289-1309; Fiss, *supra* note 60, at 6-17.

83. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, §§ 15-2 to -3, § 16-1, §§ 17-1 to -3 (1978).

84. *See, e.g.*, Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1105-09 (1981).

85. *See Economics in Legal Education*, *supra* note 1.

86. *See* Stewart, *supra* note 61, at 1760-1802; *see also* Stewart & Sunstein, *supra* note 61, at 1239-41, 1267-89 (developing new "forms of action" that could be used by courts to protect against poor performance by administrative agencies).

87. *See* G. GILMORE, *supra* note 79, at 99-111; Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974); Leff, *Law and*, 87 YALE L.J. 989, 1008-11 (1978).

88. *See* W. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT (1982) (posits relationship between case method and substance of administrative law); G. WHITE, *supra* note 41 (influence of paradigms among elite groups within the legal profession); Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979) (relationship between case method and presence of "scientific method" as a dominant force in higher education during post-Civil War period); Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) (formalism as response to antislavery movement).

89. *See* Stewart, *supra* note 61.

90. *See* J. VINING, *supra* note 59.

civil procedure;[91] however, these arguments are not extended beyond the specific areas treated. Even though the existing legal theory work seems to suggest that changes in each of these areas are part of a fundamental change taking place throughout American law, most legal theory scholars do not analyze the effect of these political changes on other areas of the law. Some of the most ambitious legal theory work represents preliminary theories about the relationship between legal thought and political theory;[92] however, the specifics of that relationship are not yet worked out in detail. Thus, while legal theory scholars seem to sense that the relationship between law and politics lies at the heart of many of their difficulties, they have not, as a group, been able to fully develop that relationship.

3. *The Emergence of New Legal Techniques.* The techniques of the legal theory scholars also differ from those of conventionalism. Most significantly, legal theory scholars are concerned with the structure of legal thought. Instead of merely focusing on doctrine and case-by-case analysis in the fashion of the conventionalists, legal theory scholars assume that legal thought itself, apart from doctrine or cases, possesses a structure that connects entire systems or subsystems of doctrine and defines legal argument.[93] Rather than focusing on textual exegesis or on particular litigated cases, the work of the legal theory scholars implicitly assumes that the case-by-case, interstitial analysis associated with conventionalism is no longer necessarily entitled to prima facie legitimacy. By focusing on the intellectual structure of legal dialogue, legal the-

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91. *See* Chayes, *Public Law*, *supra* note 60, at 1304-09, 1314-16; Fiss, *supra* note 60, at 28-44.

92. *See, e.g.*, B. ACKERMAN, *supra* note 14, at 178-85 (theorizes general relationships between ordinary observing and scientific policy making and theory of state); B. ACKERMAN, *supra* note 2 (nature of legal argument in reactive versus activist state); Ackerman, *supra* note 55, at 366-71 (nature of legal argument in reactive versus activist state); Mashaw, *supra* note 59, at 1150-71 (relationship between individualistic and statist notions of state with respect to particular issues in administrative law); Stewart & Sunstein, *supra* note 61 ("preliminary effort" to address theory of role of courts vis-a-vis administrative agencies not based on public/private distinction); Sunstein, *supra* note 61 (describing tentative emergence of independent public law divorced from common law principles).

93. *See, e.g.*, B. ACKERMAN, *supra* note 2; J. VINING, *supra* note 59, at 3 ("intellectual structure of law"); Mashaw, *supra* note 59, at 1130 ("I want . . . to offer an explanation that focuses, not on general political or social movements, or on shifts in the personnel and personal philosophies of the Supreme Court, but rather on the intellectual structure of our dominant conceptions of rights.").

ory scholars are necessarily denying the primacy of textual exegesis and case law analysis (and hence conventionalism itself) as legal methodology. By arguing that an intellectual structure exists that influences legal argument, legal theory scholars also necessarily argue that legal analysis can no longer be limited to cases and that legal meaning can no longer be derived merely from the application of any autonomous system of analysis. Thus, while legal theory scholars are somewhat concerned with articulating general principles or policies in a particular substantive area, they are (unlike the conventionalists) as much concerned with the unarticulated assumptions and relationships implicit in the application or interpretation of those standards.[94]

Legal theory scholars do not assume that legal doctrine or individual results are unimportant but only that an unspoken structure helps to direct the legal dialogue.[95] These silent assumptions, often unnoticed by the lawyers speaking the dialogue itself, determine what questions are asked and what answers are deemed appropriate. Moreover, by looking at the structure of legal thought, the legal theory movement also challenges conventionalist assumptions about the autonomy of law. Once it is argued that structural change has taken place, even in a relatively narrow subject area, the conventionalist assumption of gradual and interstitial change becomes increasingly problematic. The isolation of distinct structure in legal argument raises the further possibility that legal thought itself may be subject to systemic change rather than gradual, isolated evolution on a case-by-case basis. This not only raises the specter of political or cultural influence on legal thought but also begins to draw into question the ability of case-by-case analysis to explain or predict systemic change.

Legal theory scholars have also redefined the nature of appropriate legal argument. In particular, three methods predominate. First, common law categories are either abandoned

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94. *See, e.g.*, Chayes, *Public Law*, *supra* note 60 (concepts of procedure implicit in traditional civil actions contrasted with "public law"); Fiss, *supra* note 60 (procedural assumptions involved in use of "structural" injunctions to remedy societal conditions contrasted with ordinary civil litigation); Stewart & Sunstein, *supra* note 61, at 1229-46 (need to consider general background understandings of basic functions of government to determine proper role of courts in creating private remedies in administrative law).

95. This theme is particularly evident in B. ACKERMAN, *supra* note 2, at 24-37, 46-55 (effect of political structure on nature and focus of dialogue by lawyers).

or given new interpretations.[96] Second, techniques other than textual exegesis or case-by-case analysis are used, including economics,[97] social choice theory,[98] and political philosophy.[99] Third, the focus of legal dialogue is assumed to be about more than merely adjudication and is expanded to include such areas as administrative agencies and markets, among others.[100]

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96. *See, e.g.*, Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975) (traditional tort concepts of causation reinterpreted in terms of economic analysis); Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (property rules and liability rules substituted for traditional common law concepts of property and torts).

97. This categorization does not treat law and economics as a separate mode of thought along with legal theory and CLS. This is not to deny the importance and influence of economic analysis in modern legal thought. Rather, as will be developed more extensively in a later work, the law and economics movement is part of a larger enterprise in modern legal thought that is attempting to respond to the political realities of an activist state. Although a part of this effort, law and economics fails to consider either the cultural or political aspects of legal thought. For example, to argue that the present goal of the law should be to achieve "wealth maximization," see R. POSNER, THE ECONOMICS OF JUSTICE 48-115 (1981), and that the implicit force of the common law was to achieve "efficiency," see R. Posner, Economic Analysis of Law 27-191 (2d ed. 1977), is to argue that culture, particularly legal culture, is not an influence to be considered and that the arguments or substance of the legal culture are not socially or politically contingent. *See* R. POSNER, THE ECONOMICS OF JUSTICE, *supra*, at 119-227 (using economic theory to explain the legal and other social institutions of primitive societies). Since one underlying thesis of the theory proposed here is that culture and politics have a central connection to legal thought and that the Civil War-to-1937 and the post-1937 eras are distinct periods in American politics, the law and economics movement does not play a prominent role in this Article. Nonetheless, law and economics can be treated as a development tied to the needs of modern legal scholarship. Even though law and economics is deficient as a theory of legal consciousness, its existence and growth plays a role in the development of a theory of modern legal thought.

98. *See, e.g.*, Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke, *the FCC, and the Court*, 88 YALE L.J. 717 (1979); *see also* M. DAN-COHEN, *supra* note 63 (organizational theory).

99. *See, e.g.*, Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (arguing wealth maximization justified by political argument based on consent).

100. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 56-60 (Coasean "statement of the facts"); G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS *passim* (1970) (government regulation, legislation, and the market as well as courts); Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's* Costs (Book Review), 80 YALE L.J. 647, 656-57 n.19 (case-by-case decision making no longer necessarily best).

B. *Critical Legal Studies*

The most prominent critics of conventionalism have been the critical legal studies scholars.[101] Drawing on leftist political themes, members of the CLS group argue that far from being separate from politics, law is, in fact, little more than politics in disguise.[102] Instead of ignoring the possibility of linking law to politics, CLS scholars argue that conventional legal methodology is controlled almost entirely by political values, particularly those of capitalism.[103]

Throughout the work of CLS scholars, several themes are repeated. First, CLS scholars hold that the law is inherently political and that, as a result, it institutionalizes politics.[104] Rather than be-

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101. For a bibliography of CLS writings, see Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

102. *See, e.g.*, Kairys, *Introduction*, in POLITICS OF LAW, *supra* note 3, at 3-6; Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

103. This statement must to some extent be only a caricature of the CLS movement. Members disagree among themselves about the political significance of their work. Some members stress the relationship between conventional legal doctrine and capitalism. *See, e.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); Able, *Torts*, in POLITICS OF LAW, *supra* note 3, at 185, 186 ("contemporary tort law is intimately related to the rise of capitalism, as both cause and effect"); Gabel & Feinman, *Contract Law and Ideology*, in POLITICS OF LAW, *supra* note 3, at 172, 173 (considering "the relationship between the history of contract law and the development of capitalism over the last two hundred years"); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (discussing the relationship of labor law and capitalism). In contrast, other members of the CLS movement take an even more contingent perspective on history and argue whether capitalism itself is any type of unified concept. *See, e.g.*, Unger, *supra* note 54, at 563 n.1. Rather than focusing on capitalism per se, they may instead rely on the existence of broad and ultimately conflicting aspects of existence. *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter Kennedy, *Form and Substance*]; Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) [hereinafter Kennedy, *Blackstone's Commentaries*]; Unger, *supra* note 54. At this point, some make a plea for a reconstruction of social theory, *see, e.g.*, Unger, *supra* note 54, at 583-602, while others take a nihilistic position, *see, e.g.*, Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981); Tushnet, *Introduction*, 52 GEO. WASH. L. REV. 239, 241-42 (1984). For a useful perspective on this issue, see Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 606-10 (1984).

104. *See* Kennedy, *Form and Substance, supra* note 103; Unger, *supra* note 54; *see also* Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984) ("Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society."); Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 248 (1984) ("[T]he separation between law and policy that occupies so much of legal education is also a myth: it is all politics.").

ing autonomous, the law mirrors the existing power structures in society. By its very nature, then, the law cannot be neutral; it can only be judged by the political values it advances or the power it sanctions. The role of the law is to institutionalize the status quo and to legitimate existing uses of power. As a result, the law draws its strength from the existing power structure. The underlying structure itself, however, is viewed by CLS scholars as one which unduly constricts the range of human potential and interferes with the attainment of a just social and political structure. From this perspective, the role of the law is essentially negative. Under the guise of neutrality, legal thought limits questions to those which perpetuate the status quo and thus serves as a barrier to constructive social change. The law thus typically serves only to maintain existing exploitive hierarchies in tort and contract doctrine,[105] as well as those in the workplace,[106] the marketplace,[107] the family,[108] and the social structure.[109]

A second theme apparent from most CLS work is that conventional legal techniques have no independent validity or consistency. CLS scholars argue that what is taught as "law" consists of no more than forms of argumentation which are devoid of any independent substance.[110] Legal argument, once divorced from

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105. *See* Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Mensch, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753 (1981).

106. *See* Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982); Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981); Klare, *Critical Theory and Labor Relations Law*, in POLITICS OF LAW, *supra* note 3, at 65; Klare, *supra* note 103.

107. *See* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) [hereinafter Kelman, *Ideology in the Coase Theorem*]; Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215 (1980) [hereinafter Kelman, *A Brief Rejoinder*].

108. *See* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *The Family and the Market*]; Olsen, *The Politics of Family Law*, 2 LAW & INEQUALITY 1 (1984) [hereinafter Olsen, *Politics of Family Law*].

109. *See* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Polan, *Toward a Theory of Law and Patriarchy*, in POLITICS OF LAW, *supra* note 3, at 294.

110. As noted in Kennedy, *Legal Education as Training for Hierarchy*, in POLITICS OF LAW, *supra* note 3:

> Teachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical and political dis-

the values it promotes, is inherently contradictory. Instead of providing an objective or neutral method of decision making, law serves only as a means of masking the relevant political issues. CLS scholars thus argue that the conventionalist assumptions of autonomy and objectivity are necessarily futile, if not dangerous. Viewing their own work in part as a continuation of the realist tradition,[111] CLS scholars assail the assumption of neutral legal method, whether it is in the context of conventional legal thought[112] or newer forms of legal analysis such as law and economics.[113] A significant part of the CLS work to date thus has

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> course in general (*i.e.*, from policy analysis). It is true that there are distinctive lawyers' argumentative techniques for spotting gaps, conflicts, and ambiguities in the rules, for arguing broad and narrow holdings of cases, and for generating pro and con policy arguments. But these are *only* argumentative techniques. There is never a "correct legal solution" that is other than the correct ethical and political solution to that legal problem.

Id. at 47 (emphasis in original); *see also* Kairys, *Introduction*, in POLITICS OF LAW, *supra* note 3, at 1, 3 ("There is no legal reasoning in the sense of a legal methodology or process for reaching particular, correct results."); Unger, *supra* note 54, at 669 ("mixture of low-level skills and high-grade sophistic techniques of argumentative manipulation").

111. *See, e.g.*, Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 627-30 (1984); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1669 (1982) ("[CLS] scholars locate the genesis of today's crisis in the realist legacy and see their task as the continuation of an abandoned Realist project."). *But see* White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 649-57 (1984) (drawing distinctions between realists and CLS scholars).

112. The primary CLS target is "formalism," which is associated with conventional legal thought. *See, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS 92-94 (1975); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Tushnet, *supra* note 54; Unger, *supra* note 54, at 564-65.

113. The "debunking of law and economics" has been "a major effort of critical scholarship." Note, *supra* note 111, at 1680 n.72. CLS scholars typically attack law and economics for one of five different reasons. First, it is criticized because it is sometimes advanced as a neutral "science" in the tradition of Langdellian orthodoxy. *See, e.g.*, Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980). Second, it is criticized because its concepts of "efficiency" are not determinative and do not avoid questions about the legitimacy of the underlying political structure. *See, e.g.*, Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980). Third, CLS scholars attack law and economics as merely a front for conservative political philosophy. *See, e.g.*, Kelman, *Ideology in the Coase Theorem*, *supra* note 107, at 673-78; Kelman, *A Brief Rejoinder*, *supra* note 107, at 122. Fourth, CLS scholars maintain that neoclassical economics is merely one of the basic variants of liberalism and thus is subject to the same problems of liberalism itself. *See, e.g.*, Heller, *The Importance of Normative Decisionmaking: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385; Kennedy, *supra* note 112, at 352. For a partial rejoinder, see Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349

been the "trashing" of conventional legal techniques and common law doctrines.[114] After they are done "deconstructing reality," "exposing hegemony," and "delegitimating hierarchies," however, even the most committed members of the CLS movement admit that an alternative set of political and legal structures is presently little more than a hope.[115]

The third and most important theme recurrent in CLS scholarship associates the American political structure with a particular vision of liberalism. The dominant conception of liberalism used by CLS scholars is largely dependent on the formulation put forth by Roberto Unger and Duncan Kennedy.[116] Under their formulation, the basic dilemma of liberalism—preserving individual freedom while recognizing the inevitability of mutual dependence—can only produce unsolvable contradictions under the prevailing psychological and epistemological structure of liberal thought.[117] On the one hand, individual values are subjective and arbitrary.[118] On the other hand, the existence of mutual dependence requires the formulation and application of neutral rules for society.[119] The central dilemma of liberalism from this perspective is that the promulgation and application of rules assumes the existence of objective substantive criteria, but that the actual

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(1984). Fifth, CLS scholars assert that the psychological assumptions of neoclassical economics are incorrect. *See, e.g.*, Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Kelman, *Ideology in the Coase Theorem*, *supra* note 107.

114. *See, e.g.*, Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981); Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). As Freeman notes, "[T]rashing is fun." Freeman, *supra*, at 1230.

115. *See* Tushnet, *supra* note 103, at 241 ("Critical legal studies does not have a positive program.").

116. The most extensive articulation of this portion of Unger's theory is R. UNGER, *supra* note 112; *see also* Unger, *supra* note 54. *See generally* Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477 (1984) (describing Unger's role in developing a framework for critical jurisprudence). Kennedy's basic positions are set forth in Kennedy, *Blackstone's Commentaries*, *supra* note 103; Kennedy, *Form and Substance*, *supra* note 103; Kennedy, *supra* note 112. This basic formulation has had an extensive influence in the CLS movement. *See, e.g.*, Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1059 n.1 (1980); Klare, *supra* note 103, at 276-77; Klare, *Contracts Jurisprudence and the First-Year Casebook* (Book Review), 54 N.Y.U. L. REV. 876, 889 n.69 (1979); Olsen, *The Family and the Market*, *supra* note 108; Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 493 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1060-61 (1980).

117. The dominant formulation is R. UNGER, *supra* note 112, at 29-144.

118. *Id.* at 31-62.

119. *Id.* at 63-103.

promulgation of substantive rules necessarily favors one view of the good over another and thus violates the assumption of individual freedom.[120] Therefore, under this view, liberalism is inherently inconsistent.[121] From the CLS perspective, conventional legal thought attempts to mediate or hide these basic contradictions;[122] however, because it cannot be divorced from liberalism itself, work within the existing doctrinal framework of conventionalism can only continue a hopeless quest for answers to unanswerable questions.[123] As a result, conventional legal thought is, at best, unusable and, at worst, politically repressive. Moreover, as the inconsistency of liberalism becomes increasingly obvious, conventional legal thought will in turn become increasingly unworkable.[124] Thus, CLS critiques of conventionalism (and law and

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120. *Id.* at 83-88.

121. *Id.* at 104-44. A related formulation is Kennedy's often-cited "fundamental contradiction":

> The fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom—is not only intense. It is also pervasive. First, it is an aspect of our experience of every form of social life. It arises in the relations of lovers, spouses, parents and children, neighbors, employers and employees, trading partners, colleagues, and so forth. Second, within law, as law is commonly defined, it is not only an aspect, but the very *essence* of every problem. There simply are no legal issues that do not involve directly the problem of the legitimate content of collective coercion, since there is by definition no legal problem until someone has at least imagined that he might invoke the force of the state. And it is not just a matter of definition. The more sophisticated a person's legal thinking, regardless of her political stance, the more likely she is to believe that all issues within a doctrinal field reduce to a single dilemma of the degree of collective as opposed to individual self-determination that is appropriate. And analyses of particular fields tend themselves to collapse into a single analysis as soon as the thinker attempts to understand together, say, free speech and economic due process, or contracts and torts.

Kennedy, *Blackstone's Commentaries*, *supra* note 103, at 213 (emphasis in original).

122. *See, e.g.*, Kennedy, *Blackstone's Commentaries*, *supra* note 103, at 214-16; Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980-83.

123. *See, e.g.*, Brest, *supra* note 84; Kelman, *supra* note 102; Kennedy, *Blackstone's Commentaries*, *supra* note 103, at 221; Kennedy, *Form and Substance*, *supra* note 103, at 1774-76; Tushnet, *supra* note 116, at 1057-62; Unger, *supra* note 54, at 567-76.

124. *See, e.g.*, Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RES. L. & SOC. 3, 5 (1980) (S. Spitzer ed. 1980) ("As I see it, we live *not* in a time of return to the sound practice of 1830, but in a post-Classical age of disintegration.") (emphasis in original); Unger, *supra* note 54, at 567 ("Our key idea [in attacking objectivism] is to reinterpret the situation of contemporary law and legal doctrine as the ever more advanced dissolution of the project of the classical, nineteenth century jurists conceived in a certain way.").

economics) are tied to and used as critiques of liberalism.

C. *The Commonalities and Questions of the New Scholarship*

The new scholarship represented by the legal theory and CLS schools represents an effort to displace conventionalism as the dominant concept of American law. Behind this effort is a change in the basic nature of American politics and, ultimately, liberalism. While both legal theory and CLS have made substantial progress in articulating an alternative vision of the nature of law, each also has a series of problems that it must confront over the next several decades. At present, each is only a partial critique of conventionalism. Nonetheless, by looking at the difficult questions that unite the legal theory and CLS scholars, some insight can be gained into the direction that the new scholarship must take if it is to be successful. To develop this thesis and to set up the discussion of a theory of legal consciousness and a modern theory of law that follows, the remainder of this Section focuses on the commonalities of legal theory and CLS scholarship and on the significant questions that each leaves unanswered.

1. *Commonalities of the Critics—Structure, Politics, and Transition.* Despite the vast range of scholarship produced by the legal theory and CLS groups and the important political differences that divide them, they nonetheless stand on common ground with respect to four important issues. Together, these points of commonality help to define much of the critical contours of the new legal scholarship.

First, they agree that legal thought does have a structure and that sets of underlying, and often silent, assumptions help to give wide-ranging substance to the scope and manner of legal thought.[125] Description of this structure helps to define the substance of legal thought. Moreover, determining the genesis and transformation of these categories and the interworkings of these structures plays a critical role in understanding the dynamics of legal thought and the dimension of the legal culture.

Second, they agree that a connection exists between forms of

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125. *Compare* J. VINING, *supra* note 59, at 3 *and* Ackerman, *The Structure of Subchapter C: An Anthropological Comment*, 87 YALE L.J. 436 (1977) *and* Mashaw, *supra* note 59 *with* Gabel, *supra* note 105 *and* Kennedy, *Blackstone's Commentaries*, *supra* note 103 *and* Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984) *and* Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383 (1979).

legal thought and political structures, although they differ greatly on the reasons behind the connection and the implications to be drawn from it. For their part, CLS scholars view the current debate about the role of legal scholarship as evidence of the inevitable inconsistency of liberalism.[126] Moreover, because they view common law thought as the necessary product of a capitalist economic structure, their research efforts focus on constructing modes of legal scholarship free of the political taint of capitalism, thereby illuminating the possibility of constructing social and political structures outside the framework of the liberal tradition.[127] Conversely, legal theory scholars perceive common law thought as far less threatening. Rather than viewing common law thought as a carrier of repressive political dogma, they tend to view it as a nonthreatening cultural artifact within an accepted liberal tradition.[128] At the same time, however, the legal theory scholars, while unwilling to accede to the CLS claim that liberalism itself is inconsistent, nonetheless recognize that traditional liberalism is in a state of flux and that traditional formulas have to be refined or reformulated to be useful in modern legal scholarship.[129] Their efforts to refine or to restructure liberalism are sometimes marked

126. *See, e.g.*, Freeman, *supra* note 114, at 1233 ("Within the world of liberal legal scholarship, every position is refutable, and the product taken as a whole is hopelessly contradictory.").

127. As stated by Alan Freeman, "One must step outside the liberal paradigm, into a realm where truth may be experiential, where knowledge resides in worldviews that are themselves situated in history, where power and ideas do not exist separately." Freeman, *supra* note 114, at 1237. For some such attempts by CLS members and the alternatives they offer, see Abel, *supra* note 106, at 747-54 (decentralized socialism); Brest, *supra* note 84, at 1109 ("citizen participation in the community's public discourse and responsibility to shape its values and structure"); Frug, *supra* note 116, at 1141-54 (decentralized participatory democracy); Gabel, Book Review, 91 HARV. L. REV. 302, 315 (1977) ("an open and decentralized socialism that has yet to appear in developed form anywhere in the world"); Kairys, *Introduction*, in POLITICS OF LAW, *supra* note 3, at 1, 3 ("democracy, by which we mean popular participation in the decisions that shape our society and affect our lives"); Unger, *supra* note 54, at 583-602 (loosening of fixed order of social divisions and hierarchies).

128. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 24-28, 47-48; M. DAN-COHEN, *supra* note 63, at 8; Chayes, *Burger Court*, *supra* note 60; Chayes, *Public Law*, *supra* note 60; Mashaw, *supra* note 59, at 1131-32; Stewart, *supra* note 61; Stewart & Sunstein, *supra* note 61, at 1316-22; Sunstein, *supra* note 61, at 210-12.

129. *See, e.g.*, B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983).

by frustration.[130] While CLS scholars would consider the demise of liberalism inevitable and incurable, legal theory scholars, though at times disheartened, are not disillusioned about the liberal cause.[131] Thus, while both groups may disagree about the present legitimacy of liberalism, they do agree that legal thought is related to political structures and that understanding the relationship between those political structures and legal thought is critical to understanding the nature of the present legal culture.

Third, both groups agree that the legal culture is in a time of transition[132] and that common law thought is increasingly less relevant. The increased interest in describing the transition is a theme which, perhaps more than any other, unites CLS and legal theory scholars in a common enterprise. What distinguishes the groups is the level of critique used. The legal theory scholars challenge the conventional wisdom within the liberal framework, while the CLS scholars abandon both the conventional wisdom and liberalism. Nonetheless, both groups agree that explaining the dynamics of the current change is a motivating force behind much of the significant scholarship in the present legal culture.

2. *The Hard Questions for the Critics—Four Questions for Legal Consciousness.* Although both CLS and legal theory scholars agree that legal thought possesses a particular structure and that the nature of that structure is related to political values, they have

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130. *See, e.g.*, Michelman, *Politics as Medicine: On Misdiagnosing Legal Scholarship*, 90 YALE L.J. 1224 (1981). Others, although still aware of the difficult nature of the enterprise, seem to display greater optimism. *See, e.g.*, Stewart & Sunstein, *supra* note 61, at 1322; Sunstein, *supra* note 61, at 213 & n.135; Sunstein, *Politics and Adjudication* (Book Review), 94 ETHICS 126, 135 (1983).

131. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 93-104; J. MASHAW, DUE PROCESS AND ITS DISCONTENTS: MAINTAINING DIGNITARY VALUES IN AN ADMINISTRATIVE STATE 172-253 (1985); Mashaw, *supra* note 129; Stewart, *supra* note 129, at 1537-39.

132. *Compare* B. ACKERMAN, *supra* note 2, at 5 *with* Hutchinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 YALE L.J. 209, 211 (1984) *and* Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981) ("I suspect that symposia like this one [on the nature of legal scholarship] are convened when it seems that something has gone wrong."). *See generally Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981) (symposium on current developments in legal academia); *The Legacy of the New Deal: Problems and Possibilities in the Administrative State* (pts. 1 & 2), 92 YALE L.J. 1083, 1357 (1983) (symposium addressing continuing effect of administrative state on legal discourse). Some CLS members, however, seem to go even further and claim that they are responsible for the transition. *See* Unger, *supra* note 54, at 563 ("The critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place."); Note, *supra* note 111, at 1669 (growing self-consciousness in the legal culture largely attributable to the critical legal scholars).

not fully developed the specific nature of that relationship. Both agree that conventional legal thought is a distinct form of analysis which played a critical role in the development of American legal thought and which continues to play a role, albeit less certain, in the present legal culture. Both also agree that conventional legal thought is linked in some significant way to normative political values and that understanding the structure of modern liberalism and the role of legal thought in that enterprise is a central feature of modern legal scholarship. Neither group, however, has yet been able to refine its theories to account for some of the central aspects of these relationships. What has eluded each group has been a further refinement of its work to take into account the special dynamics of the generation, interworkings, and maintenance of such relationships—in short, a theory of legal consciousness.[133]

In particular, four difficult questions remain for both groups that must be answered before a theory of legal consciousness can be developed. The first involves the specific structure of common law thought. While a starting point for many CLS and legal theory scholars is that common law thought exists as a recognizable form of legal consciousness, they nonetheless have a difficult time defining common law thought other than by noting that it involves techniques such as categorization,[134] belief in mechanical application of rules,[135] and certain styles of argumentation.[136]

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133. *Compare* Ackerman, *supra* note 55 *and* Chayes, *Burger Court, supra* note 60, at 8 *with* Gabel, *Contracts Jurisprudence and the First-Year Casebook* (Book Review), 54 N.Y.U. L. REV. 876 n.2 (1979) *and* Gordon, *New Developments in Legal Theory*, in POLITICS OF LAW, *supra* note 3, at 281 *and* Kennedy, *supra* note 124, at 6 ("Legal consciousness holds the key to a large number of the most puzzling aspects of the intellectual history of law.") *and* Klare, *supra* note 103, at 325-36 *and* Trubek, *supra* note 103, at 591-95.

134. *Compare* Ackerman, *Law and the Modern Mind* (Book Review), 103 DAEDALUS 119, 119-20 & 126 n.4 (1974) (taxonomic nature of common law thought) *and* G. WHITE, *supra* note 41, at 23-24, 32-34 (importance of classification in common law thought) *with* Kennedy, *Blackstone's Commentaries, supra* note 103, at 223-34, 273-93, 317-45 (analysis of classifications used by Blackstone) *and* Kennedy, *supra* note 124, at 8-14 (process or "ordering" in classical legal thought) *and* Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 327 (1980) ("Legal thought is, in essence, the process of categorization.").

135. *Compare* Ackerman, *Introduction: On the Role of Economic Foundations of Property Law*, in ECONOMIC FOUNDATIONS OF PROPERTY LAW vii, vii (B. Ackerman ed. 1975) ("[t]hat there *was* a conceptual order given to us by history was not doubted [by the Langdellians]") (emphasis in original) *with* Unger, *supra* note 54, at 564-65 (description of "formalism" in conventional thought).

While scholars are able to talk to each other about common law thought, to recognize examples of it when they see it, and, in general, to share some common understanding of it, a specific description of common law thought has nonetheless remained elusive.

The second difficult question that remains concerns the relationship between legal thought and political values. Much like the description of common law thought, the exact relationship between legal thought and political structure has been difficult to formulate. CLS scholars typically associate conventional legal thought with a capitalist or market-based political system.[137] Some of the legal theory scholars associate common law thought with a political structure in which the state plays a limited role.[138] The specific relationship between legal thought and political norms, however, remains somewhat ill-defined. Members of both groups, for example, sense a strong connection between classical common law thought and the political structure of the United States during the pre-New Deal era.[139] Neither group, however, has linked political theory and legal doctrine in a way which accounts for both the general relationship between legal thought and political norms and the implementation of specific doctrine over a wide range of substantive areas. Most of the work has dealt with the application of legal doctrine in specific subject areas.[140] The relationship between the structure of political thought and the structure of legal thought, both systemic and within specific subject areas, is not well-developed.[141] Nonetheless, both groups recognize

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136. *See, e.g.*, G. WHITE, *supra* note 41, at 32-37 (use of inductive reasoning and belief in the existence of "true" legal rules); Nelson, *supra* note 88, at 516 (influence of science in the shift in judicial reasoning in the mid-nineteenth century).

137. *See supra* note 103.

138. *See, e.g.*, B. ACKERMAN, *supra* note 14, at 178-79; B. ACKERMAN, *supra* note 2, at 24-28; Ackerman, *supra* note 65, at 367-68; Mashaw, *supra* note 62, at 1158-65.

139. *Compare* B. ACKERMAN, *supra* note 2, at 6-22 *and* Chayes, *Public Law*, *supra* note 60, at 1285-88 *with* Kennedy, *Form and Substance*, *supra* note 103, at 1728-31 *and* Mensch, *The History of Mainstream Legal Thought*, in POLITICS OF LAW, *supra* note 3, at 18, 23-29.

140. For example, most CLS work involves contract law and, to a somewhat lesser extent, labor law, family law, constitutional law, and procedure. This may, in turn, reflect the different political assumptions of the groups. CLS scholars seem to be particularly concerned about the hierarchies of common law liberalism, while legal theory scholars seem more oriented toward the modern regulatory state.

141. Typically, even the most extensive conceptualizing to date is perceived by its authors as merely a preliminary part of a far larger (and necessary) project. *See* B. ACKERMAN, *supra* note 2, at 101-10; Kennedy, *Form and Substance*, *supra* note 103; Stewart & Sunstein,

that the full development of this relationship is critical.

The third difficult question that must be answered before a theory of legal consciousness can be developed involves the explanation of the cultural aspects of legal consciousness. Although legal thought is certainly a political phenomenon, it is also a cultural phenomenon. Patterns of thought are developed and maintained within legal education and the legal culture. Although some work has been done on the cultural aspects of legal thought, usually from the perspective of intellectual history, a more complete theory of the dynamics of lawyers as a professional group has not been explored.[142] Moreover, the cultural aspects of legal thought must also be linked to the political aspects of legal thought.[143]

The fourth difficult question remaining for both groups concerns the continuing attraction of common law thought. Despite

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supra note 61, at 1202, 1322; Unger, *supra* note 54.

142. *See, e.g.*, B. ACKERMAN, *supra* note 14 (describing the way lawyers talk and analyze problems in traditional legal culture and emerging legal culture); B. ACKERMAN, *supra* note 2 (exploring relationship between the way lawyers talk and political theory); Ackerman, *supra* note 65, at 371-72 (impact of "the rationalization" of bureaucracy on legal thought); Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed. 1983); Konefsky & Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982); *see also* Kairys, *supra* note 104, at 245 ("The law is . . . a culture, a language, and a body of knowledge."). Some of the most extensive work so far is G. WHITE, *supra* note 41 (analyzing relationship between paradigms among elite in legal culture and nature of legal analysis); Chase, *supra* note 88 (describing social and intellectual background of law schools' adoption in late 19th century of casebook method as education technique comparable to clinical science's education); Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (intellectual structure underlying "classical orthodoxy").

143. *See, e.g.*, Ackerman, *supra* note 65, at 366-71; Gjerdingen, *supra* note 13, at 759-60; Konefsky & Schlegel, *supra* note 142, at 846, 851. I do not imply here that the CLS movement has ignored these aspects. Some of the moderate members of the CLS movement have, in fact, recognized the importance of such matters. *See, e.g.*, Trubek, *supra* note 103. As Trubek notes, "Until we can produce convincing maps of the relationships between elite ideological production, the social definition of meaning, and the history of social relations, we will not be able to sustain the claims made for Critical studies." *Id.* at 612; *see also* Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 384-87 (1984) (critique by non-CLS member that the movement fails to consider the relation of law to other social structures). Similarly, part of the CLS literature has been directed towards some of the cultural aspects of legal education (although even here the political aspects dominate). *See, e.g.*, Kennedy, *Legal Education As Training for Hierarchy*, in POLITICS OF LAW, *supra* note 3, at 40; Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1984). The heart of the movement, however, has been directed toward a discussion of ideology and political theory rather than an empirical study of the application of their theories. Moreover, the psychological aspects of legal thought have been ignored because they are typically viewed as being tied to the existence of hegemony.

their critiques of conventional legal analysis, both CLS and legal theory scholars seem uneasy about the continuing attraction of common law thought in the legal culture. Although CLS scholars argue that common law methodology consists merely of techniques of argumentation (rather that neutral substantive standards), the use of common law techniques continues to maintain a strong pull on the legal culture.[144] Despite what CLS scholars probably consider lethal doses of criticism, the attraction of common law technique, although weakened, remains.[145] Preference for case-by-case analysis, belief in "plain meanings," and the use of rules remain staples of legal doctrine. Unless a conscious and continuous choice is made not to use such techniques, they remain on the periphery of consciousness, ever ready to enter into legal argument.[146] While the attraction of common law thought is less of a problem for legal theory scholars (because they view common law thought itself as less threatening than CLS scholars do), they also are concerned about understanding the role of common law technique in modern legal scholarship. The forms of legal thought that legal theory scholars are trying to describe and legitimate are typically viewed as representing a sharp break with conventionalist thought, yet the attraction of some of the elements of common law analysis remains.[147] In some ways, the legal theory

144. *See, e.g.*, Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982) (persistence of common law tort concepts in discrimination law); Freeman, *supra* note 109 (attraction of "fault," "cause," and "victim perspective" in antidiscrimination law). Members of the legal theory movement have also voiced the same concern. *See, e.g.*, Fiss, *supra* note 60, at 44-50 (persistence of courts in viewing remedies for social conditions in terms of common law framework).

145. This, as I interpret it, is the source of some of the anguish expressed by CLS scholars in discussing the persistent qualities of what they perceive as aspects of traditional legal thought. *See, e.g.*, Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Written Selves*, 62 TEX. L. REV. 1563 (1984); Gordon, *New Developments in Legal Theory*, in POLITICS OF LAW, *supra* note 3, at 281. It may also be the source of their concern about hegemony, *see, e.g.*, Greer, *Antonio Gramsci and "Legal Hegemony,"* in POLITICS OF LAW, *supra* note 3, at 304.

146. *See, e.g.*, Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663 (1983). As Gudridge notes, "I think, however, that classical style persists as more than convention. In its contemporary expressions, it is not merely rhetoric but reflex—the point from which we regularly start; a means of organization we may suspect but which we seem unable to put aside." *Id.* at 729.

147. *See, e.g.*, B. ACKERMAN, *supra* note 14, at 168-89 (role of "ordinary observing" in activist state); Grey, *supra* note 142, at 51 & n.181 (persistence of orthodox form in legal analysis); Mashaw, *supra* note 62, at 1166-71 (hybrid nature of current legal analysis in administrative law).

movement appears schizophrenic. On the one hand, these scholars feel compelled to break with the conventionalist tradition as one which is no longer able to accommodate modern political structures.[148] On the other hand, some semblance of common law technique nonetheless seems to work its way back into their new types of analysis.[149] Thus, they simultaneously seem compelled to question the use of common law thought as the dominant form of legal analysis and yet seem equally compelled to use some variation of common law technique to make their arguments acceptable.[150] For both groups, therefore, the continued attraction of conventional legal technique needs to be explained: CLS scholars must explain why, as a practical matter, their claims of common law as ideology are more difficult for the legal culture to accept than they would expect, while the legal theory scholars must explain the dual nature of much of the recent legal scholarship.

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148. *See, e.g.*, B. ACKERMAN, *supra* note 2; Fiss, *supra* note 60, at 28-50; Stewart & Sunstein, *supra* note 61, at 1199-1201, 1220-46.

149. This usually takes one of two forms, both of which continue to stress the functions of courts. The first is a reworking of some accepted common law function of courts based either on the failure of some coordinate branch of government or, in the tradition of the legal process school, some special institutional competency of courts. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (courts as updaters of obsolete statutes); Fiss, *supra* note 60, at 5-17 (courts as articulators of public values and correctors of institutional "failures" of other branches of government); Stewart & Sunstein, *supra* note 61, at 1307-22 (courts as protectors of rights analogous to those protected at common law and correctors of "failures" of other branches); Sunstein, *supra* note 130 (process of adjudication and institutional structure of courts provide plausible constraint on political aspects of law). *But see* B. ACKERMAN, *supra* note 2 (concern about common law doctrine and courts need not be necessarily more legitimate than new forms of legal analysis such as the Coase theorem).

A second persistent theme is the coordination of a common law/transactional justice system with a public law/distributive justice system. *See, e.g.*, Kronman, *supra* note 129 (arguing for integration of transactional and distributive aspects of contract law under single concept of "advantage-taking"); Stewart & Sunstein, *supra* note 61, at 1289-1316 (discussing of proper mix of public and private enforcement in administrative law).

150. *See, e.g.*, G. CALABRESI, *supra* note 100, at 24-33 (1970) (economic analysis contrasted with "other justice" considerations); Ackerman, *supra* note 65, at 367, 369 (takings law could be island of ordinary observing in activist state); Mashaw, *supra* note 59, at 1166-71 (hybrid nature of existing arguments); Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978) (failure of economic analysis to consider "moralisms" and other accepted aspects of law).

IV. The Future of the New Scholarship—Prolegomena for a Theory of Legal Consciousness and a Modern Theory of Law

Legal theory and critical legal studies scholars agree that legal thought is changing and that this change is related to the state of modern liberalism, yet they are unsure of the exact nature of that relationship. Similarly, they agree that common law thought is no longer necessarily legitimate, yet each group has a difficult time explaining the exact nature of common law thought and the continuing appeal of some of its central features, such as the use of rules and case-by-case analysis. The thesis of this Article is that the new scholarship represents the first step toward the emergence of a modern theory of law which will replace conventionalism.

Behind the distinction between the old and the new scholarship is a distinction between an old and a new concept of law. Once this is understood, the reasons for the similarity between legal theory and CLS, as well as between their respective hard questions, can be appreciated. This Section will develop this argument in three steps. First, several of the assumptions used to develop this thesis are set out and briefly discussed. Second, a prolegomenon derived from these assumptions is proposed for a theory of legal consciousness. Third, based on this theory of legal consciousness, another prolegomenon for a modern theory of law is discussed, along with its relationship to the work of the legal theory and CLS scholars. In sum, the modern theory of law represents a complete rejection of the elements of the old scholarship and constitutes the theory of law underlying the new scholarship. Once this is understood, the work of both groups and the future of conventionalism can be assessed.

A. *Some Assumptions*

The prolegomenon for the theory of legal consciousness and the prolegomenon for modern theory of law are based on a number of assumptions about the nature of politics, political structure, psychology, and liberal theory. After each individual assumption is discussed, they will be combined to propose a theory of legal consciousness and a modern theory of law.

1. *Foundational versus Ordinary Politics.* A fundamental and

significant difference exists between the nature of foundational and ordinary politics.[151] Foundational politics are at work during

151. This, as I understand it, is one of the main propositions behind Ackerman's notion of "constitutional" and "ordinary" politics. *See* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022-23 (1984); *see also* Blasi, *Creativity and Legitimacy in Constitutional Law* (Book Review), 80 YALE L.J. 176, 193 (1970) (reviewing C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969)) (applying this to founding of Constitution and Civil War but not to events of 1937). As implied in Ackerman's further distinction between "constitutional politics" and "constitutional moments," not all attempts at foundational politics are successful, however. There are other periods in American politics when significant numbers of people thought it necessary to engage in dialogue about foundational politics but which did not lead to an immediate resolution of those issues or a successful implementation of those politics. Examples would include such events as the debate about socialism in the early 1900's or the nullification controversy in the early 1800's. Thus, while 1787, 1866, and 1937 are not the only moments of foundational dialogue, they are the only successful moments of foundational politics.

It is important to acknowledge a distinction between the theory presented here and what I understand to be the dominant CLS interpretation of those same events. In my discussions with John Henry Schlegel about the meaning of 1937, he argued that the present nature of legal thought points toward a different interpretation of 1937, even if the possibility of foundational change is accepted. He argues that the distinctive legal thought of the post-Revolutionary and post-Civil War periods set themselves up within 20 years, while the legal thought in the post-1937 structure is "still aborning" after 50 years, and that this seems to indicate that 1937 was, in fact, not a foundational change but an attempt at foundational change that failed. From this perspective, legal theory and CLS are both attempts to make those events foundational in the face of a belated recognition that the event had not turned out that way. This perspective, he argues, not only seems to better fit the tentative, gap-filled nature of both bodies of work but also explains what he perceives as the "wishing (and working) will make it so" nature of the present theory. Thus, as I understand this position, the best approach to take is one that would start from the premise that the key to understanding modern legal thought lies in explaining and working through why 1937 was *not* a moment of foundational politics. This is an argument that I take seriously and one that deserves at least a preliminary response here.

In response to the argument about whether the events of 1937 constituted a moment of foundational politics, I would argue that the change in the nature of legal argument that took place in light of the events of 1937, in particular, those that dealt with constitutional law, was so far reaching that any classification as other than a moment of foundational politics is difficult to accept. The intellectual structure of classical legal thought constructed by the legal culture to respond to the political structure of common law liberalism instantly collapsed in the wake of the events of 1937. CLS scholars, as I understand them, do not question the basic validity of this event, but they do tend to ascribe the reason for the collapse to the end of an intellectual movement started by the realists rather than the beginning of a political moment legitimated by the Court. I am prepared to argue in subsequent articles that the uniformity and predictability of classical legal thought was far greater up until 1937 than usually claimed in CLS work and that the change in legal thought after 1937 at the level of foundational politics was far more abrupt than CLS work claims. From this perspective, what is seemingly "wishing it so" is not so much an attempt to pretend that a foundational event happened as it is to make those in legal culture confront the fact that it is possible for foundational change to occur without it being openly recognized by those in the legal culture, including those who may have been participating

those periods when, for whatever reason, people challenge the legitimacy of the underlying political structure. These are times when the legitimacy of the underlying structure *of* society is questioned *by* society, followed by a perceived resolution of the meaning of those events. This change in foundational principles then is taken as legitimate and must be refined or worked out during the subsequent years. Ordinary politics, in contrast, involve those actions that people take within the framework of a given and largely unquestioned set of assumptions about the basic legitimacy of the political structure.

In the United States, there have been three moments of foundational politics—1787, 1866, and 1937. Each of these is related to a particular event—the change from a confederation to a federalist structure, the Civil War, and the legitimation of the activist state, respectively. Each moment provided a source of legitimacy for the period following it. As a result, rather than a single unified theory, liberalism in American political theory consists of three variants of liberal political theory, each of which dominates a particular period of American legal thought—pre-Civil War, Civil War-to-1937, and post-1937. Each of these periods represents a major shift in the nature of the underlying political structure.

2. *Foundational Politics and Political Structure.* Each period of legal thought is dominated by a particular political structure. The idea of political structure is derived from the distinction between ordinary politics and foundational politics. The notion of structure follows from the assumption that each of these moments of foundational politics gives a minimum content to a set of assumptions considered resolved. In turn, the working out of the exact nature of this change becomes the main political task in the period following each of these events. Rather than a gradual, partial, or overlapping shift in the political system, each period represents a distinct, systemic change whose meaning and legitimacy are linked to events during particular defined moments.

A further ramification of this perspective is that: (1) the principles established during these moments of foundational politics take priority over other principles; (2) the concerns of founda-

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in the foundational debate itself. Thus, just as lawyers could perform their work during the post-Civil War era without ever confronting the relationship of legal categories to common law liberalism, lawyers in the post-1937 era can practice without openly confronting the present political structure.

tional politics go to the legitimacy of the underlying structure of society (i.e., confederation versus federalist structure, federal versus state relations, invisible hand versus activist state); (3) the resulting change in structure has potentially systemic ramifications, not only for the values accepted as legitimate, but also for the various institutions in society (i.e., courts, family, market, etc.); (4) these changes in structure would be expected to have some kind of unifying theme since they arose out of the meaning of particular, discrete moments of foundational politics, each of which has some obvious minimum content; and (5) some refinement of the meaning of each of these events must take place during the period following the moment of foundational politics.

3. *Hard and Easy Questions.* Political structure influences *what* is discussed in the political culture as well as *how* it is discussed. Structure makes some questions more important than others. What these questions will or will not be, the significance of their being asked or not being asked, and the importance of their answers are all critical aspects of political structure. These questions also harbor significant normative judgments. The values inherent in a structure, along with their visibility and openness to critique, are also related to structure. The nature of political structure creates a specific set of hard and easy questions. *Hard questions* are those which, because of the influence of structure, involve what are perceived to be the central dilemmas within the political structure. *Easy questions* are those which, for a variety of reasons, "go without saying" in the political structure. Three different levels of hard and easy questions exist: those dealing with the legitimacy of existing political structure itself, those dealing with the specific structure of the political system, and those dealing with the specific application of the structure in particular cases. Hard and easy questions contribute to the form and nature of dialogue in the political culture. Most significantly, the hard and easy questions help to determine the methods of legal analysis used within the structure, the nature of the questions asked, and the legitimacy of the legal dialogue that takes place. In addition, hard and easy questions contribute to a particular perspective on the determinacy issue, one termed here as *bounded indeterminacy* (i.e., indeterminacy exists, but only in certain areas). Given the nature of political structure, not every assumption can be challenged, not every question is relevant, and not every argument is

germane. Thus, a given political structure will have a more or less fixed set of hard questions, and only a limited number of questions will be considered. Indeterminacy (and hence dialogue) will tend to center only on this set of questions.

4. *The Role of the Legal Culture.* The related notions of political structure and hard and easy questions combine to generate a specific role for the legal culture. The legal culture draws some of its legitimacy from and is dependent upon the political structure. The political structure determines the legitimacy of the underlying structure of society, the general form of the mediating concepts used by the legal culture to implement the political structure, and the dominant form of disputes. The forms of legal thought generated by legal culture must be consistent with these aspects of the political structure and must be able to accommodate the questions it makes important. To the extent that it is able to do this, the legal culture not only assures its own legitimacy, but also the legitimacy of the political structure. By mapping onto the basic structure of the political culture, the legal culture is able to draw on the accepted legitimacy of the dominant political system. In particular, the legal culture provides the specific mediating concepts for the political structure and applies them in resolving the disputes generated by the political structure. Thus, the concept of political structure provides general standards for the legitimacy of the legal culture.

Conversely, the legal culture helps to legitimize the political culture. Because it helps to provide the basic mediating concepts, the legal culture also helps to determine the exact form of that political structure. The legal culture legitimizes the political structure by channeling dialogue about the political structure and resolving its disputes. In addition, the legal culture helps to resolve some of the hard questions of the political structure—in particular, the choice of the exact form of the general political structure itself. Thus, the role of the legal culture is best understood as one in which it performs the following functions: (1) it addresses the questions that the political structure deems important without drawing into question the normative presuppositions of that same political structure; (2) it mediates the exact form of the political structure; and (3) it helps to resolve the typical disputes generated within that structure.

5. *The Psychology of Legal Thought.* The form of legal

thought—particularly that of classical common law thought—is the result of a special connection between certain families of political argument and certain familiar features of the way adults are socialized. Intuitionistic thought—the common sense of laypersons—contains a predictable and consistent structure.[152] Rather than being irrational or unsystematic, intuitionistic thought has predictable features and tendencies. Although variations exist, a more or less common core of features is present in the intuitionistic thinking of adults. The structure that inheres in the common sense of well-socialized laypersons plays a special role in the genesis and refinement of legal thought. One factor is the nature of intuitionistic thought itself. For example, among other features, the intuitionistic thought of laypersons tends to be marked by some of the following tendencies: (1) it reifies concepts—it treats abstract concepts as concrete "things"; (2) it associates "rights" with "things"; (3) it associates causation with responsibility; (4) it assumes the existence of "rules"; (5) it assumes the existence of a single, correct result or answer; (6) it favors interstitial or case-by-case decision making; and (7) it assumes the existence of external, dominant standards of proper conduct. The structure of intuitionistic thought, although certainly malleable by social and political events, nonetheless retains a vital psychological coherency of its own.

Another factor explaining why intuitionistic thought plays a role in defining legal thought is that certain political structures and their associated legal concepts draw some of their validity from their connection with certain prominent features of intuitionistic thought. In particular, some components of intuitionistic thought can be linked to political arguments traditionally associated with a transactional justice political culture. For example, within the framework of the transactional justice model, the linkage assumed between cause and responsibility and the tendency to reify rights reinforces a political argument linked to notions of individual responsibility and autonomy. Additionally, some of these same features of intuitionistic thought may run counter to political arguments associated with a distributive justice political structure. For example, the same tendency of intuitionistic thought to associate cause with responsibility and to reify

152. *See* Gjerdingen, *supra* note 13, at 729-40.

rights conflicts with some of the political concepts of "responsibility" and "rights" associated with modern politics.

6. *The Nature of Post-1937 Liberalism.* The legitimation of the activist state in 1937 represented a fundamental change in the nature of the American political structure.[153] In particular, it represented a change from a strict transactional justice form of liberalism to one in which distributive justice norms are no longer necessarily illegitimate. Moreover, the nature of the change in 1937 was such that it required the open discussion of political options rather than an automatic acceptance of the status quo. This represented a significant break from the ruling theory of law associated with classical liberalism and its theory of rights.

B. *A Prolegomenon for a Theory of Legal Consciousness—The Theory Behind the Crisis in Legal Scholarship*

These various assumptions can be combined to offer a prolegomenon for a theory of legal consciousness to explain, first, the generation and nature of classical common law thought, second, the demise of common law thought in the post-1937 era and, third, the nature of the current crisis in modern legal thought.

1. *Classical Common Law Thought and Transactional Justice.* Classical common law thought, the dominant intellectual force in the legal culture, is best understood as a response of the legal culture to the Civil War-to-1937 political structure. The political structure during this period, which will be termed *common law liberalism*,[154] represented a distinct variant of liberal political

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153. *See infra* note 155 and accompanying text. Thus, in contrast to the conventional wisdom that views the events of 1937 in institutional terms (i.e., the Supreme Court itself was wrong), this argues that the events are best understood as a structural change in which the Supreme Court happened to play a central role.

154. This might as easily be termed "capitalist liberalism," "reconstructionist liberalism," or "classical common law liberalism." By the use of the term "common law liberalism," I do not imply that this political structure governed the variety of legal thought in the pre-Civil War period. Rather, I merely intend to indicate the nature of the political structure associated with classical common law thought. By emphasizing the Civil War-to-1937 period here, however, I do not intend to belittle the application of some of the theories presented here to the pre-Civil War era. I focus here on the Civil War and the post-1937 eras because of the importance given to the rise and fall of classical common law thought in the literature of both the legal theory and CLS scholars.

The description of the types of disputes as bipolar or multipolar, etc., is becoming common place in the literature. *See, e.g.*, Chayes, *Public Law, supra* note 60; Fiss, *supra* note 60. What needs to be done in addition, however, is to link these forms to particular political

theory dominated by the concept of transactional justice. The elements of common law liberalism included the following:

i) *Faith in the market.* The unaided market serves as a norm. The results of the market are the outcome of a natural course of events and prima facie correct.

ii) *Legitimacy of the status quo.* In a transactional justice system, the center point is the status quo. It is not changed unless by consent. If changed without consent (e.g., by fraud), it serves as the measure of relief. As a result, it is prima facie more legitimate than another state of affairs.

iii) *Individualism.* Bargains are struck by individuals *as* individuals. Individual responsibility is the norm.

iv) *No redistribution of wealth.* The distribution of wealth generated by the market defines the just distribution of wealth. Redistribution of wealth on another basis, such as the favoring of one group (e.g., workers) over another (e.g., employers) is improper. Similarly, "class legislation" is disfavored.

v) *The validity of the social structure is not a matter of political concern.* Political rights are distinct from social rights. The validity of the social structure (e.g., the place of the race or gender) and the disputes within units of social structure (e.g., the family, the schools, the prisons) are off limits.

vi) *The night-watchman state.* The role of the state is simply to enforce transactions between individuals and to provide redress for violations against property (e.g., trespass or theft) or against the means of bargaining (e.g., fraud). What actions the state does take are judged by the same standard that applies to individuals.

In turn, these elements of common law liberalism generated predictable forms of dispute:

i) *Disputes typically are bipolar.* This reflects the political themes of individualism and transactional justice. Deviations from the strict bipolar model are suspect.

ii) *Relief is that which puts the person wronged back into the status quo ante.* The dominance of transactional justice and its corollary concepts of emphasizing the importance of the status quo and the bar against redistribution of wealth help to assure the dominance of this mode of relief.

iii) *The focus of the dispute is retroactive.* Reenactment of the

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structures and particular time periods, something relatively undeveloped to date.

disputed event (i.e., a trial) is important as is a belief that objective "facts" exist and can be determined by representatives of the community (i.e., a jury).

iv) *The parties are deemed equally able to bring actions, to bargain, and to obtain information.* The ban against redistribution of wealth and the importance of individualism reinforce the idea that one party is equal to another, both in terms of bargaining power and in terms of legal status.

v) *The judge plays a passive role in the dispute.* Individualism and the night-watchman state reinforce the image of a neutral arbiter responding when requested to do so by the parties, but otherwise shunning an inquisitorial role or serving as a party to the dispute.

Most importantly, common law liberalism represents an example of political structure. The component elements of common law liberalism display certain characteristics of wholeness and unity that give meaning to the entire period.

Classical common law thought represented the response of the legal culture to common law liberalism. Common law liberalism set the outer boundaries of classical common law thought by determining the general political structure and by creating a specific role for the legal culture in the legitimation and implementation of that structure. To succeed, the legal culture had to reinforce the legitimacy of the political structure, resolve the disputes it generated, and create a form of discourse and analysis compatible with the central propositions of common law liberalism. Arguments inconsistent with the features of the political structure would not be accepted as valid or relevant.

Intuitionistic thought was also a source of the specific texture and substance of common law thought. Even though common law liberalism did determine the general requirements that the legal culture had to fulfill, it did not determine the exact response of the legal culture (i.e., the exact form of classical common law thought). In generating its specific response, the legal culture drew upon intuitionistic thought and succeeded because of a special relationship that existed between this form of thought and the needs of the legal culture during the period of common law liberalism. The features and texture of intuitionistic thought, along with its hard questions, thus were reflected in classical common law thought.

Once tailored to the specific demands of common law liberalism, intuitionistic thought supplied much of the substance for the mediating concepts for classical common law thought. In so doing, however, the legal culture did not incorporate intuitionistic thought wholesale or use it in exactly the same way as laypersons. Rather, the legal culture emphasized or deemphasized features of intuitionistic thought according to its own needs. Simply because they were more important within the context of the legal culture, particular distinctions in intuitionistic thought became more important in legal thought than they were in the ordinary speech of laypersons. For example, even though the mediating concepts of classical common law thought were ultimately anchored in intuitionistic thought, the legal culture had to deal with dispute resolution and its attendant accentuation of distinctions. As a result, distinctions in the use of intuitionistic thought were used by the legal culture that were not used by laypersons in their everyday affairs. Even so modified, however, the core features and constructs of intuitionistic thought provided much of the doctrine of common law thought.

The localized and hard-edged features of intuitionistic thought grounded common law liberalism in everyday life and provided a sense of psychological security for the legal culture and laypersons alike. Intuitionistic thought emphasized an intensely three-dimensional, physical world limited by preexisting boundaries in which immediate physical interaction and responses were important. Qualities, things, concepts, and rules existed in this world. People physically interacted with this world and with each other, and they argued over the significance or consequences of immediate transactions based on a supposed correct version of prior events. Single, correct answers existed "out there," as did proper standards of conduct. The refinement of such concepts of intuitionistic thought as reification, physical control, acts, cause, and responsibility thus all became important.

Although the legal culture made sophisticated and, at times, even elegant interpretations of the intricate subtleties of the basic constructs of intuitionistic thought, it never denied their essential validity. Extensive dialogue could evolve, for example, around such simple matters as whether something was really one "thing" or two (e.g., fixtures) or whether it is the same "thing" (e.g., accession and confusion). Implicit in the dialogue itself, however,

was an assumption that the layperson's tendency to focus on "things" was an important aspect of legal thought. Similarly, the legal culture could make detailed arguments about the subtleties embedded in the intuitionistic notion of cause (e.g., last clear chance, contributory negligence, but-for cause, intervening cause). All of these issues, however, were grounded in the application of intuitionistic thought, and the validity of the constructs that intuitionistic thought made important was unquestioned.

As a result of this connection between the politics of common law liberalism and the use of intuitionistic thought in the American legal culture, the use of classical common law thought must be understood to have certain political consequences. Intuitionistic thought is not inevitably or exclusively used in transactional justice schemes. However, because of the overlap between certain features of intuitionistic thought and the philosophical and political context of transactional justice argument, classical common law thought tends to be associated with transactional justice political values. Thus, classical common law thought cannot be treated as being entirely politically neutral.

2. *Modern Legal Consciousness and the Rise of the Activist State.* A legal culture is dependent on the political culture. If the political system changes, the symbiotic relationship between the two decays and the constructs of the legal culture become problematic. The political events of 1937, culminating in the Court-packing plan and the resultant change in the attitude of the Supreme Court,[155] mark the beginning of the modern political culture. The political events of 1937 legitimate the idea of the activist state, a concept that can be described as one where the government is supposed to serve some affirmative goal (rather than merely being a night watchman) and where the status quo is not prima facie more legitimate than another state of affairs.

The legitimation of the activist state in 1937 constituted a moment of foundational politics. Rather than a continuation of

155. This refers to the political events, including the threat of Court packing, that precipitated the capitulation of the Court to the programs of the New Deal. *See* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 260-62 (4TH ED. 1977); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 39-41, 157-61 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 449-50 (1978). The specific events are well chronicled in Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4 (1967) and Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L.J. 791 (1952).

the politics of the Civil War-to-1937 era, the events of 1937 constituted the displacement of one set of foundational politics for another and represented a moment when the legitimacy of the underlying structure of society embodied in common law liberalism was being questioned. The resolution of that moment of foundational politics was that the transactional justice elements of common law liberalism were no longer necessarily legitimate and the distributive justice arguments inherent in the notion of an activist state were no longer necessarily illegitimate. The most fundamental change was this legitimation of a distributive justice form of liberalism.

The era of the activist state is marked by the following:

i) *Growth of bureaucracy, both public and private.* The government is a bureaucratic structure. In addition, parts of the social structure once viewed as off-limits to regulation (such as prisons, schools, and mental hospitals) are subject to scrutiny.

ii) *Group concerns.* Instead of only individual concerns, group concerns are now deemed legitimate. This follows from the breakdown of market individualism and the consequent legitimacy of changing bargaining power to further social goals.

iii) *The legitimacy of the redistribution of wealth.* Prior to 1937, wealth could only be transferred for public purposes. For example, allocating resources for projects used by the public, such as roads, schools, and public buildings, was legitimate, but allocating them to benefit private groups, such as workers, was not. After 1937, the private redistribution of wealth is no longer totally prohibited. Minimum wage laws and transfer payments, such as unemployment compensation and social security payments, are examples.

iv) *The social structure is open to scrutiny.* Starting points in society and class issues are legitimate concerns. For example, the place of race, gender, and illegitimacy in the social structure are open to scrutiny.

v) *The market is not self-regulating.* The idea that the market represents a natural norm is rejected. The market is viewed as one of several means available to implement policy.

vi) *Public ends are important.* One of the key features of the activist state is that government has an affirmative purpose, such as ending discrimination, increasing industrial capacity, or cleaning up the environment.

The dawning of the era of the activist state brought with it a corresponding change in the nature of the disputes generated by the political structure, illustrated as follows:

i) *Multipolar disputes.* The breakdown of the individualistic political culture brought with it a corresponding change in the nature of disputes arising in the political culture. Groups became relevant, either as economic bargaining units (e.g., unions), social classes, or factions (e.g., political groups).

ii) *The restructuring and management of institutions (e.g., schools, public agencies).* Several political themes converge to bring this about. The first is scrutiny of the social structure. Institutions are part of the social structure. In the case of schools, for example, they are important in implementing such changes as exposing persons to the values and qualities of a class different than their own. The second political theme is the presence of affirmative goals for government. Institutions are restructured to conform to affirmative goals. If the status quo is not conforming to such goals, a restructuring may be necessary. Structural injunctions thus become important. Remedies are not always tied to specific wrongs (as would be the case in a transactional justice system) but rather to the status quo vis-a-vis the affirmative goals.

iii) *The government as an active participant, whether as judge or legislature.* With the advent of the activist state, the government is perceived as having an affirmative role rather than solely a negative or limited role. Correspondingly, abuse of government power is a greater concern, and ways in which issues are raised about the operation of affirmative programs are more important. In addition, the judge takes on a greater role as a manager of governmental programs, making affirmative decisions and focusing dialogue between participants (typically political groups).

iv) *Prospective concerns are important.* In contrast to the retrospective focus of a transactional justice political culture, the focus of the activist state tends to be prospective. This follows from the state having affirmative objectives. The status quo is no longer prima facie legitimate. The status quo is not entitled to greater legitimacy than any other state of affairs. The focus is on the relationship between the status quo and other possible states of affairs or goals that the state is to implement.

v) *The use of categories rather than individualized treatment in regulation, whether economic or social.* Major issues are developed

as to when individualized treatment is required. Nonetheless, the standard means of implementing decisions is the use of categories rather than individualized evaluation.

3. *The Problem of Modern Legal Consciousness—New Politics, New Questions, New Roles, and the Problem of Old Forms and Old Traditions.* The emergence and maturation of a distributive justice form of liberalism in the post-1937 era undermined the political foundation of classical common law thought. The emergence of the activist state presented the legal culture with a new set of concerns and a new set of hard and easy questions. In turn, this generated a reconceptualization of the nature of political theory and a change in the role of the legal culture. At the same time, however, the psychological and cultural foundations of common law thought remained an important part of the legal culture. This ultimately created a sense of unrest in the legal culture and precipitated a crisis in legal scholarship.

The crisis in legal thought was delayed by the intervention of several different factors however. The first, and the most important, was the power of legal culture in the post-1937 era. If anything, the development of Langdellian legal science—with its emphasis on case-by-case adjudication and intuitionism—facilitated the development and continuation of classical legal thought. That cultural phenomenon however, once put into motion, began to take on a source of influence all its own. Given the homogenization of legal education and the subsequent monopolization of legal training by law schools that accompanied the Langdellian revolution, the cultural fixations and power structure within the legal culture itself dampened any swift change. For example, while the areas of pure contract law began to shrink with the advent of disciplines associated with the rise of the activist state (e.g., labor law), with the recognition in legal thought of disparate bargaining power (e.g., employer/employee, insurer/insured), and with the modification of contract law in the pursuit of change in the social structure (e.g., Title VII), the basic first-year contract courses tended to treat developments such as these as exceptions deserving of separate treatment rather than an incursion into contract law itself. This focus helped to mask the nature of the change that had taken place, in addition to supporting existing power structures within the law schools.

A second factor delaying the crisis in legal thought was the

nature of the post-1937 political culture itself—one which by its nature was more open-ended than that of the previous two periods. While the earlier periods focused more on the implementation of a single, positive structural change (i.e., the change from the confederation to a federalist structure and the emergence of a positive role for the federal government in the protection of individual rights, respectively) the events of 1937 represent more a "we don't have to do things this way anymore" reaction to common law liberalism than a total rejection of the merits of transactional justice. This would explain the persistence of the perception that "all things are up for grabs" that is so much a part of the present political debate. The post-1937 structure is more the result of a legitimation of a greater range of options than it is the result of the progressive collapse of common law liberalism itself. As a result, the change in the nature of the post-1937 political culture itself was more a matter of progressive choices of the type that deepen and mature over time than existed in the earlier periods. Given the open-ended nature of the permissible political options, constitutional debate was not closed off as quickly as it was in either of the earlier two periods.

A third intervening factor was that the continued use of intuitionistic thought and its past association with the politics of common law thought tended to mask the political change that had taken place as well as the nature of the present political issues of greatest importance.

Together, these various factors helped not only to delay the crisis in legal thought but to hide the nature of the crisis itself. The inability of reasoned intuitionism, case-by-case analysis, and classical common law categories to fulfill the appropriate role of legal dialogue in the post-1937 era became particularly acute following the maturation of the activist state in the late 1960's. In this context, conventionalism, with its assumptions about the separation of law and politics, its emphasis on adjudication and courts, and its reliance on common law technique and reasoned intuitionism became problematic. The assumed separation of law and politics prevented the discussion of such important concerns as the legitimacy of the existing distribution of power and the role of the state.

To fill the gap, members of the legal culture initially turned to other disciplines to address the new concerns of the post-1937

political culture. Economics and moral philosophy were the first areas appealed to because they addressed some of the questions that the post-1937 political structure made important, such as the appropriate rationale for the regulation of the market or the proper standards by which to critique the legitimacy of the existing social structure. Each of these disciplines ultimately proved inadequate as a complete theory of law to replace conventionalism; however, they provided a useful transition into the new legal scholarship and served as a convenient foil for the articulation of the legal theory and critical legal studies work on a modern theory of law.

The legal culture thus is in the middle of a reassessment of its purpose and a reconstruction of its methodology. Conventionalism, cases, rules, reasoned intuitionism, and the assumption that the law is autonomous skews the nature of the legal dialogue away from the kinds of questions that the legal culture must ask if it is to be effective. It is at this point that the new scholarship and the modern theory of law become important.

C. *A Prolegomenon for the Modern Theory of Law—The Theory of Law Behind the New Scholarship*

Based on this theory of legal consciousness, it is possible to articulate a rationale for the emergence and basis of the modern theory of law. The debate between the old and the new scholarship is a debate between two different concepts of law—conventionalism and the modern theory of law. The work of the legal theory and critical legal studies scholars represents an attempt to isolate a new theory of law in the wake of the decline of conventionalism. The modern theory of law has six basic elements, each of which is distinct from the tenets of conventionalism. The elements of the theory are implicit in much of the work of the new scholarship and, in sum, constitute a theory of law distinct from conventionalism.

1. *Law and Politics*

Element 1: Law must be political. Rather than starting from the assumption that law and politics are separate subjects, lawyers must start with the assumption that the two are related. Not only is it proper to consider the relationship of law to politics, but it is a necessary starting point.

Basis: The concept of political structure and, specifically, the

nature of the post-1937 political structure.

Argument: Under the modern theory of law, the conventionalist assumption that law is apolitical—that it is separate from politics—is deeply problematic. Implicit in the idea of political structure and the role that it generates for the legal culture is the assumption that law and politics are related. To argue that the law is neutral in the sense that it does not make political choices or that it is not related to the dominant political structure is suspect. While the law may be said to be neutral, it can be so only in the sense that it does not contradict what "goes without saying" in the dominant political structure, whether it be the neutral operation of the market in common law liberalism,[156] or the sense of neutrality associated with the modern state.[157]

a. *The Treatment of Law and Politics by the Legal Culture.* Given this perspective, it is important to explain why the claim of the conventionalists that the law was separate from politics typically was perceived as unproblematic during the period of common law liberalism and why, in contrast, the relationship between law and politics is a central issue in the new scholarship.

The appeal of the conventionalist position on the separation of law and politics can be explained by two features of common law liberalism. The first was the prominent role played by the status quo in which dominant social expectations limited the need for political critique of the existing system. In the context of common law liberalism, the status quo was prima facie just. Existing structures of power in society—whether reflected in the natural operation of the market, the social structure, or dominant social expectations and roles—served as necessary starting points and as sources of legal standards.[158] This association of the "ought" with the "is" assured that the legal culture would not be called upon to critique or to develop alternatives to the status quo. Instead, the

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156. *See* 2 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 504-49 (London 1848) (defense of laissez-faire as general rule).

157. *See, e.g.*, B. ACKERMAN, *supra* note 129, at 10-12, 15-17, 356-71 (concept of neutral dialogue linked to equal respect); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (prevention of abuse of self-serving action evident in interpretation of several clauses of the Constitution).

158. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 24-26. As Ackerman notes, "[T]he military, economic, and social foundations of daily life are not conceived as raising questions for self-conscious and systematic political decision." *Id.* at 24.

legal culture would focus on the interstitial, noncritical analysis involved in articulating standards derived from existing structures, answering hard questions about the marginal application of accepted standards, and arguing about individual cases of deviant conduct.

A second feature of common law liberalism explaining the appeal of the conventionalist separation of law and politics was that the use of intuitionistic thought by the legal culture reinforced the legitimacy of the existing system. Even though the legal culture adapted intuitionistic thought to its own use and modified it, the basic structure remained familiar. The mediating concepts used by the legal culture to implement and legitimize the political principles of common law liberalism therefore were grounded in the same type of framework used by laypersons in their ordinary affairs. This made it difficult to separate the legal doctrine implementing explicit political values from the familiar psychological features structuring the basic reality of everyday existence. The reality, comforting support, and legitimacy of intuitionistic thought could not be denied. Thus, the mediating concepts of the legal culture reinforced the foundations of everyday life. Intuitionistic thought also contributed to the perception that the law was apolitical simply because the existing legal system itself was to some extent reified and thus incorporated into the very notion of common sense itself.[159]

Together, these features required the legal culture to consider politics writ small (i.e., the merits of individual cases) and not politics writ large (i.e., the legitimacy of existing social and political conditions). Under these circumstances, the assumption that the law was apolitical easily followed. So long as the belief in dominant social standards prevailed—whether in the form of classical common law categories, consensus, public interest, or similar formulas—little reason existed for the legal culture to criticize the status quo. Consequently, the use of intuitionistic thought and the separation of law from politics remained unproblematic.

With the maturation of the activist state in the 1960's, however, the continued separation of law and politics became untenable. Two related aspects of the post-1937 political structure contributed to the increased concern about the relationship between

159. *Cf. supra* note 145 and accompanying text (CLS treatment of "hegemony").

law and politics. First, the general nature of the post-1937 political culture is one in which the status quo is no longer prima facie legitimate. As a result, it is proper to critique the existing structures of power and to actively consider alternatives to the status quo. What "goes without saying" in the post-1937 political structure is that the elements of common law liberalism are no longer necessarily legitimate—that the status quo is no longer prima facie legitimate and that it is no longer improper to assume an activist role for the state. Once it became legitimate for the state to change the status quo, then the hard questions of specific structure became such matters as: (1) when the state should change the status quo (i.e., just for labor law or for other social problems as well); (2) why the state should do it (i.e., what types of state goals are permissible); (3) what limits exist on the exercise of this power (i.e., if the state can redistribute wealth or change the social structure, what limits exist on how much it can do or on how quickly it can do it); (4) what counterproblems state intervention brings (i.e., error factors, institutional defects, risk of abuse of power by the state); and (5) whether the state must override the results generated by the existing social structure (i.e., provide minimum amounts of certain items to every citizen, even though the unaided market would not). Consistent with the notion of bounded indeterminacy, a range of possible options is legitimate with respect to each of these hard questions; the important point, however, is that the dialogue itself must be about these issues. As it did during the period of common law liberalism, the legal culture must now affirm the legitimacy of the basic elements of the political structure and take part in the debate about the modern political structure's hard questions about specific structure. Unlike the period of common law liberalism, however, what "goes without saying" in this political structure is that the nature of dialogue shifts from merely questions of politics writ small to questions of politics writ large. Consequently, the legal culture must no longer focus only on the propriety of specific, individual changes within a transactional justice framework but must engage in dialogue about the general state goals and group concerns associated with a distributive justice system.

The second aspect of the post-1937 political structure contributing to an increased concern about the relationship of law and politics was that, due to this change in the nature of the state,

the legal culture could no longer rely on intuitionistic thought to create mediating concepts. The maturation of the activist state, undercut the use of dominant social expectations and existing social roles as normative standards. This severed the link between the psychological propensity of intuitionistic thought to reify existing social structures and legitimate political values. The maturation of the activist state also increased the need to rely on group-related, end-state, and category-by-category standards rather than case-by-case decision making involving consent or personal blame.[160] This undercut the continued use of legal categories derived from such intuitionistic notions as cause, reification, and promise. Together, these features assured that the reality of the political "ought" could no longer be camouflaged by the psychological attraction of the "is."

b. *The New Scholarship and the Politics of the Modern Theory of Law.* Under the modern theory of law, four issues about politics become especially important for the legal culture: (1) the existence of foundational versus ordinary politics; (2) the nature of liberalism post-1937; (3) the development of the specific structure of modern politics; and (4) the political consequences of the continued use of intuitionistic thought by the legal culture. The resolution of these issues, perhaps more than any other aspect of the modern theory of law, separate the legal theory from the critical legal studies scholars.

i. *Constitutional versus Ordinary Politics.* For the most part, conventionalists ignore the distinction between foundational and ordinary politics.[161] "Rules of recognition" (i.e., why legal principles are accepted as legitimate) are taken as a social fact to be observed but not confronted by the legal system.[162]In contrast, legal theory and critical legal studies scholars both recognize the importance of "constitutional" dialogue (i.e., arguments about the basic legitimacy of the social structure), but each group differs on the justification and focus of that dialogue. Legal theory scholars rec-

160. *See generally* Gjerdingen, *supra* note 13, at 715-28 (contrasting treatment of torts in transactional justice framework with treatment in distributive justice framework).

161. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962). This characterization of Supreme Court decisions as beset by "counter-majoritarian difficulty" implicitly assumes existence of only "ordinary politics."

162. *See, e.g.*, H.L.A. HART, *supra* note 20, at 107 ("[E]xistence [of the rule of recognition] is a matter of fact.").

ognize a distinction between foundational and ordinary politics and argue that 1937 represents a moment of foundational politics. As a result, their constitutional dialogue is directed towards articulating the meaning of those events.[163] Although certain CLS scholars, such as Unger, recognize the distinction between foundational and ordinary politics,[164] they do not recognize either the Civil War or the events of 1937 as a moment of foundational politics. Thus, they locate the legitimacy of their constitutional dialogue on something other than foundational politics, such as personality theory,[165] abstract utopias,[166] or theology.[167] The status of the events of 1937, therefore, is a critical factor in distinguishing between both legal theory and CLS positions on the nature of liberalism and the basis for each group's constitutional dialogue. Because legal theory scholars view 1937 as a moment of foundational politics, they view the modern era as a new period of liberalism and ground their constitutional arguments in the accepted legitimacy of these events. In contrast, because the CLS scholars do not view 1937 as the start of a new political structure, they interpret the shift in the modern era as part of the indeterminacy or inconsistency of liberalism itself.

The modern theory of law suggests that the work of both groups can be reconciled to some extent. For example, the substance of the resulting constitutional dialogue of both groups is consistent with the range of rhetoric expected in the post-1937 era under the modern theory of law, even though each group offers a different explanation for the existence of that dialogue. Legal theory scholars argue for constitutional dialogue on the basis

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163. *See, e.g.*, Ackerman, *supra* note 151, at 1052 ("[T]he lessons we learn from [these constitutional moments] control the meanings we give to our present constitutional predicaments.").

164. *See* Unger, *supra* note 54, at 567-68. Unger makes note of "the distinction between the foundational politics, responsible for choosing the social type, and the ordinary politics, including the ordinary legislation, operating within the framework established at the foundational moment." *Id.* at 568.

165. *See* R. UNGER, PASSION: AN ESSAY ON PERSONALITY (1984); Hutchinson & Monahan, *supra* note 116, at 1528-37 (general discussion of this aspect of Unger's work).

166. *See* Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275, 1283 (1981) (urging need for "utopian speculation").

167. *See* R. UNGER, *supra* note 112, at 290-95 (the "idea of God" as effort to transcend problems of liberalism); *see also* Kronman, Book Review, 61 MINN. L. REV. 167, 200-05 (1976) (reviewing R. UNGER, KNOWLEDGE AND POLITICS (1975)) (letters between Unger and Kronman in which Unger describes relation of his work to Christian philosophy).

of 1937, while CLS scholars argue for similar dialogue as a part of a concern about modern liberalism itself. Moreover, the modern theory of law explains why CLS scholars have a difficult time establishing a political justification for their proposals. As noted in one review of Unger's work:

> Unger's stated ideal is a fluid world in which the rigid distinction between routine and revolution would have disappeared. Ostensibly, he wants to construct a society that would not separate ordinary disputes within the institutional context from foundational struggles about the context itself. Yet this very distinction appears to be an integral feature of his own superliberal world. Unger proposes a determinate and detailed constitutional framework that would operate above the realm of ordinary politics. The particular state, market, and set of rights that Unger proposes would themselves form a foundational and enduring aspect of his social world. This framework is nothing more than a series of contingent and controversial choices about the proper organization of society. Given Unger's initial premises about the power and pervasiveness of contingency, there is reason that these particular political "deals" should be insulated against change. In effect, Unger pays lip service to the ideal of contingency and at the same time claims overriding authority for a particular, provisional scheme of human association. He overlooks the flat contradiction between his ideal and his claim for historical and political precedence.[168]

From this perspective, Unger's difficulty stems not from the substance of the political values that he wants to promote but from his failure to ground them in an interpretation of the foundational politics of 1937.[169]

ii. *The Nature of Liberalism Post-1937.* Both the legal theory and CLS scholars are concerned about the nature of liberalism post-1937. Both groups acknowledge that classical liberalism is associated with conventionalism[170] and that the politics of classical liberalism are no longer valid. They disagree, however, about why classical liberalism is no longer valid. Legal theory scholars argue, in essence, that the events of 1937 transformed liberalism.[171] In contrast, CLS scholars argue that liberalism itself is inconsistent.

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168. Hutchinson & Monahan, *supra* note 116, at 1521.

169. This does not mean that Unger would necessarily give exactly the same interpretation to those events as some of the conservative scholars, but it does mean that Unger's interpretation is a legitimate one.

170. *Compare* Stewart, *supra* note 61, at 1671-76 (connections between traditional model of administrative law and traditional social contract theory) *with* Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (relationship between liberalism and formalism in context of public and private bureaucracies).

171. *See supra* notes 70-77 and accompanying text.

For the most strident members of the CLS group, liberalism is based on a "fundamental contradiction" between self and community.[172] This contradiction always existed in the American political structure and only became more acute with the passage of time.[173] Under this conception, the central role of the legal culture is to disguise the basic contradiction that animates the dominant political conception of liberalism.[174]

The legal theory and CLS positions can be reconciled to some extent once each is viewed as an attempt to articulate the modern theory of law. The events of 1937 represent a change from a transactional justice form of liberalism to a distributive justice form of liberalism. Much of Unger's criticism of liberalism is directed to the classical form of liberalism associated with conventionalism, one that relied to a significant extent on the assumption of consensus and the existence of dominant social expectations. To the extent that such a belief "went without saying" during the Civil War-to-1937 period, no inconsistency would be recognized within that political structure. The theoretical foundation of classical liberalism became problematic after 1937, however, following the emergence of a distributive justice form of liberalism and the decline of the use of dominant social expectations as a normative standard. From this perspective, Unger's critique of liberalism is important as an illustration of the inability of the assumptions of

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172. *See, e.g.*, R. UNGER, *supra* note 112, at 29-144 (inconsistency of basic features of liberal thought); Kennedy, *Blackstone's Commentaries*, *supra* note 103, at 211-14.

173. As expressed by Unger:

> The endeavor of the classical nineteenth century jurists in turn represented a diluted version of the more common, conservative social doctrines that preceded the emergence of modern social theory. These doctrines pretended to discover a canonical form of social life and personality that could never be fundamentally remade and reimagined even though it might undergo corruption or regeneration. At each succeeding stage of the history of these ideas, the initial conception of a natural form of society becomes weaker: the categories more abstract and indeterminate, the champions more acutely aware of the contentious character of their own claims.

Unger, *supra* note 54, at 576; *see also* Brest, *supra* note 84, at 1105-09 ("fundamental rights" controversy in constitutional law illustrates "the essential and irreconcilable tension between self and other"); Tushnet, *supra* note 116 (incoherence of constitutional doctrine a specific instance of theoretical problems of liberalism); Tushnet, *supra* note 54, at 783-85 (conflict in constitutional law between Hobbesian and Lockean concepts of power).

174. *See generally* Kennedy, *Blackstone's Commentaries*, *supra* note 103, at 214-21 (discussing attempt by Blackstone to mediate contradictions in civil society); Singer, *supra* note 122 (discussing attempt by legal culture to mediate fundamentally contradictory political and legal theory of rights).

classical liberalism to survive the transition to a distributive justice form of liberalism in the modern era but not as a critique of liberalism in all its possible forms.

iii. *The Specific Structure of Modern Politics.* The events of 1937 legitimated a change in the basic structure of American politics. Therefore, legal scholarship must consider the specific elements of that political structure, the hard and easy questions it generates, and the differences between it and common law liberalism. The theory of political structure indicates that any number of possible versions of that basic political structure are possible so long as they are consistent with the underlying political assumptions that created it. Moreover, if one of the meanings of 1937 is that the elements of common law liberalism are no longer automatically valid, then an intellectual battle would be expected to be taking place about the specific form of the modern political structure, much like it did for the development of the specific structure of common law liberalism. For example, once it is accepted that the role of the state is not limited merely to supporting the invisible hand of laissez-faire capitalism and that it may occasionally interfere in the market, then a major debate would be expected about when and for what reasons the state will interfere. Similarly, once it is accepted that the state can change the social structure, then such questions as when the state can do it, for what reasons it can do it, and to what extent it can do it also become important.

In this respect, it is important to recognize that the substance of much of the constitutional dialogue of both legal theory and CLS scholars is similar, even though the source of that dialogue for each group may be different. Indeed, once these issues become those that the legal culture must confront, it is possible to view the legal theory and the CLS positions as merely two possible variations within a single tradition. For example, it is significant that the work of some of the prominent scholars in each group assumes: (1) that the existing power structures in society must be justified (i.e., there is no prima facie legitimacy to the status quo);[175] (2) that the operations of the market and the existing dis-

175. *Compare* B. ACKERMAN, *supra* note 129, at 4-6 (describing how "[n]o form of power is immune from the question of legitimacy") *with* Unger, *supra* note 54, at 584-88 (describing cumulative loosening of fixed order of society).

tribution of wealth are open to scrutiny;[176] and (3) that an activist role is taken by the state.[177] Other common concerns could also be explored at length.[178] Certainly, substantial political differences exist between the two groups about the ultimate resolution of many of these issues. The important point, however, is that each of these groups is responding to a similar concern (i.e., the exact form of the modern political structure). Each group's arguments, though different, are legitimate because each is consistent with the basic assumptions of what "goes without saying" in the modern political culture.[179] Each group is attempting to deal with a similar state of affairs and engage in constitutional dialogue about the modern political structure.

iv. *Politics and Intuitionistic Thought.* Intuitionistic thought played a key role in the development of the classical common law thought associated with conventionalism. In creating its mediating concepts, the legal culture used some of the prominent features of intuitionistic thought to reinforce key political elements of common law liberalism. A special relationship existed between certain key features of intuitionistic thought and certain critical political elements of common law liberalism. For example, intuitionistic notions of possession could be used to reinforce transactional justice arguments about people having rights in things. Similarly, common sense notions of cause could be adapted to reinforce transactional justice principles of individual responsibility and personal autonomy.[180] Consequently, classical common law thought

176. *Compare* B. ACKERMAN, *supra* note 129, at 31-68, 168-200 (describing standards for wealth distribution and systems of "free exchange" in liberal state) *with* Unger, *supra* note 54, at 593-97 (describing proposal for regulating industrial organization).

177. *Compare* B. ACKERMAN, *supra* note 129, at 231-324 (describing affirmative duties of state and break with liberal tradition of laissez-faire) *with* R. UNGER, *supra* note 112, at 174-90 (describing features of welfare-corporate state "in which the government assumes a widespread and overt responsibility for the distribution of economic and social advantages, as a complement or a limit to the market").

178. Additional concerns would include the role of race or gender and the abuse of power by the government, among others.

179. Thus, it would be expected that a debate would be taking place about the philosophical foundations of a distributive justice form of liberalism, *see, e.g.*, J. RAWLS, A THEORY OF JUSTICE (1971); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983), as well as about its validity in contrast to historical, laissez-faire theories, *see, e.g.*, R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

180. *See* Gjerdingen, *supra* note 13, at 715-22 (describing this aspect of Richard Epstein's work).

was, among other things, a sophisticated form of intuitionistic thought. With the rise of the activist state, however, the continued use of such mediating concepts became increasingly suspect.

While both the legal theory and CLS scholars implicitly recognize the importance of this issue, they do so from very different perspectives. The legal theory literature takes somewhat of a psychological interpretation of this problem, while the CLS literature takes a more political interpretation. Neither group has extensively addressed the issue; however, the work of both groups is generally consistent with the modern theory of law. Legal theory scholars argue that traditional legal thought is grounded in the ordinary language of laypersons and that a general relationship exists between particular forms of legal thought and particular political philosophies.[181] To date, however, no specific explanation has been advanced for such connections or for the differentiation of legal thought from the everyday attributions of laypersons. CLS scholars, while seemingly addressing the same phenomenon, analyze the survival of conventional legal thought in terms of hegemony (i.e., the permeation throughout society of a particular belief system to the point where it becomes an accepted part of the common sense of the general culture).[182] From this perspective, the continuing attraction of classical common law thought is attributed to the internalization of capitalist political structures.

The modern theory of law suggests that the views of the legal theory and CLS scholars can be partially reconciled. The notion of political structure suggests, consistent with the CLS position, that the dominant political structure affects the nature of legal dialogue simply because the mediating concepts developed by the legal culture must be consistent with the elements of the political structure that "go without saying." It also suggests, consistent with both the legal theory and CLS positions, that certain forms of legal thought are associated with certain types of political structures.[183] The modern theory of law suggests a refinement of the

181. *See, e.g.*, B. ACKERMAN, *supra* note 14, at 175-85 (describing relationships between use of ordinary observing and political theory in which state does not have any special mission and between scientific policy making and theory of "critical state"); Ackerman, *supra* note 55, at 367-69 (describing these same relationships).

182. *See supra* note 145.

183. For example, both the legal theory and CLS scholars associate traditional legal thought with laissez-faire principles and the demise of common law categories with the rise of the modern political structure. They differ on the rationale given for the change and on

present position of each group, however. Both groups must distinguish between the appeal and validity of three different concepts: (1) basic transactional justice political principles; (2) classical common law categories; and (3) intuitionistic thought. During the period of common law liberalism, all three necessarily were related and legitimate. In contrast, in the modern political structure, all three are no longer necessarily connected. For example, in considering arguments about the role of cause in tort liability, it is important to distinguish between the following concepts: (1) the political argument, usually associated with transactional justice principles, that cause is necessary for liability because of deference to principles of individual responsibility and autonomy;[184] (2) the mediating concepts (such as proximate cause) created by the legal culture during the period of common law liberalism to reinforce such transactional justice political elements and derived from, although not coextensive with, intuitionistic notions of responsibility; and (3) the core concepts dominant in the intuitionistic thought of adults that associate cause with responsibility.

The CLS literature generally conflates all three categories. Although this still emphasizes the potential political connections of common law categories, it also makes it difficult for CLS scholars to argue against the political values of transactional justice or to expose the political baggage attached to mediating concepts used by the legal culture without having to argue against the validity of the intuitionistic concepts as well, which is extremely difficult.[185] Similarly, it forces them to assume that the politics of common law liberalism still exist simply because of the presence of intuitionistic thought, which need not be the case. In contrast, le-

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the consequences it has for legal thought; however, both groups argue that such relationships exist and that understanding the nature of such relationships is important for understanding the current state of legal scholarship.

184. *See generally* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 168-69 (1973) (causation defines, prima facie, acts that invade the rights of others); Horwitz, *The Doctrine of Objective Causation*, in POLITICS OF LAW, *supra* note 3, at 201-02 (importance of causation in corrective justice system).

185. An example of this can be found in some of Mark Kelman's work. On the one hand, when Kelman attacks the behavioral foundation of neoclassical economics, he argues that such assumptions run counter to intuitionistic thought. *See* Kelman, *Ideology in the Coase Theorem*, *supra* note 107, at 678-95; *see also* Gjerdingen, *supra* note 13, at 750-58 (discussing this aspect of Kelman's work). On the other hand, when he attacks the determinacy of traditional criminal law doctrine, he argues that intuitionistic concepts of cause and blameworthiness cannot constrain legal analysis. *See* Kelman, *supra* note 102.

gal theory work to date attempts to link politics and intuitionistic thought without acknowledging the influence of the mediating concepts of the legal culture.

The task of both the legal theory and CLS scholars might more properly be expressed as attempting to resolve what should be done to restructure legal thought once it is acknowledged that the politics of common law liberalism are no longer necessarily legitimate after 1937 but that the mediating concepts derived from the pre-1937 era continue to be used because of cultural fixations and that modern politics must still cope with the normative aspects of intuitionistic thought.[186]

2. *Law and Culture*

Element 2: Law is a semiautonomous discipline. While the law is no longer assumed to be autonomous, it nonetheless remains something different from politics. Nor is the law merely congealed politics. It must be considered on its own terms.

Basis: Bounded indeterminacy, the role bounded indeterminacy creates for the legal culture, and the nature of the modern political structure.

Argument: Under the modern theory of law, the conventionalist assumption that the law is autonomous is modified. The legal culture is no longer separate from politics; nonetheless, a distinct role remains for the legal culture.

The concept of foundational politics implies not only that a

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186. Recent literature, in fact, has begun to distinguish some of these various factors rather than conflating them. *See, e.g.*, Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1821-28 (1985) (distinguishing causal element in corrective justice from probabilistic notions of cause associated with distributive justice schemes).

The discussion in the text only used the example of "cause." A similar analysis could be applied to such matters as recent disputes about "promise" and efficient breach, and about "reification" and Hohfeldian notions of property, among many others. In each case, it is important: (1) to distinguish between the psychological, the legal, and the political concepts; (2) to understand the connections between them; and (3) to understand the appeal of each. Thus, for example, "efficient breach" is an end-state political concept, *cf.* Gjerdingen, *supra* note 13, at 722-28, 753 n.205 (end-state nature of Coasean tort analysis), while "promise" has meaning for intuitionistic thought and common law mediating concepts, and it is also associated with transactional justice political arguments, *see, e.g.*, C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) ("promise" as basis of transactional justice grounded in liberal individualism). As a result, the debate about efficient breach is a debate about several issues. Sometimes it is a debate about the inability of end-state political concepts to accommodate intuitionistic thought, sometimes it is a debate about end-state versus transactional justice principles, and sometimes it is a debate about the tendency of common law mediating concepts to reinforce transactional justice.

given set of common political assumptions apply over distinct periods of time but that the concepts of the legal culture must be consistent with those elements if the legal culture is to succeed. The legal culture helps to legitimize the political culture. The legal culture channels dialogue about the legitimacy of the political structure, constructs mediating concepts for the political structure, and resolves some of the disputes of the political structure, all of which serve to legitimate the political culture itself. In addition, the legal culture helps to resolve some of the hard questions of the political structure, in particular, the choice of the exact form of the political structure. To be successful, the legal culture must be consistent with the normative assumptions of the political culture. Unless the legal culture is able to do this, it will be perceived as irrelevant and will suffer its own crisis of legitimacy. Thus, a general connection exists between legal thought (i.e., the response of the legal culture to its task) and political values.

At the same time, however, the notion of political structure facilitates the appearance of some separation of law from politics. The legal culture works within a given system. By the very definition of its role, the legal culture is required to legitimate rather than to critique the fundamental tenets of that system. If the legal culture could not perform this task, it would lose much of its legitimacy. Questions about the legitimacy of the underlying political structure itself thus are not ordinary legal matters. Such issues cannot be resolved or critiqued by ordinary legal techniques since the operation of the legal culture presupposes that a political structure is already in place. Likewise, the mediating concepts developed by the legal culture typically are not overtly political. The mediating concepts must be compatible with the political structure, but they exist in a separate, although parallel plane and thus deflect rather than attract political dialogue. The bounded nature of the determinacy in the political structure also helps the legal culture avoid appearing political. Although the political structure determines what has to be decided as well as the range of acceptable answers, the legal culture determines the final form of legal thought.

In the context of common law liberalism, the assumption that the law was autonomous was reinforced by the special prominence

of adjudication.[187] In addition, the emergence of the university-based law school and the case law method provided a mechanism for the homogenization of the legal culture, thus fostering the creation of a particular interpretive community.

In the modern era, however, the idea of law as an autonomous craft became less feasible for several reasons. First, the emergence of politics writ large[188] and the increased importance of institutions other than courts[189] diminished any claim for autonomy based either on a separation of law from politics or an association with a particular institution. Second, the increased use by the legal culture of formal models divorced from intuitionistic thought, such as statistics, economics, and risk assessment, presented a more obvious need to justify the normative foundation of such techniques since the legal culture could no longer take advantage of their accepted legitimacy by laypersons. Once that source of legitimacy was removed, however, the legal culture had to confront the political and normative issues raised by the use of such techniques.[190] Together, both of these features also diminished the credence of the claim of lawyers that they had exclusive access to the law.[191] Thus, although the mediating concepts created by the legal culture are related to the dominant political structure, under the modern theory of law they are not solely a matter of politics but are partially dependent on the power structure and cultural traditions within the legal culture itself.

This relationship between the legal culture and the political structure is consistent with much of the CLS work on the semiautonomous nature of the law.[192] This feature of the modern theory

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187. *See infra* notes 223-46 and accompanying text.

188. *See supra* text accompanying notes 159-60.

189. *See infra* notes 240-43 and accompanying text.

190. *See* Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980) (normative issues raised by use of Posnerian "wealth maximization"); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (political aspects of efficiency standards); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972) (normative aspects of policy science and cost-benefit analysis).

191. An excellent recent description of this phenomenon is Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251 (1986).

192. *See* Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977); Gordon, *New Developments in Legal Theory*, in POLITICS OF LAW, *supra* note 3, at 287-92; Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV.

of law also explains several other aspects of the new scholarship. One concern in the new scholarship is the dynamics of the creation and transmission of meaning within the legal culture itself. The legal culture comprises a particular interpretive community. Meaning exists within the legal culture in part because of a shared set of assumptions and experiences among the members of that community. Words and expressions take on meaning only within a given community. The shared experiences among lawyers give rise to what Thomas Kuhn has referred to as "tacit knowledge"[193] and provide a source of limited determinacy in the legal culture for legal concepts. Consistent with this idea, the new scholarship addresses the institutional, personal, and cultural factors that create and disseminate ideas within the legal culture.[194]

A second and related concern of the new scholarship is the normative aspect of this activity. The existence of an interpretive community provides a source of determinacy and a source of power for lawyers. The existence of such an interpretive community, however, is fostered in part by the monopolization and subsequent homogenization of legal education by the modern university-based law school. Thus, the content of that common experience and, in particular, the relationship between the social construction of reality by lawyers and that of other groups in society becomes a matter of concern under the modern theory of law.[195]

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529 (1977). *But see* Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 222 n.97 (1984) ("The notion of relative autonomy is so vague as to be of no real significance.").

193. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 191-98 (2d ed. 1970). This, of course, is related to the issue of determinacy in the legal culture. *See infra* note 202.

194. *See, e.g.*, G. WHITE, *supra* note 65 (intellectual history of torts); Chase, *supra* note 88 (adoption of case method at Harvard); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (intellectual history of doctrine of enterprise liability within legal culture); Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985) (establishment of profession of law professor); Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984) (growth of CLS movement); Schlegel, *supra* note 43 (legal realism at Yale); *see also* Konefsky & Schlegel, *supra* note 142 (pointing out failure of law schools to consider these factors).

195. *See, e.g.*, B. ACKERMAN, *supra* note 14 (relationship between legal thought and construction of reality by laypersons); Gordon, *supra* note 192, at 287-92 (how people experience and should critique "clusters of belief" associated with law); Trubek, *supra* note 103 (relationship between law and construction of society).

3. *Law and History*

Element 3: Law must be historical. Change grounded in historical events can be a source of legitimacy for the law rather than a threat to its legitimacy.

Basis: Legitimizing effect of periods of foundational politics and their resulting hard and easy questions.

Argument: According to the tenets of conventionalism, law is ahistorical. Historical events may influence the law, but they do not control or legitimate it.[196] In contrast, under the modern theory of law, the relationship between law and history takes on a normative dimension. Certain historical events (i.e., those involving foundational politics) create and legitimate political structures. The legitimacy of the resulting political structures is tied to the accepted legitimacy of these moments of foundational politics. The history of these events and their subsequent impact on the legal culture thus becomes an integral part of the modern theory of law. In turn, these political structures provide the basis for the legitimacy, form, and content of legal dialogue. History, therefore, also becomes important for providing a descriptive account of the nature of legal thought in each of the three periods of American law. The nature of legal thought in each period is linked to the existence of a particular political structure, to the hard and easy questions it creates, and to the role that the political structure creates for the legal culture. Understanding the nature of legal thought in each period is tied not only to understanding the meaning of these moments of foundational politics but also to the other historical events that played a role in the development and resolution of some of the hard questions of each period.

The work of legal theory and CLS scholars reflects this perspective of the modern theory of law. The increased interest in legal history and the concern among both legal theory and CLS scholars about the structure and the periodization of legal thought indicates a new conception of the relationship of history and law. The use of legal history, particularly among the CLS scholars, has changed. Rather than being confined (in the fashion of the conventionalists) to the history of an autonomous subject and stressing the history of particular cases, courts, or lawyers,

196. The best description of this aspect of conventionalism is Gordon, *supra* note 32.

CLS legal history scholars increasingly have focused on the historical contingency of law and have argued for the explicit recognition of the relationship between law and political structures during particular periods.[197] The concern of both legal theory and CLS scholars with the structure of legal thought[198] can be viewed not only as a plea for the recognition of the connection between political structure and legal thought but also as the influence of specific political constructs on legal thought during particular eras. The increased focus of each group on the periodization of legal thought also reflects the influence of the modern theory of law.[199] For example, the work of legal theory scholars that compares common law and various modern models of legal thought can be viewed as an attempt to isolate and compare the political structure of the Civil War-to-1937 and post-1937 eras.[200] Similarly, the work of CLS scholars comparing the structure of the pre-Civil War and Civil War-to-1937 eras indicates the recognition of distinct political structures related to particular historical

197. *See, e.g.*, M. HORWITZ, *supra* note 103; Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Gordon, *supra* note 8. This change in the nature of legal history is also evident in many of the essays in 3 NEW YORK UNIVERSITY SCHOOL OF LAW SERIES IN LEGAL HISTORY, LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW (H. Hartog ed. 1981). Even among the more politically moderate legal historians, this change is also very evident. *See, e.g.*, Presser, *"Legal History" or the History of Law: A Primer on Bringing the Law's Past into the Present*, 35 VAND. L. REV. 849 (1982).

198. *See supra* note 125 and accompanying text.

199. *See, e.g.*, P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (2d ed. 1983) (pre-Civil War, post-Civil War, and post-1937 periods); G. GILMORE, *supra* note 79, at 11-18 (using Llewellyn's period styles for pre-Civil War, Civil War to World War I, and World War I to present); M. HORWITZ, *supra* note 103 (pre-Civil War legal thought); K. LLEWELLYN, COMMON LAW TRADITION, *supra* note 40, at 35-45, 62-100 (detailing "Grand Style" of legal thought after Civil War); R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960) (pre-Civil War, post-Civil War, and post-1937 legal thought); G. WHITE, *supra* note 41 (post-Civil War legal thought); Gabel & Feinman, *Contract Law as Ideology*, in POLITICS OF LAW, *supra* note 3, at 172 (contract law in 18th, 19th and 20th centuries); Kennedy, *Form and Substance*, *supra* note 103, at 1725-37 (pre-Civil War legal thought compared to post-Civil War legal thought and its variations); Kennedy, *supra* note 124 (period of classical legal thought from 1850-1940); Mensch, *supra* note 54 (preclassical, classical and modern legal thought); Nelson, *supra* note 88 (pre-Civil War style of scholarship).

200. While each of the existing formulations may vary slightly on the exact dates assigned to each period, *see supra* note 199, they all agree that the nature of legal thought changed over this period. What distinguishes the various work is the rationale presented for this change. Few connect the change in style to an underlying transformation in the political structure. Such a conclusion would be consistent with much of the existing literature, however.

events.[201]

4. *Law and Determinacy*[202]

Element 4: Legal technique does not necessarily give one right answer. The existence of a determinate answer need not be taken as a starting point, and the existence of discretion is not fatal. It is possible to postulate the existence of indeterminacy in the law, yet not say that the law itself is indeterminate.

Basis: Hard and easy questions and the existence of different political structures.

Argument: Conventionalism assumes that the law is determinate—that a single, correct answer exists. The legitimacy of the legal culture is linked to a supposed rule of law in which judges are bound by external standards and reason to a determinate result by the application of apolitical legal techniques. Consequently, within the framework of conventionalism, if any legal decision is indeterminate, the legitimacy of the legal culture is threatened.

In contrast, under the modern theory of law, neither the presence of indeterminacy nor the existence of discretion is fatal to the legitimacy of the law. The existence of different results need not inevitably lead to the conclusion that the law is indeterminate or that it is illegitimate. Two different aspects of the theory of legal consciousness contribute to this assumption. First, the recognition of three distinct political structures raises the possibility of different interpretations of legal doctrine during each pe-

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201. CLS scholars still disagree with legal theory scholars over why the periods exist, but they do seem to recognize that such periods are important.

202. This section deals with only part of what is usually labeled as the "determinacy" issue. Under the influence of the elements of the modern theory of law discussed here, the following can be argued: first, the notion of bounded indeterminacy as applied to the political structure excludes certain types of questions (thus somewhat constraining legal dialogue); second, the final choice within the options that remain is determined by social choice factors; and third, different results between periods do not support a claim that law is indeterminate. Other features of the modern theory of law relevant to the determinacy issue include the presence of an interpretive community in the legal culture, *see, e.g.*, Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Singer, *supra* note 11, at 21-22, and the structure of intuitionistic thought, *see, e.g.*, Gjerdingen, *supra* note 13. Together, these various factors do not provide either determinate answers as they are traditionally understood by conventionalists or totally indeterminate answers as CLS work is sometimes interpreted by others to imply. Rather, it sets up a hierarchy—political structure, mediating concepts, specific application—that progressively narrows the range of debate, even though at each level it still provides a range of possible answers. Thus, the entire scheme, as well as each of its individual components, represent an example of bounded indeterminacy.

riod. For example, conventionalists typically require that the meaning of a provision of the Constitution be harmonized over different historical periods and that any deviation be explained by errors in judicial method.[203] In contrast, under the modern theory of law, the meaning of a provision of the Constitution could be assumed to reflect a different political structure during each period. Moreover, it could also be assumed that various clauses of the Constitution serve as placeholders for particular aspects of the dominant political structure. Therefore, it would not be inconsistent to argue, for example, that the judicial interpretation of the contract clause reflected its association in each of the three periods with a particular feature of the dominant political structure: vested rights in the pre-Civil War era,[204] limitations on the power of the state to change bargaining power or redistribute wealth in the Civil War-to-1937 era,[205] and concern for abuse of regulatory power by the state in the post-1937 era.[206] If cases from each era (particularly those from the last two) are directly compared, they often illustrate inconsistent results.[207] The results vary, however, not because the law is indeterminate or inherently manipulable

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203. A good example of this approach is G. GUNTHER, CONSTITUTIONAL LAW 453-58 (11th ed. 1985).

204. *See* P. BREST & S. LEVINSON, *supra* note 199, at 108-20; Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFFALO L. REV. 381, 404-37 (1982).

205. The contracts of the state were treated as the contract of a private person. *See, e.g.*, Murray v. Charleston, 96 U.S. 432, 445 (1877). Thus, a promise by the state to pay was given "the same meaning as that of similar contracts between private persons," *id.*, consistent with the notion of the invisible hand state. Similarly, the state could regulate private contracts according to basic common law principles (i.e., fraud, duress, illegal conduct, common law nuisance) so long as it did not try to change bargaining power, a topic that tended to be filed in the due process "box," *see, e.g.*, Coppage v. Kansas, 236 U.S. 1, 13-21 (1915).

206. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 21-32 (1977) (higher standard of review applied to impairment of public contracts "because the State's self-interest is at stake"); *see also* Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1643-51 (1980) (higher standard of review proposed for state impairment of public contracts based on representation of affected parties in decision making process).

207. For example, because the events of 1937 established that the elements of common law liberalism were no longer necessarily legitimate, the state can now regulate in ways that clearly would have been invalid under the principles of common law liberalism. *Compare* United States v. Butler, 297 U.S. 1, 61 (1936) ("The word [tax] has never been thought to connote the expropriation of money from one group for the benefit of another.") *with* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (unemployment compensation upheld).

but because the political structure is different in each period.[208] To the extent, therefore, that any supposed indeterminacy—at least in the sense of inconsistent results over time—merely reflects the existence of different political structures for particular historical periods, it is expected and legitimate.

The second aspect of the theory of legal consciousness contributing to the assumption that indeterminacy is not fatal in the modern theory of law is that the notion of bounded indeterminacy and its related notion of hard and easy questions represents a particular perspective on the determinacy issue within each period. The bounded indeterminacy of the political structure thus creates a range of possible options, each of which is consistent with the overall political structure and hence is legitimate. Within these constraints, the final decision is determined by social choice factors. In this context, social choice refers to the interplay of institutions, individuals, and cultural factors that determine the final choice within the permissible range of options.[209] This choice is determinate in the sense that some decision is finally made; however, this choice is also indeterminate in the sense that there is no necessary claim that the final choice is the only correct or legitimate one or that a different mix of social choice factors would have produced the same result. The politics of the modern theory of law consist not of avoiding the existence (or appearance) of discretion but of accepting the reality of discretion and then deciding who gets to exercise discretion, why it is accepted as legitimate, and how it is constrained.[210] The term social choice factor

208. At the same time, these structures provide a source of uniformity across different areas of law during each period.

209. The use of the term "social choice" here is not meant to endorse the legitimacy of social choice literature in economics. Nonetheless, it is somewhat suggestive of the kind of inquiry that must take place. As Kenneth Arrow has shown so elegantly, it is impossible to construct a social welfare function by merely summing individual preferences. *See* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). Before any collective choice can be made, people must either give up certain options (i.e., the condition of citizens' sovereignty in Arrow's terminology, *see id.* at 28-30) or someone else must impose them (i.e., the condition of nondictatorship, *see id.* at 30-31). It is not that the conditions Arrow places on social choice are ever fulfilled that makes them important. Rather, it is because decisions get made anyway that it forces dialogue about the various mechanisms that exist for "agenda setting." Thus, the use of the term "social choice" here refers to the various power structures in society that determine what issues are presented, who gets to decide them, and how they are decided.

210. As a first step, this requires a description of how things really work. *See* Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013, 1023-28

thus serves as a placeholder for a variety of concerns: (1) microcultural factors, such as the influence of particular people or law schools; (2) macrocultural factors, such as the existence and development of particular interpretive communities within the legal culture; and (3) the institutional and strategic game-theory aspects of decision making.[211]

The work of legal theory and CLS scholars is consistent with this assumption that indeterminacy is not fatal in the modern theory of law.[212] The indeterminacy issue is a prominent theme associated with CLS scholars.[213] At times, some CLS scholars appear to take the extreme position that law is totally indeterminate. Although this position is usually associated with CLS scholarship, the dominant position in the CLS movement is not in fact so extreme. The indeterminacy argument usually is advanced by CLS scholars only as a means of criticizing the inevitability of conventionalism.[214] By arguing that the law is indeterminate, the CLS scholars are only arguing that conventionalism is not the only possible vi-

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(1985) (factors affecting professional careers in law teaching); Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1222-67 (1983) (operation of welfare system). Another feature of this literature is that traditional models of decision making are challenged, such as the individualistic model of decision making, *see infra* notes 225-43 and accompanying text, and traditional Weberian notions of bureaucratic rationality, *see, e.g.*, M. DAN-COHEN, *supra* note 63, at 17-20; J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 100-01 (1985); Frug, *supra* note 170, at 1297-1305; Simon, *supra*, at 1222-45.

211. The use of the term "game theory" from current economic literature, *see, e.g.*, W. BAUMOL, ECONOMIC THEORY AND OPERATIONS ANALYSIS 437-57 (4th ed. 1977), is only meant to be suggestive—to capture the basic notion that institutional or cultural factors may so structure the incentives for decision that the decisionmaker may select options that, under other circumstances, would not be rational. *See* Elliot, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985); Meidinger, *On Explaining the Development of 'Emissions Trading' in U.S. Air Pollution Regulation*, 7 LAW & POL'Y 447 (1985).

212. For example, it is interesting to note how some similar themes, such as the need to articulate the nature of the modern political structure rather than just assuming that conventional techniques such as case analysis or textualism are sufficient, are reflected in the work of scholars who otherwise might not be seen as engaged in a common enterprise. *Compare* Unger, *supra* note 54, at 602-16 (equal protection doctrine reflects current political structure rather than formalist interpretation of clause) *with* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (concept of equality only reflects substantive values of background political structure).

213. *See supra* notes 110-24 and accompanying text.

214. *See, e.g.*, Gordon, *supra* note 197, at 125 ("The Critical claim of indeterminacy is simply that none of these regularities [about the predictability of rules in given contexts] are *necessary* consequences of the adoption of a given regime of rules.") (emphasis in original).

sion of law and not that law in any form must be indeterminate. The CLS argument also can be viewed as saying merely that the common law categories and techniques created by the legal culture to legitimate the political structure of common law liberalism are no longer useful once the political structure that they were designed to reinforce no longer exists. Once the background structure provided by common law liberalism is removed, common law categories no longer reinforce the right politics or ask the right questions.[215] Thus, classical common law categories are perceived by CLS scholars as politically repressive because of their connection with common law liberalism and indeterminate because they no longer have much predictive value. Similarly, the CLS work also seems to recognize the existence of hard and easy questions within a particular political structure[216] and that legal techniques are related to particular political structures, which implies that legal thought is related to and yet constrained by the political structure in which it operates.[217]

The work of legal theory scholars is also consistent with this scheme. Unlike CLS scholars, legal theory scholars do not directly address the determinacy issue. Part of the reason simply may be that the legal theory movement so far has been unable to supplant conventionalist notions of political legitimacy. The position of the legal theory scholars on the determinacy issue is less developed than that of the CLS scholars; however, a similar assumption seems to be implicit in their work. For example, by contrasting classical common law models of legal thought with modern models, the legal theory scholars assume that different political structures produce (and legitimate) different varieties of legal thought.[218] The related concept of bounded indeterminacy also is underdeveloped in the legal theory literature; nonetheless, it is

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215. *See* Feinman, *The Failure of Legal Education and the Promise of Critical Legal Studies*, 6 CARDOZO L. REV. 739 (1985). As noted by Singer, "Saying that decisionmaking is both indeterminate and nonarbitrary simply means that we can explain judicial decisions only by reference to criteria outside the scope of the judge's formal justifications." Singer, *supra* note 11, at 20; *see also* Unger, *supra* note 54, at 602-48 (inability of conventional doctrine of equal protection and of contracts to relate to or explain modern results).

216. *See, e.g.*, Heller, *supra* note 125, at 173 n.81; Tushnet, *supra* note 54, at 823 & n.135.

217. For example, this appears to be a possible reading of Kennedy, *Form and Substance*, *supra* note 103.

218. *See supra* notes 70-77 and accompanying text. *See, e.g.*, B. ACKERMAN, *supra* note 14; B. ACKERMAN, *supra* note 2.

also implicit in the work of legal theory scholars.[219]

Legal theory scholars, perhaps because of their greater acceptance of economic theory, have dealt with the game-theory aspects of the social choice element of the modern theory of law.[220] Conversely, CLS scholars have dealt with the cultural aspects.[221] Much of the work to date is somewhat tentative; nonetheless, it seems clear that some of the work of the legal theory and CLS scholars is the result of an attempt by each group to provide an alternative to conventionalist concepts of determinacy.[222]

5. *Law and Adjudication*

Element 5: Law is more than the study of adjudication. The proper subject of law extends beyond the study of rules generated by courts. Law need not abandon the study of courts or rules but properly extends beyond them.

Basis: Political structure of the post-1937 era.

Argument: The legal culture must make important the questions that the dominant political structure makes important and make unimportant the questions that either "go without saying" or are unimportant in the political structure.

In the context of common law liberalism, this meant that the legal culture made important the questions of transactional justice and had to deal with such matters as retrospective, case-by-case decision making and the application of dominant social standards. Similarly, questions about the legitimacy of the existing social structure, regulation of the market, or redistribution of wealth, among others, were unimportant. In these circumstances, the concept of law as adjudication fulfilled the needs of the legal culture. Law as adjudication reinforced the legitimacy of the historical, individualistic focus of transactional justice and provided a forum well-suited to the statement and application of dominant social ex-

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219. *See, e.g.*, B. ACKERMAN, *supra* note 129, at 10-19 (notion of conversational constraints that allows range of possible outcomes); Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363 (1986) (general discussion of determinacy); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) (cultural constraints on decision making); Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (range of legitimate answers possible in construing text).

220. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 55-60 (transaction cost economics as related to social choice issues); Elliott, Ackerman & Millian, *supra* note 211.

221. *See, e.g.*, Chase, *supra* note 88; Gabel, *Reification in Legal Reasoning*, in 3 RES. L. & SOC. 25 (S. Spitzer ed. 1980); Konefsky & Schlegel, *supra* note 142; Schlegel, *supra* note 43.

222. Other social choice aspects are discussed in relation to the change from law as adjudication. *See infra* notes 227-43 and accompanying text.

pectations about rules of conduct and social roles. Moreover, the substantive limits that common law liberalism placed on actions by the state assured that legislative and administrative action would be limited. Since it was improper for the state to redistribute wealth, regulate bargaining power, or challenge the legitimacy of the existing social structure, the establishment of government institutions for the performance of such functions was unnecessary. This effectively eliminated any need for extensive legislative or administrative action and, in turn, established the relative dominance of courts vis-a-vis legislatures and administrative agencies as well as the dominance of the judicial model of decision making.[223]

Given the change in the post-1937 political structure, however, the association of law with courts and adjudication became increasingly problematic. With the legitimation of the activist state, the questions that the political culture made important and unimportant changed drastically. Matters such as prospective, group-oriented concerns became important, as did the articulation of end-state goals. This brought into question the continued use of case-by-case enforcement of majoritarian social expectations by courts as the dominant legal standard. Similarly, once it was accepted as legitimate for the state to regulate the market, to change the existing social structure, and to redistribute wealth, it was predictable that legislative and administrative action would challenge adjudication as the dominant legal form.[224] A related consequence was that conventionalist concepts of decision making and representation also became suspect. Conventionalism relied on an individualistic model of decision making that stressed the following features: (1) free will, supposedly manifesting itself in some form of recognized consent, was the dominant form of legitimation; (2) organizations and the state were judged by the same standards that applied to individuals and relied on the concept of virtual representation;[225] and (3) individuals were assumed to have

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223. *See* Stewart, *supra* note 61, at 1671-88 (dominance of trial court model for administrative agencies and trial court/appellate court model for judicial review of agency action).

224. *Cf.* Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (efficiency of decision making by courts vis-a-vis legislative and administrative action); Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982) (arguments for social change best directed at legislative and administrative arenas).

225. Under the doctrine of virtual representation, one entity is assumed to represent another—a concept often referred to as "metonymy." For example, under the concept of

equal bargaining power. So long as the individualistic model was used, it was difficult to ask questions about the cultural, political, or institutional forces that affected decision making. As a result, conventionalism could not take seriously either the existence of disparate power or the reality of bureaucracy.[226]

In legal theory and CLS literature, the influence of this element of the modern theory of law has taken two different forms. First, the subject of law expanded beyond courts to include other political institutions such as administrative agencies and legislatures, other social choice mechanisms such as the market or groups (e.g., corporations), and other methods of decision making such as arbitration and economic analysis. While much of the literature is still in the formative stage, several related features of this work are particularly prominent: (1) it challenges the individualistic model of decision making associated with conventionalism, whether applied to the state,[227] legislatures,[228] bureaucracies,[229] corporations,[230] or courts themselves;[231] (2) it challenges the related inability of the individualistic model to distinguish between different amounts of power, whether between employer and employee,[232] rich and poor,[233] state and individual,[234] or men and women;[235] (3) it challenges conventionalist theories of representa-

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virtual representation, the act of "the legislature" is taken as the act of "the people." *See, e.g.*, G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 173-88 (1969) (discussing arguments about virtual representation made in the context of representation of American colonies in British Parliament).

226. *See* M. DAN-COHEN, *supra* note 63, at 41-51; Frug, *supra* note 170; Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 NW. U.L. REV. 900 (1984-1985); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1345-58 (1979).

227. *See* Stewart, *supra* note 61.

228. *See* Elliott, Ackerman & Millian, *supra* note 211.

229. *See* J. MASHAW, *supra* note 210.

230. *See* M. DAN-COHEN, *supra* note 63; *Corporations and Private Property*, 26 J.L. & ECON. 235 (1983); Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923 (1984).

231. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 94-129 (1985); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981).

232. *See* Klare, *Critical Theory and Labor Relations Law*, in POLITICS OF LAW, *supra* note 3, at 65.

233. *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

234. *See* M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983) (government speech not like individual speech).

235. *See* Olsen, *Politics of Family Law*, *supra* note 108.

tion (which are tied to consent and virtual representation), whether in law suits,[236] administrative agencies,[237] legislatures,[238] or the Constitution;[239] (4) it challenges the conventionalist fixation with courts. (While merely implicit in the early scholarship,[240] this particular challenge is becoming increasingly explicit[241]); and (5) it challenges the continued use of the judicial model of decision making in areas other than courts, such as in administrative agencies,[242] and it challenges the continued separation of courts and other decision making institutions.[243]

The second influence of the modern theory of law is that the role of courts is no longer limited to adjudication in legal theory and CLS models. Rather than being limited to adjudication of private claims, the role of the courts is expanded to include such functions as the management of public institutions,[244] the generation of quality control techniques for bureaucratic decision making,[245] and the administration of federal court systems.[246]

Together, this scholarship can be viewed as an attempt to displace the conventionalist definition of law as adjudication (and its associated concepts of decision making and representation) and to confront the reality of the political and social choice aspects present in the post-1937 political structure.

6. *Law and Classical Common Law Categories*

Element 6: Legitimate legal techniques include more than traditional common law methods and are not necessarily linked to classical common law categories. Textual exegesis and case analysis no longer comprise the sole source of legitimate legal techniques, and

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236. *See* Fiss, *supra* note 60; Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980).

237. *See* Stewart, *supra* note 61, at 1711-60; Sunstein, *supra* note 61.

238. *See* Elliott, Ackerman & Millian, *supra* note 210.

239. *See* Ackerman, *supra* note 151.

240. *See* G. CALABRESI, *supra* note 100.

241. *See* Elliott, *Goal Analysis versus Institutional Analysis of Toxic Compensation Systems*, 73 GEO. L.J. 1357 (1985).

242. *See* Stewart, *supra* note 61, at 1671-88.

243. *See* Elliott, *supra* note 241.

244. *See* Fiss, *supra* note 60; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

245. *See* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

246. *See* Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981).

classical common law categories no longer comprise the sole source of legitimate legal classifications. It is legitimate for legal argument to extend beyond these techniques and categories, to reinterpret them, or to use them for new purposes.

Basis: Change in the political structure after 1937 and its effect on the mediating concepts of the legal culture.

Argument: One of the accepted tenets of conventionalism is that classical common law categories provide the substance of the law and that manipulation of these categories, along with textual exegesis and case analysis, provides the basic tools of legal analysis. In contrast, under the modern theory of law, classical common law categories no longer are necessarily legitimate, and textual exegesis and case analysis no longer comprise the only legitimate legal techniques.

One of the central functions of the legal culture is to create mediating concepts that reinforce the legitimacy of the basic elements of the dominant political structure. These mediating concepts must "map onto" that political structure: the questions they make important and unimportant must be the same questions that the political structure makes important and unimportant. As a result, a special symbiotic relationship exists between the dominant political structure and the mediating concepts created by the legal culture: the institutionalization of the political structure requires the creation of mediating concepts that legitimate and provide day-to-day implementation of its elements; in turn, the mediating concepts constructed by the legal culture carry with them the implicit structure of the dominant political elements. Therefore, the mediating concepts initially created by the legal culture—in this case, contracts, property, and torts, along with their refinements—are efforts to respond to the basic elements of common law liberalism.[247] Similarly, these classical common law categories carry with them some of the implicit structure of common law liberalism and, accordingly, selectively filter and shape legal dialogue.

Classical common law categories remain useful under the

247. *See, e.g.*, G. GILMORE, *supra* note 79, at 41-48 (describing rise of contracts as subject of study after Civil War); G. GILMORE, THE DEATH OF CONTRACT 5-34 (1974) (creation of classical common law contract doctrine after Civil War); White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671 (1977) (emergence of torts as mediating concept after Civil War).

modern theory of law, however, only as long as the political structure that provides their basic form remains in place. With the demise of common law liberalism in 1937, the political structure that common law categories were designed to reinforce was no longer prima facie legitimate. The questions that common law categories made important thus are no longer relevant, and the political expectations that the common law categories carried with them are no longer necessarily legitimate. Common law categories continue to emphasize transactional justice principles and, correspondingly, fail to address the questions of distributive justice that the post-1937 political structure made important.[248]

With the maturation of the activist state in the late 1960's, this problem became particularly acute. Predictably, classical common law categories and doctrine were abandoned or modified either explicitly[249] or implicitly.[250] Combined with the corresponding breakdown of the conventionalist tenet of law as adjudication, common law models of procedures and decision making also became suspect.[251]

Much of the work of legal theory scholars can be seen as an attempt to create new categories of analysis that assume the legitimacy of the activist state and ask the questions that need to be asked in the present political culture.[252] At an accelerating rate, existing classical common law categories are being questioned,[253] and new categories and methods are being proposed.[254] Moreover, the rise of the law and economics movement can, in part, be seen as an attempt to develop legal techniques not tied to adjudi-

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248. This is not so much because common law categories are totally unable to deal with distributive justice issues as it is because they only do so under such unhelpful labels as "public policy."

249. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) ("property" under due process clause no longer determined by common law categories).

250. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (use of dominant social standards based on social role of women no longer valid normative standard); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (common law categories of defamation modified to take into account social position and power of public officials); Brown v. Board of Educ., 347 U.S. 483 (1954) (dominant social expectations no longer valid normative standard).

251. *See supra* notes 227-46 and accompanying text.

252. *See supra* notes 54-100 and accompanying text.

253. *See, e.g., Interpretation Symposium* (pts. 1 & 2), 58 S. CAL. L. REV. 1, 277 (1984-1985) (challenging common law methods of interpretation); *see also* Westen, *supra* note 212 (challenging technique associated with conventionalism that "meaning" of word is self-defining).

254. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 46-71 (arguing for constructivism).

cation, courts, or common law categories.[255]

The lack of CLS literature on new legal techniques can be attributed to their position on the meaning of the events of 1937.[256] CLS scholars typically view the post-1937 era as the collapse of liberalism rather than the creation of a new form of liberalism; consequently, they view the constructing of new political forms rather than of new legal forms as their preeminent task. Nevertheless, the work of CLS scholars, particularly the trashing[257] and deconstructing of existing common law categories,[258] is consistent with the basic proposition that common law concepts carry with them certain political baggage and that the political assumptions present in many classical common law categories are no longer necessarily valid.

Based on this assessment, some prediction for the future development of legal techniques can be offered. The demise of classical common law categories will only accelerate as the inability of common law categories to give an appropriate framework for the modern political structure and the infusion of new techniques into law schools continue.[259] The use of common law categories, however, will not completely disappear for a number of reasons. First, the cultural constraints attending curriculum reform in law schools will assure that at least the existing labels of contract,

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255. Law and economics, however, is only an attempt to do this. To the extent that it helps to ask some of the questions associated with the modern political structure, it can be helpful, but to the extent that it is used to hide normative questions, to claim neutral methodology, or to ignore the cultural aspects of legal thought, it cannot be useful. Thus, at best, it can be only an interim technique and, at worst, it can be harmful.

256. In general, CLS scholarship focused on deconstructing common law categories rather than creating new ones. For some preliminary attempts, however, see Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 900-18 (1985) (using category of "contorts" rather than contracts and torts); Unger, *supra* note 54, at 586-648 (discussing new "deviationist doctrine" as applied to equal protection and contracts).

257. *See supra* note 114 and accompanying text.

258. *See* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

259. The central features of each of the classical common law categories are under attack—for example, contract and "promise," *see, e.g., Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461; Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107 (1984); Kronman, *supra* note 129; Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); torts and "fault" or "cause," *see, e.g., Modern Tort Theory*, 15 GA. L. REV. 851 (1981); *Conference on Causation and Financial Compensation*, 73 GEO. L.J. 1355 (1985); *Critical Issues in Tort Law Reform: A Search for Principles*, 14 J. LEGAL STUD. 459 (1985); and property and reification, *see, e.g.*, Calabresi & Melamed, *supra* note 96; Reich, *The New Property*, 73 YALE L.J. 733 (1964).

property, and tort will be used, even if the subject matter under each banner is entirely different from what it used to be, thus giving at least an outward appearance of continuity.[260] Second, some common law techniques will survive because they fulfill a new function in the post-1937 era.[261] Third, cases and courts will remain a part of legal discourse, although the function of courts may no longer be limited to adjudication and, instead, may include such tasks as generating and managing dialogue about legal issues,[262] controlling the quality of bureaucratic decision making,[263] managing public institutions,[264] and updating statutes.[265] Fourth, the psychological appeal of rules, case-by-case analysis, and the assumption of a single, right answer will remain appealing even though their political justification may no longer be present; nevertheless, debate about the political consequences of using intuitionistic thought as a legal benchmark will increase.[266] Fifth, the proposal of transactional justice arguments by conservative legal scholars will supply an additional source of advocacy for cases, classical common law categories, and intuitionistic thought.[267]

IV. THE THEORY OF LEGAL CONSCIOUSNESS, THE MODERN THEORY OF LAW, AND THE LEGAL CULTURE—THE CRISIS IN LEGAL SCHOLARSHIP AND ITS FUTURE

A. *The Future of Conventionalism*

Together, the theory of legal consciousness and the modern theory of law explain much of the present contours of legal scholarship. The theory of legal consciousness explains the reasons be-

260. *See* Hazard, *Curriculum Structure and Faculty Structure*, 35 J. LEGAL EDUC. 326 (1985) (constraints on curriculum reform because of dynamics of faculty interaction).

261. *See, e.g.*, Calabresi, *supra* note 96 (common law categories of "but-for cause" and "proximate cause" adopted to use in end-state tort system).

262. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

263. *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

264. *See* Fiss, *supra* note 60.

265. *See* G. CALABRESI, *supra* note 149.

266. For initial inquiries, see B. ACKERMAN, *supra* note 14; Gjerdingen, *supra* note 13; Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763, 776 (1985).

267. *See* C. FRIED, *supra* note 186; Epstein, *supra* note 184.

hind the present crisis in legal scholarship, and the modern theory of law explains the substance of the debate. In addition, the modern theory of law provides a framework for the development of the new scholarship. The position of the conventionalists as well as the legal theory and critical legal studies scholars is consistent with an interpretation that the legal culture is in a state of transition. The political structure that gave rise to conventionalism is no longer dominant in American politics. The old scholarship associated with conventionalism will continue to decline and the new scholarship associated with the modern theory of law will rise. The transition will be gradual and not always obvious, however, for a variety of reasons. First, the present structure of legal education contributes to the maintenance of the old scholarship. Legal education is beset with its own institutional factors that make it more resistant to change than other academic disciplines, not the least of which is that bar exam law schools are required to teach students the categories and techniques of conventionalism. Combined with such other factors as the hierarchical nature of legal education and the monopoly that law schools have on legal education, this assures that conventionalism will not suddenly disappear as a taught tradition in legal education.

Second, common law thought cannot be entirely divorced from common sense thought. Conventionalism drew upon intuitionistic thought and incorporated it into common law thought. The attraction of conventional legal thought as a variant of intuitionistic thought, therefore, will never totally disappear. The appeal of rules, case-by-case decision making, and such notions as linking cause with responsibility will remain, in part, because of the prominence of such features in common sense thought. They cannot be excluded from the thoughts of lawyers any more than they can be excluded from the thoughts of laypersons. The basic structure of common law thought will never be far from the constructs that well-socialized people use in everyday thought. Intuitionistic thought cannot be repressed. A tension will continue to exist, however, between the use of common law thought as a component of common law liberalism and the use of common law thought as an example of intuitionistic thought. Even though the political structure that gave rise to the use of common law thought is no longer in place, the legal thought associated with common law liberalism will continue to create problems for the

legal culture as it tries to deal with modern legal scholarship.[268]

Third, the transition will be gradual because the labels and terminology used by conventionalism will continue to play a role even in the new scholarship, thus giving at least the outward appearance of the continuation of conventionalism itself. In an attempt to maintain their professional position, the conventionalists can be expected to classify the new scholarship as merely an application of conventionalism whenever possible. Similarly, the advocates of the new scholarship, in an effort to establish their legitimacy, can be expected to use the labels and terminology of conventionalism, even as they try to give them new meaning. As a result, mixed or hybrid scholarship can be expected, with each faction claiming it as its own. Neither the substance nor the labels of conventionalism therefore are likely to disappear from legal dialogue.

B. *The Future of the New Scholarship*

The modern theory of law is the force behind the new scholarship. What unites legal theory and critical legal studies scholars are the questions of the modern theory of law. Both groups recognize the decline of conventionalism, try to understand the reasons why, and try to develop the legal dialogue necessary for the modern political structure. They differ on the explanation they give for the change and, most important, on the meaning of the events of 1937. Their disagreements, however, are within the context of the modern theory of law.

To date, some aspects of the modern theory of law have been articulated best by legal theory scholars and others best by CLS scholars. Legal theory scholars focus on the social choice aspects of the modern theory of law, the creation of new legal techniques, and the movement of law away from adjudication, while the importance of history and the cultural aspects of legal thought are articulated primarily by the CLS scholars. Taken together, the work of both groups is generally consistent with the modern theory of law.

Nevertheless, the modern theory of law suggests a critique of the work of the legal theory and CLS movements. A prominent feature of legal theory work is its uneasiness about the legitimacy

268. *See supra* notes 183-85 and accompanying text.

of its politics and its new techniques.[269] The modern theory of law suggests that the modern political structure provides legitimacy for the legal theory work, apart from the confines of conventionalism. In addition, it also suggests that legal theory scholars might profit from an explicit articulation of the political structure behind their work.

A critique of CLS scholarship is slightly more complicated. In their effort to expose what they perceive as the unjust political realities of the present social structure, CLS scholars propose a single theory of liberalism and a political theory of common law thought. The single theory of liberalism and the political theory of the common law ultimately form the basis for some of the most distinctive CLS arguments, but they also create some of the greatest problems for the CLS scholars. The critical factor in the single theory of liberalism proposed by CLS scholars is the meaning of the events of 1937. Typically, CLS scholars view the events of 1937 either as a failed revolution or as a nonevent. Accordingly, CLS literature does not categorize 1937 as a major shift in political structure but rather as the continuation of what was essentially the same classical liberal structure. Because the single theory of liberalism does not give any particular political significance to the events of 1937, CLS scholars must turn elsewhere to explain the changes in legal and political thought in the modern era. One approach, exemplified by the work of Kennedy, Tushnet, and Unger, is to explain the changes as the result of the dissolution of liberalism itself.[270] This strand of CLS work provides some of this scholarship's most radical politics. The single theory of liberalism links the present legal discourse to the Civil War-to-1937 political structure and thus supports an argument that, because *Lochner v. New York*[271] is accepted as wrong and because the present political structure is part of that same tradition, present answers must lie outside of liberal tradition.

Another approach of CLS scholars is to explain the change in modern legal thought as the result of a similar dissolution of legal thought itself, best exemplified by the interests of CLS scholars in trashing and deconstructing common law thought and attacking

269. *See supra* notes 78-92 and accompanying text.
270. *See supra* notes 116-24 and accompanying text.
271. 198 U.S. 45 (1905).

formalism.[272] Rather than interpreting the events of 1937 as an event of constitutional politics that forced a change in modern legal thought, CLS scholars interpret it as an event of legal reasoning. This allows CLS scholars to link their work to that of the realists. The single theory of liberalism allows CLS scholars to argue that although the realists introduced the problem of the indeterminacy of legal thought to academia, it was the events of 1937 that confirmed these suspicions of indeterminacy. The single theory of liberalism also allows CLS scholars to link their own efforts to previous attacks on formalism, such as realism. This provides a source of legitimacy for the CLS work because, according to the conventional wisdom, realism was the last legitimate movement of legal thought associated with an attack on the political status quo.

The single theory of liberalism, however, also prevents CLS scholars from dealing with two significant issues under the modern theory of law. One is the existence of the legal theory movement itself. Because CLS scholars do not attach any particular significance to the events of 1937, they do not see the distinctive point of the legal theory efforts. Accordingly, they tend either to deny the possibility of any new forms of legal thought in a liberal political structure or to classify legal theory work as merely a continuation of formalism. This prevents CLS scholars from arguing that the legal theory movement presents any distinctive ideas or shares any common ground with the CLS movement.

Another and more serious problem is that the single theory of liberalism prevents CLS scholars from dealing with problems within the present political framework.[273] Because they claim that

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272. *See supra* notes 110-14 and accompanying text.

273. Of course, some of those within the CLS movement do not want to work within the present system. My point, however, is that it is important to distinguish between: (1) the hierarchies of common law liberalism; (2) the power structures present in the post-1937 period; and (3) the existence of any kind of power structures in any kind of political system. Some of those in the CLS movement may think that all three notions are illegitimate, while more moderate adherents may simply wish to argue about only the first two. The present theoretical framework for CLS work, however, makes it difficult to raise the more moderate arguments. Those who wish to make the more moderate claims thus have difficulty with buying into all of the CLS principles. This would also explain some of the love/hate relationships that many of those in the present legal culture have with the CLS movement. Certainly, a significant number of those in the legal culture may well want to talk about the legitimacy of the existing social practices or exercise of power by the government. They are drawn to the CLS scholarship because it presently represents the dominant method of legal scholarship that discusses such matters. At the same time, however, CLS scholars have

the types of relationships prevalent in common law liberalism, such as the market or traditional family structures, are exploitive, they must also claim that most present relationships, whether or not they are the same as those of common law liberalism, are exploitive as well. Because CLS scholars use a single theory of liberalism and argue that the hierarchies of common law liberalism were bad, it is also necessary for them to say that all present hierarchies are bad as well, even though some of them may be more acceptable than those of common law liberalism. While this makes it easier for them to argue for a radical restructuring of the political system, it also leaves them incapable of working well within the present system.[274]

The political theory of common law thought implicit in the work of CLS scholars explains some of the techniques used in the CLS scholarship as well as some of its weaknesses under the modern theory of law. Under the political theory of common law thought fostered by the CLS scholars, the existing political structure creates certain exploitive positions. This political structure becomes part of the common sense of those within the system, and the legal system reinforces these relationships. From this perspective, the resulting common sense is a product of the operation of the political system on the minds of the citizens. It has no basis independent of the political system and is not a product of the internal operations of the mind. The political theory of common law thought allows CLS scholars to link legal discourse with overt political argument, thus justifying their attack on the present political structure. It also allows them to argue that overt political arguments have always been part of legal discourse, thus justifying their emphasis on the connection between law and politics. This approach, however, denies the possible influence of intuitionistic thought on legal discourse. Once this position is taken, the choice remaining for CLS scholars is a difficult one to make.[275] If they

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a difficult time generating positive proposals. This leaves many with a sense of Pyrrhic victory.

274. This, I suspect, is the reason behind some of the uneasiness about CLS work noted in Levinson, *Escaping Liberalism: Easier Said Than Done* (Book Review), 96 HARV. L. REV. 1466, 1476-84 (1983); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984); White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 657-61, 670-72 (1984).

275. *See supra* notes 180-86 and accompanying text.

deny the validity of common law thought, they must also deny the validity of intuitionistic thought separately from the political positions it once was used to justify. In contrast, if they accept the validity of intuitionistic thought, they must also accept some of the political positions of common law liberalism that the legal culture used intuitionistic thought to justify. The end result is that the importance of common sense thought is overlooked because the presence of intuitionistic thought as intuitionistic thought is confused with the political generation of common law doctrine. Similarly, the importance of legal culture is also overlooked as a result.

The modern theory of law suggests that the substantive political vision animating CLS work can be accommodated without abandoning liberalism in all its forms. Deconstructing, as it is usually practiced, is unnecessary. Under the modern theory of law, it is possible to argue simultaneously that, although classical legal thought certainly had its share of hard questions, it was coherent enough for an entire generation of lawyers and others to work with it, and that present politics should be given a radical interpretation. As a result of the events of 1937, we are left with two distinct political cultures—common law liberalism and the modern political structure. Thus, CLS scholarship can still be radical without having to trash classical common law doctrine. It is not necessary, therefore, for them to show that classical legal thought is inconsistent before modern politics can be talked about.

An extension of this argument is that the politics of radicalism have already been provided for CLS scholarship. The events of 1937 have already made it possible to argue that the government should take such actions as regulate the market, change the social structure, and redistribute wealth. People may disagree on how much change should take place, but they cannot say, unless they want to deny the reality of 1937, that discussion of these topics by CLS scholars is either illegitimate or unnecessary.

VI. Conclusion

The critique offered here of the old and the new scholarship must remain somewhat preliminary. The purpose of this Article is merely to introduce some of the features of a theory of legal consciousness and a modern theory of law to be developed at length

in subsequent articles.[276] Nonetheless, the existing critique and the arguments that various competing factions are developing indicate the nature of the future inquiry that must take place.

Given the future influence awaiting the group best able to make sense of the present unrest in legal scholarship and direct the transition, it perhaps is not surprising that the rhetoric between the conventionalists and the legal theory and critical legal studies scholars should be marked by emotion and a sense of mission, as well as by an increased sense of intolerance. The CLS scholars attack the conventionalists; the conventionalists, in turn, attack the CLS scholars; and the legal theory scholars disassociate themselves from both.

In the midst of it all, however, is frustration. Conventionalists are frustrated because they feel that CLS scholars are claiming that conventionalism is not just inadequate, but that it is evil. For conventionalists, these claims come at a particularly bad time. As a group, conventionalists of today feel more confused (and more defensive) than conventionalists of fifteen years ago did. They are particularly frustrated because they feel that CLS scholars have somehow sensed their vulnerability and are taunting them (which only makes them more defensive). Moreover, conventionalists are also frustrated because they feel that CLS scholars are telling them that the true reason behind their vulnerability is that the traditional legal scholarship they have been producing for the last several decades is not only bad, but morally wrong. In response, conventionalists label CLS doctrine as heresy and its followers as outlaws.

CLS scholars, in turn, are frustrated because they feel committed to the discussion of political values and to the study of the

276. This Article is the first of several essays that will develop this theory of legal consciousness, its relationship to political values, and its relationships to recent debates about the changing nature of legal scholarship. The next article will concentrate on the Civil War-to-1937 period and will elaborate on the elements of common law liberalism, the concepts of political structure, hard and easy questions and bounded indeterminacy, and the resulting role created for the legal culture and legal dialogue in the context of common law liberalism. A second article will consider the response of the legal culture to common law liberalism and, in particular, the nature of intuitionistic thought and nineteenth century science and the special role that they played in creating the specific structure of the classical common law thought. A third article will consider the specific applications of this work in understanding the structure of constitutional law during the *Lochner* era, which set up the framework for classical common law thought. Later work will also consider the emergence and growth of modern legal thought.

historical, cultural, and political aspects of the common law, yet they feel that conventionalists are not listening to them. CLS scholars are committed to the idea that it is legitimate to talk about such things as the vision of a good society and the role of the government and of law in providing that vision. They argue that lawyers, if they are to live any kind of honest life, must take responsibility for the political consequences of their acts, acknowledge the political framework of their training, and realize the full range of political options open to them. In particular, CLS scholars feel frustrated by the constraints of the existing legal categories which, they feel, only get in the way of the debate that must take place. In response to their frustration, CLS scholars try to get beyond the conventional legal categories and force conventionalists into basic political dialogue. The purpose is simply to make conventionalists recognize that questions about the basic structure of power in society are legitimate, particularly in legal dialogue. CLS scholars feel that their only option is to "trash" conventional legal categories, hoping either to break down the constraining categories if the argument can be made strong enough, or if not, at least to force conventionalists into political dialogue out of frustration.

Legal theory scholars are also frustrated because they believe in the liberal tradition but feel unable to provide the politics that would give their new forms of legal thought legitimacy. For many legal theory scholars, CLS arguments have some psychic appeal. CLS arguments, however, are necessarily linked to a political tradition and a view of the common law they do not share. The cost to them of using CLS techniques is a rejection of liberalism and the categorization of common law thought as repressive political dogma. Nevertheless, the basic legal theory position concerning the role of common law thought and the relationship of law to politics remains relatively undeveloped.

The thesis of this Article has been that it is legitimate to discuss the issues that CLS scholars want to discuss without forfeiting either liberalism or the law and that it is possible to find a source of legitimacy for the work of legal theory scholars without being tied to conventionalism. If this is correct, then some of the frustration is unnecessary. There is room within each group for accommodation as well as for growth and development. Each group has something to teach the others and something to learn from

the others.

It is important for the conventionalists to understand that CLS scholars can attack the politics of common law liberalism and its present validity without attacking that part of our existence that responds more to what we feel as laypersons than to what we think as lawyers. They can also learn from CLS and legal theory scholarship that the taught tradition in legal education is not sacrosanct. While the current crumbling of classical common law categories is not the result of the evil of its founders or the indeterminacy of its answers, it does reflect the growing inability of conventional legal thought to make sense of a world that no longer belongs to it. The modern theory of law presupposes the activist state; however, the training typically received by lawyers does not. The frustration of conventionalists thus is best directed at articulating the political basis of their disagreement with CLS scholars about the specific structure of modern politics and at providing new justifications for the continued use of conventionalist categories.

It is important for legal theory scholars to understand that they share with most CLS scholars a common vision about the relationship of politics to law and a common agenda of concerns about that relationship, even though they may disagree with them about what the specific answers to these concerns should be. In their effort to articulate the meaning of the modern political structure, legal theory scholars also can learn from CLS scholars about the present-day theoretical inadequacies of classical liberalism and the importance of history and politics in developing an affirmative vision of a just society. Yet it is also important that the legal theory scholars attempt to channel their frustration about their legitimacy into articulating the political legitimacy of the events of 1937 and of their own new legal categories and techniques.

Finally, it is important for CLS scholars to understand that it is possible for others to attack their political theories without attacking their political ideals. CLS scholars can learn from legal theory scholars that they need not attack classical common law thought or liberalism before they can argue for a radical interpretation of the modern political structure. The frustration of CLS scholars, therefore, is best directed towards developing new legal techniques to give voice to their political hopes.

It is these possibilities that make a modern theory of law worth pursuing. If we can at least understand why it is important, we can begin to appreciate much of the present nature of legal scholarship. If we can understand how it came about, we can begin to know our past. And if we can understand why it came about, we can begin to chart our future.