1986

The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought

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The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought

DONALD H. GJERDINGEN*

Table of Contents

I. INTRODUCTION ............................................. 873
II. POLITICAL VISIONS, POLITICAL RIGHTS ............... 875
    A. The Transactional Justice Vision ....................... 876
        1. Normative Framework ............................. 876
        2. Concept of Rights .............................. 877
    B. The Distributive Justice Vision ....................... 878
        1. Normative Framework ............................. 879
        2. Concept of Rights .............................. 880
    C. Cows, Corn and the Distributive Justice Vision—The Coase Theorem as an End-State Proposition ......... 884
        1. The Normative Framework of the Theorem—End-State Propositions, the Status Quo, and the Role of the State .......... 885

* Visiting Associate Professor, Indiana University School of Law, Bloomington. I would like to express my gratitude to several people who assisted in the preparation of this Article. I am especially grateful to Kendra Gowdy Gjerdingen for her support, her comments, and, most importantly, for her gift of time. The Faculty of Law and Jurisprudence of the State University of New York at Buffalo was kind enough to allow me to present a version of this Article to them in the fall of 1985 and I benefited greatly from their comments. I also benefited from some continuing conversations about this material with Bruce A. Ackerman of the Columbia University School of Law, and Errol E. Meidinger and John Henry Schlegel of the Buffalo Faculty of Law and Jurisprudence, each of whom share an uncommon commitment to the power of ideas, even ones they may think are wrong, such as mine. David Gregory, Matthew Spitzer and Pierre Schlag were kind enough to comment on various drafts of this Article, as were my colleagues David S. Clark and Thomas Horne. In addition, I wish to thank my research assistant, Andrea R. Kunkel, University of Tulsa College of Law, Class of 1986, for her usual good work and comments, and Sally Totty for her careful preparation of the manuscript under less than ideal conditions.
3. The Nature of Disputes in the Distributive Justice Vision—Loss of Party Control and the Independence of Right and Remedy .. 890
4. The Coase Theorem and Law and Economics; the Coase Theorem and Conservatism 892

III. Political Visions and the Events of 1937 ....... 893
   A. Legitimacy Issues .................................. 895
   B. Transition Issues .................................. 899
      1. Present Legitimacy of the Transactional Justice Vision .................. 899
      2. Legitimacy of Transactional Justice Vision Rights Acquired Prior to 1937 .... 901
   C. Boundary Issues .................................. 902

IV. Political Visions and the Coase Theorem ....... 904
   A. The Coase Theorem and the Transactional Justice Vision—Realization of the Politics of the Past and the Politics of the Law .................... 904
   B. The Coase Theorem and the Distributive Justice Vision—Exposure to the Possible Politics of the Future 911
      1. The Distributive Justice Vision and the Legal Culture—In General ............ 911
      2. The Theorem and the Existence of the Distributive Justice Vision ............ 914
      3. The Theorem and the Substantive Questions of the Distributive Justice Vision .... 915
   C. The Coase Theorem and the Events of 1937—The Politics of the Present ........ 917
      1. The Procedural Aspects of the Coase Theorem and the Events of 1937 ........... 918
      2. The Substantive Aspects of the Coase Theorem and the Events of 1937 .......... 920
         a. The Coase Theorem as Proxy—The Correspondence Between the Interpretation of the Theorem and the Events of 1937 .................. 921
         b. The Coase Theorem as Proxy—Interpretation of the Theorem as Reflective of the Controversies of Political Philosophy Surrounding the Events of 1937 .................. 924
I. INTRODUCTION

Some twenty years after its appearance, the Coase theorem\(^1\) remains a controversial proposition.\(^2\) The conventional wisdom is that the theorem is controversial because it is necessarily associ-

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The theorem has been defended (1) as a correct empirical proposition about human behavior, *see*, *e.g.*, Hoffman & Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J.L. & Econ. 73 (1982); (2) as a tool that can be used to reconceptualize common-law categories, *see*, *e.g.*, Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972) (combines property and tort); and (3) as a new professional paradigm for the legal culture, *see*, *e.g.*, B. Ackerman, *Reconstructing American Law* 46-71 (1984).

In addition to this legal commentary, the theorem has also inspired a great deal of economic literature. *See generally* Hoffman & Spitzer, *supra* at 73-77 & n.3 (summarizing economic literature on the theorem).
ated with conservative political philosophy. The thesis of this Article, however, is that the theorem is controversial because it has an end-state or distributive justice political structure. As a result, it presents a normative framework and a theory of rights that are at odds with the historical or transactional justice framework dominant in classical common-law thought. In the process, it forces the legal culture to confront a political structure whose meaning and legitimacy animate much of modern legal scholarship. Rather than just a law and economics proposition, the Coase theorem can be viewed as a thought experiment whose meaning is troublesome because it serves as the shorthand expression for a political structure whose meaning and legitimacy animate much of modern legal scholarship. By focusing legal dialogue on the questions and validity of that political structure, the theorem forces the legal culture to deal with many of the central political concerns animating modern legal scholarship. In short, the Coase theorem makes the legal culture consider the political nature of its past, the political possibilities of its future, and the political controversies of its present.

To develop this thesis, Section II of this Article sketches a caricature of two familiar political perspectives: a transactional justice vision (TJV) and a distributive justice vision (DJV)—each of which plays a central role in modern legal thought. The normative framework of each vision is discussed, as is the concept of rights and the role of the state dominant in each vision. I will argue that the TJV assumes a unified or complete theory of rights, while, in contrast, the DJV assumes a disintegrated or Hohfeldian theory of rights. After this general background, Section II also considers the end-state or DJV nature of the Coase theorem.

3. See Horwitz, supra note 2; Kelman, Ideology in the Coase Theorem, supra note 2; Priest, Gossiping About Ideas (Book Review), 93 YALE L.J. 1625, 1634-35 (1984). A significant recent exception to this is Schlag, An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left, 1986 WIS. L. REV. 919. The theorem's politics are not the only reason for its notoriety. It also carries with it a certain psychological structure. See Gjerdingen, The Coase Theorem and the Psychology of Common-Law Thought, 56 S. CAL. L. REV. 711 (1983) (theorem controversial because it challenges implicit, yet critical, proposition of traditional legal training that normative legal argument must ultimately be grounded in the intuitional thought of laypersons). Moreover, there also are as yet unexplored connections between the psychological structure of the theorem, its political structure, and the form of legal discourse. Other topics that have yet to be explored include: (1) the relationship between common-law thought and the theorem; and (2) the relationship between the theorem and the substantive issues associated with the DJV.
Section III considers the significance of the TJV and the DJV for the legal culture. I argue that the constitutional events of 1937 fundamentally changed the nature of modern American politics and the nature of modern political philosophy. In particular, the events of 1937 ended the unqualified acceptance of the TJV that dominated American politics in the Civil War-to-1937 era and legitimated the use of the DJV in the post-1937 era. In turn, this gave rise to a series of controversial issues in political philosophy that focused on the need to justify an end-state version of liberalism and the proper relationship between the TJV and the DJV.

Section IV considers why the Coase theorem is perceived by the legal culture as such a controversial proposition. Given the distributive justice structure of the Coase theorem and the nature of the political issues of the events of 1937, three different sources of political controversy can be isolated for the theorem. First, because the TJV formed the basis for classical legal thought, the theorem, with its DJV structure, forces the legal culture to confront both the specific politics of common-law thought and the general relationship between law and politics. Second, because the theorem carries with it the implicit structure of the DJV, the legal culture is forced to confront the controversial political structure of the DJV itself. Third, and perhaps most important, because the theorem also serves as a vehicle for the merging of the TJV (usually from what lawyers bring to it) with the DJV (from the nature of the theorem itself), it also serves as a vehicle for presenting the legal culture with the difficult political issues that attend the similar merging of those visions in the context of the events of 1937. Thus, the theorem is controversial because the legal culture, in its reaction to the theorem, reflects its own disagreement and concern over these issues. In this sense, much of the controversy surrounding the theorem is derivative: the theorem is controversial in large part because of the controversies of modern political philosophy that it reflects.

II. Political Visions, Political Rights

The TJV and the DJV presented here are caricatures. Nonetheless, each has a special meaning for the legal culture. The genesis and legitimacy of each vision, along with the tension and interplay that exist between them, represent issues of fundamental
theoretical and practical importance for the legal culture. For the present generation of legal scholars, understanding the significance of these visions is an important first step towards understanding why the Coase theorem, with its implicit end-state structure, is so controversial.

A. **The Transactional Justice Vision**

The transactional justice vision is a recurring and often dominant theme in American legal thought. This vision, which has had a major influence on conventional legal thought, stresses two central features—(1) a normative framework based on principles of historical justice and a limited role for the state; and (2) a unified or complete theory of rights.

1. **Normative Framework.** The normative framework of the TJV is one of historical justice. Autonomous individuals make bargains with each other, governed by general free-market principles that are tempered by the application of idealized dominant social standards. Individuals have irreducible spheres of autonomy free from the control of other persons. Protected by these boundaries, individuals exercise their autonomy and interact with other autonomous individuals. Each person is expected to protect his or her own boundaries and to respect those of others. Disputes about unprivileged boundary crossings are centered around standards that existed at the time of the disputed move. The propriety of the move is judged by standards of historical justice as applied to

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5. See R. Nozick, *supra* note 4, at 150-60.
the immediate parties to the dispute. Within this structure, the role of the state is to police these moves without changing existing boundaries or interfering with the exercise of individual autonomy. The status quo is prima facie just in the TJV. If achieved through the use of historically correct moves, the status quo and the expectations associated with it reflect the desired state of affairs. The existing rights reflected in the status quo are thus presumed to be legitimate. As a result, a necessary connection exists in the TJV between what is and what ought to be.

2. Concept of Rights. The TJV also assumes the existence of a complete or unified theory of rights. Rights are assumed to preexist the state. People already have spheres of authority, such as personal autonomy and bodily integrity, as a feature of their existence as persons. The state recognizes and protects these rights but does not create them. These spheres of authority are assumed to be already in place and physicalized in the world. Individual moves take place against a set background and are judged in light of standards of conduct drawn from existing dominant social expectations.

The TJV assumes that people have rights in things. Physical spaces and things are the usual objects of control; physical dominion is the usual manifestation of control. Physical boundaries thus become important and designate the things subject to dominion. Consistent with its emphasis on personal autonomy, the concept of rights in the TJV designates which persons may exercise autonomy with respect to what things and places. Autonomy by its very

6. This theory puts forward three principal propositions all of which are related: (1) that rights preexist the state; (2) that rights can be reified or treated as things that literally exist in the world; and (3) that such things have "essences" that define the nature of the right.

While few people talk explicitly about these characteristics, there nonetheless seems to be a common understanding that these are the basis of TJV rights, not only among those who support such theories, but among those who attack them. Thus, conservatives such as Nozick assume that rights exist and that the important dialogue should be addressed toward the question of how to protect them. See R. Nozick, supra note 4, at ix-xiv. Equally clear patterns, however, seem to appear from the attack by the Realists on the "lump-sum" thinking associated with legal thought in a TJV framework. See, e.g., K. Llewellyn, The Common Law Tradition: Deciding Appeals 19-27 (1960); Cohen, Transcendental Nonsense and the Functional Approach, 55 Colum. L. Rev. 809, 809-21 (1955); Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429, 431-43 (1934). Similar attacks appear in parodies of this position by critical legal studies scholars. See, e.g., Symposium: A Critique of Rights, 62 Tex. L. Rev. 1363 (1984).
nature is a manifestation of individual will and cannot be shared. The owner is the person who can exercise complete dominion. The right attaches to the physical boundaries and to the person who may exercise dominion. Thus, the assumption that people have rights in things reinforces the need for the designation and protection of spheres of personal autonomy, a central feature of the TJV.

Moreover, this concept of rights represents a single, unified framework for determining (1) the background assumptions about individuals; (2) the substantive standards that govern what individuals are allowed to do vis-a-vis other individuals; (3) the procedural rules and standards of disputes; and (4) the role of the state vis-a-vis the parties. While in the abstract these four factors need not necessarily be viewed as related, one of the features of the TJV is that each is necessarily related and understood by reference to a single framework of rights. Necessarily bound up in the complete rights of the TJV is an interlocking set of assumptions about these factors. For example, the TJV typically is concerned with property rights. The designation of the property right indicates not only the starting points of the people involved (i.e., what people own) and the nature of the background assumptions about the parties' rights of physical autonomy, but also the nature of the types of moves that violate that right (e.g., physical invasions or interference with control) and the expectations vis-a-vis the state (i.e., these rights preexist the state). Moreover, under the TJV, right and remedy are necessarily related. Thus, only the person who owns the property right can complain about any violations of that sphere, and only the person who violates the autonomy of another can be held responsible.

B. The Distributive Justice Vision

A contrasting vision in American law is that of distributive justice. Rather than being concerned about whether moves between autonomous individuals are historically correct, the DJV is concerned with the validity of the existing distribution of power, wealth, and position in society. Significantly, this concern gener-

7. See B. Ackerman, supra note 2, at 28-37; R. Nozick, supra note 4, at 149-231; Chayes, supra note 4, at 1288-1304; Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 17-28 (1979); Mashaw, supra note 4, at 1152-58.
ates both a normative framework and a conception of rights at odds with the TJV.

1. Normative Framework. From the distributive justice perspective, disputes are concerned not so much with correcting improper moves between autonomous individuals but with decisions about the nature, implementation, and resolution of end-state or patterned goals in society. The existing distribution of power and the structure of society are assessed against an end-state perspective. The substance of the particular end-state pattern used may vary, and no particular end-state pattern is necessarily preordained. Disputes may arise about what substantive pattern to implement or about how to refine goals already selected as legitimate. Once chosen, however, the selected end-state vision is used to assess the existing state of affairs in society.

Against this background, individual conduct may generate systemic problems even though each individual move was innocent by the standards of transactional justice. If the status quo deviates from the desired end-state pattern, a problem exists despite the fact that the status quo was reached by a series of individual moves, each of which, taken alone, satisfied the standards of historical justice. Accordingly, to implement the desired pattern, the state may intervene in particular transactions between individuals even though the person harmed by the intervention is faultless and the person benefited is undeserving. As a result, the status quo is no longer entitled to prima facie legitimacy. No necessary connection exists between the existing state of affairs in society and what is needed to satisfy the desired end-state goal. Once considered in light of the desired state of affairs, the status quo may be found to be consistent with the end-state or, even if inconsistent, may nonetheless be chosen as a second-best implementation of the end-state goal. Thus, in the DJV, the status quo is not used (as it is in the TJV) as a necessary reference point for determining deviant actions.

Within the DJV, the state plays a special role. A central feature of distributive justice is that a problem may exist (i.e., a deviation from the desired end-state pattern) even though each person individually may have acted in a historically correct man-

8. See R. Nozick, supra note 4, at 149-231.
ner. The overall distribution of wealth and power in society may be suspect even though the wealthy and powerful may have attained their position without violating the transactional justice rights of others and even though the poor and powerless may not have been the victims of any violations of their transactional justice rights by others. Thus, the state of affairs generated by the decentralized interaction of individual wills is no longer necessarily correct, and the social structure sustained by dominant social expectations is no longer necessarily just.10

2. Concept of Rights. The DJV also incorporates an Hohfeldian concept of rights.11 Rather than dealing with a system of complete rights in which people are assumed to have rights in

9. See B. Ackerman, supra note 2, at 28-32.

10. This also generates three significant changes in the nature and role of the state as compared to its status under the TJV. First, rather than merely policing moves between individuals, the state becomes an important social-choice mechanism for identifying, critiquing, and implementing end-state programs. Once it is accepted that a problem may occur, even though the standards of historical justice are satisfied, it then becomes necessary to identify what types of problems can exist, when they will exist, and how they can be remedied. Disputes would be expected to focus on the information needed to implement and critique end-state patterns rather than on individual instances of wrongdoing. This requires an ongoing choice and assessment of ends. Problems cannot be assumed to be self-identifying or self-correcting. An ongoing dialogue is required among many interests. Most importantly, the state is deemed to take an active role in the process. From an end-state perspective, deviant conditions that are allowed to exist are as much a problem as deviant conditions that are actively created. As a result, the state is necessarily assumed to be partially responsible for the status quo in society.

A second and closely related idea is that the character of the state changes. In the TJV the state is perceived as a narrow and bounded concept. The state polices moves by individuals, and reinforces dominant social expectations. Other than these tasks, the state has no special role to play. Moreover, a clean boundary is assumed to exist between private and public spheres. Once it is accepted that the transactional justice framework itself is not necessarily the product of individual wills alone but may also be the partial product of state power and societal choice, then the distinction between public and private is no longer as meaningful. See Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927). See generally Symposium on The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982) (tracing general breakdown in public/private distinction in American law). Similarly, once it is accepted that societal choices may be made on a basis other than individual wills and dominant social expectations, then it also becomes important to consider the legitimacy and character of those organizations that in fact decide what end-state patterns will be selected and how they will be implemented. Thus, while the DJV assumes that the state must play an active role in the selection of end-state programs, the definition of what constitutes the state must be expanded beyond the narrow TJV to one which recognizes the decision-making power of a variety of organizations and groups that help to implement end-state patterns. See Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937).

things, the Hohfeldian perspective assumes a system of dis-integrated rights which exist between people with respect to things.\textsuperscript{12} This generates both a different role for the state and a different view of the nature of rights than the TJV.\textsuperscript{13}

A central function of the distributive justice vision is the making of choices: some end-state patterns will be chosen while others will not; some people, because of their status, will be chosen to benefit from end-state goals while others, also because of their status, will not; and some parts of the social structure will be open to scrutiny while others will not. In essence, end-state patterns con-

\textsuperscript{12} Hohfeld's rejection of the idea that people have rights in things and his corresponding "dephysicalization" of rights is evident even in his early work. See Hohfeld, \textit{Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 26 \textit{Yale L.J.} 710 (1917). For example, the categories of rights in rem and in personam, concepts that correlate well if it already is assumed that people have rights in things, no longer are first order concepts. See \textit{id.} Similarly, reification of rights (i.e., physicalization) is no longer important. See Hohfeld, \textit{Some Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 23 \textit{Yale L.J.} 16, 20-25 (1913) (implicit rejection of reified view of property).

A candid statement of the nature of the change from the reification/in-things perspective to the dephysicalized/between-people perspective is found in Radin, \textit{A Restatement of Hohfeld}, 51 \textit{Harv. L. Rev.} 1141 (1938):

\textit{When we attempt to use Hohfeld's, or indeed any "analysis", we are dealing with an attempt at a legal algebra or a geometry, the purpose of which is more modest than that which is effected by the mathematical organa usually understood under these names. We are concerned with an algebra that will enable us to describe some precise and repeated situations, the actual judgments of courts, in such a way that any judgment can fall into the scheme. It will be of some service in the larger task either of collecting, memorizing or teaching these judgments, but not in the much more vitally important task of forecasting them.}

\textit{There are certain postulates we begin with. . . .}

\textit{First of all, there is only one unit in the law, as thus formulated, and that is a human being, every human being and nothing but a human being. There is no corporation, no state, no quasi-corporation, no juristic person, no \textit{nasciturus}, no "estate", no "entity", no "civil death".

Secondly, the only legal fact at our first level is a relation between two such human beings. No relation that has legal relevance exists between a human being and a thing, between a human being and a group of other human beings considered as a group, nor between a human being and an abstract idea. There is no right in \textit{rem} and no action in \textit{rem}. All these terms are useful and significant, as we may discover, in other connections, but they do not concern us now.}

\textit{Id.} at 1146-47 (footnote omitted).

stitute sets of choices about what types of people are to be favored for what types of reasons with respect to what type of power. Consistent with the Hohfeldian perspective that rights exist between people with respect to things, the concept of rights in the DJV involves a series of choices between people with respect to wealth, position, and power in society. From this perspective, rights are more concerned with the implementation of patterns across groups than with the designation of areas of individual autonomy. Rights attach to anyone who meets the relevant end-state criteria. Individual autonomy and physical dominion are no longer necessarily relevant. Similarly, physicalization is unimportant because patterns across society are more relevant than individual areas of autonomy.

The end-state concept of rights is concerned about the relationship of society to the desired pattern. Rights are no longer exclusive but, instead, are collective; one person's right to inclusion in the relevant group does not necessarily diminish another person's right. The DJV also implies that the very existence of end-state rights is partially a matter of choice and that the fulfillment of such rights is partially dependent on affirmative actions by the state. The Hohfeldian concept of rights existing between people with respect to things thus reinforces the nonexclusive, dephysicalized nature of rights in an activist state, distributive justice political system. In contrast to the system of rights in the TJV, which emphasizes exclusive, individual rights that preexist the state, the Hohfeldian notion captures the features of choice, group entitlements, and conflicting substantive patterns that are central features of the DJV.

The Hohfeldian perspective also assumes a disintegrated theory of rights. Unlike the unified theory of rights associated with

14. See Grey, supra note 13; Vandevenlede, supra note 13.
15. See Grey, supra note 13.
16. Conceptualizing rights as relationships that people have in things generates a notion of exclusive rights, while viewing rights as between people with respect to things generates a notion of nonexclusive rights. Similarly, the Hohfeldian perspective implies that the content of the right is derived in part from action of the state.
18. This was evident, for example, in much of the Hohfeldian analysis of the legal realists in their attack on pre-1937 Supreme Court doctrine. See, e.g., Cook, Privileges of Labor Unions in the Struggle for Life, 27 YALE L.J. 779 (1918).
the TJV, in the DJV there is no necessary connection between existing rights and rights required for a just state of affairs. The status quo merely serves as a starting point. If it matches the expectations of the end-state pattern, the status quo is just. If it deviates an unacceptable amount from the desired pattern, however, it is not. If the status quo is entitled to legitimacy, it is because it conforms, within tolerable limits, to the preferred end-state pattern and not merely because it happens to be the status quo. Thus, in the DJV, there is no necessary connection between what is and what ought to be.

Another aspect of the Hohfeldian perspective of disintegrated rights in the DJV is that there is no necessary connection between the four features of rights in the TJV. For example, the concept of remedy in the DJV is independent of any previously existing transactional justice right. A remedy in the DJV is derived from a comparison of the status quo to the end-state pattern. If the status quo deviates an unacceptable amount from the desired pattern, the remedy is the action needed to alleviate the discrepancy. A person may be entitled to a remedy even though no transactional justice rights were violated and a person may be liable, not because of any fault or personal misconduct, but only because he or she has the power to change the status quo. An entitlement to an end-state remedy, therefore, is not necessarily dependent on the existence or violation of a transactional justice right. Similarly, there is no necessary connection between who may be a party to a dispute and whose rights are at issue. Sometimes the immediate parties affected may be in the best position to initiate and argue the dispute while at other times they may not.

19. These Hohfeldian aspects of the DJV have already generated a rich literature. See, e.g., Chayes, supra note 4; Fiss, supra note 7; Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975). While much of the literature provides a good description of the influence of such Hohfeldian notions, it has not, however, taken the additional step of expressly linking these aspects of procedure to particular political visions.
C. Cows, Corn, and the Distributive Justice Vision—The Coase Theorem as an End-State Proposition

The conventional wisdom is that the Coase theorem is inextricably associated with conservative political philosophy and with law and economics. The theorem was initially proposed as a theory of economic efficiency that could be used to justify less government intervention in the marketplace. As a result, it is usually associated with the Chicago school of law and economics. The theorem, however, is more than merely a law and economics proposition, and it is not necessarily a conservative proposition. The reason for this is that the theorem implicitly presupposes the existence of the DJV.

When a Coasean perspective is taken, DJV questions become important and the TJV questions become unimportant. The Coase theorem does not imply (as it has so often been misunderstood to imply) that every legal issue should be reduced to the use of economic efficiency by the courts to assign entitlements to litigants in common-law actions. Instead, it simply implies a perspective—that of the DJV—whose significance cannot be limited to efficiency, court decisions, or the common law. As a result, the Coase theorem and the reaction of the legal culture to it are of greater significance than is usually supposed.

At the outset, it is important to distinguish the law and economics interpretation of the theorem from the political structure of the theorem itself. Although the commentary on the theorem

20. See Coase, supra note 1, at 17-18, 42-44; Horwitz, supra note 2; Kennedy, supra note 2, at 393-98: Priest, supra note 3, at 1634-35.
22. See B. Ackerman, supra note 2, at 46-71.


Commentators have seen in Coase's argument the basis of a formal or analytic claim about the relation between the goal of economic efficiency and the assignment of legal rights as an instrument in its pursuit. This is the Coase Theorem. There are as many ways of stating the theorem as there are illustrations of it and controversies arising from it. I prefer to state it as follows: if we assume that the relevant parties to negotiations are rational, that they have substantial knowledge of their own and one another's preferences, that transactions between them are costless, that the state will enforce contracts between them, that their negotiations are not affected by their relative wealth (no income effects), that the prices on the basis of which they bid against one another
almost universally conflates the two issues, it is critical for a proper understanding of the place of the theorem in modern legal scholarship that these issues be distinguished. In his article that proposed the theorem, Ronald Coase made two different assumptions, each of which contributed to its controversy. First, he implicitly assumed that the DJV was the relevant political structure. Even before his specific economic argument was advanced, he presupposed that it would operate in a distributive justice political structure. Second, Coase proposed a law and economics interpretation of the DJV and made certain common-law assumptions about its application. What is significant is that, although Coase's second point presupposes his first, his first point need not lead only to his second. As a result, the law and economics interpretation usually associated with the theorem in fact represents only one of many possible variations of the DJV. Moreover, the theorem need not be associated only with law and economics or only with conservative politics.

To illustrate this point, some of the implicit assumptions of the Coase theorem are compared in the following discussion with the assumptions of the DJV in three areas: normative framework; theory of rights; and nature of disputes. After looking at each of these assumptions, some final arguments will be made about the politics of the theorem.

1. The Normative Framework of the Theorem—End-State Propositions, the Status Quo, and the Role of the State. The Coase theorem presupposes the normative framework of the DJV. All of the central normative assumptions of the DJV are present in the

are given to them rather than established by their negotiations (the partial equilibrium model), the assignment of property rights by the state to either party will be irrelevant to the goal of efficiency, provided of course that the rights are divisible and negotiable.

I state the theorem with all these qualifications, partly for effect, and partly because so much confusion arises in its application simply because commentators either ignore or are unfamiliar with all the initial conditions that must be satisfied. The basic idea is really quite simple, however. As long as two people, A and B, can negotiate with one another, it won't matter from the point of view of efficiency whether the state gives B the right to prevent A from acting in a way that adversely affects B, or A the right to act in a way that harms B. As long as transactions are costless, A and B will negotiate to an efficient level of their respective activities through the process of mutual gain via trade, though there is no guarantee that they will negotiate to the same efficient distribution. Id. at 92-93 (footnote omitted) (emphasis in original).
framework of the Coase theorem. First, rather than determining whether the actions of the parties' moves are historically correct, the Coase theorem determines whether such actions satisfy a given end-state standard. The particular end-state standard used in the theorem is economic efficiency—a Pareto optimal standard. So long as the existing state of affairs is not Pareto optimal, a problem exists that justifies corrective action. The remedy, of course, is to propose Pareto superior moves.

Second, it is already assumed that the state will play an important role in the creation of rights and the implementation of end-state goals. Within the political framework presupposed by the theorem, a conscious choice of entitlement must be made by someone other than the immediate parties involved. A choice


The political idea that I'm trying to capture is that, in the DJV, the existing structure of power is subject to scrutiny. The existing power structure, whether it be in the marketplace, the family, the government bureaucracy, or the social structure, is no longer off limits—it can be challenged. Simply because the status quo is the status quo is no longer a valid normative argument within this framework for preferring the current state of affairs. The legitimacy of the current state of affairs derives from its correspondence with chosen end-state principles and not because of any special preference for the current power structure in society. Given this background, I am arguing that the Coase theorem has already presupposed this general political orientation. It is important, however, to distinguish between the place of my general comments about the importance of the status quo in the DJV and the use of the status quo in the definition of Pareto optimality because the status quo is an important part of the end-state principle of the law and economics version of the DJV.

When I state that the status quo is not entitled to any special legitimacy in the DJV, I mean only that the existing power structures in society are subject to scrutiny. I do not mean that the existing status quo—in the sense of the existing state of affairs—is of no importance at all. Unless we have some given starting points, we can never have economic efficiency. Thus, there are two different ways in which the status quo is used in relation to the definition of economic efficiency. First, some state of affairs must be given before bargains can be made. Until we specify what the pre-bargain status quo is, there can be no bargain. Second, there is the state of affairs that exists after bargains are made. This post-bargain status quo may be the preferred state of affairs in an end-state world governed by economic efficiency, but it is so only because it has satisfied the relevant end-state standard. Once we have reached the relevant end-state standard the status quo becomes just, as it is now in line with the relevant end-state principle of justice. Thus, I do not view my statement about the use of the status quo in the DJV as inconsistent with the use of Pareto optimality as an end-state standard.

24. This point was not treated at any length in Coase's article simply because it was not necessary to his thesis. Thus, in his discussion about the application of the theorem in the absence of transaction costs, Coase simply stated:

It is necessary to know whether the damaging business is liable or not for
must be made, for example, whether to place the initial liability on the rancher or the farmer. Once that choice has been made, the theorem specifies that the rancher and the farmer will bargain to an economically efficient result. Significantly, however, the choice of that initial placement of liability cannot be made by either the rancher or the farmer but, instead, must be made by a third party (e.g., the state or some other social choice mechanism) based on criteria other than the wills of the parties involved. Similarly, in making that choice, the state must decide not only who will get the rights, but also how those rights will be protected and what the subject of the entitlement will be. Whatever the final properties of the entitlement, it is clear that the right is largely a creation of the state.

Third, the status quo is not granted any special legitimacy. Prior dealing between the parties and existing boundaries or distribution of rights are of no special importance. It is assumed instead that the existing state of affairs is to be judged against the particular end-state standard of economic efficiency. The existence of some distribution of boundaries, of course, must be assumed for the theorem to apply at all. The economic interpretation of the theorem assumes that both the rancher and the farmer have rights defined by certain existing boundaries, are involved in certain activities, and possess certain capacities, such as the ability to bargain. Significantly, however, what that distribution may have been is important only insofar as it provides a set of facts for

damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

Coase, supra note 1, at 8.

In his discussion of the effect of the presence of transaction costs, Coase noted that "the situation is quite different when market transactions are so costly as to make it difficult to change the arrangement of rights established by the law. In such cases, the courts [i.e., the state] directly influence economic activity." Id. at 19.

25. For example, the state must decide whether the entitlement is inalienable or is protected by a property or a liability rule. See Calabresi & Melamed, supra note 2, at 1092-93, 1105-10, 1115-24: Kronman, Specific Performance, 45 U. Chi. L. Rev. 351 (1978).

26. Coase initially only considered the issue of common-law nuisance, a matter of land use. There was nothing about the structure of the theorem, however, that dictated what the subject of the entitlement should be. Rather than a matter of land use between two persons, it could involve all farmers and all ranchers (i.e., a group entitlement), see Kennedy, supra note 2, at 438-49, or a social status rather than farming (i.e., an entitlement to a certain state of the social structure).
the application of economic efficiency. Thus, the status quo is of no special importance: if it is already Pareto optimal, then it is correct; if it is not Pareto optimal, then it must be remedied. Rather than a preferred state of affairs, the status quo is merely a convenient starting point.

2. The Theory of Rights in the Theorem—Hohfeldian Rights, a "Thin" Theory of Rights, and the Demise of Personal Autonomy. Similar to its presupposition of the DJV, the framework of the Coase theorem assumes the Hohfeldian theory of rights. The essential question for determination is a choice between the rancher and the farmer with respect to implementation of an end-state goal. Neither person is assumed to have any particular pre-existing rights of autonomy. Rather, their rights are derived from the end-state principle adopted (i.e., those rights which it assumes to exist). Because the end-state principle is Pareto optimal, the rancher and the farmer are assumed only to have the basic ability to bargain to a Pareto optimal result. They are guaranteed no richer set of rights.27 As a result, the TJV concept of rights, which stresses personal autonomy, physical dominion, and individual rights, is eroded. End-state criteria rather than reification determine the existence and nature of rights.28 For example, dominion


28. Coase does not think of people having rights in things but rather of relationships between people. This is implied in his discussion about rights being factors of production:

A final reason for the failure to develop a theory adequate to handle the problem of harmful effects stems from a faulty concept of a factor of production. This is usually thought of as a physical entity which the businessman acquires and uses (an acre of land, a ton of fertilizer) instead of as a right to perform certain (physical) actions. We may speak of a person owning land and using it as a factor of production but what the landowner in fact possesses is the right to carry out a circumscribed list of actions. The rights of a landowner are not unlimited. It is not even always possible for him to remove the land to another place, for instance, by quarrying it. And although it may be possible for him to exclude some people from using "his" land, this may not be true of others. For example, some people may have the right to cross the land. Furthermore, it may or may not be possible to erect certain types of buildings or to grow certain crops or to use particular drainage systems on the land. This does not come about simply because of Government regulation. It would be equally true under the common law. In fact it would be true under any system of law. A system in which the rights of individuals were unlimited would be one in which there were no rights to acquire.

If factors of production are thought of as rights, it becomes easier to under-
over property and a sphere of control is no longer assumed to exist and rights are no longer physicalized. Conventional physical barriers may mark their starting point, but these are only preliminary assumptions rather than the hallmark of substantive rights.\textsuperscript{29} For example, if the initial legal liability is placed upon the rancher, even though the farmer has an entitlement to farm, the farmer no longer has complete physical dominion over the activities that take place on his land. Instead, he is subject to a possible veto by the rancher merely upon the payment of an objectively set amount of money.\textsuperscript{30} From this perspective, once the initial liability has been placed on the rancher, physical boundaries are important only insofar as they help to designate who must do the bribing. If the activity takes place entirely on the rancher's land, he must absorb the cost. Similarly, if the activity is connected with the farmer's land, the rancher must be bribed to alter his behavior.

Autonomy with respect to control over bargaining also is eroded in the context of the theorem. Bargaining is no longer a matter of individual choice. Because of the assumption of no transaction costs and cooperative bargaining, it is already assumed that a bargain will be made between certain people, regardless of the actual desires of the persons involved.\textsuperscript{31} The result mandated

\begin{quote}
stand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.) is also a factor of production. Just as we may use a piece of land in such a way as to prevent someone else from crossing it, or parking his car, or building his house upon it, so we may use it in such a way as to deny him a view or quiet or unpolluted air. The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right—the inability to cross land, to park a car, to build a house, to enjoy a view, to have peace and quiet or to breathe clean air.
\end{quote}

\textcolor{red}{Coase, supra note 1, at 43-44.}

\textcolor{red}{29. See Gjerdingen, supra note 3, at 724-26.}

\textcolor{red}{30. See Coase, supra note 1, at 6-8; Gjerdingen, supra note 3, at 725-26.}

\textcolor{red}{31. Moreover, even if transaction costs are present, the state must do two things. First, it must guess what the parties would have done. See Note, Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics, 97 HARV. L. REV. 978, 988-94 (1984) [hereinafter Two Models of Law and Economics]. This, of course, infringes on autonomy. See Weinrib, Utilitarianism, Economics, and Legal Theory, 30 U. TORONTO L.J. 307, 319-24 (1980). As Weinrib notes, "Actual markets embody respect for the individual and his choice, whereas [wealth-maximizing] hypothetical markets entail the sacrifice of the interests of some individuals in the name of maximization." \textit{Id.} at 322. But see Note, A Theory of Hypothetical Contract, 94 YALE L.J. 415 (1984) (use of hypothetical contracts to protect autonomy). Second, the state's reason for mandating the bargain may be paternalistic, which}
by the theorem may have happened under TJV conditions, but it
certainly is not necessarily what would have happened. In the
TJV, the parties would have been able to choose whether they
could contract or not, with whom they would contract, and for
what purposes. By contrast, in the DJV the assumption of coopera-
tive bargaining is merely a way of describing a result that is
equivalent to implementing another end-state result mandated by
the state apart from the actual desires of the parties.

Similarly, the separate existence and independence of each
person, which is critical in the TJV, is severely eroded in the DJV.
In his story about the cows and the corn, Coase assumed a fact
setting involving two different people. Significantly, however, the
theorem would generate the same result if both plots of land were
owned by one person or by two million people. This indicates
that the right is defined by the relevant entitlement. If the entitle-
ment extends to a large number of persons, it is a collective or
group entitlement and any individual claims are merged into the
whole. By contrast, if the entitlement is assumed to extend only to
a setting involving a conflict between two individuals, then, in es-
sence, it is an individual right.

3. The Nature of Disputes in the Distributive Justice Vi-
sion—Loss of Party Control and the Independence of Right and Rem-
edy. Coase also assumes that the dispute between the rancher and
the farmer takes place in the context of a common-law action.
He assumes that rights are already in place, that boundaries are
already drawn, and that the form of the dispute is a bipolar, com-
mon-law action already before a common-law judge. All of

also lessens autonomy. See, e.g., Note, Two Models of Law and Economics, supra at 992-94.
32. See Coase, supra note 1, at 16-17 (discussion of the nature of the firm).
33. Such would be the case if the farming and ranching enterprises were gigantic com-

munes, Indian tribal lands, or even states (e.g., Minnesota cattle and Iowa corn).
34. Of course, even in this case, an individual right within the DJV does not include
such things as complete physical dominion and control. See supra notes 28-30 and accompa-
nying text.
35. See Coase, supra note 1, at 8-28. Coase did, of course, mention the possible appli-
cation of his theory to regulatory questions as well, see id. at 29-36 (discussing statutory
exception to common-law standards), 41-42 (taxation). Most of the discussion, however,
centers on common-law appellate opinions.
36. This was a common assumption in much of the early commentary on the theorem
as well. See R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS
AND NOTES 117-62 (2d ed. 1978); Calabresi & Melamed, supra note 2, at 1115-24 (theorem
applied to nuisance cases). I do not mean to imply that any of these scholars were unaware
these, of course, are permissible assumptions. They must, however, be recognized as assumptions and not as preconditions to the use of the theorem itself. The structure of the Coase theorem need not be so confined since it incorporates the DJV. In fact, even though the theorem could be applied in a common-law setting, the implicit structure of the theorem evidences a far broader concept of disputes and litigation.

In the context of the Coase theorem, the nature of the dispute reflects the DJV perspective. In the TJV, parties had control over their own sphere as a matter of personal autonomy. Not only was each person assumed to be able to care for his or her own sphere, but each was also individually responsible for invasions of another person's sphere. In contrast, in the Coasean framework, party control is limited. The initiation of disputes (i.e., the calling of attention to the divergence of the status quo from a desired end-state goal) is no longer solely limited to the injured party, but may include the state or even a third party. If a group of people are affected by the entitlement, the dispute is not determined by reference to existing boundaries or rights, but by the selection and implementation of end-state standards. Moreover, since the end-state goal need not be based on the wills of the individual persons involved, it must be assumed that the intentions or actions of the rancher and the farmer are no longer the sole criterion of decision. Relevant information, such as where the initial entitle-
ment should be set, may be generated by a third party or by the state.\textsuperscript{38}

Similarly, there is no necessary relationship between who initiates the dispute and who has the best information about it.\textsuperscript{39} In fact the initial placement of liability does not even have to be on either the rancher or the farmer, but could be on a third party.\textsuperscript{40} Finally, the structure of the theorem is institution independent.\textsuperscript{41} Although it can be applied by courts, it certainly need not be so limited. Decision-making bodies other than courts can be considered,\textsuperscript{42} as well as substantive categories other than those of the common law.\textsuperscript{43}

4. \textit{The Coase Theorem and Law and Economics; the Coase Theorem and Conservatism}. The law and economics interpretation of the theorem has to be distinguished from the political structure of the theorem. The structure of the theorem presupposes the DJV. Coase made a law and economics assumption and a common-law assumption to inform the DJV. By making the law and economics assumption, he assumed that the parties had a thin concept of personhood, one sufficient to make bargains and Pareto superior moves. Similarly, he made the common-law assumption that the existing distribution of rights was already specified, boundaries were already drawn, and the dispute was already before a common-law judge. All of these, of course, are permissible assumptions, but they must be recognized as only a part of an entire set

\textsuperscript{38} From the Coasean perspective, it is assumed (1) that someone other than the rancher or the farmer must set the initial entitlement, and (2) that the wills of the parties are no longer controlling. As a result, it also follows that the decision maker must look to sources of information other than the parties themselves. \textit{See, e.g.}, Calabresi, \textit{Transaction Costs, Resource Allocation and Liability Rules—A Comment}, 11 J.L. \& Econ. 67 (1968).

\textsuperscript{39} In the context of the Coase theorem this is part of transaction costs. Even if it is assumed that there are no transaction costs, this absence of a necessary relationship still holds true simply because transaction costs only deal with the assumptions about the bargaining between the parties and not the choice of initial entitlement itself. In the presence of transaction costs the additional problem of paternalism arises. \textit{See supra} note 31.

\textsuperscript{40} \textit{See G. CALABRESI, supra} note 37, at 136-38.

\textsuperscript{41} I am grateful to Bruce Ackerman for pointing out this aspect of the theorem to me.

\textsuperscript{42} \textit{See, e.g.}, G. CALABRESI, \textit{supra} note 37 \textit{passim} (government regulation, legislation, and the market, as well as courts).

\textsuperscript{43} \textit{See, e.g.}, B. ACKERMAN, \textit{supra} note 2, at 56-60 (Coasean statement of the facts); Calabresi \& Melamed, \textit{supra} note 2 (property rules and liability rules instead of common-law categories of tort and property); Michelman, \textit{supra} note 37, at 656-57 \& n.19 (case-by-case decision making no longer necessarily best).
of possible assumptions. The theorem necessarily incorporates the DJV political structure, but Coase also chose to give that general structure a particular political interpretation. This distinction gives rise to another important point about the political structure of the theorem. Although the theorem is an end-state proposition, it need not be a conservative proposition. Economic efficiency, of course, is one particular end-state principle that could be chosen. The particular end-state principle chosen will determine whether the theorem is conservative or liberal. If a conservative end-state proposition such as wealth maximization is used, the theorem can support a conservative end-state result. In contrast, if a liberal end-state proposition such as Rawlsian maximin, or Ackermanian neutral dialogue, is chosen, the theorem can support a liberal end-state result.

III. Political Visions and the Events of 1937

The TJV and the DJV are caricatures possessing all the limitations which that term implies. They are not, however, without a special meaning for the legal culture. The constitutional events of 1937 fundamentally changed the American political structure. These supralegal events ended the unqualified acceptance of the TJV and legitimated the use of the DJV. The acknowledgement of this change in American politics is now becoming orthodox. It is also becoming orthodoxy to acknowledge that the transition has

44. Cf. Priest, supra note 3, at 1634-35 (deregulation movement uses Coase’s work to mount “sustained attack on the activist state”).
45. Thus it becomes important to distinguish transactional justice conservatives, such as Epstein, from end-state conservatives, such as Posner. While Epstein is very much against the use of the state to redistribute wealth, etc., Posner champions the idea so long as the intervention by the state is used to favor the preferences of the wealthy.
47. B. Ackerman, Social Justice in the Liberal State (1980).
48. My point is not to propose these particular theories as necessarily being the appropriate ones to use. Rather, the point is that the theorem, because it necessarily incorporates the DJV, is only as conservative or as liberal as the political theory that is read into it.
precipitated significant unrest in the legal culture. However, what has yet to be fully acknowledged is (1) the relationship between the events of 1937 and the controversies of modern political philosophy, and (2) the further relationship between these controversies and the structure of the Coase theorem.

The events of 1937 stand for two basic propositions. First, the TJV is no longer entitled to unqualified legitimacy and acceptance. It is no longer necessarily acceptable. Second, the DJV is no longer necessarily illegitimate. It can no longer be automatically dismissed as irrelevant or unacceptable. Some of the most controversial aspects of modern political philosophy can be understood as attempts to comprehend and deal with the consequences of these propositions. A short catalog of some of those concerns


51. The events of 1937 can be expected to generate significant substantive controversies. The primary substantive concerns of legitimacy, transition, and boundaries, which surround the events of 1937, are significant in their own right simply as matters which invoke important questions about the nature of modern political philosophy. For a number of reasons, however, they can be expected to generate a particularly significant amount of controversy. First, the meaning of the events of 1937 is an issue of immense practical significance for present day events. It is not a mere academic exercise in the possible, but a real life controversy about the present structure of American political life. Depending on the answers that are given, real people will gain and real people will lose. This can only serve to heighten the intensity of the concern about the interpretation of these events.

Second, a variety of different positions on these substantive issues is to be expected. The events themselves simply sanction the setting up of an agenda for dialogue. It is significant, of course, that what has to be talked about in the present is different than what had to be talked about prior to 1937. It is also significant, however, that numerous responses could be generated which would be consistent with the demands and constraints of the events of 1937. What has thus been described generally as an "anarchy in ethics," R. Posner, The Economics of Justice v (1983), to some extent has to be expected as a variety of different positions continue to be advanced. At the same time, however, the very existence of such a variety of positions can only help to produce a deeper sense of rivalry and factionalism as one position competes with the other for acceptance.

Third, no one position at this point can be expected to be totally satisfactory. Because of the transition that is taking place, orthodox constructs must be reconsidered and new constructs must be tested and reviewed. Presently, each has its faults, and each must be expected to draw criticism. In addition, the development of an entirely new vision of politics may ultimately be necessary. This new vision would, in Hegelian fashion, resolve the existing conflict between the two visions from yet another perspective. See Bush, Between Two Worlds: The Shift From Individual to Group Responsibility in the Law of Causation of Injury, 33 UCLA L. REV. 1473 (1986) (proposing communitarian theory of law as solution to conflict between TJV and DJV). In any case, at present, any claims of final answers must be suspect. Moreover, in such circumstances debates about the issues serve an important and beneficial function, since they ultimately help to generate the dialogue needed to bring the
can help to illustrate the source of some of the Coase theorem's controversy.

A. Legitimacy Issues

If the events of 1937 represent a change from an unqualified transactional justice system to a distributive justice system, then what is the legitimacy of such a change and how can it be justified within the liberal tradition? At least three significant issues arose with respect to the legitimacy of this transition, all of which created controversy for political theory.

The first was explaining the legitimacy of the events of 1937 themselves. If the events of 1937 were accepted as legitimate, how could they be justified within the dominant political tradition? In this respect, the events of 1937 created special problems. On the one hand, they were accepted as constituting a supralegal event tantamount to a constitutional amendment. On the other hand, the legitimacy of those events could not be explained by orthodox liberal theory. An attempt to justify the change under conventional social contract theory would be difficult because the formal amendment process was not used. Similarly, any attempt to justify the change on the basis of textualism would be difficult because of the great inconsistency between the doctrine of the Civil War-to-1937 era and the modern era. Since textualism assumes some type of consistent substantive doctrine over time, a strict textualist would have to say that one of the two periods was wrong. This in turn, however, would undermine the belief in textualism as a sufficient check on the abuse of power. Either the legitimacy of the events of 1937 somehow had to be explained in a way that would satisfy orthodox theory, or existing political theory had to be modified or abandoned. No longer would any single theory be entitled to unquestioned acceptance. This created a le-

society through the transition period.

In combination these various factors assure that the substantive controversies surrounding the events of 1937 will be the subject of intense interest, concern, and dispute. Disagreement and controversy not only are an expected incident of their existence, but also a necessary element of their resolution. In addition, the significant present day consequences that attach to the dispute and the increased power that awaits those persons who are best able to explain or rationalize the transition can only be to heighten the sense of urgency.

The legitimacy controversy for political theory, the effects of which are still with us. Some scholars still attempt to interpret the events of 1937 in terms of orthodox theory, others attempt to modify orthodox theory to accommodate them, while still others attempt to develop new theories of political legitimacy. Others theorize that any attempt to resolve this dilemma is futile.

The second legitimacy controversy was the ability of post-1937 political theory to construct a coherent end-state version of liberalism. If the events of 1937 sanctioned the use of the DJV, then how could a coherent activist state theory be constructed within the liberal tradition? Once again, orthodox liberal theory was deficient. Neither traditional social contract theory nor laissez-faire theory could easily accommodate the notion of an end-state distributive justice system. For example, while traditional social contract theory was premised on the idea of rights preexisting the state, the DJV acknowledged the possibility of rights created by the state. Similarly, while the laissez-faire theory was premised on the primacy of the status quo, the DJV was premised on the notion that the status quo was no longer necessarily desirable. As a result, legitimizing the use of the DJV would require new efforts to justify distributive justice within the liberal tradition. This created a second source of controversy and fostered some of the most creative literature in modern political theory. These ranged from Robert Nozick's frontal attack on the validity of end-state systems, to efforts by John Rawls, Bruce Ackerman, and


58. See, e.g., 2 J. Mill, Principles of Political Economy 558-603 (1874).

59. R. Nozick, supra note 4.

60. J. Rawls, supra note 46; see also infra note 137 (presupposed activist state in which
others to establish theoretical frameworks for end-state versions of liberalism, to the efforts of Roberto Unger to show the inability of the orthodox liberal tradition to support such a transition.

A third and closely related legitimacy controversy centered on efforts to develop a liberal theory of rights compatible with the DJV. Just as the events of 1937 fostered debate about the legitimacy of a distributive justice form of liberalism, they also fostered debate about the legitimacy of a theory of rights within the DJV. Orthodox theory was premised on the existence of rights of autonomy that preexisted the state. These rights tended to be exclusive to their owner, associated with physical things, and uniform. While such a theory of rights could function well in the decentralized, individualistic setting of transactional justice, it could not easily accommodate the political premises of the DJV. For example, the emphasis in orthodox theory on exclusive rights reinforced the TJV notions of individual initiative and of trading between autonomous individuals. Yet this same feature of orthodox theory made it difficult to accommodate either the DJV concept that alterations might be necessary in the existing distribution of wealth, even though it was attained by the proper application of TJV standards, or that choices might have to be made apart from the desires of individual will. Similarly, an emphasis on uniform rights, although it reinforced the TJV notion of individualism, made it difficult to accommodate the DJV concept that because of existing deviations from end-state goals, rights requiring affirmative action might attach to some groups or persons but would not attach to others. In addition, the primacy of the status

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rights derive from hypothetical contract involving veil of ignorance).

61. B. ACKERMAN, supra note 47; see also B. ACKERMAN, supra note 17, at 71-87 (Kantian theory of takings jurisprudence): infra notes 139-40.


63. R. UNGER, KNOWLEDGE AND POLITICS (1975).

64. For an excellent article on the different political structures implicit in the notion that property consists of rights in things versus between people with respect to things, see Grey, supra note 13.

65. See, e.g., R. NOZICK, supra note 4, at 160-64.

66. See, e.g., Shiffrin, supra note 62, at 1124-27.

67. See id. at 1127-30. This dilemma usually surfaces in arguments about the nature of equality. See, e.g., Dworkin, WHAT IS EQUALITY? PART 1: EQUALITY OF WELFARE, 10 PHIL. & PUB. AFF.
quo and individual initiative in orthodox theory clashed with the 
DJV concepts that the status quo was no longer necessarily valid, 
and that initiative by the state in pursuance of end-state goals 
(rather than merely the enforcement of individual wills) was no 
longer suspect.

At the same time, not all aspects of the Hohfeldian concept of 
rights were satisfactory. Viewing rights as between people with re-
spect to things was helpful initially because it reinforced the criti-
cal presuppositions of the DJV that affirmative action by the state 
may be required to attain a just society, and that actions of the 
state inevitably involved a series of conscious choices between va-
rious groups or strata in society.68 The Hohfeldian notion of 
rights, however, was unable to address two critical aspects of a lib-
eral theory of individual rights in the DJV. First, it was unable to 
supply the choice of affirmative goals for the state. The 
Hohfeldian notion of rights facilitated the implementation of end-
state goals, but it could not, within its own framework, supply the 
substance of those goals. Perceiving rights as existing between 
people with respect to things helped to avoid the limitations that 
the orthodoxy of exclusive rights placed on alteration of the status 
quo, but it could not supply a positive theory of end-state prin-
ciples. Second, it similarly could not provide a theory of limitations 
on the state.69 The Hohfeldian notion of rights had a positive side 
because it allowed the creation of new rights by affirmative acts of 
the state. However, it also had a negative side. If rights could be 
created by the state, rights could also be destroyed by the state. 
The Hohfeldian vision allowed rights to be a creation of the state, 
but it did not prevent rights from existing at the whim of the 
state. It allowed the intervention of the state to further end-state 
goals, but it did not prevent the state from using that power to 
intervene to a dangerous degree in the daily activities of its 
citizens.

Thus, the Hohfeldian concept of rights helped to facilitate


68. This theme was a central feature in the literature of the Realists and helps to 
explain some of their initial success, as well as their fall from grace after 1937. See White, 
The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va. L. 

69. See, e.g., C. MacPherson, The Political Theory of Possessive Individualism: 
Hobbes to Locke (1969); R. Wolff, The Poverty of Liberalism (1969); Singer, The Legal 
Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. Rev. 975.
the emergence of the DJV by breaking down conceptual barriers that prevented the realization of end-state goals actively pursued by the state. However, it also created some problems for the implementation of the DJV because it was unable to do what the TJV did so well—provide a theory of individual rights.

Together, these offsetting deficiencies of the orthodox theory of rights and the Hohfeldian theory of rights created another crisis for modern political philosophy. The complete theory of rights associated with the TJV could not accommodate the notion of an activist state; yet the pure Hohfeldian concept of rights associated with the DJV could not generate a satisfactory substantive theory of individual rights against the state, a theory so prominent in the liberal tradition. The ensuing responses of the scholars followed much the same pattern of the other legitimacy controversies. While some argued for a reaffirmation of orthodox complete rights, others attempted to reform the orthodox position to deal with the DJV. While some attempted to develop a liberal concept of rights for a distributive justice framework, others warned of the inability of modern liberal theory to support a coherent notion of rights and, as a result, the imminent collapse of law into politics.

B. Transition Issues

If 1937 represents the sanctioning of the use of the DJV, then what is the present day legitimacy of the TJV? Prior to 1937 the TJV was accepted as legitimate, and the normative presuppositions of the TJV became part of the institutionalized expectations of society. Based on the assumed legitimacy of the TJV, people made transactions, acquired wealth, and rose or fell in society. After 1937 the TJV was no longer necessarily accepted as valid.

1. Present Legitimacy of the Transactional Justice Vision. One issue raised by this transition is the present day legitimacy of the TJV. This, in turn, depends on which of several currently debated interpretations of the events of 1937 is accepted.

One interpretation is to view the events of 1937 as reestab-

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70. See, e.g., R. Nozick, supra note 4, at ix-xiv.
72. See, e.g., B. Ackerman, supra note 47; J. Rawls, supra note 46.
lishing or confirming the legitimacy of the TJV in certain areas. Under this view, the events of 1937 would simultaneously be viewed as reaffirming the legitimacy of the TJV in some areas and legitimizing the use of the DJV in other areas. From this perspective, the TJV is entitled to as much legitimacy within its sphere as the DJV is in its sphere.

An alternate interpretation is that the DJV is necessarily dominant and that the TJV exists only at the sufferance of the DJV. Under this reading, the events of 1937 would be viewed as a complete shift, making the DJV the only legitimate political vision. This would not necessarily mean that all traces of the TJV would disappear, but only that the legitimacy and use of the TJV would be tied to fulfilling some function in the DJV rather than any independent legitimacy of the TJV itself. For example, the TJV might be used in areas where the status quo of the pre-1937 period did not significantly diverge from the desired end-state goal of the DJV. Alternatively, the TJV might be employed in areas where it was judged the most effective, or the second-best method to implement a goal according to DJV standards. In this case, any argument that the TJV must be applied in particular areas would have to be justified by reference to the DJV. The legitimacy of the TJV, therefore, would be based not on any independent legitimacy of its own, but rather on that of the DJV.

74. For some initial efforts at the kind of argument that could support such a reading, see Johnson, The Idea of Autonomy and the Foundations of Contractual Liability, 2 LAW & PHIL. 271, 289-99 (1983). Some of Epstein's work is also susceptible to such a reading, see, e.g., Epstein, The Case of Antitrust, supra note 4; Epstein, Nuisance Law, supra note 4. This also appears to be a possible reading of C. Fried, CONTRACT AS PROMISE (1981); and Wright, Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis, 14 J. LEGAL STUD. 435 (1985).

75. This seems to be the dominant theme in B. Ackerman, supra note 2, at 35-37; B. Ackerman, supra note 17, at 183-84; G. Calabresi, supra note 37; R. Posner, Economic Analysis of Law (2d ed. 1977); Kronman, Contract Law and Distributive Justice, 89 YALE L.J. 472 (1980).

76. Cf. Campisano, Ordinary Observing and Utilitarian Policymaking in the Internal Revenue Code, 55 S. Cal. L. Rev. 785, 791 n.26 (1982) (implying substantive results may not change after shift from one political system to a different one because of overlap of results).

77. See, e.g., G. Calabresi, supra note 37, at 307 (under certain conditions, fault system may have done a good job of meeting end-state standards); Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69 (1975) (TJV notions of “but for” and “proximate cause” survive because they fulfill some of the needs of end-state goals).
A third interpretation is that the events of 1937 allowed the ordinary political processes to choose between the TJV and the DJV. From this perspective, no particular approval was necessarily given to one vision over the other, and no one vision was necessarily more legitimate than the other. The essence of this argument is that during the Civil War-to-1937 period the TJV was taken as given; but during the post-1937 period, either the TJV or the DJV, separately or in combination, could be freely chosen for the present political structure. Under this reading the TJV could become legitimate in its own right, but only after it was chosen by the ordinary political processes and not because the events of 1937 necessarily determined that it was any more, or any less, legitimate than the DJV. Given this choice, it could be affirmed either that after experimenting with the DJV, the TJV remained the most desirable structure,\(^7\) or that even after choosing an end-state program, the optimal one to select was one that incorporated as many aspects of the TJV as possible.\(^8\)

2. Legitimacy of Transactional Justice Vision Rights Acquired Prior to 1937. A second issue raised by the transition is the legitimacy of rights, wealth, and position acquired prior to 1937 in reliance on the accepted legitimacy of the TJV. In other words, if the events of 1937 amounted to a transition, do they also include a theory of transition? Several interpretations are possible. First, the DJV could only be applied prospectively to new arrangements. Under this interpretation, new transactions would be subject to the DJV. Until they took place, however, the existing or carryover rights would be protected and could not be diminished for the purposes of implementing new DJV goals. Thus, some interim period of protection would exist. This, in essence, would be an argument that there was a theory of transition and that the DJV applied only to new transactions.

Second, it could be assumed that 1937 marked a new starting

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78. This is another possible interpretation of Epstein's work. Cf. supra note 74 and accompanying text (alternative interpretation of Epstein's work as viewing the events of 1937 as confirming the legitimacy of the TJV in certain areas).

point and that the existing power in society was to be viewed anew. Prior transactions and existing wealth were no longer necessarily legitimate. This would not mean that existing rights were necessarily invalid, but only that they had to be legitimated according to prevailing DJV standards. Under this interpretation 1937 represented a clear demarcation. Until 1937 events were judged according to the TJV, but after 1937 events would be judged according to the DJV. Under this reading, there would be no transition period. All existing distributions of power would be subject to possible use for DJV goals. This amounts to an interpretation that there was no theory of transition, and that existing distributions were subject to possible modification, but only for the pursuance of new DJV goals.

Third, it could be assumed that the events of 1937 were not merely the start of a new era (as the second interpretation would suggest), but that they were also meant to undo what amounted to the accumulated errors of the TJV under current standards. This, for example, is a possible interpretation of affirmative action.80 Existing distributions would not only be subject to possible use for new DJV concerns, but also for rectifying the past problems of the TJV. This would be an interpretation that there was no theory of transition, but that there was a theory of retribution and that existing rights were subject to rearrangement not only for new DJV goals, but also for the undoing of what, under current DJV standards, were the old errors of the TJV. This reading suggests that current distributions would be subject to possible change for a greater range of concerns. While under both this and the previous reading the DJV would be applied prospectively, in the previous case completed transactions would not be subject to redistribution except for new DJV principles. However, under this reading they would, in addition, be subject to redistribution for rectifying perceived errors of the TJV.

C. Boundary Issues

A final area of controversy is the relationship between the TJV and the DJV. Unless an extreme position is taken, both the TJV and the DJV would, in some fashion, continue to coexist.

The interplay between the two systems raises a series of what could be termed boundary controversies.

The first boundary controversy addresses the issue of where to set the boundary between the TJV and the DJV. Once it is assumed that the TJV and the DJV can, or should, coexist in some configuration, then boundaries must be marked out between them. One type of dispute would be expected to center on the relative dominance of each. Some people, for example, might argue for an expansive DJV while others may argue for an expansive version of the TJV. In a related fashion, another type of dispute would center on the choice of areas subject to each vision. Even after a determination is made about the relative dominance of each vision, it still must be determined which vision will govern which areas. For example, even if it is assumed that the DJV should be dominant relative to the TJV, some might argue that the DJV should apply in the marketplace and the TJV should apply to the social structure. In contrast, others might argue that the TJV should apply to the market and the DJV to the social structure.

A second boundary controversy concerns coordinating the operation of the two visions. An assumed coexistence of the two visions makes it necessary to deal with the possibility of overlap between them. Each vision has its own structure and its own associated values. As a result, their coexistence may not always be without difficulty. Each may reinforce the other in some respect, but each is more likely to conflict with the other. One problem arising out of their coexistence is the delineation of standards for resolving conflicts between the two visions. This can be viewed as a problem of policing the boundaries set up between the two visions.  

This catalogue of issues involving the various legitimacy and boundary issues concerning the meaning of the events of 1937 is admittedly brief, and the questions it raises are complex. To understand why the Coase theorem is controversial, however, it is not necessary to accept any particular position with respect to any of these issues. It is only necessary to recognize that such matters are currently perceived as important ones for the legal culture, and that they are controversial because they are central to the le-

81. See, e.g., B. Ackerman, supra note 2, at 35-37 & n.8.
gitimacy of modern political philosophy. Given this background, the special role that the Coase theorem plays in introducing these issues to the legal culture can now be sketched out.

IV. POLITICAL VISIONS AND THE COASE THEOREM

Given the end-state structure of the Coase theorem and the political structure of the events of 1937, three different sources of controversy can be isolated. First, the Coase theorem forces the legal culture to consider the TJV political foundations of its past and, ultimately, to question the autonomy of the law. Second, the theorem forces the legal culture to consider the political structure and substantive issues associated with the DJV. This is controversial not only because it presents the legal culture with a concept of rights, a theory of disputes, and a role for the state at odds with the implicit political perspective of conventional legal thought, but also because the DJV is a controversial political proposition in its own right. Third, the political structure of the Coase theorem reflects the political structure of the events of 1937. As a result, it serves a special proxy function. It forces the legal culture to confront (in the guise of the Coase theorem) some of the difficult questions of modern political philosophy. Some of the criticisms of the Coase theorem can be understood as merely mirroring some of the philosophical concerns associated with the events of 1937.

A. The Coase Theorem and the Transactional Justice Vision—Realization of the Politics of the Past and the Politics of the Law

When presented with the Coase theorem, the legal culture is presented with the DJV in a pure form. Within the Coasean framework, the legitimacy of the DJV is unquestioned, its range is complete, and its tolerance of the TJV is minimal. The legal culture is therefore presented with a structure that challenges the political foundations of classical common-law thought.

During the Civil War-to-1937 period, a transactional justice political structure provided the framework for the development of classical common-law thought. During this period, the legitimacy

of the basic TJV was taken for granted. Within this structure, the role of the legal culture was essentially threefold. First, the legal culture reinforced the tenets of transactional justice. Questions that challenged the legitimacy of transactional justice were not taken seriously, and issues that were not germane to transactional justice were not relevant. Second, in the process of working with and institutionalizing the TJV, the legal culture answered the hard questions generated by the TJV. These hard questions might involve such matters as the exact form of the TJV, the marginal application of accepted principles, or the conflict between such principles. Both significant and trivial decisions had to be made, and the legal culture played a prominent role in making them. Third, the legal culture administered and resolved the historically focused types of disputes which would be expected to be generated in a transactional justice system. Concurrently, the legal culture presented its work as an autonomous and neutral science, free from the taint of politics.

The TJV, therefore, came to serve as the organizing political principle of an entire generation of lawyers. It animated their work, it structured their dialogue, and it provided their legitimacy. Most importantly, it represented some of their most fundamental (and hence unspoken) assumptions about the law. As the legal culture adopted techniques and substantive doctrine to reinforce this structure, the political notions of transactional justice became firmly embedded in the substantive and procedural law of the period. The TJV fostered classical common-law thought and the substantive categories and techniques of classical common-law thought, in turn, implicitly carried with them the political structure of the TJV. As a result, the core features of transactional justice and its theory of disputes, rights, and the state became an implicit feature of legal consciousness during the Civil War-to-1937 period.

The appearance of the Coase theorem, however, forced the

83. Id. at 428-32.
84. Id. at 425-26.
85. Id. at 426, 429-30.
legal culture to confront the political foundations of its past. Initially, the theorem was almost universally perceived as alien, incorrect, and not law. From the standpoint of classical legal thought, the facts of the Coase theorem presented an easy case.\textsuperscript{87} The rancher’s cows entered the farmer’s area of control without justification and caused damage. Applying conventional legal analysis and its implicit TJV perspective, the rancher would clearly be held responsible.\textsuperscript{88} In contrast, the Coase theorem held that this

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87. See, e.g., Page v. Hollingsworth, 7 Ind. 317 (1855) (analysis of cows straying on adjoining corn field from perspective of common-law thought). This approach has a venerable tradition. See Exodus 22:5 (King James) ("If a man shall cause a field or vineyard to be eaten, and shall put in his beast, and shall feed in another man’s field; of the best of his own field, and of the best of his own vineyard, shall he make restitution."). The same, however, has been said for the Coase theorem. See Liebermann, The Coase Theorem in Jewish Law, 10 J. LEGAL STUD. 293 (1981) (argues similarity exists between Coase and Jewish law in treatment of social cost).

88. From the perspective of the TJV, it is already assumed that the rancher and the farmer have certain preexisting rights. As an irreducible part of their existence as persons, both the rancher and the farmer are assumed to possess the natural right to their own bodies and the fruits of their labors. These rights are not a matter of legislative grace, but preexist the state.

As another aspect of their existence as persons, both the rancher and the farmer are entitled to exercise autonomy over what they own, and to interact with other persons on the basis of mutual consent. The rancher and the farmer are assumed to have an autonomous sphere of protection delimited and physicalized by the boundaries of their property. Within their respective spheres, the rancher and the farmer exercise complete physical dominion. Each may independently choose what activity takes place in his sphere, and may complain if it is violated. For example, the rancher may choose to raise cows and, if so, what types of cows to raise and how to raise them. Similarly, he is free to farm, to engage in some other activity, or even to let the land lay fallow. Each may also exercise physical dominion over his area. The area itself is marked off and defined by physical boundaries. Dominion is complete, since neither has to share his realm with anyone else.

Another aspect of their separate autonomy is control over agreements with other persons. Each is assumed to be able to sell his property at a price that is agreeable to himself. Similarly, each may, as an exercise of his autonomy, refuse any offer regardless of how favorable the terms.

In addition, events are assumed to take place against a fixed background of entitlements. So long as each has acquired his holdings by historically correct moves, the present boundaries and distribution of property are assumed to be correct. As a result, the status quo defines the preferred state of affairs.

From this perspective, given the facts of the Coase theorem, the important act is the boundary crossing by the rancher’s cows. The rancher (through one of his possessions) invaded the preexisting physicalized sphere of autonomy of the farmer, thereby interfering with the exclusive dominion of the farmer over that sphere. The violation is complete at the precise moment the cows cross the farmer’s boundary. Since the rancher caused the boundary crossing, the farmer may ask that the move be justified.

The farmer is assumed to be able to protect his autonomy and to complain when it is violated by others. Similarly, the rancher is assumed to be able to explain the violation.
answer was no longer necessarily correct. This created a sense of crisis for the legal culture. On the one hand, common-law thought was accepted as the dominant, if not the exclusive, method of legal analysis. Its legitimacy was unquestioned. On the other hand, given an easy case, the Coase theorem generated a wrong answer. As a result, the legal culture had to defend common-law thought and the TJV.

This conflict gave rise to a spirited and far-ranging debate about the nature of common-law thought. In the process, the legal culture ultimately was forced to reconsider the political foundations of classical common-law thought. The response of the legal culture followed several distinct stages. At first, the theorem was treated as merely a special application of economics to common-law thought. From this perspective, the theorem was merely a continuation of the Realist plea to refine legal thought by using the insights of other disciplines into human behavior.

Under this interpretation, no conflict existed between the theorem and the autonomy of common-law thought. The theorem was

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The farmer controls whether a dispute is brought, and, if so, how it is maintained. The merits of the dispute are decided by reference to the substance of the rights of the farmer. The farmer has a right because it is assumed that he has preexisting rights of autonomy. It is a personal right of the farmer, and is assumed to be physicalized and marked off by the boundaries of his property. As a result, he has rights in the thing (i.e., the land). Who may complain about the boundary crossing and who must answer are defined by the right. Only the owner of the right, the farmer, may initiate the complaint, and only the person who caused the physical boundary crossing, the rancher, can be made to answer.

89. See Coase, supra note 1, at 2. As Coase stated it:

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.... [An] example is afforded by the problem of straying cattle which destroy crops on neighboring land. If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops.


merely a permissible source of insight. To the extent that the theorem provided a more precise measure of accepted common-law standards of reasonable behavior, its economic insights were useful. The legal culture was free to make use of economics, just as it was free to make use of other disciplines, such as psychology or logic, so long as it was not controlled by them.92 Similarly, to the extent that the theorem did not reinforce the common law, it could be dismissed as an interesting but non-binding economic principle that did not pose a threat to the autonomy of the law.

The Coase theorem, however, did not disappear. Shortly after its introduction, it became the keystone of the law and economics movement. The critique of the relationship between common-law thought and the Coase theorem reached a second level of analysis. At the heart of the law and economics movement was an assumption that law had been, and still was, an application of economic efficiency.93 That is, that common-law thought was really economic thought. This changed the analysis in several respects. First, it challenged the traditional assumption that the law was autonomous. The law and economics argument, in essence, was that law necessarily was an application of economics rather than economics being a permissible complement to law. Second, the Coase theorem began to be treated as an end-state proposition. Led by Calabresi94 and Posner,95 law and economics began to take on the status of a distributive justice proposition. Criticism of the theorem centered on the politics of economics. Critics of the law and economics movement argued about the normative problems inherent in the structure of law and economics, its concept of rights,96 and why it was less morally acceptable than con-

92. For an example of this position see Pound, The Economic Interpretation and the Law of Torts, 53 Harv. L. Rev. 365 (1940).
94. See, e.g., G. Calabresi, supra note 37; Calabresi, supra note 38; Calabresi & Melamed, supra note 2.
96. See, e.g., C. Fried, supra note 3, at 81-107 (1978); Baker, The Ideology of the Economic Analysis of Law, 5 Phil. & Pub. Aff. 3 (1975); Polinsky, Economic Analysis as a Poten-
The attack on the political foundation of law and economics, however, marked a turning point in the debate about the relationship between the theorem and common-law thought. Once the debate shifted to the politics of law and economics and once law was no longer necessarily viewed as autonomous, then discussion of the politics of common-law thought could not be far behind. In particular, efforts to attack the end-state aspects of the theorem helped to sharpen the dialogue about the political foundations of common-law thought. Two very different strands of recent scholarship converged, both of which stressed a close relationship between common-law thought and the TJV. On one side was the conservative position of Epstein. He attacked the end-state political structure of the theorem as politically unacceptable, and argued for the continuation of the TJV. On the other side was the leftist position of members of the Critical Legal Studies (CLS) movement, who attacked the theorem (and law and economics generally) as a politically unacceptable reincarnation of the TJV. Significantly, however, both groups agreed that the TJV...
was connected with common-law thought, even though they vehemently disagreed about the present day merits of the TJV.

These insights led to a third level of analysis—the political nature of common-law thought. Most of the commentary on the politics of law and economics had necessarily denied the autonomy of the law. However, most of the commentary had also taken a single political perspective. For example, Posner viewed both classical common-law thought and the Coase theorem as part of a single theory of economic efficiency. Similarly, while Epstein associated the common law with the TJV, he also argued for the continuation of the TJV and the denial of the DJV. Finally, the CLS members associated common-law thought and the Coase theorem with the TJV, and argued for the rejection of both. The events of 1937, however, suggest another interpretation of the interplay between the theorem and the political foundation of common-law thought. Once the events of 1937 are considered, a dual political perspective can be offered. This perspective suggests that common-law thought represents the TJV that dominated American politics in the Civil War-to-1937 era, while the Coase theorem represents the DJV that was legitimated in 1937. From this perspective, the interplay between common-law thought

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[L]urking behind Coase’s model was a major inarticulate premise about what was “natural” and “normal” in society. Freedom of contract was the norm. Departures from bargaining were aberrational and would only be justifiable when high transaction costs made the bargain inefficient.

Indeed, Coase’s theorem was the perfect ideological ally to the economist’s paradigm of a competitive market occasionally made “imperfect” by monopolistic competition. By placing contract both logically and normatively prior to tort, it shifted the burden of persuasion back to those who would justify intervention.

Id. at 908.

101. Posner does not distinguish between the political structure of the Civil War-to-1937 period and the modern era. In his view, economic efficiency not only was an accurate description of what the common law was, but also a statement of what current doctrine should be. See Landes & Posner, The Positive Economic Theory of Tort Law, 15 GA. L. Rev. 851, 852-57, 863, 916-20 (1980).

102. See, e.g., Epstein, The Case of Antitrust, supra note 4 (argument for application of corrective justice principles to antitrust).

103. See infra notes 135-36 and accompanying text.

104. This is suggested by B. Ackerman, supra note 2, at 23-71; Mashaw, supra note 4; see also Stewart, supra note 19 (traditional model of law contrasted with model of “interest representation”); Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Sup. Ct. Rev. 177 (model of public law contrasted with private law).

105. See Gjerdingen, supra note 82, at 422-35.
and the Coase theorem is controversial not because they represent the same political theory, but rather because they represent two different ones. Thus, when the legal culture is confronted with the different structure of the theorem, it is forced to consider the political foundations of its past. In the process of defending why the theorem cannot be right, the legal culture in turn is forced to contrast the Coase theorem with the transactional justice foundations of their professionally trained intuitions. In a sense, it is as if the political basis of conventional legal analysis was not obvious until it was removed. Once the Coase theorem took it away, the legal culture could sense that a fundamental change had been made, but it had a difficult time locating the source of that change. In retrospect, the theorem created a sense of crisis because it removed the political foundations of classical common-law thought. The assumptions of the TJV—autonomy, spheres of control, and moves between people—were no longer controlling. As a result, common-law analysis could no longer work because the political structure that gave rise to it was no longer present. Common-law thought could no longer produce correct answers because the kinds of questions that it was designed to answer were no longer being asked and were no longer assumed to be relevant. Only when conventional legal analysis no longer worked was the legal culture forced to consider what the political foundation of conventional legal analysis and the claims of autonomy were all about.

B. The Coase Theorem and the Distributive Justice Vision—Exposure to the Possible Politics of the Future

1. The Distributive Justice Vision and the Legal Culture—In General. While the pure DJV nature of the theorem helps the legal culture to become aware of its historical ties to the TJV, it also helps the legal culture to confront the nature of its possible future—the DJV. The constitutional events of 1937 ended the unqualified acceptance of the TJV and legitimated the use of the DJV. End-state principles were no longer automatically viewed

106. Historically, this shift first manifested itself in the area of economic regulation in the 1930s and 1940s. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-400 (1937). The Parrish opinion presupposes (1) that the state may regulate the market; (2) that class legislation is no longer invalid; (3) that the state may redistribute wealth; (4) that the state may change bargaining power; and (5) that the existing social structure (in this case,
as suspect and were continually being debated in a growing number of contexts. It has become increasingly commonplace to question the legitimacy of the existing distribution of wealth, power, and position in society, and to propose end-state goals to replace the status quo. As a result, the DJV (along with its attendant theory of rights and the state) has taken on increased prominence. For example, the increased scrutiny over the last thirty years of the use of race, gender, age, and other factors as criteria in decision making, serves as a prominent example of the influence and range of the DJV. Much of the dispute about the use of these criteria implicitly centers on the conflict between two different views of society. At one extreme are those who choose to treat discrimination within a modified TJV framework. They assume it involves individual acts of wrongdoing by perpetrators which the state is required to redress only upon application of an injured party. At the other extreme are those who treat discrimination as a problem within the DJV. They assume that it involves a social condition which deviates unacceptably from substantive end-state goals involving distribution of power in society, and which the state, accordingly, has an affirmative duty to remedy. The application of the DJV in the area of discrimination has received varying degrees of support. Some groups have made strong arguments for the adoption of end-state principles (such as the use of quotas or disparate impact analysis) based on particular substantive end-state visions of a just society. In some areas these argu-

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109. See id. at 1073-78.

110. See Freeman, supra note 108; Fiss, School Desegregation: The Uncertain Path of the Law, 4 PHI. & PUB. AFF. 3 (1974).

111. A pure disparate impact approach is certainly an unduly simplistic theory. See, e.g., Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 CALIF. L. Rev. 1183 (1972). However, the disparate impact standard is significant because it serves
ments have succeeded; in others they have not. What is of primary importance, however, is that the DJV is a concept that increasingly must be confronted in some fashion, if only to dispute or modify it.

Similar trends are evident with respect to the distribution and exercise of power in such areas as the workplace, the family, and the government itself. Recent debates about economic regulation have also centered on the use of such end-state standards as wealth maximization or cost-benefit analysis. Even the physical environment is no longer immune from the influence of the DJV. During the last twenty years, the world around us, as well as the places in which we work, have been increasingly perceived as less clean or safe. As a result, affirmative end-state standards of safety or cleanliness have been proposed.

The existence of such trends is accepted doctrine. The important point is not to attempt to delimit the variations in which the DJV appears in dialogue discussing the modern American political structure. Instead, it is important to note that the DJV, while at times controversial, is no longer automatically dismissed as illegitimate, and that the areas in which the DJV is debated are expanding.

The DJV, therefore, is a significant part of the future of the legal culture. The political structure that supports it and the controversies that surround it have become an increasingly prominent part of American political life. Perhaps most importantly, the DJV is an unknown part of our future. Just as the dominance of the TJV during the Civil War-to-1937 period required a realignment as a placeholder for rights linked to some kind of end-state vision of society.


of the legal culture, the emergence of the DJV in the post-1937 era raised the spectre of an equally significant realignment. The legal culture would be positioned to reinforce the legitimacy of the DJV, to answer the questions it makes important, and to resolve its disputes.

Because the political structure of the theorem is one of pure distributive justice, it also forces the legal culture to consider the nature of the DJV. This is done in two mutually supporting ways. First, the theorem forces the legal culture to consider the general nature of the DJV. Second, it also forces the legal culture to deal with the major substantive issues of the DJV.

2. The Theorem and the Existence of the Distributive Justice Vision. The Coase theorem was the first scholarly device that succeeded in presenting the DJV to the legal culture.\footnote{There were other attempts. See, e.g., Lasswell & McDougal, Criteria for a Theory About Law, 44 S. Cal. L. Rev. 362 (1971); Lasswell & McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. 203 (1943).} Matters of distributive justice had been dealt with by the legal culture prior to the Coase theorem only because lawyers had to function in the reality of post-1937 politics. Prior to the theorem, however, the legal culture had been spared a direct confrontation with the DJV. Since classical legal thought was based on the TJV it was unable to directly confront the issues of the DJV. Some of the greatest controversies about the legitimacy of the DJV did not mature until the late 1960s and 1970s. As a result, initially there was no perceived crisis. Conventional legal techniques could be reworked, and discussion of distributive justice could be safely exiled to the domain of politics rather than law. What was special about the Coase theorem was not only that it presented the DJV in a pure, simple form, but also that it did so in a fashion initially compatible with the demands of classical common-law thought. Moreover, it did so at a time when dialogue about the role of the DJV in modern politics began to take on particular importance.

Rather than dealing with isolated aspects of the DJV, the Coase theorem presents it in a pure form. It presents it completely, and in a unified manner. The Coase theorem represents a very special kind of thought experiment. The Coasean perspective presents a world of pure distributive justice. The TJV, for all practical purposes, no longer has any special claim to legitimacy.
Transactional justice, complete rights, and the notion of a limited state no longer exist. The very use of the theorem has already selected the DJV as the appropriate political framework. And thus, the theorem has become an easy symbol for a complex idea. The easy facts of the cows and the corn play the role of political parable. They serve as a mediation device between the political presuppositions of the DJV and the realities of its application. The story of the cows and the corn simultaneously carries with it the essential political structure of the DJV and a particular application of the vision.

It is equally significant that the theorem accomplished this by using the standard unit of common-law thought—the case. This served a dual function. First, it eased the assimilation of the theorem into the legal culture. Next, once accepted, it provided an easy way to contrast the structure and demands of the DJV with those of the TJV. The fact situation first used to illustrate the theorem (cattle straying on adjoining crop land) would not create any problems for a legal culture deeply indoctrinated in the dynamics of the TJV and classical common-law thought. The cows and the corn provided a fact pattern that lent itself easily to traditional TJV analysis. The very description of the facts—the cows crossing a boundary and causing damage—provided an easy and thus non-threatening transactional justice statement of the facts. This helped to present the theorem as if it were merely a variant of conventional legal technique (i.e., just another way for common-law courts to deal with common-law cases).

At the same time, the use of a case also provided a convenient way to contrast the structure of the DJV to that of the TJV. To a legal culture trained to analyze a case in transactional justice terms, the presentation of the DJV in the form of a case could only serve to highlight the contrasting structures and theories of the two visions.

3. The Theorem and the Substantive Questions of the Distributive Justice Vision. The Coase theorem also systematically forces the legal culture to consider some of the central concerns of the DJV. Just as the TJV has certain issues that its structure makes more important than others (such as delimiting boundaries and specify-

116. The fact that economics was initially presented as a neutral social science also served to make the theorem seem like something that was just an accepted part of the Realist legacy.
ing permissible moves), the DJV has a competing set of issues that it makes important. Within the structure of the DJV, dialogue turns from permissible moves and complete rights to end-state goals and Hohfeldian rights. The Coase theorem is not necessarily a tool of conservatism, but it is a tool of the DJV. It does not require that particular answers be given to the questions it raises, but it does require that certain questions be addressed.

For example, in the DJV the legitimacy of the existing distribution of wealth is no longer taken for granted. Merely because the existing distribution of wealth may have been attained by historically correct moves does not necessarily mean that it is just. Thus, once it is assumed that the DJV is to be applied, it becomes necessary to develop dialogue about when redistribution of wealth is permissible or desirable. Moreover, to function within such a political framework, the legal culture must be able to help isolate those issues and to develop some of the necessary dialogue. In a complimentary fashion, the Coase theorem cannot be applied without explicitly dealing with the matter of wealth distribution.\footnote{117. Although this point was merely implicit in Coase's earlier work, it has been developed in subsequent commentary on the Coase theorem. As one commentator has phrased it:}

The traditional understanding of Coase's theorem might be summarized as follows: allocative efficiency, or the maximum productive use of resources, does not depend on the initial assignment of entitlements. The initial assignment is only the starting point from which negotiations begin. The point at which negotiations cease represents the efficient allocation of resources. The initial assignment of entitlements, however, does affect the relative wealth of the competing parties simply because the assignment determines which party has to do the purchasing (or what economists misleadingly call "bribing").

\cite{Coleman, supra note 23, at 225; see also Calabresi & Melamed, supra note 2, at 1095-96, 1098-99 (advocates conferring legal entitlements on the basis of their wealth distribution effects); Kennedy, supra note 2, at 422-44 (wealth effects of placement of entitlements). This includes several kinds of wealth distribution questions, including background entitlements, see, e.g., Kennedy, supra note 2, at 422-29: and offer-asking choice, \cite{id. at 401-13, as well as choosing, once given these other answers, which person gets the specific entitlement considered. See also Baker, supra note 96, at 7-27 (wealth impact of choice of entitlement).}
wealthier, the other poorer. If the Coase theorem is to be applied at this point, additional normative dialogue must be generated. Before the rancher or the farmer can be favored, explicit reference must be made to some other normative framework such as utilitarianism, social contract theory, or natural rights. Significantly, the Coase theorem itself does not require that any particular answer be given. It does require, however, that some answer be given. Thus, it forces those who use the theorem to confront both the issue of wealth distribution and the larger normative issues the theorem implies.

The theorem itself does not require particular answers, but it does require that other topics be considered. For example, even though it does not entail a theory of merit or wealth distribution, it does require that one be considered. This raises the option of attempting to justify the results by explicit reference to the political events of 1937, rather than just by reference to abstract notions of fairness or general political theory. Similarly, other disciplines consistent with the political arguments chosen may also be used. As a consequence, this further undermines the conventional assumption that the law is autonomous. Thus, while the theorem does not deny that legal argument is different from other disciplines, it does mandate some interdisciplinary discourse.

In a similar fashion, the Coase theorem also forces consideration of other issues, including the social structure, methods of regulating the market, and social choice techniques.118 Thus, the theorem serves as a useful device to force the legal culture to develop dialogue about some of the significant issues of the DJV.

C. The Coase Theorem and the Events of 1937—the Politics of the Present

Much of the future of American law depends on how the events of 1937 are interpreted. Since the orthodox theories that dominated American political thought for the last two hundred years are unable to give meaning to those events, there is a sense

118. In this sense, the theorem serves as a useful bridge to a growing number of disciplines. For example, if the term “no transaction costs” is taken seriously, the Coase theorem could be interpreted as asking what would result if all parties involved could achieve a social contract in which all possible issues were resolved. See Kennedy, supra note 2, at 429-41.
of crisis. The events of 1937 set out controversial questions, demand controversial responses, and guarantee only controversial answers.

The Coase theorem, because of its special relationship to those events, can only do the same. This section considers the special role the Coase theorem plays in forcing the legal culture to focus on and to develop dialogue about these concerns. An argument is made that the Coase theorem is a convenient and significant thought experiment that forces the legal culture to confront questions about the TJV and DJV that are such an important part of modern political philosophy. Once viewed from this perspective, much of the dispute about the Coase theorem can be reduced to arguments about the questions of political philosophy that the theorem carries with it.

The theorem does this in two different ways. First, it satisfies the general requirements of dialogue required by the events of 1937. This could be termed the procedural aspect of the theorem. Second, many of the disputes about the theorem reflect the influence of the particular political controversies arising out of the events of 1937. This could be termed the substantive aspect of the theorem. Each of these aspects will be discussed.

1. The Procedural Aspects of the Coase Theorem and the Events of 1937. While the events of 1937 raise significant substantive controversies, they also carry with them two main procedural requests. First, the events of 1937 are more a declaration of possibilities than a definitive decree. They establish that the TJV is no longer necessarily legitimate and that the DJV is no longer

It is a crisis that, regardless of its ultimate resolution, will be unsettling. Three options are present, each of which is troublesome. First, if the orthodox theory is affirmed, then the events of 1937 must be disaffirmed. Second, if the events of 1937 are accepted as legitimate, a new form of liberalism must be worked out. Familiar theories and concepts have to be discarded, and the difficult intellectual task that accompanies the development of a new theory must be taken on armed only with the faith that such a new theory is possible. Third, if there is no such faith, or if the new theories do not work, there is only uncertainty. Old formulas no longer work and new formulas no longer can be created.

From the perspective of political philosophy, this final possibility may be the most unsettling of all. If taken to its limits, it implies that model building—the traditional mainstay of political philosophy—has run its course. Political philosophy can only exist in the form of an ad hoc existentialism, where decisions must be made but where no theory can be developed to justify the decisions other than the insights or intuitions of the moment. Thus, regardless of which position ultimately prevails, a period of intellectual unrest must be expected.
necessarily illegitimate. This sets up an agenda for dialogue. The dialogue must be about the TJV and DJV and it must be about the concerns raised with respect to them in the context of the events of 1937. However, so long as it is about these issues, it does not have to give a particular, correct answer. Second, the events of 1937 require dialogue. The three main areas of controversy—legitimacy, transition, and boundaries—are complex, but they are also questions that have to be talked about and decided.

Given these requirements, the Coase theorem plays an important complementary role. One of the features of the theorem is that it can be used to develop dialogue solely about the TJV or solely about the DJV. In addition, however, it is obviously capable of generating dialogue about both together, thus satisfying the overall boundary concerns about the subject matter. This also serves as a useful agenda-setting device that emphasizes the need to consider the relationship between the two visions. The theorem does not mandate that any particular result follows once the dialogue is initiated. Rather than predetermining a particular result, it sets up a structure that makes sure the relevant questions are asked.

Because of its structure, the theorem also forces the legal culture to talk about the nature of the two political visions and the relationships between them. The theorem thus serves as a generator of dialogue. The theorem helps the legal culture to recognize the existence of the two visions and their political assumptions. In addition, as noted earlier, the theorem forces the legal culture to confront some of the central substantive questions associated with the DJV. What is equally important, however, is that the theorem also requires answers. Because of its structure, the theorem also forces the legal culture to give some response to it. For example, before the theorem can be rejected outright, a normative argument must be generated that an end-state political structure is illegitimate, either because it is politically unacceptable, or because it is conceptually infeasible. Even at this stage neutrality is not possible because the theorem, as a political statement, also requires a political rejection. Similarly, if the theorem is not re-

120. See, e.g., C. Fried, supra note 2, at 81-107 (1978); Epstein, supra note 23.
121. See, e.g., Kelman, Ideology in the Coase Theorem, supra note 2.
jected, the full agenda of issues it presents must be confronted.\textsuperscript{122} The structure of the theorem requires the direct consideration of the substantive nature of the DJV, such as, for example, wealth distribution. In addition, it requires consideration of the tension between the two visions. Finally, before the theorem can be implemented, some decision about those issues must be made. The very act of applying the theorem already implies that some type of choice has been made. For example, to say that the theorem mandates the use of economic efficiency, already presupposes a host of significant political assumptions. These assumptions range anywhere from the legitimacy of existing rights to the particular end-state principle that should inform the DJV.\textsuperscript{123}

In each of these ways, therefore, the theorem serves an important procedural function by exposing the legal culture to the types of controversies that arise out of the events of 1937. In this respect the theorem is controversial not so much because of what it says, but because of what it makes the legal culture do. Once given the theorem, the legal culture is placed in the position of being given the tools to confront some of the most difficult questions of political philosophy and then being required to use them. What is equally significant and difficult for the legal culture, is that lawyers can no longer claim that the law is autonomous. The theorem can only be denied by recourse to normative political philosophy and it can only be used by recourse to normative political philosophy. There is no middle ground.

2. The Substantive Aspects of the Coase Theorem and the Events of 1937. Because of the special relationship between the structure of the Coase theorem and the events of 1937, the theorem serves as a special thought experiment about the problems of modern political philosophy and therefore law. On the one hand, the essence of the political events of 1937 is evident in the struc-

\textsuperscript{122} Of course, the considerations will not always be explicit; however, the important point is that the use of the theorem necessarily carries with it a series of political choices regardless of whether those choices are immediately obvious or not.

\textsuperscript{123} See, e.g., Coleman, Efficiency, supra note 98 (use of wealth maximization requires assumptions about other instrumental goals, stipulation of initial entitlements, as well as political justification of arguments based on hypothetical consent); Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191 (1980) (wealth maximization requires assumptions about initial rights as well as instrumental goals); Kennedy, supra note 2 (economic efficiency yields indeterminate results without a series of political decisions about initial entitlements as well as general structure of society).
ture of the theorem. On the other hand, the views of those in the legal culture concerning the central substantive issues surrounding those events are evident in their treatment of the theorem. The crisis and unease that dominate modern political philosophy are consequently reflected in the way the legal culture deals with the theorem. Because the essence of the political structure of the events of 1937—the legitimacy of and relationship between the TJV and the DJV—is captured in the Coase theorem, the theorem performs a special proxy function: in reality much of the commentary on the theorem is also commentary about some aspect of the events of 1937.

To illustrate this aspect of the theorem, two examples of the proxy function will be discussed. The first is the general correspondence between the political interpretation given the theorem and the interpretation given the events of 1937. Because of the close relationship between the structure of the theorem and the events of 1937, the particular political meaning a person imputes to the Coase theorem usually corresponds to the same meaning he or she imputes to the events of 1937. Samples of the application of this feature will be taken from several political perspectives. The second is the correspondence between the criticism of the Coase theorem and the controversies surrounding the events of 1937. Because of this proxy function much of the commentary on the theorem also corresponds to commentary about some aspect of the events of 1937. Rather than attempting a complete treatment of how all the various controversies surrounding the events of 1937 could be presented in discussion about the theorem, one particularly prominent area—the treatment of rights in the theorem—will be used to illustrate this aspect of the proxy function.

a. The Coase Theorem as Proxy—The Correspondence Between the Interpretation of the Theorem and the Events of 1937. Both the theorem and the events of 1937 require dialogue about the legitimacy of the DJV and its relationship to the TJV. Both require answers to a similar set of political questions. While the events of 1937 present these issues writ large, the Coase theorem presents many of these same issues writ small. Thus, it would be expected that a legal scholar's interpretation of the legitimacy of the DJV and the relationship between the DJV and the TJV in the context of the Coase theorem would bear a close relationship to his or her interpretation of those same questions when presented in the con-
text of the events of 1937. Examples from the work of scholars of several different political perspectives illustrate the workings of the proxy function of the Coase theorem in this context.

One example is the work of Richard Epstein, one of the most prominent conservative scholars. In some of his early work Epstein attacked the Coase theorem as a politically unacceptable end-state proposition. In a series of articles and books he subsequently developed a theory of tort liability based on transactional justice principles. In some of his later work, Epstein expanded his criticism of current doctrine beyond the area of tort liability to aspects of modern constitutional law and to labor regulation. Significantly, Epstein's work on constitutional theory continues to advocate many of the same TJV principles that dominated the pre-1937 era of constitutional law and questions the legitimacy of the use of the DJV in American law. By necessary implication, of course, Epstein is advocating a restrictive interpretation of the events of 1937. His initial rejection of the end-state elements of the Coase theorem also served as a guide to his later rejection of the use of the DJV in modern constitutional law.

Another example can be taken from the work of Bruce Ackerman, a political moderate. In contrast to Epstein, Ackerman undeniably supported the Coase theorem as a legitimate, if not necessary, form of legal analysis. Ackerman's work in law and economics and in legal theory clearly supported the use of the theorem. Consistent with his strong support of the DJV in the context of the theorem, Ackerman's work in political philosophy

124. See Epstein, supra note 23.
125. See Epstein, Defenses and Subsequent Pleas in a System of Strict Liability, 3 J. Legal Stud. 165 (1974); Epstein, Intentional Harms, 4 J. Legal Stud. 391 (1975); Epstein, Nuisance Law, supra note 4; Epstein, Causation and Corrective Justice, supra note 4.
128. B. Ackerman, supra note 2, at 46-71.
129. B. Ackerman, supra note 17, at 169, 271 n.3, 272 n.5; Economic Foundations of Property Law 17-24 (B. Ackerman ed. 1975).
supported the legitimacy of a distributive justice form of liberalism.\textsuperscript{130} Similarly, his work in constitutional theory advocated that the events of 1937 are unquestionably valid.\textsuperscript{131} Thus, his initial interpretation of the validity of the DJV in the context of the Coase theorem mirrored his later interpretation of those similar issues in the context of the events of 1937.

A final example can be taken from the work of some of the CLS scholars. One of the central themes of the CLS movement is the "debunking of law and economics"\textsuperscript{132} and, along with it, the Coase theorem.\textsuperscript{133} At first this may appear to be a paradox. While the conservatives, such as Epstein, attack the theorem as a tool of the leftists, the leftists attack the theorem as a tool of the conservatives. After considering the position of the CLS movement on the events of 1937, however, the reasons behind their rejection of the theorem become clear. The political theorists and constitutional scholars in the CLS movement stress the breakdown of liberalism in the modern era. For the CLS scholars, the events of 1937 represent the further manifestation of the inherent inconsistencies of liberal political theory rather than the movement away from an unqualified acceptance of the TJV to a mixed system.\textsuperscript{134} CLS scholars associate orthodox liberal theory with both the TJV of the Civil War-to-1937 period and with law and economics (and consequently with the Coase theorem). They also argue that it only sanctions politically repressive hierarchies and is no longer

\textsuperscript{130} See B. Ackerman, supra note 47. Ackerman announced at the outset that he is proposing a theory of rights, based in neutral dialogue, that does not depend either on social contract theory, or on an assumption that rights preexist the state. \textit{Id.} at 4-6; see also \textit{id.} at 341-42. The concept of neutral dialogue is then used to develop a series of rights about such things as access to material goods, education, and genetic diversity, see \textit{id.} at 31-227; as well as the role of the state, see \textit{id.} at 231-324; see also infra note 139.

\textsuperscript{131} See Ackerman, supra note 55, at 1051-57.

\textsuperscript{132} Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669, 1680 n.75 (1982).

\textsuperscript{133} See, e.g., Horwitz, supra note 2; Kelman, Ideology in the Coase Theorem, supra note 2; Kennedy, supra note 2.

intellectually defensible. Thus, because the CLS scholars view the TJV/DJV dichotomy in the events of 1937 as evidence of the collapse of liberal theory, they also reject the Coase theorem.

These few examples do not exhaust the application of this principle. However, they illustrate one aspect of the special connections between the theorem and the events of 1937. Because the theorem reflects the political structure of the events of 1937, how legal scholars interpret the theorem may well symbolize their interpretation of the legitimacy of those events.

b. The Coase Theorem as Proxy—Interpretation of the Theorem as Reflective of the Controversies of Political Philosophy Surrounding the Events of 1937. Another aspect of the proxy function of the Coase theorem is that some of the controversies about it may be related to some of the controversies of political philosophy surrounding the events of 1937. Because of the similarities between the political structure of the Coase theorem and the political structure of the events of 1937, many of the most significant debates about the Coase theorem among legal scholars merely echo the important political themes that attach to those same questions in the context of the events of 1937. To illustrate this aspect of the theorem, one of the central questions in political philosophy surrounding the events of 1937—the legitimacy of an end-state version of liberalism—will be contrasted with some of the criticism of the law and economics interpretation of the theorem. Finally, the application of the proxy function to some of the philosophical controversies associated with the events of 1937 will also be briefly considered.

i. The Coase Theorem as Reflective of the Substantive Problems Associated with the Events of 1937—The Example of the Problem of a Modern Theory of Rights. One of the central features of modern political philosophy is the need to legitimate the DJV. While the events of 1937 sanctioned the use of the DJV, they did not supply a theory to justify it. In reaction, a central task of modern political philosophers has been to supply a theoretical foundation for a dis-


136. The fact that law and economics represents a conservative end-state theory is also significant.
tributive justice theory of liberalism. That is, one that would justify and direct such end-state goals as the redistribution of wealth, regulation of the market, and alteration of the social structure, but at the same time preserve the liberal tradition of individual rights. Perhaps the most publicized effort so far has been John Rawls' *A Theory of Justice*. \(^{137}\) Rawls was the first to propose a theory of liberalism that responded to both the need for an end-state vision and a particular concept of individual rights. \(^{138}\) In addition, Bruce Ackerman's work, *Social Justice in the Liberal State*, \(^{139}\) can be viewed as another attempt to develop a theory of liberalism that would provide guidance for an activist state without sacrificing protection of individual rights. \(^{140}\)

Not all end-state theories advocated were able to deal initially with both of these DJV requirements. The most prominent example is utilitarianism, along with its close variations of economic efficiency and wealth maximization. While these theories could easily supply the required end-state principle (i.e., maximize utility, attain efficiency, or maximize wealth), they could not supply an effective theory of rights. Each could provide a theory of when to redistribute wealth, but none could supply, within its own framework, a theory of rights against the state. \(^{141}\)

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138. Several aspects of Rawls' theory are of particular significance here. First, it is important to note that Rawls clearly abandons the orthodox social contract theory that rights somehow preexist the state and that people therefore contract to protect them. Instead, he derives both his concept of rights and his concept of the state from his celebrated hypothetical contract involving a "veil of ignorance." *Id.* at 118-92. Second, Rawls also clearly presupposes the existence of an activist state as well as the need to assess critically the legitimacy of the status quo with respect to such matters as the distribution of wealth, access to power, and the social structure itself. *See id.* at 7, 54-117, 258-84.

139. B. Ackerman, *supra* note 47.

140. Ackerman also clearly rejects the traditional social contract theory as well as conventional rights analysis. *Id.* at 4-6. Similarly, he also presupposes that the status quo is not prima facie legitimate, *id.* at 4-5, and that the state (the "Commander" in Ackerman's lexicon) plays an active role, *id.* at 24, 51-32. While Rawls used his hypothetical contract to generate answers, Ackerman uses a theory of "restrained conversations," *id.* at 6-10, the most important feature of which is his Neutrality principle, *id.* at 10-12.

Some leftist scholars attacked the entire enterprise. For these theorists, orthodox talk of rights or liberalism was no longer useful, since it yielded only politically repressive results and intellectually incoherent arguments.\textsuperscript{142} As a result, orthodoxy could no longer be maintained. While some argued for a push beyond orthodoxy (perhaps to a form of superliberalism),\textsuperscript{143} others urged a withdrawal from orthodoxy and a retreat to the decentralized structure of communal life.\textsuperscript{144}

All of these theories have their adherents and their critics. Similarly, no one perspective has clearly dominated. What is significant, however, is not that some of these efforts may be incomplete or preliminary, but that all of them are part of an ongoing dialogue in political philosophy that is ultimately linked to the need to respond to the sanctioning of the DJV by the events of 1937.

With these considerations in mind, some of the controversy associated with the theorem can be more readily understood. Because of the proxy function of the theorem, some of the same controversies surrounding the DJV in the context of the events of 1937 should also be reflected in the treatment of the DJV in the context of the Coase theorem. For example, a common criticism of the law and economics interpretation of the theorem is that it justifies results that deviate from acceptable moral norms. A common reaction to the story about the rancher and the farmer (particularly among law students) is that the result generated by the theorem is somehow morally wrong because it did not immediately label the conduct of the rancher's cows as wrong, and it may even require that the farmer pay the rancher to have the actions stopped. This same general criticism is present in many of the other criticisms of the law and economics interpretation of the theorem. Thus, it is sometimes said that the theorem fails to ac-


\textsuperscript{144} See, e.g., Frug, The City as a Legal Concept, 99 Harv. L. Rev. 1057, 1141-54 (1980) (decentralized participatory democracy); see also 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").
commodate process rights,\textsuperscript{145} or noneconomic values,\textsuperscript{146} or that it would justify moral monstrousness.\textsuperscript{147}

Much of the controversy can be understood, instead, as a re-
fection of the inability of the DJV, within its own framework, to
generate a coherent theory of individual rights. When such moral
criticisms are made of the law and economics interpretation of the
theorem, they are merely a reflection of the larger controversy
surrounding the generation of a viable theory of liberalism in the
context of the events of 1937. Thus, even though initially di-
rected towards the Coase theorem, these moral criticisms are
more an indication of the reaction to the DJV political framework
that the theorem represents.

For example, an important aspect of the TJV is its concern
for personal autonomy. Contract and property rights, for exam-
ple, are premised on the inviolability of the individual and the im-
portance of personal choice. Under this framework, each person
exercises control over his or her own sphere of autonomy. These
spheres of autonomy, in turn, symbolize the separateness and im-
portance of each person. Each person controls when and under
what circumstances he or she bargains with others.

In contrast, in the DJV individual rights are collapsed into
end-state goals, with an attendant loss of personal autonomy. Due

\begin{itemize}
\item \textsuperscript{145} See, e.g., Tribe, Technology Assessment and the Fourth Discontinuity: The Limits of In-
strumental Rationality, 46 S. CAL. L. REV. 617, 630-41 (1973); see also Stewart, supra note 19,
at 1704-05 (preference shaping problem of economic analysis); Summers, Evaluating and
plea for recognition of process values).
\item \textsuperscript{146} See, e.g., Rizzo, The Mirage of Efficiency, 8 HOFSTRA L. REV. 641, 643-48 (1980)
(general inability of economic analysis to deal with “moralsisms”); see also Sagoff, Economic
capture relevant policy concerns in environmental law).
\item \textsuperscript{147} See, e.g., Tribe, supra note 96, at 86-94. As even Posner has noted:

But there is probably more to notions of justice than a concern with effi-
ciency, at least in any obvious sense of the latter term. It is not obviously ineffi-
cient to permit people to enter into enforceable suicide pacts, to discriminate
on racial or religious grounds, or to eat the weakest passenger in the lifeboat in
circumstances of genuine desperation; nor is it obviously inefficient to permit
abortions, to allow babies to be sold for adoption, or to give convicted felons a
choice between imprisonment and participation in dangerous medical experi-
ments. Yet these are all practices frequently condemned as unjust. With regard
to them, the primary role of economic analysis would appear to be one of dis-
pelling certain pseudo-justice issues which seem to be based on sheer intellec-
tual confusion, and, even more important, to assist in value clarification. . . .

R. Posner, supra note 75, at 23 (footnotes omitted).
\end{itemize}
to the need to implement end-state goals, the separateness of persons can no longer be guaranteed. Physicalized spheres of control no longer exist and individual will is no longer controlling. As a result, property and contract rights are restricted. Persons no longer have complete physical autonomy over their property, and because of the assumption of cooperative bargaining, they no longer have complete control over the bargains by which they are bound. Within the framework of end-state goals, the separateness of persons is no longer central.

Given this divergent treatment of rights in the two visions, some of the reasons behind these attacks on the theorem can be understood. Given the proxy function of the Coase theorem, discussion of the economic interpretation of the theorem must be controversial. For traditional conservatives, the economic reading of the theorem is politically and morally unacceptable because it fails to give sufficient protection to individual autonomy and the separateness of persons. The theorem is controversial because it represents a challenge to the very assumption about the nature of rights in the TJV. Thus, for the conservatives, talk about morals is a way to attack the DJV.

For liberals, the economic interpretation of the theorem is controversial, but for a different reason. The liberals interpret the theorem as exposing a weak point in a political theory they might otherwise endorse and simultaneously presenting an end-state principle they do not like. The liberals attack the law and economics interpretation of the theorem as a way to defend the DJV and as the first step toward developing a theory of the kind of affirmative visions they want society to reflect. If rights can be specified and the end-principles of efficiency attacked, then the DJV is generally no longer as weak, and the threat of a conservative end-state principle can be countered.

148. See, e.g., C. Fried, supra note 2, at 81-107; Epstein, supra note 23, at 189-204 (1973); Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 Tex. L. Rev. 35 (1981); see also Buchanan, Good Economics—Bad Law, 60 Va. L. Rev. 483, 488-92 (1974) (use of efficiency as standard for judges runs risk of inadequate protection of individual rights because it conflates functions of Constitution, courts and legislatures); Epstein, A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic, 9 J. Legal Stud. 665, 680 (1980) ("[R]ules that have to do with property, with aggression, and with family are intuitively understood and justified for reasons that have nothing to do with some hidden social welfare function.").

149. See, e.g., Dworkin, supra note 123, at 222-23.
tioning the ability of the theorem to accommodate process rights or declaring the moral monstrousness of various economic end-state visions, and talking about the importance of personal autonomy and fulfillment are the mark of a continued faith in liberalism. When they argue that the law and economics interpretation of the Coase theorem is morally wrong, they are really attempting to give specific form to an inarticulate political notion that the DJV fails to grant sufficient individual rights to the farmer. When they argue that the invasion of the rancher’s

150. It is interesting to note the correspondence between the arguments made by liberals against the theorem with the arguments they typically make when the political issues are presented directly. Compare notes 149-52 and accompanying text with Stewart, Regulation in a Liberal State: The Role of Non-Commodity Values, 92 YALE L.J. 1537 (1983).

Sometimes there is a merely cursory effort to bring in noneconomic considerations whose possible bearing is conceded pro forma. And sometimes these considerations are just left for others to explore—philosophers, or maybe poets, but not we hardheaded lawyers, not just this minute: we have mastered economics (at least well enough to publish an economic analysis of this problem), but we can not fathom all that other spongy stuff.

It is true that we do not fathom the other stuff very well. We often cannot talk about it very clearly; we do not see precisely how it works or grows; and that, I guess, is one reason why it is just now being crowded out of the garden. Normative economics is a far more polished, a far better articulated, a far more accessible and presentable, a far better systemized body of analytical and critical material, commanding far more internal disciplinary consensus than the rest of moral and political theory. But from the fact that we find it hard to talk clearly about the noneconomic normative bases of law, it does not follow that they are not there or are not fundamental. I do not have a clear idea of the principles underlying the warranty of habitability, though I can adumbrate them clumsily. But I do know that the warranty of habitability is not a joke, is not a fable, is not a law professor’s fantasy or examination question. It is an authentic legal event in the chronicles of the highest courts of too many American jurisdictions—twelve, by count in 1975—to be dismissed as an aberration or a mistake. Clarifying what its motivating principles are seems at least as important for scholars wishing to stay in touch with actual law as demonstrating that economic efficiency is not properly among them.

Id. at 1029-30 (footnote omitted). Even though he has been associated with conservatism because of his use of economics, Calabresi has fully expressed his concern with the place of ‘‘moralizing’’ in the law. See G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 69-86 (1985) (issues of ‘‘moralisms’’ and emotions in torts); G. CALABRESI, supra note 37, at 24-26 (role of ‘‘justice’’ in accident law); G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 32 (1978) (difficulty in pricing ‘‘moralisms’’); Calabresi & Melamed, supra note 2, at 1111-15 (certain fundamental moral entitlements such as freedom, are deemed inalienable even if the entitlement holder wants to sell them because of the psychic effects of such a transaction on other members of society); Calabresi, About Law and Economics: A Letter to Ronald Dworkin, 8 HOFSTRA L. REV. 553 (1980) (importance of rights to economic analysis). Even though other
cows upon the farmer's land was wrong, they are really arguing that personal responsibility and the recognition of the separateness of persons are important features of rights even in the DJV. When they argue that the rights of the farmer were violated, they are actually arguing that the elements of personal control and freedom, so evident in the TJV, have not been reflected in the DJV. As a result, they conclude that the DJV presents a deficient theory of individual rights.¹⁶²

Finally, for CLS scholars the law and economics interpretation of the theorem is wrong because it symbolizes all that is wrong with liberal political theory and with law and economics. They contend it is wrong because it symbolizes the incoherency of liberal thought,¹⁶³ it fails to generate a theory of individual rights,¹⁶⁴ and it represents a conservative end-state view.¹⁶⁵

ii. The Coase Theorem as Proxy for the Transition and Boundary Controversies Associated with the Events of 1937—Selected Examples. The proxy function is not limited to the law and economics interpretation of the theorem. The influence of the correspondence between the political structure of modern political theory and the Coase theorem is evident in other areas as well. When lawyers are presented with the theorem, they usually sense a conflict between what their professional intuitions suggest and what the standards of the theorem require. Much of this tension, however, can be attributed to the reflection of the transition and

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¹⁶² See, e.g., Dworkin, Why Efficiency?, 8 Hofstra L. Rev. 563 (1980), his approach is far more sympathetic to liberal values than Posner, a person with whom he is often grouped.

¹⁵² See, e.g., C. Fried, supra note 2, at 81-107 (1978) (economic analysis diminishes the concept of person); Baker, supra note 96, at 39-41 (1975) (economic theory fails to respect autonomy and dignity of persons); Tribe, supra note 97, at 86-97 (individual preferences cannot be expressed as simple summations of the total bundle of goods the individual enjoys); see also Baker, supra, at 9-32 (favors rich over poor).

¹⁵³ See, e.g., Heller, The Importance of Normative Decisionmaking: The Limitations of Legal Economics as a Basis for Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development, 1976 Wis. L. Rev. 385, 468-500; see also Kennedy, Legal Formality, 2 J. Legal Stud. 351, 352 (1973) (proposes concept of legal formality to link Lockean contractarian political doctrine, legal positivism, and welfare economic analysis under single treatment of liberalism).

¹⁵⁴ See, e.g., Mensch, The History of Mainstream Legal Thought, in Politics of Law, supra note 107, at 18, 36-37; Note, Two Models of Law and Economics, supra note 31, at 978.

¹⁵⁵ See, e.g., Horwitz, supra note 2; Kelman, Spitzer and Hoffman on Coase: A Brief Rejoinder, 53 S. Cal. L. Rev. 1215, 1222 (1980):
boundary controversies associated with the events of 1937.\textsuperscript{156} For example, when lawyers sense a conflict between the application of conventional legal concepts of torts and property and what the economic interpretation of the theorem requires, they are also recognizing the tension between the TJV and the DJV, and are beginning to talk about what the relationship between them should be.\textsuperscript{157} Similarly, when they sense a conflict between what they were trained to perceive as the existing rights of the farmer to use his land and the seemingly prospective rearrangement of those rights by the Coase theorem, they are beginning to deal with some of the controversies surrounding the transition from the TJV to a mixed system.\textsuperscript{158}

Some of the reaction to the Coase theorem also reflects the influence of the boundary controversies involving the interaction of the TJV and the DJV.\textsuperscript{159} For example, the reaction of the legal culture to the theorem typically depends on the subject matter and the persons that are used to illustrate its operation. If in the facts of the Coase theorem corporations are substituted for the rancher and farmer, or if entitlements about pollution rights are substituted for entitlements about husbandry,\textsuperscript{160} the theorem be-

\textsuperscript{156} See supra text accompanying notes 49-81.
\textsuperscript{157} I have noticed that beginning second-year law students almost universally perceive the theorem as deviant. Much of the reason for this is that the conceptual framework they are given in their first-year courses in torts and property is almost entirely based on classical common-law thought. As a result, the students have already implicitly accepted the TJV as the relevant standard of proper legal argument. Once exposed to the politics of the theorem, however, the dialogue tends to gravitate in one fashion or another to one of the legitimacy controversies associated with the events of 1937.
\textsuperscript{158} For example, common questions from my students are whether the farmer possessed this right previously, and if so, what status it had; or alternatively, whether the theorem applies without respect to any existing rights.
\textsuperscript{159} See supra Section III(C).
\textsuperscript{160} Application of Coasean principles in environmental legislation involving either intraplant or interplant trading between sophisticated bargainers is far less controversial than some of its other applications. See, e.g., Comment, Increment Allocation Under Prevention of Significant Deterioration: How to Decide Who is Allowed to Pollute, 74 NW. U.L. Rev. 936 (1980); Note, Emission-Offset Banking: Accommodating Industrial Growth with Air-Quality Standards, 128 U. Pa. L. Rev. 937 (1980). In this respect, it is also interesting to note that the theorem has made far greater inroads into such regulatory areas as environmental law than into many traditional common-law areas. Nearly every contemporary environmental law textbook deals with the Coase theorem. See F. ANDERSON, D. MANDELMER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 31-32 (1984); R. FINDLEY & D. FABER, ENVIRONMENTAL LAW: CASES AND MATERIALS 226-30 (2d ed. 1985); T. SCHOENBAUM, ENVIRONMENTAL POLICY LAW: CASES, READINGS, AND TEXT 27-30 (1985); R. STEWART & J. KRIER, supra note 36, at 119-33.
comes generally acceptable to the legal culture. In contrast, if the facts involved entitlement to steal, or a relationship between a parent and a minor child, the theorem probably would be unacceptable. What this change of persons and activities illustrates is simply a concern over the boundaries of the TJV and DJV. While the DJV typically is more acceptable for entitlements capable of sophisticated negotiation and for economic regulation, it also is perceived as less acceptable for many of the day-to-day activities of ordinary people, or for matters such as crime. This simply illustrates another application of the proxy function of the theorem. When people are arguing about the application of the theorem to such different areas, they are really arguing about which areas are best suited to the DJV and which are not.

Similarly, the reaction of the legal culture to the Coase theorem also reflects the tension involved in the coordination of the two visions. Commentators have frequently dealt with the controversies raised by the treatment of cause in the Coase theorem. Much of this controversy, however, is actually about the

161. See, e.g., Hoppe, A License to Steal, San Francisco Chron., Feb. 8, 1971, at 39, col. 5, reprinted in Economic Foundations of Property Law 49 (B. Ackerman ed. 1975); see also Weinrib, The Case for a Duty to Rescue, 90 Yale L.J. 247, 249-50 (1980) (Coasean treatment of cause and duty to rescue). The DJV certainly has had some impact on the administration of the criminal laws, see, e.g., R. Posner, supra note 75, at 163-77; Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968); Polinsky & Shavell, The Optimal Tradeoff Between the Probability and Magnitude of Fines, 69 Am. Econ. Rev. 880 (1979). However, when economic analysis is used to determine whether such basic acts as theft should be declared crimes, it has a less authoritative ring to it. See, e.g., Calabresi & Melamed, supra note 2, at 1124-47. I doubt whether even some of the most committed proponents of economic analysis would argue that the Coasean assumption of reciprocit

162. See, e.g., Campisano, supra note 76, at 818-32 (argues that business taxpayers should be treated differently than individual taxpayers because of different normative considerations).

163. See supra text accompanying notes 74-81.

coordination of the TJV and DJV. Cause is an essential aspect of liability in the TJV.\textsuperscript{165} In contrast, in the DJV cause is important only insofar as it provides relevant information for specific end-state goals.\textsuperscript{166} For Calabresi, who adopts a Coasean perspective, cause is therefore subordinated to other end-state goals, such as loss spreading, distributional equity, specific deterrence and general deterrence.\textsuperscript{167} As a result, Calabresi is concerned about such concepts as "causal link."\textsuperscript{168} Similarly, adherents of other end-state standards also use this notion of causation.\textsuperscript{169} On one level, the causation debate reflects a tension between the TJV and the DJV.\textsuperscript{170} In terms of the TJV/DJV dichotomy posed in this Article, this presents a classic boundary problem. Actual or intuitive causation is a central feature of the TJV, yet probabilistic cause or causal link is a feature of the DJV. Therefore, part of the rationale behind the choice of concepts must be linked to a political preference for one vision over the other. On another level, however, the debate reflects an effort to utilize existing TJV concepts for the purpose of fulfilling a DJV goal and thus coordinating the two systems.\textsuperscript{171} That effort merely reflects the larger problems of coordinating the TJV and DJV.

\textsuperscript{165} See, e.g., Epstein, supra note 23, at 165-89. As Epstein notes, "[F]or most persons, the difficult question is often not whether these causal assertions create the presumption [of liability], but whether there are in fact any means to distinguish between causation and responsibility, so close is the connection between what a man does and what he is answerable for." Id. at 169; see also Horwitz, The Doctrine of Objective Causation, in Politics of Law, supra note 107, at 201 (doctrine of objective causation an essential part of a system of nonredistributive private law).

\textsuperscript{166} See, e.g., Gjerdingen, supra note 3, at 726-27.

\textsuperscript{167} See Calabresi, supra note 77, at 73-91.

\textsuperscript{168} Id. at 71-72.

\textsuperscript{169} See, e.g., Landes & Posner, supra note 164: Shavell, supra note 164 (probabilistic cause and instrumentalist approach).

\textsuperscript{170} While I am not certain whether Richard Wright would draw the same conclusion, his recent article on causation, in my view, provides a good example of this tension between the two political perspectives. See Wright, supra note 74. The clearest statement of the political issues is Bush, supra note 51.

\textsuperscript{171} Particularly good examples of this phenomenon are Calabresi, supra note 77 (adapting TJV notions of "but for" and "proximate cause" to use in a DJV format); Rizzo, supra note 164, at 1037 (argues "that traditional deterministic ideas of causation are simply special cases of a more general probabilistic analysis"); Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849 (1984) (proposal to graft some DJV aspects of tort law onto TJV framework to deal with problems of toxic torts). See generally Bush, supra note 51 (attempts to resolve problem by proposing communitarian vision of the law rather than just TJV/DJV).
The Coase theorem is many things. It is a proposition about economic efficiency and it is a proposition about law and economics. In addition, I have argued that it is a thought experiment of special importance to the legal culture, and that it carries with it a distributive justice political structure. Once the nature of that structure is understood and the theorem is viewed as something more than law and economics, many of the reasons behind its controversy can be discerned.

The Coase theorem is a political structure. It carries with it the political presuppositions of the DJV; it draws attention to the absence of the TJV; and, as a result, it also carries with it the essence of the political conflict surrounding the events of 1937. As a political statement it requires a political response. The theorem can be understood only after the politics of the TJV and the DJV are comprehended and only after the influence of those political structures on the legal culture is understood.

The Coase theorem is a thought experiment. It can be used to begin to talk on a small scale about issues that might overwhelm us if talked about on a large scale. It can help us talk about the source of the legal culture, its current status, its direction, and whether or not such direction is warranted. But if it is a way into the controversy, it is also a way out of the controversy. The structure of the theorem forces those who must deal with it to deal with questions that it raises. It does not just ask questions, but it also structures the dialogue to begin to develop some answers.

The Coase theorem is a story about the "death of the common law." It challenges the political foundations of common law thought, it challenges its reliance on intuitional thought, and it challenges its reliance on common-law categories. It also challenges the conventional assumptions about the autonomy of the law.

The Coase theorem is a story about the birth of modern politics. It reflects the problems of its legitimacy and the uncertainty of its future. It also begins to question the role of the legal culture in that future.

Thus, the Coase theorem is controversial not because it is

172. See Gjerdingen, supra note 3, at 758-60.
173. See Gjerdingen, supra note 3.
about law and economics, but because it is not only about law and economics. It is controversial not because it is about politics, but because it is about law and politics. And it is controversial not because it is something alien to the law, but because, if anything, it tells us too much about it. That may be the most controversial point of all.