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The Future of Our Past: The Legal Mind and the Legacy of Classical Common-Law Thought

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The Future of Our Past: The Legal Mind and the Legacy of Classical Common-Law Thought

DONALD H. GJERDINGEN*

I. OUR COMMON PAST

One hundred and fifty years ago, Classical common-law thought—the form of legal thought that dominated the Civil War-to-1937 period in American law—had yet to appear. One hundred years ago, Classical common-law thought was in place and formed the basis for traditional legal education. Fifty years ago, Classical common-law thought was all but dead. We have yet to figure out why.

The purpose of this Essay is a modest one. I simply want to argue that how we, as lawyers, approach our future is very much dependent on our ability to understand how Classical common-law thought came about and why it remains vestigially so much a part of our legal culture today. The lessons for the future of our past are three. First, Classical common-law thought was more than cases and doctrines. At its fullest, it represented a comprehensive, deep, and interlocking set of intellectual, political, and cultural connections that influenced virtually every aspect of law during the Civil War-to-1937 period, from Constitutional Law to Conflict of Laws, and defined the common dimensions of legal thought. Second, much of the current unrest in legal scholarship can be understood only by tracing the rise and fall of Classical common-law thought and by understanding why some of the earliest and deepest memories of our professional lives have, in recent years, become...
some of the most often challenged. Third, as we look to the future of legal thought and consider what it may bring us, the existence of Classical common-law thought offers some important and under-studied lessons about how lawyers respond to and, in turn, interact with the political and cultural worlds around them.

My argument will proceed in several stages. First, I want to set out the dominant political model of the Civil War-to-1937 era, the vision of society it fostered, and the form of dispute it legitimated. Next, I want to show how these features combined to create constraints that shaped public dialogue, particularly what questions could be asked and what could be talked about. Once I have done that, I want to talk about how the political model and its accompanying dialogic constraints influenced the work of lawyers. My next goal is to show how these features combined to create the special mosaic of Classical common-law thought and, in particular, the implicit cognitive maps that united and informed the work of lawyers. Finally, I conclude with some of the lessons that we might use from this understanding of Classical common-law thought as we look towards our collective future.

II. NORMATIVE VISIONS, POLITICAL FORMS

My argument can be illustrated by a series of charts and the relationships among them. Together, these charts present key elements that have shaped the nature of law, legal education, and the role of lawyers in American life.

A. Political Questions, Political Answers—
   The Substance of Political Dialogue

My starting point is the political culture of the Civil War-to-1937 period. The political structure during this period represented a unified and coherent structure—one that I have termed "common-law liberalism." The substance of common-law liberalism can be summarized in chart form in the following terms, which I will call Box 2 and label "Political Culture."

In the world of common-law liberalism, the status quo is prima facie legitimate and the state has no special role to play. Transactional justice dominates. If achieved through the use of historically correct moves, the status quo and the expectations associated with it reflect the desired state of affairs. Autonomous individuals make bargains with each other, governed by general free-market principles tempered by the application of idealized dominant social standards. Each person is assumed to have certain rights that preexist the state and set baseline boundaries. The role of the state is to police individual moves within these boundaries without interfering with the exercise of individual autonomy.

Common-law liberalism creates a clear negative and a clear positive role for the state, both of which are linked to upholding existing social and private power arrangements. On the one hand, certain pockets of private power are deemed beyond the reach of the state. Baselines achieved by historically correct means define proper "private" starting points, just as proper "private" moves between individuals are defined by an assumed equality of wills. The state may neither upset these private baselines nor deny this assumed equality of wills. As such, the state may not redistribute wealth, change bargaining power, or regulate prices. These limits are natural and akin to the law of gravity, something it would be both silly and dangerous for the state to try to change.
On the other hand, other forms of private power provide “public” standards for the state to emulate and reinforce. Patterns and distributions achieved by historically correct moves define proper public ending points. If each individual move, separately considered, complies with the tenets of transactional justice, the overall societal pattern and distribution that results from the sum total of these individual moves is not open to review. In turn, the dominant social expectations derived from the existing economic, social, and political arrangements provide publicly enforceable standards of conduct. These standards reinforce existing private power arrangements—and hence the resulting distribution of political, economic, and social power in society. The resulting public standards often embody idealized and group-based concepts of race, class, role, and gender. These majoritarian (sometimes ruthlessly majoritarian) standards provide a significant basis for the imposition of public standards by the state, ostensibly as the accumulated product of mere individual preferences.

B. The Procedure of Politics, the Politics of Procedure

Predictably, common-law liberalism would generate a particular type of dispute. Why disputes take place, what they are about, and who controls them reflect the basic normative assumptions of common-law liberalism. The resulting form of dispute reflects and reinforces the deep assumptions of common-law liberalism. The dispute form in common-law liberalism can be summarized in another chart, which I will name Box 3 and label “Form of Dispute.” Added to Box 2, it takes the following form:

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2. See id. at 429-30. The standard cite for forms of dispute is Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1282-92 (1976), followed by Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353 (1978); Owen M. Fiss, The Supreme Court 1978 Term—Foreward: The Forms of Justice, 93 HARV. L. REV. 1, 17-28 (1979); and Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 YALE L.J. 949 (1988). The dispute is not about the existence of such forms. About that, all seem to agree. My difference with these people is (a) what gives rise to such forms, (b) why the forms changed, (c) how such forms are linked to substantive political visions, and (d) how this affects public dialogue. I believe now, as I said then, that politics and particular points in American history have a lot more to do with the generation of these forms than Chayes, Fuller, and Fiss may think, and that natural law has a lot less to do with it than Weinrib may think.
### Political Culture

- night watchman state
- transactional justice
- status quo prima facie just
- faith in the market
- public/private distinction
- individualism
- personal autonomy/independent
- social structure not subject to political control (e.g., family off limits; private groups)
- reinforce dominant social expectations based on idealized concepts of role
- no redistribution of wealth
- moralistic; individual responsibility
- rights preexist the state (fencing in)

### Form of Dispute

- "historical" validity of individual moves; so long as each is valid, resulting distribution is "just"
- if no one complains, no problem exists
- people who complain say what is wrong in court
- bipolar
- retrospective
- administered on case-by-case basis
- state judged by same standards as private person
- individual instances of "deviant conduct"

The relationship between Box 2 and Box 3 is the relationship between substance and procedure. The substance of Box 2 legitimates the procedure of Box 3. The normative vision of common-law liberalism—and hence the basic rules of conduct in society—is grounded in transactional justice. In a transactional justice political culture, disputes could be expected to be bipolar, retrospective, case-by-case disputes, typically about individual instances of deviant conduct. In part, this is because transactional justice makes those types of disputes more important than others. It is also in part because transactional justice—with its ban on redistribution and political alteration of the social structure—virtually rules out the possibility of group- or class-based, prospective disputes.

In turn, the procedure of Box 3 reinforces the substance of Box 2. The procedure of Box 3 filters out questions that may challenge what is already assumed in Box 2. For example, by treating a dispute between the state and a private person as the functional equivalent of a dispute between two individuals, the procedure of Box 3 reinforces the substantive political doctrine of Box 2 that the state has no particular responsibility for or special power to change the status quo. Similarly, because common-law liberalism emphasizes personal autonomy and the validity of baseline holdings, the
normative focal point—predictably—would be the validity of each individual move. The resulting bipolar dispute form, in turn, effectively cuts off questions about the validity of the political, economic, and social power that emerge from the total sum of all such individual moves. In turn, this exclusion of dialogue reinforces and validates the initial assumptions about personal autonomy and the validity of baseline holdings.

III. POLITICAL TALK, POLITICAL VISIONS

The form and nature of public dialogue in common-law liberalism also follows predictable patterns. What can (or cannot) be talked about, what questions can be asked, and what will be listened to also follow predictable patterns. Together, these patterns structure, shape, and validate public discourse.

A. Gödelian Worlds\(^3\) and the Substance of Silence

Within common-law liberalism, certain deep assumptions simply "go without saying." They are not talked about simply because they are already assumed. For example, common-law liberalism takes as given that the market works, that the status quo is just, and that the state acts best as a night watchman. In the context of common-law liberalism, these propositions are noncontestable. It is not that such proposals—in the abstract—are easy, clear, or obvious, or that humans are incapable of contesting them. It is just that such propositions cannot easily be debated or plainly seen from inside common-law liberalism. They are more clearly seen and more easily talked about from afar. In this way, what is not talked about and why determines more about the nature and direction of what ultimately is talked about than the substance of the resulting public dialogue itself. Silence has substance.

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3. By Gödelian worlds, I simply mean the general idea, borrowed from Kurt Gödel's work in math theory, that (a) we construct our worlds—both theoretical and real—out of nested systems of thought that fold into each other; (b) each system is based on certain axiomatic assumptions that cannot be proved within the system they create; (c) multiple worlds, each consistent in its own way, can be constructed; and (d) such systems are self-referencing. See Douglas R. Hofstadter, Gödel, Escher, Bach: An Eternal Golden Braid (1979); Ernest Nagel & James R. Newman, Gödel's Proof (1958). A version accessible to lawyers can be found in John M. Rogers & Robert E. Molzon, Some Lessons About the Law from Self-Referential Problems in Mathematics, 90 Mich. L. Rev. 992 (1992). As should be evident from this Essay, I believe that such ideas can be applied on a far grander scale and in far different ways than lawyers have yet been willing to talk about.
B. Contours of Contestability

What is seen and what is not seen determine what is open for debate and what is not. The deep assumptions of what "goes without saying" set dialogic boundary lines that open some topics for debate and close off others. The same assumptions that separate what is talked about from what is "just understood" also shape what can be argued about and what cannot. On one level, they tell us what need not be talked about (for example, noncontestable issues such as whether the market works or whether equality of wills applies). They also tell us what cannot be talked about, either because it would contest something that is noncontestable (for example, whether it is preferable for the state to redistribute wealth) or because the categories used do not allow it to be asked (for example, equality of wills blocks talk about inequality of bargaining power).

In a related way, this also establishes what questions are "hard" (that is, contestable) and what questions are "easy" (that is, noncontestable), as well as what questions are "relevant." The substance of hard questions tracks what is contestable once what goes without saying is in place. Some hard questions represent conflict between accepted principles or categories. For example, if consensual moves are founded on autonomy and equality of will, an agreement based on a mistake presents a problem. Upholding the agreement could be said to violate the will of one of the parties, but the same could be said for not upholding it. At the same time, a mistake itself could be labeled as an example of a false will (and thus bad) or full autonomy (and thus good). Other hard questions represent marginal application of accepted principles or categories (for example, exactly where do we cross the line from private to public). Easy questions, in contrast, represent the substance of what is already assumed, along with core applications of accepted categories.

The sum total of what it is proper to talk about under these various rules constitutes the substantive body of what is "relevant." Talk of other topics or other categories is not taken seriously. It would not do, for example, to argue about inequality of bargaining power once equality of wills is already assumed. Such a question is not proper and is not relevant. If asked, it need not be answered.

C. The Generation of Dialogue and the Shaping of Questions

Together, what goes without saying and the resulting contours of contestability shape the rules of debate. Inside common-law liberalism, what is talked about is linked to what the deep assumptions of common-law liberalism make it important to talk about. Once in place, common-law liberalism makes some
questions more important than others. The contours of what is talked about are derived from the questions, topics, and situations that common-law liberalism makes important. People ask the questions that the accepted categories lead them to ask (for example, what are dominant social expectations for women generally), they debate the issues the accepted categories need them to debate (for example, what are manifestations of equality of will in the world), and they learn what common-law liberalism makes it important for them to know (for example, what are proper and improper "moves").

IV THE WORK OF LAWYERS

Given this general framework, the work of lawyers centers on three related tasks: (1) creation of mediating concepts to implement common-law liberalism and carry it out in everyday life; (2) resolution of the expected disputes of common-law liberalism; and (3) legitimation of the deep assumptions of common-law liberalism. Each is worth special mention.

A. Mediating Concepts and Overlays

Common-law liberalism makes some questions and some problems more important than others. Lawyers, to be successful, must provide ways to talk about them. To the extent that lawyers provide categories and techniques that assist in that task, they provide an important public function and increase the power and prestige of their craft. If lawyers help people talk about what needs to be talked about, they will be listened to.

Law does not provide this function directly. Instead, it creates "mediating concepts." These implement what "goes without saying" into the texture of daily life. Mediating concepts themselves often are perceived as independent concepts, understandable on their own terms. At the same time, they reflect and serve as carriers for the politics of common-law liberalism. Whatever mediating concepts the legal culture creates must be consistent with both the substance and procedure of common-law liberalism. The mediating concepts must respond to both, track both, and shadow both. Mediating concepts make up much of the substantive body of the law. Examples might be such legal notions as "property" or "fault."

Lawyers gain legitimacy by mapping onto the basic features of common-law liberalism. On the one hand, mediating concepts allow the deep assumptions of common-law liberalism to be implemented, applied, and discussed in a convenient and facile way. In the context of common-law liberalism, this supplies the concepts (and hence lawyers) with legitimacy. On the other hand, mediating concepts gain legitimacy by not talking about common-law
liberalism directly, hence serving to make the deep assumption of common-law liberalism seem all the more natural and legitimate. Thus, while the mediating concepts must be consistent with the dominant political vision, the best ones do not use the language of politics. In this sense, they serve as overlays—ideas or concepts that are independent in their own right, yet silently responsive to the larger as well as the smaller politics in the world.

B. Dispute Resolution Function

On a basic level, law must deal with the inevitable disputes that arise in the day-to-day world of common-law liberalism. Law must respond to the expected arguments and charges about improper boundary crossings associated with transactional justice. To maintain public order and to confirm the legitimacy of common-law liberalism, these matters must be satisfactorily resolved.

On another and more fundamental level, law must resolve the “hard” public questions about the general content and shape of common-law liberalism and about how to treat the particular gaps, ambiguities, or conflicts in the deep assumptions of common-law liberalism. Such issues typically arise in what are treated as landmark decisions or in what are perceived as the pressing public issues of the day.

C. Legitimation Function

Law and lawyers also fulfill certain legitimation functions. Ideally, they create, use, and manipulate mediating concepts and resolve the various disputes that common-law liberalism places before them without drawing the legitimacy of the basic normative vision of common-law liberalism or its basic form of dispute into question. Some of this is done by linking mediating concepts (and hence the political visions they carry with them) with other basic sources of legitimacy in everyday life. For example, this could be done by linking the political issue of liability to the complementary concept of fault in the everyday life of lay people. Some of this is also done by mapping mediating concepts onto the deep assumptions of common-law liberalism without directly invoking the contestable language of politics. This makes common-law liberalism seem natural. Lawyers also legitimize the existing political culture by enforcing the dialogic constraints of common-law liberalism and its dispute forms. This directs public dialogue toward those forms and questions that implicitly support the deep assumptions of common-law liberalism and away from those that might challenge what went without saying.
The argument so far may be summarized in the following chart by adding Box 1, labeled “Legal Culture,” to the earlier two boxes.

<table>
<thead>
<tr>
<th>LEGAL CULTURE</th>
<th>POLITICAL CULTURE</th>
<th>FORM OF DISPUTE</th>
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<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>• autonomous</td>
<td>• night watchman state</td>
<td>• “historical” validity of individual moves; so long as each is valid, resulting distribution is “just”</td>
</tr>
<tr>
<td>• formalism/positivism</td>
<td>• transactional justice</td>
<td>• if no one complains, no problem exists</td>
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</tr>
<tr>
<td>• territorial</td>
<td>• public/private distinction</td>
<td>• retrospective</td>
</tr>
<tr>
<td>• precedent</td>
<td>• individualism</td>
<td>• administered on case-by-case basis</td>
</tr>
<tr>
<td>• fault/consent/causation</td>
<td>• personal autonomy/independent</td>
<td>• state judged by same standards as private person</td>
</tr>
<tr>
<td>• classical common-law categories</td>
<td>• social structure not subject to political control (e.g., family off limits; private groups)</td>
<td>• individual instances of “deviant conduct”</td>
</tr>
<tr>
<td>• single, right answer</td>
<td>• reinforce dominant social expectations based on idealized concepts of role</td>
<td></td>
</tr>
<tr>
<td>• intuitionism</td>
<td>• no redistribution of wealth</td>
<td></td>
</tr>
</tbody>
</table>

Given the relationship between Box 2 and Box 3, the role of the legal culture—subject always to the general constraints that attend public dialogue inside common-law liberalism—is threefold: first, to ask the kinds of questions that are important in Box 2; second, to resolve the disputes of Box 3, and third, to do so without drawing into question “what goes without saying” in either.
V. THE SPECIAL MOSAIC OF THE LEGAL MIND AND CLASSICAL COMMON-LAW THOUGHT

Classical common-law thought is a special mosaic. While a first approximation can be assembled from a few principles, the precise lines and exact texture of Classical common-law thought emerge only after several other elements are brought into play. Each additional element supports and folds into the others in powerful yet often silent ways. Once together, the end product is clear, precise, and cohesive.

A. Element One—The Constitution, the Civil War, and the Three Spheres

The Civil War created a series of foundational changes in the American political structure, particularly with respect to deep assumptions about the structure of federalism and the role of the federal government in the protection of individual rights vis-à-vis the states. Resolution of this problem became a central concern for the legal culture. The ideological solution, as others have pointed out, was the conceptualization of three separate and independent spheres, largely analogous to the dominions of three separate property owners. One sphere belonged to the federal government, a second to the state government, and a third to individuals. Graphically, it could be presented as follows:

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4. See Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, in 3 RES. L. & SOC. 3 (Steven Spitzer ed., 1980). I would interpret all of this in a different way than Kennedy, though. I agree that the three-sphere structure that Kennedy sets out plays a key role in Classical common-law thought. From here on, I suspect that we part company. I do not believe that he would agree with what has been said so far in this Essay, and I do not believe that he would agree with much of what comes after this. See infra note 33 and accompanying text (discussing other differences about reasons for the demise of spheres).

One of the prominent issues on which I disagree with Kennedy would be how I would explain the coherence as well as the exact content of the spheres. I believe that common-law liberalism was a coherent political structure while it was in place. In contrast, Kennedy sees the entire period as far less coherent and laden with any number of opposing and irreconcilable distinctions. See, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976) [hereinafter Form and Substance].

As should be evident from what has come so far in this Essay and from what will follow, I also believe that Classical common-law thought is far more coherent and that the various pieces blend together in far more exacting ways and in larger themes than legal scholars of all stripes have yet been willing to explore.
Ultimately, the three spheres serve as a critical feature of Classical common-law thought. For example, from this construct alone it would follow that:

- Power cannot be shared (since within each sphere, the respective actor has autonomy).
- There can be only one location for each power, thing, or person.
- Categorization is important, as are bright-line demarcations that emphasize in/out, yes/no, and right/wrong (from the need to locate and place things in or out of one sphere or the other).
- The public/private distinction is assumed (from the assumed borders between the individual and the state).
- A single form of legal actor is assumed (from the assumed equality of the spheres and the assumption that within each sphere autonomy is complete).
- Each actor stands on an equal footing with the other (since each sphere is separate and equal, and since each stands on an equal plane free of hierarchy).

**B. Element Two—The Boundaries of Common-Law Liberalism, the “Yes” and “No” of Government, and the Substance of the Spheres**

Taken alone, the three spheres presuppose clean, precise boundaries for each of the three actors and one location for each power or thing. What is given to one is denied to the others. The critical task, therefore, is to know what to place in each sphere. To continue the process, we need to know how to sort out what is placed in one sphere or another. Once completed, this categorization process determines the substantive content of each of the spheres.
Here the substantive politics of common-law liberalism supplies the answer. The specific content of the respective spheres tracks what the state can or cannot do according to the tenets of common-law liberalism. The Federal and the State spheres are placeholders for what the state can do. In turn, the Individual sphere is a placeholder for what the state cannot do.

With respect to individuals, the state cannot do the following: (1) redistribute wealth; (2) change bargaining power; (3) regulate the market; (4) interfere with the power exercised within existing units of the social structure (for example, family, political parties, bureaucracies); or (5) concern itself with the validity of the social structure. This supplies the content of the Individual sphere and the substance of what is "private."

In contrast, the state can do the following: (1) regulate for the public good, typically defined as projects used by or open to the public; (2) regulate for the general health of the public, typically defined as safeguarding the public from physical danger; (3) reinforce accepted moral values of dominant social groups; and (4) reinforce dominant social roles. This supplies the substantive content of the Federal and State spheres, as well as denominates what is "public."

One additional distinction needs to be made. This might be termed the federalism test. While common-law liberalism makes deep assumptions about the state, here there are two different state entities—the federal and the state governments. Under the tenets of common-law liberalism, both have the same general powers (what the government can do) and both have the same general limits (what the government cannot do). This alone does not distinguish one from the other. How do we know what belongs in the Federal sphere (that is, what the federal government can regulate according to the tenets of common-law liberalism) and what belongs in the State sphere, knowing that what is given to one is necessarily denied the other and that where one ends the other begins?

Perhaps because of the strong connections in common-law liberalism between "physical" manifestations of autonomy (that is, property) and "physical" manifestations of boundary crossings, the answer here is based on whether a physical "thing" is moving or not. Physical "things" are in the Federal sphere while they are moving between state boundaries. Whatever happens before these "things" start to move on their physical journey or after these "things" stop moving is in the State sphere. Under this standard, the regulatory power of the federal government vis-à-vis the states is limited.
C. Element Three—The Common-Law Mind and the Constitution—The General Contours of Law

Given these three spheres, the political content of each, and the boundaries between them, some general deductions about the nature and contours of law can be made. Based on the previous two elements, it was predictable that the law of the period would involve: (1) predominately state law, because of the limited role of the federal government; (2) disputes of a bipolar nature because of the general transactional justice basis of common-law liberalism; and (3) an emphasis on courts and case law because the substantive limits on state action (such as no distribution of wealth or regulation of the market) assured only a limited role for statutes and administrative action.

D Element Four—Langdell, Transactional Justice, and the Case Method

In this context, the role of the legal culture stands out in sharp relief. Given the previous three elements, the legal culture would clearly need to deal with transactional justice, bipolar disputes, and dominant social expectations. It would also be expected to deal with a world where power was more with courts than legislatures and more with states than the federal government. Finally, it would be expected to assume and to look for consensus rules and uniform standards. Given these tasks, the response of the legal culture was particularly effective. That response was the case method, Socratic dialogue, and Langdellian orthodoxy.

In such a world, teaching law by cases made eminent sense. It made sense because in a world where the state could not redistribute wealth, regulate the market, or change bargaining power, courts could play an important role, but administrative agencies or legislatures could not. It made sense because in a world where the power of the federal government was limited, state case law constituted the bulk of law. And perhaps it made the most sense of all in a world where transactional justice formed the substance of law and bipolar, retrospective individual disputes about instances of deviant conduct formed the procedure.

In such a world, Christopher Columbus Langdell could succeed. He succeeded in part because he was at Harvard and he succeeded in part because his ideas paralleled the dominant intellectual model of nineteenth-century

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But more than anything else, he succeeded because he did a better job of allowing law and lawyers to do what they needed to do in the political world and the Constitutional setting in which they found themselves.

VI. THE FINAL PRODUCT

What, then, was the final product like? Once these elements were placed together, the resulting mosaic of Classical common-law thought dominated all law, both public and private, both state and federal. In turn, it defined what lawyers did, what they talked about, and how they were trained.

A. The Common-Law Mind and the Constitution

1. Public Law

The content of Constitutional Law is largely defined by the answer to one question: “When, if ever, is judicial review proper?” During the Civil War-to-1937 period, that question is answered solely by reference to the three spheres and their content. The task that falls to the Court, and defines its role, is policing the boundaries of the spheres, consistent with the tenets and dialogic constraints of common-law liberalism. The Court repels incursions by one of the actors into the sphere of another, adjudicates boundary disputes between the actors, and resolves the “hard questions” of common-law liberalism implicated in those disputes.

This scheme determined when the Court would review state or federal legislation and how it would do it. Under this model, judicial review would be performed in two typical situations. The first would be the policing function of keeping each sphere free from the imperialistic efforts of the others. For example, the Court would repulse federal incursion into state territory or state incursions into individual territory.


7. I would hope that this is at least a partial answer to the question posed by John Schlegel: “Just what part has constitutional law played in forming the legal twentieth century?” John H. Schlegel, The Line Between Casenote and History, 22 LAW & SOC’Y REV. 969, 977 (1988).

The second would be the definition function. This would involve marginal application of accepted elements of common-law liberalism or its related mediating concepts, or the resolution of definitional issues tied to the precise placement of boundary lines separating the spheres. This also could take the form of landmark cases linked to the recognition of significant

At first, many of these were minor boundary disputes. Later the Court faced (and similarly repulsed) wholesale attacks on the foundations of Classical common-law thought and the role of the Court in monitoring it. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 297-310 (1936) (concerning frontal attack on spheres, what states can and cannot do, and use of "things in movement" to determine boundary between Federal and State spheres).

9. For example, once it is taken as given that the state can regulate on the basis of "public" matters—typically those which pose a physical threat to all members of the public (such as disease or safety) or which are physically open to the public at large (such as public buildings or streets)—then it should not come as a surprise that businesses that historically are monopolies, physically open to the public at large and that must serve all members of the public (such as ferries, mills, bridges, and turnpikes), are within the power of the state to regulate. What then becomes a "hard" question is whether a business is like a traditional category when it is something new, such as a grain elevator, see Munn v. Illinois, 94 U.S. 113, 125-30 (1877) (yes), or a broker for theatre tickets, Tyson & Bro. v. Banton, 273 U.S. 418, 439-42 (1927) (no).

10. For example, if "commerce" is envisioned as a "thing" that moves between states, then one of the easy cases of the period is that a train presently in motion over interstate rail lines is commerce; however, one of the hard questions may be whether the "thing" is still commerce if it is detoured in the middle of the trip. See, e.g., Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922) (holding that logs temporarily detained by boom to prevent destruction were still deemed to be in transit); General Oil Co. v. Cram, 209 U.S. 211, 228-31 (1908) (finding that oil separated into other cars for reshipping was no longer in transit). If the "thing" being transported between states is capable of self-locomotion, so much the better. See, e.g., Stafford v. Wallace, 258 U.S. 495, 514-17 (1922) (cows); Kelley v. Rhoads, 188 U.S. 1 (1903) (sheep).

11. For example, once it is taken as given that the state may not regulate the basic bargain of employment except in those few instances that "everybody knows" are "dangerous," and coal mining is understood to be such a "dangerous" profession, then it should not be strange that someone might argue that another occupation (say, working in a bakery) that is also usually performed under "dark conditions" (that is, at night) and that involves hard physical labor under conditions where large amounts of "dust" are inhaled might also be dangerous. Compare Lochner, 198 U.S. at 54-60 (Peckham, J.) (finding that bakers are not like coal miners) and id. at 59 ("To the common understanding the trade of a baker has never been regarded as an unhealthy one.") with id. at 70-73 (Harlan, J., dissenting) (noting that bakers are like coal miners). In so arguing, the Justices did not question the existence of the three spheres, the general content of those spheres, or what the deep assumptions of common-law liberalism determined was relevant. They disagreed only about their particular application in this individual case, which was, in the end, a minor boundary dispute between the state and individual spheres.
elements of common-law liberalism, or the resolution of "hard questions" about the general structure of common-law liberalism.

Throughout the entire process, the Court would also enforce the dialogic constraints associated with common-law liberalism. If a party tried to contest what went without saying, the Court need not listen. If a lawyer tried to argue that the state had the power to change bargaining power, the Court need only invoke "freedom of contract" or allude to the obvious impropriety of "a labor law, pure and simple." If a lawyer tried to argue that redistribution of wealth is permitted, the Court need only say "class legislation" or "due process." And if a lawyer tried to challenge existing forms of majoritarian power in the social structure, the Court need only disclaim jurisdiction over "social, as distinguished from political equality," cite "the law of the Creator," or defer to the "established usages, customs and traditions of the people."

The content of the spheres is better known by the mediating concepts the Court used to label them. The content of the Individual sphere became Due Process (and to a lesser extent Takings or Contract Clause). The content of

12. See, e.g., Allgeyer v. Louisiana, 165 U.S. 578 (1897) (regarding role of state vis-a-vis market); Plessy v. Ferguson, 163 U.S. 537 (1896) (concerning legitimacy of dominant social expectations); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (finding no redistribution of wealth); The Civil Rights Cases, 109 U.S. 3 (1883) (discussing respective roles of federal government, state government, and individual); Bradwell v. Illinois, 83 U.S. 130 (1872) (regarding use of ideal role and group-based characteristics for women).

13. The first significant attempt was The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (discussing role of Court, place of markets, and respective role of state versus federal governments after Civil War).

14. See, e.g., Coppage v. Kansas, 236 U.S. 1, 14-21 (1915).

15. See, e.g., Lochner, 198 U.S. at 57 ("The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words.").


19. See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (explaining why women may not practice law); see also Late Corp. of the Church of Jesus Christ of the Latter-Day Saints v. United States, 136 U.S. 1, 49 (1889) (finding Mormonism "contrary to the spirit of Christianity").

20. See, e.g., Plessy, 163 U.S. at 550 (explaining segregation); see also The Civil Rights Cases, 109 U.S. at 25 ("Mere discriminations on account of race or color [are] not regarded as [violations of the 13th Amendment].")
the Federal or State sphere became Police Power. In the disputes between the Federal and the State spheres, what was in the State sphere was labeled Tenth Amendment and what was in the Federal sphere was labeled Commerce (and to a lesser extent Spending Clause, Taxing Clause, or federal police power), just as what happened before or after physical things moved was labeled Manufacturing.

2. Private Law

While large areas of law were left to the states and to the courts, the law of each state would conform to the pattern already set in place and enforced by the Supreme Court. While each state was allowed to experiment, it was allowed to do so only within the context of police power as defined by the Court and only so long as it avoided due process violations as defined by the Court. While states were free to develop the fine points of common law at the bottom, the big points were already set at the top. The basic rules of contracts and torts were already set by police power and due process. The basic rules of conflict of laws and jurisdiction were already set by the assumptions of the three spheres and the corollary that, just as each power can be in only one place at a time, so too can a tort happen in only one place or a person be in only one place at a time. The basic forms of procedure were already set by the politics of common-law liberalism, and the basic forms of evidence and legal method were already set by the dialogic constraints about what could or could not be talked about.

Since this entire interlocking structure was part of constitutional law, these ideas provided the controlling assumptions of the period. All the law of the period would be consistent with this pattern, whether practiced at the federal or the state level, or whether practiced in one state rather than another. The rules, top to bottom, were the same.


B. Common-Law Categories and Mediating Concepts

During the period of Classical common-law thought, most of what lawyers knew as the law, as well as the categories they learned, manipulated, and used in the daily practice of their craft, were mediating concepts. The seemingly autonomous, self-referencing system they created legitimated the deep political assumptions of common-law liberalism and elevated the role of lawyers in public life. The mediating concepts folded into the significant debates of public life as well as the fine-grained texture of the disputes of daily life and provided a common language for talking about both.

Because of the transactional justice political assumptions of common-law liberalism, mediating concepts such as property, criminal law, contract, and torts could claim to be basic, elementary categories. Combined, they shadow and track elementary features of transactional justice, such as establishment of baselines (property), consensual moves based on equality of will (contract and property), and market transactions (contract), as well as improper boundary crossings (criminal law, property and torts). In such a world, it should not have been a surprise that torts and contracts only appeared as special legal categories after the Civil War. In addition, in creating mediating concepts to shadow the world of common-law liberalism—filled as it was with real or imagined boundaries and dominant social expectations and idealized social roles—using categorization, relying on territoriality, and assuming the existence of single, right answers made sense.

Once the mediating concepts created by the legal culture are accepted (that is, they go without saying in the legal culture), an additional round of dialogic constraints would be expected to exist and be played out inside the legal culture. These constraints would involve similar issues of contestability, relevancy, and hard and easy questions, but would be played out in the narrower context of the mediating concepts themselves (for example, marginal application of existing categories or conflicts between categories). Resolution of these issues at one level or another would involve academics as well as practicing lawyers. The work product this produced would constitute most of the content of the law reviews and judicial reports of the period.


C. Law Schools and Legal Education

The period of Classical common-law thought was the generative period for conventional legal education. The techniques and tasks of legal academics and legal education folded into other features of Classical common-law thought. A partial list could include some of the following:

*Cases and Transactional Justice.* At the very time that the intellectual structure of Classical common-law thought was being established, the case method played a critical role by establishing case-by-case assessment of individual moves as a dominant concern of the legal culture. In so doing, the legal culture was able to train those entering the profession in a perspective and in a technique of argument important in a transactional justice political system.

*Cases, Socratic Dialogue, and Dialogic Constraints.* The conventional wisdom overlooks the political connection between the case method and the dialogic constraints of common-law liberalism. Langdell and his method succeeded because it fulfilled the special role that common-law liberalism created for the legal culture. To a significant extent, the case method served as a filter on the types of issues that could become important and also matched the professional perspective of the legal culture to distinctions of importance in the political structure. Questions not easily structured within the confines of bipolar retrospective dispute (such as the legitimacy of the existing social structure) could not be raised.

*The Work of Legal Academics.* The best work of the best academics in the early years of Classical common-law thought was the creation of mediating concepts.\(^\text{25}\) For example, Langdell’s lasting legacy was not the few crabbed articles he authored, but the conceptual framework he created for what turned out to be the dominant mediating concept of the era—Classical common-law contracts. While we should avoid the easy tendency to endow Langdell retrospectively with the good sense to do something famous—good timing and dumb luck certainly played a role, too\(^\text{26}\)—the ultimate political and cultural

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26. See Chase, supra note 6. Among other things, Chase details the significance of Charles Elliott’s being president of Harvard at the time and how the case method proposed by Langdell happened to reinforce Elliott’s aims of promoting 19th-century science as a legitimating principle for university work.
reasons behind the acceptance and success of what he did are clear. After this first wave, work by legal academics centered on the “hard questions” of already accepted mediating concepts.

VII. THE FUTURE OF OUR PAST

What, then, is the future of our past? In closing, I can offer a few questions to fill our lifetimes.

A. Legal Theory Matters

That such a mosaic did exist matters. If the mosaic of Classical common-law thought has any validity, then Legal Theory matters. Legal Theory matters for academics, it matters for law students, and it matters for practicing lawyers. Part of the tradition we all received was that the law was autonomous and belonged to lawyers. We were told that while there was a place for “policy” in what we did, there was no place for politics, and while there was a place for legal history, there was no place for the historical contingency of the law. Torts, contract, and property were presented to us as Platonic forms, fixed and eternal, rational and right.

The mosaic of Classical common-law thought calls all this into question, but not in a way we should fear. The mosaic of Classical common-law thought calls into question the strict autonomy of the law, but it does not call into question the importance of what lawyers do. The mosaic may call into question the ritualistic use of the trappings of Langdellian orthodoxy, but it does not call into question the importance of understanding how lawyers are trained to think and what that has to do with the world around them.

Id.

27. A complete study of Classical common-law thought would also benefit from studying how the taxonomic character of 19th-century science folded into the need for categorization implicit in the structure of the three separate spheres. See, e.g., WHITE, supra note 6, at 20-62 (discussing taxonomic structure of 19th-century science).

28. By “Legal Theory,” I mean to use a specific term of art. I earlier used the term “Legal Theory Movement” to describe a particular group of scholars prominent in the New Scholarship that was distinct from the Conventionalism, associated with the Old Scholarship and from Critical Legal Studies (CLS). See Gjerdingen, supra note 1, at 398-408. I also use “Legal Theory” in the sense of equating it generally with the New Scholarship. Others use the term in a related way to describe what they view as the increased significance of interdisciplinary work in legal scholarship. See, e.g., Richard A. Posner, The Decline of the Law as an Autonomous Discipline: 1962-1987, 100 HARV. L. REV. 761, 778-79 (1987). Whatever disagreement people may have about its exact meaning, it is important to note that (a) the term means something now that it did not mean twenty years ago, (b) many more people are using it, in more than casual ways, to describe what they are doing, and (c) the various ways they continue to use it seem to coalesce around what is being brought to law by the New Scholarship.
Legal Theory simply tells us that there may be other ways to understand things that we, as lawyers, already know, other ways to understand what lawyers need to know and learn, and other ways to predict what lawyers will say. These are not things that push us apart, but things that bring us together. They show us things that we share that we might not otherwise know. If this mosaic really existed, then all of us should be able to learn about law more easily than we have been doing, and that should be of interest to law teachers, law students, and legal practitioners alike.

B. Then and Now—Packing and Unpacking the Common Law

If such a mosaic no longer exists—as seems clear from a reading of the cases— it also matters. In 1937, the constitutional foundation of Classical

29. The story, in fact, is a familiar one. The pieces are familiar to lawyers, but not how they fit together. A brief, conceptual outline—all of which happens in 1937 or shortly thereafter—might go something like this:

(1) General Breakdown of Spheres. The end of Federal/State spheres is illustrated, for example, in the demise of (a) dual sovereignty generally, (b) derivative immunity in the area of intergovernmental immunities, (c) the Tenth Amendment as a significant limit on federal regulation, and (d) the rise of federal power to regulate local matters under the Commerce Clause. The end of the State/Individual spheres is illustrated by the demise of substantive due process. The related demise of the assumption that each actor is autonomous within its own area (and that there is one place for each power) is illustrated by the rise of balancing tests, both for the Federal/State spheres (for example, under the Commerce Clause) and for the State/Individual spheres (just about everything). The demise of equal footing is repudiated in increased displacement of state power through preemption.

(2) The Breakdown of the Federalism Test (physical things that are moving between states). This can be seen in (a) the change to the “effect” test under the federal commerce power, (b) the end of the manufacturing/commerce distinction, (c) the end of the direct/indirect (that is, physical slowing down) test for state interference with interstate commerce, (d) the end of the original package doctrine for state taxation of interstate commerce, and (e) the rise of the multiple burdens concept in state taxation of interstate commerce.

(3) The Breakdown of Common-Law Liberalism as Something that “Goes Without Saying.” This can be traced in such varied matters as allowing the redistribution of wealth, changing of bargaining power, and regulation of the market as seen through such changes as (a) the power of both the federal and state governments to regulate the economy, along with a growth in the commerce power and the demise of substantive due process, (b) the demise of the “public” purpose as a significant limit to the Takings Clause, (c) the end of the Contract Clause as a serious limit on regulation of private contracts, and (d) the end of delegation as a serious limit on granting power to administrative agencies.

(4) The Breakdown of the Role of the Court. The Court no longer polices the spheres, as shown by its quick retreat from exercising judicial review whenever it involved striking down anything in (1), (2), or (3) above. Similarly, it no longer upholds the content of common-law liberalism as evidenced by allowing arguments that would have been noncontestable under common-law liberalism. Instead of categorizing, it uses balancing tests or process tests.

(5) The Breakdown of the Mediating Concepts Used by the Court to Label the Content of the Spheres. Some concepts are virtually abandoned (such as substantive due process). Others are drastically reinterpreted (such as police power, Tenth Amendment, Commerce Clause, Contract Clause, Due Process Clause as applied to economic legislation, and Equal Protection Clause as applied to economic legislation and class legislation). The public/private distinction blurs as evidenced in such areas as state
common-law thought collapsed. On March 29, 1937, the mosaic shattered. What happened in 1937 was not that common-law liberalism suddenly became less coherent. What happened—and suddenly—was that common-law liberalism simply no longer went without saying. It was not that the principles and pieces of common-law liberalism were banished from public life as untrue, or suddenly became illegitimate. It was just that common-law liberalism was no longer necessarily legitimate in our world. From that point on, the spheres no longer existed, common-law liberalism no longer went without saying, and the Supreme Court, for whatever reason, no longer acted as it once did. The Court, judicial review, and constitutional law have not been the same since. The common law, lawyers, and legal thought have not been the same since either.

The common law we have today is not the common law of Classical common-law thought. Many of the names may be the same, but much of the content and character of the categories is not. In 1937, the key elements that came together to create Classical common-law thought came apart. In 1937,
the Court ceased being a common-law court. The common law that it had helped create and monitor was set adrift. The impact is still with us.

When cut free from the underlying standards of common-law liberalism, the once proud mainstays of Classical common-law thought had to find new moorings. So long as transactional justice, equality of will, and isolated autonomy went without saying, so would bipolar lawsuits, freedom of contract, and private property. Most important, so long as the deep assumptions of common-law liberalism remained in place, the legal culture could safely build contracts around “promise,” property around “things,” and torts around “fault.” Now this was not so clear. Cut free from the moorings of common-law liberalism, the once-proud mediating concepts of property, contract, and tort gradually began to shrink and drift, trying to find their place in the new political landscape, ever less able to fend off the incursions of new rivals (for example, administrative agencies) and the expanded power of old ones (for example, legislative bodies).

Cut free from the underlying assumptions about the spheres and the notions of territoriality associated with them, other mediating concepts had to face new problems. People, we are soon told, can be in more than one place at a time, and Civil Procedure is left to struggle with that fact. Torts or contracts do not necessarily happen in one place and Conflict of Laws is left to struggle with what that can mean. Cut free from the notions of exclusive functions and clear boundaries between state and federal courts, new

supra note 4; Schlegel, supra note 7.

In this context, whether the spheres disappeared suddenly and whether they did so at the same time that common-law liberalism no longer went without saying are important for three reasons. First, if this event can be located in a particular point in time, it would discount the argument that development of modern legal thought is just the result of a gradual change in the conceptions of the intellectual elite in the legal profession. Second, it would also make it unnecessary to argue that Classical common-law thought was incoherent or indeterminate as a precondition to saying that it should not be followed now. Third, it would seem to support Bruce Ackerman’s theory of transformative politics. See, e.g., Bruce A. Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453 (1989).


36. Compare, e.g., RESTATEMENT OF CONFLICT OF LAWS §§ 377-378 (1934) (using place of wrong in torts) and id. § 311 (using place of contracting for contract) and id. §§ 355-357 (using place of performance for contract) with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (noting place of wrong no longer used), § 186 (noting place of performance no longer used) and id. § 145 introductory note at 412-14 (rejecting vested rights approach) and id. § 186 introductory note at 557-58 (same).

alignments of power also had to be found. We are also told in short order that the common law in the federal courts is no longer the exclusive province of the federal government,\textsuperscript{38} that just because the federal government can do something does not mean that the states cannot,\textsuperscript{39} and that the federal government cannot be prevented from regulating large parts of daily life.\textsuperscript{40}

The response of legal academics to all of this has been less than daring. When pressed to authenticate the old forms (and, arguably, to justify the continuation of their tenure), legal academics have tried to prop up the falling edifice. They have kept many of the same names and even some of the same pieces, but it never really was the same again. We are told that the modern role of private bargaining in a regulatory state was really about "contracts," yet when we want to cover any problem that cleanly presented these issues—such as labor relations, insurance, and consumer protection—and which would, by implication, present a facial challenge to what went without saying in common-law liberalism, we are told that they are "different" courses. We are told as well that the complex regulatory and ethical issues that surround the inevitable choices about risk and injury in modern life are really about "torts," yet environmental law, legislation, insurance, and administrative law are not required courses. We are told this, just as we are told that "consideration" (the guarantee of a market transaction in common-law liberalism) has "really" been about "reliance" all along,\textsuperscript{41} or that the information-gathering activities so necessary (and so new) to the regulation of risk in society are "really" about the familiar and venerable doctrine of "cause."\textsuperscript{42} It is little wonder that legal academics have been charged with lacking a coherent intellectual vision.

\textsuperscript{38} See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

\textsuperscript{39} See, e.g., United States v. Darby, 312 U.S. 100, 114 (1941) ("It is no objection to the assertion of the [federal] power to regulate interstate commerce that its exercise is attended by the same incidents which attended the exercise of the police power of the states."); see also South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184-91 (1938) (holding direct state regulation of commerce no longer necessarily invalid).

\textsuperscript{40} See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (discussing conditions of daily work); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (concerning retirement); Wickard v. Filburn, 317 U.S. 111 (1942) (discussing food grown for own consumption).

\textsuperscript{41} The standard cite for this has become Hoffman v. Red Owl Stores, 133 N.W.2d 267 (Wis. 1965). See also RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (regarding promissory estoppel); U.C.C. § 2-302 (1972) (regarding unconscionable contracts in commercial transactions).

In such a world, what we call the common law takes on entirely new meanings. Most important, we can no longer assume that the questions the Classical common-law categories helped us ask and the things they helped us see are always what we need to see today. We can no longer assume that what we need to be able to see is what conventional interpretations of conventional categories allow us to see.

In short, understanding what happened in 1937 matters—a lot. It matters because reconstructing what happened to us then may explain why we are having trouble seeing what is around us now. If the dominant mediating concepts taught in law schools are the product of a different political era, then we, as lawyers, are asking an inordinate number of wrong questions. If the mediating concepts still promoted as fundamental and basic in American law schools are best understood as the product of common-law liberalism, then the intellectual and political baggage they still carry with them needs to be talked about. Finally, the problems of legitimacy we are now facing may have more to do with the mediating concepts we are still trying to use than with the questions we are now trying to ask. While the first generation of post-New Deal academics might be excused for lack of vision (after all, it took Langdell several decades to get established), the second generation cannot be as easily excused.

C. Then and Now—Unpacking the Future

That such a mosaic as Classical common-law thought could ever have existed also matters. It matters to us now because something like what happened then may also be happening now. Within the legal culture, it is increasingly clear that there is an Old Scholarship and a New Scholarship. The Old Scholarship was the intricate case analysis and doctrinal work associated with the common law. The central question of the Old Scholarship was the study of adjudication. The central institution was the appellate court; the central datum was the appellate opinion; and the central players were lawyers. In turn, the definitive lawyerly skills were case analysis and manipulation of common-law categories.

The New Scholarship, in its many versions, takes issue with one or more of these assumptions. Under the various banners of Law & Economics, Constructivism, and Critical Legal Studies, along with Law & Literature, Feminist Jurisprudence, and Critical Race Theory questions are now common about the relationship between law and politics. And Richard Posner can write in the 100th anniversary issue of the Harvard Law Review about "The Decline of the Law as an Autonomous Discipline: 1962-1987" as an accepted fact.

The debate between the Old and the New Scholarship is more fundamental and far-reaching than previously has been supposed. The raised voices are symptoms of something more. Implicated in the debate is a redefinition of the dominant American concept of law. Implicated in the debate is a battle between two different concepts of law, one that created modern legal education and one that is in the process of transforming it. At issue, once again, are the boundaries of what is considered law, the categories and techniques of proper legal argument, and the legitimacy of what lawyers do.

44. See, e.g., ROBIN P. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990) (discussing link between legal and economic ideology); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992) (presenting law according to the Chicago school of Law & Economics).


50. See Posner, supra note 28. "Until [the early 1960s] the autonomy of legal thought was the relatively secure, though periodically contested, premise of legal education and scholarship. It is no longer." Id. at 761.

51. See Gjerdingen, supra note 1 (contrasting Conventionalism with modern theory of law).
If that is the case, then the mosaic of Classical common-law thought may be of use to us. Not for what it says about the fine points of what happened over a century ago, but for what it may say anew about the relationship between substance and procedure today, about what "goes without saying" in the world in which we live, and about the link between the kinds of categories and techniques the New Scholarship is now exploring and the questions that thinking lawyers need to ask. It may well be that after 150 years we have come full circle.