

2016

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Recommended Citation

Kunal Parker, *Law and Regime Change: The Common Law, Knowledge Regimes, and Democracy Between the Nineteenth and Twentieth Centuries*, 3 *Critical Analysis of Law* 362 (2016).

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Law and Regime Change: The Common Law, Knowledge Regimes, and Democracy Between the Nineteenth and Twentieth Centuries

Kunal M. Parker*

Abstract

Using a change in knowledge regime as a paradigm of regime change, this paper explores the career of common law thinking in the United States between the nineteenth and twentieth centuries. It shows how, under the pressures of anti-foundational thinking, knowledge moved from a nineteenth-century regime of “knowledge that,” a regime of foundational knowledge, to an early-twentieth-century regime of “knowledge how,” a regime of anti-foundational knowledge concerned with the procedures, processes, and protocols of arriving at knowledge. It then shows how common law thinkers adapted to this change in knowledge regimes, transforming the common law from a body of substantive knowledge into one that was principally procedural. The paper also shows, however, that the traditional discourses of the common law survived this intellectual transformation.

I. Introduction

At least in English, the slightly negative contemporary valence of the word “regime”—a word typically reserved for non-Western and non-democratic governments—means that the term “regime change” carries with it a whiff of unwillingness to surrender wrongly-held power, de-legitimation of an old order, and use of force. But what if the “regime change” in question is instead a change in a knowledge regime that reconfigures the imagined relationship between law and democracy? What if, furthermore, as a result of this change in a knowledge regime, an older conception of law, once relatively compatible with a certain understanding of democracy, comes to be seen as incompatible with a changed conception of democracy? How does law transform itself in such a situation?

I explore these questions in the context of a change in knowledge regimes that took place in the United States—and, indeed, all over the Western world—as the nineteenth century gave way to the twentieth. As a result of this change of knowledge regimes, I argue, the common law, which had once been seen as more or less compatible with American democracy, came to be seen as incompatible with it. How did common lawyers respond? What does this tell us in a more general sense about law’s relationship to regime change?

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A few points of qualification are in order. *First*, some might take issue with this paper's focus on a change in knowledge regimes as the engine that drove changes in conceptions of law and democracy. Why not focus on something more "real": industrial organization, capital-labor relations, demographic shifts, political mobilization, and the like? Briefly put, this is an argument about what counts as the motor of historical change, an old theme in the historiography of ideas that I eschew. I make no apologies for focusing on a change in knowledge regimes, but simply note that the changes I care about went along with a host of other, allegedly more "real," changes. *Second*, it goes without saying that the change in knowledge regimes and the altered conceptions of law and democracy that are the subject of this paper are abstractions culled from the swirl of American intellectual life in the late nineteenth and early twentieth centuries. I do not mean for them in any way to represent the totality of American thought in this period. As a related matter, I also recognize the considerable simplification, conceptual and otherwise, involved in speaking of a "knowledge regime" in the first place. What is a knowledge regime? How does one discern its outlines? Does not every historical period teem with a plethora of knowledge regimes, such that it is extremely difficult to posit the dominance of one and hence to talk meaningfully about change and directionality? These are all entirely valid questions. Nevertheless, I ask the reader's indulgence because I seek to illustrate something specific about the intellectual and legal history of the period as I broach the question of how law responds to regime change. *Finally*, from my perspective, the change in knowledge regimes that is the subject of this paper carries with it no particular *political* valence. I care neither to demonize nor to lionize any particular knowledge regime. I am interested simply in highlighting an intellectual shift and exploring how law adjusted to this shift. I hope thereby to illuminate a specific corner of American intellectual and legal history, one that has received considerable attention from scholars, but perhaps not in quite this way.

The remainder of this paper is organized as follows. First, I discuss dominant nineteenth-century knowledge regimes and their relationship to conceptions of democracy and the common law. Second, I discuss the change in knowledge regime between the late nineteenth century and the mid-twentieth century and the resulting "crisis" of the common law that it produced. In this section, I focus centrally on the question of how the common law responded to this change in knowledge regime. Finally, I draw some general conclusions from the narrative of law's response to regime change.

II. "Knowing That": The Common Law and the Knowledge Regime in Nineteenth-Century America

Nineteenth-century America was a society that largely believed in the "given" foundations of the world. In this regard, it differed little from the societies that preceded it. A sense of given foundations allowed nineteenth-century Americans to know the world in a substantive way. Knowledge took the form of "knowing that": an ability to specify that the world was structured a particular way.

To begin with, nineteenth-century Americans were overwhelmingly religious. For the majority of Americans, God's laws governed everything. Biblical injunctions were routinely invoked to explain (or contest) the order of nature, the structure of law, polity, and economy, the shape of the family, racial and gender hierarchies, and so on. The country's proliferation of religious denominations and the energy of its religious conflict suggest not that God's laws were deemed unknowable, but that there was no agreement as to what their precise meaning and contours were.

Where nineteenth-century Americans cleaved to more secular kinds of knowledge, these secular kinds of knowledge possessed distinctly "God-like" attributes insofar as, in the opinion of their adherents, they posited substantive foundations that were alleged to govern the world. Thus, as nineteenth-century Americans and Europeans shed static eighteenth-century models for understanding man, nature, and society in favor of more dynamic "historical" ones, the "history" that they came up with to explain the structure and movement of polity and society bore a striking resemblance to the Christian eschatology it replaced insofar as it confidently asserted the underlying meaning, foundation, and direction of polity and society. This is true of all the major secular historical sensibilities that emerged and faded over the course of the nineteenth century: the Scottish feudalism-to-commerce narratives that were a holdover from the eighteenth century; Marxist, Hegelian, and Comtean historical accounts; Herbert Spencer's theory that society moved from a military state to an industrial one; and Henry Maine's view of societies as moving from the rule of "status" to that of "contract."¹ The "God-like" historical faiths of the nineteenth century allowed their adherents to make sense of past, present, and future; to designate this or that phenomenon as a marker of an outdated society or as the harbinger of a future one; and to argue for (or resist) change in terms of where they thought history was headed. What I have said of nineteenth-century "history" can, of course, be extended to all of the cognate knowledges—anthropology, economics, philology, political science, sociology—that emerged over the course of the century.

To assert that the world was structured a given way—whether by God, history, reason, or something else—was also to insist upon limits to self-making, whether at the level of the individual or at the level of democratic society. Nineteenth-century "knowledge that" implied, in other words, that human intellection and activity came bounded, that many things lay beyond the power of human beings to affect.

It was widely understood, for example, that individual self-making was constrained. Although this was true for all, it was particularly so for those subordinated in terms of the "natural" hierarchies of gender, race, and class. For example, in *Bradwell v. Illinois* (1873), the U.S. Supreme Court was asked to consider whether the newly ratified Fourteenth Amendment might invalidate an Illinois law that barred women from the practice of law. The Court refused to extend the Fourteenth Amendment this way. Justice

¹ The authoritative version of this argument is made in Karl Löwith, *Meaning in History: The Theological Implications of the Philosophy of History* (1949).

Bradley’s concurring opinion reveals how the “laws” of “nature” and the “Creator” served to limit a woman’s demand for self-making:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. . . . In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position.²

The Court’s refusal to use the Fourteenth Amendment to dismantle barriers to women’s entry into the professions reveals with breathtaking clarity how “natural” laws serving as barriers to women’s demands for self-making infused the text of the Constitution.

What was true for individuals was also true for agglomerations of individuals. Thus, even though political democracy was on the march throughout the Euro-American world, it was widely believed that there were rigorous limits to what political democracies could accomplish. Thomas Carlyle, a mid-nineteenth-century conservative writer immensely popular on both sides of the Atlantic, captured this sense of democracy’s limits by comparing political democracy to a ship. Would the establishment of political democracy among the ship’s crew enable the ship to round Cape Horn? Carlyle answered in the negative:

Your ship cannot double Cape Horn by its excellent plans of voting. The ship may vote this and that, above decks and below, in the most harmonious exquisitely constitutional manner: the ship, to get around Cape Horn, will find a set of conditions already voted for, and fixed with adamantine rigour, by the ancient Elemental Powers, who are entirely careless how you vote. . . . Ships accordingly do not use the ballot-box at all; . . . one wishes much some other Entities,—since all entities lie under the same rigorous set of laws,—could be brought to show as much wisdom, and sense at least of self-preservation, the first command of Nature. . . . [Democracy] is a very extraordinary method of navigating, whether in the Straits of Magellan or the undiscovered Sea of Time.³

Just as democracy instituted among a ship’s crew would do little to affect the givenness of Cape Horn, Carlyle insisted, democracy instituted in a society would founder upon given hierarchies, rationalities, and orders. To take only one example, an entire generation of pro-slavery thinkers convinced of the “natural” foundations of slavery insisted that democracy would never be able to remedy the condition of American blacks.

Precisely *because* it acted as a limit on the self-making potential of individuals and political democracies, the dominant regime of “knowledge that” accounted for the common law’s particular relationship to nineteenth-century American democracy. At first

² *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1873) (Bradley, J.).

³ Thomas Carlyle, *The Present Time*, in *Latter-Day Pamphlets* 19-21 (1901) (1850).

glance, the prestige and authority of the common law throughout the nineteenth century might seem puzzling. Why would nineteenth-century Americans, who celebrated their democracy noisily and energetically, who insisted on their ability to give themselves their own laws in the here and now, who had broken with many forms of traditionalist authority as they broke with Great Britain, consent to have their laws laid down by unelected judges who built upon a precedent-based, English-derived body of laws that could not point to any articulated democratic origin?⁴

There are various explanations. For much of the nineteenth century, the American state was relatively small and unable to do the job of making laws for the country's burgeoning economy. Unelected common law judges filled the regulatory gap created by the absence of the state. Aided by a robust treatise tradition and an energetic bar, they reworked substantive doctrines of contract, property and tort to engineer the transformation of the United States from an agrarian economy to an industrial one. At the same time, they assisted the accumulation of capital by extending doctrines of criminal conspiracy to early labor unions.⁵

But this is an insufficient explanation, certainly at the level of political and legal discourse. A more convincing answer is that, in a world in which various kinds of "knowledge that" operated as a constraint on the self-making potential of democratic societies and individuals, the common law functioned as one constraint among many, and an appealing one at that. In order to understand the appeal of the common law as a constraint on nineteenth-century American democracy, however, it is important to go back to the origins of common law thinking in early modern England.

Common law thinking emerged in the early seventeenth century to check the law-giving claims of would-be absolutist Stuart monarchs. Breaking with medieval conceptions of law as eternal, James I had argued that "kings were the authors and makers of the Lawes and not the Lawes of the kings."⁶ The threat posed by such assertions was apparent to many. In response, seventeenth-century English common law thinkers articulated a complex of ideas that indelibly associated the common law with freedom and continuity.

Common law thinkers argued that the common law, as declared by the common law judge, consisted of the "immemorial customs" of the English. Precisely because it was deemed to emerge spontaneously from the people, the custom-based common law was hailed as the freest of all possible laws. Insofar as it was "immemorial," dating back to a

⁴ This is not to suggest that there was no opposition to the common law. This opposition took various forms, ranging from codification proposals to calls to elect judges. See Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (1981); Jed Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (2012). I discuss discourses opposing the common law in Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism* (2011).

⁵ There is a vast literature here. Two canonical texts are Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (1993).

⁶ James I, *The Trew Law of Free Monarchies*, in *The Political Works of James I* 53, 62 (Charles H. McIlwain ed., 1918) (1616).

time beyond the “memory of man,” the common law guaranteed stability and continuity. Both freedom and continuity went together. This set up the contrast between the common law, on the one hand, and monarchical law, on the other. When the monarch spoke, he represented the pronouncements of a single individual speaking in a single moment of time. When the common law judge spoke, his pronouncements stood for the ancient, spontaneously arisen, endlessly repeated freedoms of the people.

In asserting the superiority of the common law over monarchical law, seventeenth-century common law thinkers were also claiming a monopoly over their ability to declare custom. Monarchs and parliaments could not declare custom, only the common law judge could. This was, ultimately, a claim of monopoly over method, but of method that was inseparable from substance. The most important common law thinker of the early seventeenth century, Lord Coke, put it thus:

[R]eason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and of experience, and not of every man’s natural reason. . . . This legall reason *est summa ratio*.⁷

All men possessed natural reason. But only the common law judge, by dint of long study, observation, and experience, and hence by virtue of having mastered the right method, possessed the mysterious “artificiall perfection of reason” to declare the “immemorial” customs of the community.

Common lawyers’ arguments served as powerful substantive limits to the self-making claims of England’s Stuart monarchs. Monarchical power to give law ran up, in other words, against the solid constraints of “immemorial custom.” It is not surprising, then, that, in the aftermath of the Glorious Revolution and the triumph of Parliament, the common law, and common law judges generally, came to be identified simultaneously with the ancient freedoms of the English, vigorous opposition to despotism, and the virtues of continuity and stability over time. Such identifications proved enduring. As scholars such as John Philip Reid have argued, at the end of the eighteenth century, American revolutionaries couched their grievances against Great Britain precisely as a demand for the restoration of their ancient common law rights.⁸

In understanding the role of the common law in the nineteenth-century American polity, however, it is important to emphasize that the common law’s insistence upon continuity—continuity as a limit to the law-giving powers of monarchs—was necessarily complicated as the seventeenth century gave way to the eighteenth. In this regard, the method of the common law, its so-called “artificiall perfection of reason,” proved critical.

In the early seventeenth century, when Coke wrote, it was still possible for common law thinkers to assert that the common law of their day had remained unchanged

⁷ 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* bk. 2, c. 6, sec. 138 (1979) (reprint of 1832 ed.) (1628).

⁸ See, e.g., John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (2005). Reid’s multivolume *Constitutional History of the American Revolution* is also apposite here.

since Anglo-Saxon days. What they were defending, in other words, was an ancient, enduring, and unchanged law. By the end of the seventeenth century, however, such a position had become untenable. The work of antiquarians and the emergence of historical thinking had demonstrated that much of what had passed for unchanging common law had in fact emerged as a result of the Norman Conquest. As a consequence, common law thinkers were compelled to accept the fact that the common law had indeed changed over time. However, they regrouped, owing in no small part to the common law method. Accepting the fact of historical change, common law thinkers asserted that, in their hands, the common law changed “insensibly,” so gradually that change was essentially imperceptible to those affected and thus disappeared into continuity. Thus, Sir Matthew Hale’s *History of the Common Law of England* insisted:

From the Nature of the Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniences of the People, for or by whom they are appointed, as those Exigencies and Conveniences do *insensibly* grow upon the People, so many Times there grows *insensibly* a Variation of the Laws, especially in a long Tract of Time

Indeed, Hale continued in a well-known passage:

But tho’ those particular Variations and Accessions have happened in the Laws, yet *they being only partial and successive*, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho’ in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho’ Physicians tell us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before.⁹

Thus, the gradualist method of the common law permitted a careful calibration of the imperatives of identity and difference, continuity and change. The common law would vindicate venerable freedoms and be sensitive to current needs. It would change constantly and yet never change.¹⁰

In the eighteenth century, continuity, albeit now recalibrated to encompass change, remained a critical limit to law-making power. Now, however, common lawyers no longer attempted to limit the law-giving powers of monarchs: that battle had been won. Instead, they denigrated—and thus asserted rhetorical limits on—the law-giving skills of Parliament. Continuity was better maintained by the gradualist method of common lawyers, they argued, than by the more abrupt pronouncements of legislatures. Sir William Blackstone’s mid-eighteenth-century *Commentaries on the Laws of England* celebrated the figure of common law judges who were “long personally accustomed to the judicial decisions of their predecessors.” Even while he recognized Parliament’s supremacy, Blackstone urged on parliamentarians a common law sensibility when he exhorted them “to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and

⁹ Sir Matthew Hale, *The History of the Common Law of England* 39-40 (Charles M. Gray ed., 1971) (1713).

¹⁰ My discussion in this section draws from Parker, *supra* note 4, ch. 2. My thinking there, and in this paper, relies heavily on J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (1987) (1957).

to cherish any solid and well-weighed improvement; [and to be] bound . . . to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation.”¹¹

In a similar vein, nineteenth-century American common lawyers would assert as a limit to democratic self-making not only the substantive truths of common law doctrine but also the imperative of continuity. In creating law through case-by-case adjudication, they boasted that their method of law-making was superior to that of democratically-elected legislatures, whose pronouncements they labeled rash and ill-considered, the product of a single instant in time, rather than—as the common law claimed to be—born out of a profound solicitude for past, present, and future. Furthermore, as I have argued elsewhere, nineteenth-century American common lawyers proved extraordinarily skillful at fitting the temporalities of the common law within dominant historical models and arguing thereby that the common law, with its step-by-step method of law-making, was better able to realize the given logic of history than democratic legislatures were.¹²

In an America governed by the regime of “knowledge that,” then, the common law acted as a limit on the self-making ability of democratic legislatures both as substance and as method. The truths of common law property, contract, and tort were asserted as lying beyond the ability of legislatures to touch. Similarly, the gradualist method of the common law, one that assured continuity even as it accommodated change, was asserted as superior to the legislative method and thus also acted as a kind of limit. If such limits were resented occasionally, they nevertheless survived: they were only one among many imagined limits to individual and democratic self-making.

III. “Knowing How”: The Common Law and the Knowledge Regime in the Early Twentieth Century

Beginning in the late nineteenth century, and extending into the twentieth, a profound intellectual revolution that is often labeled “modernism” swept the Euro-American world. Modernism was diverse. Its impact was significant in fields ranging from mathematics to art, science to philosophy, law to literature. It came in various national and linguistic iterations. Furthermore, as might be expected, it possessed its own complex history. For our purposes, however, it might be convenient to adopt the definition advanced by the historian Peter Gay. While admitting that modernism “is far easier to exemplify than to define,” Gay identified as twin attributes of modernism, “the lure of heresy,” on the one hand, and “a commitment to a principled self-scrutiny,” on the other.¹³ Both of these attributes of modernism were realized, I want to suggest, through resort to a new conception of history.

¹¹ 1 William Blackstone, *Commentaries on the Laws of England* 52, 12-13 (David Lemmings ed., 2016) (1765).

¹² I make this argument in Parker, *supra* note 4.

¹³ Peter Gay, *Modernism: The Lure of Heresy from Baudelaire to Beckett and Beyond* 1, 3-4 (2008).

Where history for much of the nineteenth century had been foundational and teleological, offering its adherents the certitude of knowing its meaning and direction (“knowledge that”), the modernist historical sensibility was different. For thoroughgoing modernists, history had neither an intrinsic meaning nor a given direction. Instead, it served principally to undermine the pretended supra-historical foundations of phenomena—whether God, reason, logic, morality, transcendent aesthetic rules, or historical teleologies—with a view to showing up those phenomena as existing only in historical time. In their use of history, in other words, modernists preferred to be smashers of idols; this is what Gay refers to as the “lure of heresy.” Modernists’ iconoclastic use of history led in turn to what Gay refers to as “principled self-scrutiny.” For once the foundations of phenomena had been dismantled, and the phenomena themselves shown to be “merely” historical, ground was cleared. Modernists would then be able to reimagine present and future.

This idol-smashing, ground-clearing, and scrutiny-inviting function of the modernist historical sensibility had two critically important (and interrelated) consequences. *First*, as the pretended supra-historical foundations of phenomena dissolved in the name of history, what had previously been imagined as constraints upon democratic and individual self-making weakened. The result was an expansion of the sphere of what could be questioned and discussed as a matter of democratic politics. Benjamin Barber has written: “[P]olitics is what men do when metaphysics fails.” Making the same point in a slightly different way, the intellectual historian David Roberts writes that democracy “is the form of interaction for people who cannot agree on moral absolutes.”¹⁴ *Second*, the dissolving of supra-historical foundations bore profound consequences for the ways in which knowledge claims would henceforth be made. The modernist historical sensibility undermined “knowledge that” by attacking the foundations on which the secure knowledges of the past had rested. But the acid bath of history would necessarily also have to be applied to the knowledges of the present and future, i.e., those which modernists would themselves create. Henceforth, knowledge would be less stable, more tentative and provisional, always experimental and revisable. This brought about a heightened concern with the means and processes *through which* knowledge was produced. Whether in the physical sciences or the arts, philosophy or mathematics, modernist thinkers became intensely interested in *how* they arrived at knowledge. The intellectual historian John Patrick Diggins captures this modernist focus on means and processes when he writes: “Without access to the objectively real, the philosopher settles for *the processes of knowing instead of the thing known.*”¹⁵ “Knowledge that” was ceding place, in a sense, to “knowledge how.”¹⁶

¹⁴ Both references from David Roberts, *Nothing But History: Reconstruction and Extremity After Metaphysics* xvii-xix (2006) (1995).

¹⁵ John Patrick Diggins, *The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority* 48 (1994) (emphasis added).

¹⁶ I derived the terminology of “knowledge that” versus “knowledge how” from Gilbert Ryle, *The Concept of Mind* (1949). In a register very different from mine, Ryle discusses “knowing that” and “knowing how.”

What were the implications of this change in knowledge regime—the change from “knowledge that” to “knowledge how”—for the common law and its place within American democracy? To begin with, law was an important site for the operation of the modernist historical sensibility. Nowhere is this seen more clearly than in the late nineteenth-century writings of Oliver Wendell Holmes, Jr., the foremost American legal thinker of the late nineteenth and early twentieth centuries.¹⁷

Holmes’s now-little read masterpiece *The Common Law* (1881) was an exemplar of the modernist historical method. It began with lines that are now a classic statement of how law’s claim to embody formal logic was undermined in the name of history:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹⁸

Holmes followed through on this opening statement by showing that common law doctrines purporting to rest on supra-historical foundations such as logic, reason, and morality were little more than the piling up of historical errors and inadvertent transpositions from one context to another.¹⁹

Over the last two decades of the nineteenth century, Holmes’s critique of the common law deepened. In “The Path of the Law” (1897), he attacked antiquity and continuity, two revered bases of the common law:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁰

In true modernist fashion, Holmes’s attack on the common law’s foundations was an invitation to sustained thinking about what law was to be. As he put it in “Privilege, Malice, and Intent” (1894), “The time has gone by when law is only an unconscious embodiment of the common will [Holmes is no doubt referring here to the common law’s claim to reflect the customs of the community]. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.”²¹ For Holmes, fur-

¹⁷ A key text in this regard is David Luban, *Legal Modernism* (1994). There is much correspondence between Luban’s understanding of modernism and mine, but I have not engaged with his work in this paper because, at least as I understand it, we are interested in different questions.

¹⁸ Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

¹⁹ I make this argument in Parker, *supra* note 4, ch. 6; see also Kunal M. Parker, *The History of Experience: On the Historical Imagination of Oliver Wendell Holmes, Jr.*, 28 *PoLAR* 60 (2003).

²⁰ Oliver Wendell Holmes, Jr., *The Path of the Law*, in 3 *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* 399 (Sheldon Novick ed., 1995) [hereinafter *Collected Works*].

²¹ Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, in 3 *Collected Works* 377.

thermore, when society reflected upon what it wanted law to be, it should look away from the traditional resources of the common law and towards extra-legal knowledges. As he put it: “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”²²

Holmes’s critiques of the foundations of the common law were leveled at a time when the United States was in the throes of a massive socio-economic transformation brought about by urbanization, industrialization, and immigration. Increasingly, there were calls from diverse groups—farmers, consumer advocates, labor unions, urban reformers, and others—for legislative action to manage the ill-effects of these transformations. However, the common lawyerly federal courts all too frequently blocked legislative attempts to modify *laissez-faire*. By the late nineteenth century, under the aegis of Justice Joseph Story’s opinion in *Swift v. Tyson* (1842), the federal courts had developed an extensive “federal common law” that they applied in their diversity jurisdiction cases, i.e., cases in which the parties were citizens of different states.²³ Many considered the U.S. Constitution, especially as it was wielded to conservative ends, to be informed by the common law. When “interpreting the Constitution,” Justice David Brewer observed, “we must have recourse to the common law.”²⁴

For critics of the federal courts, perhaps the most egregious instance of the common law joined to the Constitution was the doctrine of “substantive due process.” In the late nineteenth century, the U.S. Supreme Court declared that the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution protected “liberty of contract” and that federal and state legislation therefore could not unduly abridge the freedoms of employers and employees to contract.²⁵ This decision effectively constitutionalized common law contract rights and impeded regulatory efforts. In *Lochner v. New York* (1905), a case that came to embody early twentieth-century “substantive due process,” the U.S. Supreme Court struck down a New York law that regulated the length of the work day in bakeries on the ground that the law interfered with workers’ and employers’ “liberty of contract.”²⁶

Critics of decisions such as *Lochner* eagerly embraced the Holmesian critique of the common law’s foundations. If the common law was not founded in reason, morality, logic, but was instead “merely” historical and thus capable of being remade, why should it be made by unelected common law judges rather than by democratically-elected legislatures and the administrative agencies they created? It is precisely in this sense that the undermining of “knowledge that” by the modernist historical sensibility led to an imagined

²² Id. at 399.

²³ *Swift v. Tyson*, 41 U.S. 1 (1842).

²⁴ *South Carolina v. United States*, 199 U.S. 437, 449 (1905) (Brewer, J.).

²⁵ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

²⁶ *Lochner v. New York*, 198 U.S. 45 (1905). The discussion in the preceding two paragraphs relies on Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power and the Politics of the Federal Courts in Twentieth-Century America* (2000).

widening of the sphere of democratic self-making (or, in what amounts to much the same thing, the collapse of the “law”-“politics” distinction).

The concern for Progressive-era critics and their successors was how to conceive of a role for law in relation to democracy *after* the erosion of law’s foundations. Political democracy, and the administrative agencies it created, seemed set to displace common law judges and to assume directive control of society and economy. How should law respond? As might be expected, there were multiple, non-mutually-exclusive ways of thinking through the problem.

In the early twentieth century, various schools of legal thought—travelling under names like Sociological Jurisprudence and Legal Realism—sought to place law in “social” context, to examine its social causes and effects. The most thoroughgoing implication of placing law in social context entailed, of course, the loss of a sense of what was distinctively legal; law would simply dissolve into a “society” that political democracy could act upon. Some early twentieth-century legal scholars subscribed to precisely such a view as they turned from law to empirical social science.²⁷

Another response was to argue for ever more minimalist standards of constitutional review. Law was to shrink, as it were, to allow for more democratic self-making to occur. For example, in the much-reviled *Lochner* case, Holmes, appointed to the U.S. Supreme Court in 1900, famously dissented on the ground that *constitutional* restraints on the activities of democratic legislatures should not be confused with any *particular* substantive idea of what was true. He put it thus:

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

. . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us.²⁸

Holmes’s *Lochner* dissent is a beautiful illustration of the modernist rejection of “knowledge that.” As he puts it, the Constitution is made for people of “fundamentally differing views.” The fact that we might find certain opinions persuasive and others shocking does not go to ultimate truth; it is merely an “accident” or, in other words, a product of history and individual background. It cannot therefore be coterminous with a law’s constitutionality. But if Holmes would have been willing in the *Lochner* case to allow

²⁷ There is a vast literature on Sociological Jurisprudence and American Legal Realism. A good starting place is John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995).

²⁸ 198 U.S. at 75-76.

New York's legislature to regulate the length of bakers' work days, he did not argue that the word "liberty" in the Fourteenth Amendment stood as no check at all upon what democratic legislatures could do. His suggested standard of constitutional review in the case—"that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law"—is perhaps more deferential to legislatures, but no clearer or less vulnerable to manipulation than the *Lochner* majority's expansive reading of the meaning of "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments.

Yet another response—the one that I want to focus on here—was to reconceive the role of law in relationship to political democracy in a much more thoroughgoing way. In areas such as literature and painting, the shift from "knowledge that" to "knowledge how" entailed an abandonment of the nineteenth-century realist attempt to represent the outside world in its totality and led to a new focus on the processes and means of literary and artistic creation. Up to the mid-twentieth century and beyond, modernist writers and painters self-consciously drew attention to the writerly and painterly processes through which they created, to the quiddity of language and paint and technique, rather than to the thing represented. Perhaps the clearest example of this is mid-twentieth-century "process art"—of which the drip paintings of Jackson Pollock are a good example—in which the primary object of the artwork is the process of creation rather than the end product.

In an analogous fashion, I want to suggest, early twentieth-century legal thinkers insisted that legal knowledge cease to be a "knowledge that" that could throw up substantive law as a check on democratic legislatures and that it increasingly take the form of a "knowledge how," a knowledge that would consist of the specification of methods, means, processes, procedures, and protocols as ways of arriving at substantive decisions. In their hands, law self-consciously took on a kind of interstitial, procedural, processual role, telling legislators not *what* law they could or could not make, but *how and by whom* law should be made. Insofar as procedure was deemed especially legal, the most lawyerly part of law, this transformation was law's turning inward upon itself.

This view was articulated in the early twentieth century and grew in influence as the decades passed. Towards the end of his career, the archetypical Progressive (and later New Dealer) Felix Frankfurter recalled something he had written in the summer of 1913, as he contemplated leaving government to take up a teaching position at the Harvard Law School. In Frankfurter's note to himself, we have a breathtakingly clear understanding of the emerging interstitial, procedural, processual role of law:

The problems ahead are economic and sociological, and the added adjustments of a government under a written constitution, steeped in legalistic traditions, to the assumption of the right solution of such problems. To an important degree therefore, the problems are problems of jurisprudence,—not only the shaping of a jurisprudence to meet the social and industrial needs of the time, *but the great procedural problems of administration and legislation, because of the inevitable link between law and legislation, the lawyers' natural relation to these issues, the close connection between all legislation and constitutional law, and the traditional, easily accountable dom-*

*inance of the lawyer in our public affairs. In the synthesis of thinking that must shape the Great State, the lawyer is in many ways the coordinator, the mediator, between the various social sciences.*²⁹

As law cedes knowledge to the social sciences, Frankfurter tells us, the lawyer must become “the coordinator, the mediator.” This would necessarily involve a focus on procedure.

In keeping with this view, soon after his elevation to the bench, Frankfurter would insist that law give up its claims to govern substance and restrict itself to the specification of procedures. Such an insistence was, of course, entirely consistent with his repudiation of *Lochner* and all it stood for. Thus, in *Driscoll v. Edison Light & Power Co.* (1939), Frankfurter argued that the U.S. Supreme Court should not interfere in the substantive rate-setting work of commissions, because commissions were better equipped than courts to adjust competing social values. Rate-setting did not involve “questions of an essentially legal nature in the sense that legal education and lawyer’s learning afford peculiar competence for their adjustment.”³⁰ Only when questions “of an essentially legal nature” arose—and what was more “essentially legal” than procedure?—should courts should intervene.

In the pre-World War II period, Frankfurter was hardly the only prominent legal thinker and jurist to shift his gaze to method, procedure, and process. As Daniel Ernst has recently shown, American common lawyers during the first half of the twentieth century responded to the emergence of government by commission and agency not by seeking to control the substantive decisions of these new-fangled bodies, but by insisting that they incorporate, to the extent feasible, the procedures long employed in common law courts.³¹ Perhaps the high point of the pre-World War II focus on procedure was the U.S. Supreme Court’s announcement of a new, post-*Lochner* direction for constitutional review: intervention in the affairs of democracy upon failure of the democratic *process*. In the celebrated footnote 4 of *United States v. Carolene Products* (1938), Justice Stone argued:

It is unnecessary to consider now [i.e., in the case at hand] whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote . . . ; on restraints upon the dissemination of information; on interferences with political organizations . . . ; as to prohibition of peaceable assembly

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . , or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry (citations omitted).³²

²⁹ Felix Frankfurter Reminisces: Recorded in Talks with Dr. Harlan B. Phillips 81 (Harlan B. Phillips ed., 1960) (emphasis added).

³⁰ *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 122 (1939) (Frankfurter, J., concurring).

³¹ Daniel Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America* (2014).

³² *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938).

If *Lochner* was about reading a socioeconomic philosophy (“knowledge that”) into the Constitution to overturn a legislative decision, the *Carolene Products* footnote speaks of judicial involvement only when political processes “ordinarily to be relied upon to protect minorities” failed to function.

In the pre-World War II turn away from substance and towards procedure, legal thinkers were often committed to the Progressive socio-economic agenda. Unlike Holmes, whose skepticism was thoroughgoing, most Progressive-era legal thinkers—Brandeis is a good example—were committed to mitigating the impact of *laissez faire*. Thus, when they turned away from substance towards process, they were fully cognizant not only of how substantive law had been used to thwart the will of democratic majorities, but also of the mutual imbrication of substance and process. When they focused on the intricacies of the procedures and jurisdiction of the federal courts, in other words, they wanted to draw attention to how the federal courts had been able to play a major role in striking down economically redistributive legislation. Felix Frankfurter’s and James M. Landis’s landmark study, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928), emphasized that “[t]he history of the Supreme Court, as of the Common Law, derives meaning to no small degree from the cumulative details which define the scope of its business, and the forms and methods of performing it—the Court’s procedure, in the comprehensive meaning of the term.”³³ The authors were at pains to show that “[t]he story of momentous political and economic issues lies concealed beneath the surface technicalities governing the jurisdiction of the Federal Courts.”³⁴ Studies such as the Frankfurter and Landis study paved the way for Justice Brandeis’s landmark opinion in *Erie Railroad Co. v. Tompkins* (1938), which overturned the ninety-year-old precedent of *Swift v. Tyson* and stripped the federal courts of their ability to create a “federal common law” in diversity jurisdiction cases.³⁵ The decision extinguished an important fount of conservative common law jurisprudence. It was widely understood that procedure and process were linked to, and were ways of shaping, substance.

However, the idea of process became increasingly divorced from an explicit substantive agenda as the 1920s gave way to the mid-century. Confronted by the horrors of Nazism and Stalinism, and eager to find a legal limit to the powers of the expanding state, American legal thinkers began to think of process and procedure not just as an adjunct to substance, but as something important in its own right. Process increasingly became its own end.³⁶

This was true of the judicial *oeuvre* of Felix Frankfurter, who, within a few years after his appointment to the Court, came to be seen as “conservative” in no small part

³³ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* xxxvi (2007) (1928).

³⁴ *Id.* at xxxvii.

³⁵ 304 U.S. 64 (1938).

³⁶ The classic text on the rejection of Holmesian skepticism in the mid-twentieth century is Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973).

because of his unshakeable adherence to procedural exactitude. In 1960, Helen Shirley Thomas's admiring study put it thus: "Justice Frankfurter is primarily interested in method, secondarily in result, for it is only through the correct methods that the mystical prestige of the Supreme Court will be enhanced."³⁷ Sticking to procedure entailed judicial respect for legislative and administrative decision-making, to be sure, but increasingly also pride in lawyerly pyrotechnics. In 1949, Louis Jaffe characterized Frankfurter as "forever disposing of issues by assigning their disposition to some other sphere of competence. His world is the urban world of the division of labor, of the specialist, the expert. He is the craftsman conscious and proud of the illusive niceties germane to his own skill and, in consequence, scrupulous in his regard for the integrity of impinging spheres of competence."³⁸

The triumph of procedure and process reached its crescendo with the post-World War II Legal Process School centered around the Harvard Law School. It is not incorrect to see this jurisprudential movement as a scholarly effort to endorse and defend the Frankfurterian approach. Many of the important exponents of Legal Process—Alexander Bickel, Paul Freund, Louis Jaffe, Edward H. Levi, Henry Hart, Albert Sacks, Herbert Wechsler, Harry Wellington—were affiliated in one way or another with Frankfurter. Often, they wrote to justify his positions. In the Harvard Law School of the late 1950s, a student recalled, "Felix Frankfurter was God."³⁹

The views of Legal Process scholars are exemplified in Henry Hart's and Albert Sacks's *The Legal Process*, a set of teaching materials widely used in American law schools in the 1950s and for decades thereafter. Hart and Sacks came up with what they called "the principle of institutional settlement," a "principle" that closely tracked Frankfurter's own views. According to the "principle," the primary function of the law was that of establishing the boundaries between the spheres of authority of various actors and agencies—legislatures, courts, administrative agencies, individuals—based on their expertise.⁴⁰

As Legal Process thinkers articulated this "principle," however, they revealed how older common lawyerly sensibilities fitted with the new knowledge regime of "how to." If the common law in the nineteenth century had claimed to limit the self-making potential of democracies as both substance and method, Legal Process thinkers turned increasingly to discourses extolling the common law method.

Common lawyers had long boasted of their ability to maintain continuity over time vis-à-vis the more sporadic or episodic activities of legislatures. This was what made the common law method superior. Legal Process thinkers struck a similar note. Even as

³⁷ Helen S. Thomas, *Felix Frankfurter: Scholar on the Bench* 114 (1960).

³⁸ Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 *Harv. L. Rev.* 357, 359 (1949).

³⁹ Quoted in William M. Wiecek, *American Jurisprudence After the War: "Reason Called Law,"* 37 *Tulsa L. Rev.* 857, 862 (2001). On the Legal Process School generally, see William Eskridge & Phillip Frickey, *An Historical and Critical Introduction to The Legal Process*, in Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, at li (William Eskridge & Phillip Frickey eds., 1994); Neil Duxbury, *Patterns of American Jurisprudence* ch. 4 (1995). There are numerous other sources as well, too numerous to canvas here.

⁴⁰ Hart & Sacks, *supra* note 39, at 4.

law surrendered substance to legislatures and administrative agencies, Felix Frankfurter warned:

[J]udges are under a special duty not to over-emphasize the episodic aspects of life and not to undervalue its organic processes—its continuities and relationships. *For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty.*⁴¹

Law's new "how to" role was deemed especially suited to continuity because procedure was deemed *knowable*, whereas (at least to modernist lawyers) the substance of law was no longer deemed to be knowable. In 1953, in an opinion joined by Justice Frankfurter, Justice Jackson made this clear: "Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of Government, as they should on matters of policy which comprise substantive law."⁴² A few years later, Hart and Sacks echoed: "Even though the substance of a decision cannot be planned in advance in the form of rules and standards, the procedure of decision commonly can be."⁴³

The knowability, continuity, and stability of procedure invested it with special significance in a world turned over to legislatures and administrative agencies. According to Hart and Sacks, procedure was a critical defense against "disintegrating resort to violence."⁴⁴ As a result, procedure became *more* critical than anything else. As Hart and Sacks put it: "In the long run, these procedures and their accompanying doctrines and practices will come to be seen *as the most significant and enduring part of the whole legal system because they are the matrix of everything else.*"⁴⁵

When it came to the decisions of the U.S. Supreme Court, i.e., in contexts deemed the proper institutional preserve of courts, Legal Process thinkers were in broad agreement that the Court had to lay down "principles" that, like the procedure generally, would prove enduring. Legal decisions thus had to be different from administrative or legislative or private decisions. Here, Legal Process thinkers offered a kind of "how to" for judges without specifying the content of what they should say. In 1957, Lon Fuller had argued: "We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility towards rationality is at once the strength and the weakness of adjudication as a form of social ordering."⁴⁶ Unlike other

⁴¹ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 531 (1947) (emphasis added).

⁴² *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (dissenting opinion of Jackson, J.; joined by Frankfurter, J.).

⁴³ Hart & Sacks, *supra* note 39, at 154.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 6 (emphasis added).

⁴⁶ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 367-68 (1978).

decision-making bodies, Henry Hart maintained, the Court was “predestined . . . by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law.”⁴⁷ Herbert Wechsler’s famous 1959 discussion of “neutral principles” emphasized that “[a] principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”⁴⁸ Thus, what was deemed a requirement of procedure—stability and continuity over time—was deemed a requirement for law generally.

As discussed in the preceding section, in asserting the superiority of their method, common lawyers had claimed a monopoly over it. Beginning with Coke’s early seventeenth-century insistence that ordinary men lacked the “artificial perfection of reason” necessary to declare common law principles, this common lawyerly claim to monopoly and exclusivity had been built up through recourse to a language of mystery, obscurity, and indefinability. Very similar languages were employed to characterize lawyerly expertise over matters of process and procedure in the mid-twentieth century.

Thus, according to Felix Frankfurter, the proceduralist and principled judge—like centuries of common law judges preceding him—was uniquely privileged to read the community. In the mid-1930s, Frankfurter had written that the open-ended language of the Constitution left “the individual Justice free, if indeed they do not compel him, to gather meaning, not from reading the Constitution, but from reading life.”⁴⁹ As a justice on the U.S. Supreme Court, he would assert: “Judges must divine [the] feeling of society as best they can from all the relevant evidence and light which they can bring to bear for a confident judgment of such an issue, and with every endeavor to detach themselves from their merely private views.”⁵⁰

These vague invocations were compounded by Frankfurter’s repeated representation of the act of judging as essentially incapable of being adequately represented. Thus, Frankfurter stated: “[J]udgment is not drawn out of the void but is based on the correlation of imponderables all of which need not, because they cannot, be made explicit.”⁵¹ Indeed, the judge was something of an artist:

The . . . demand upon the judge—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist

⁴⁷ Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 *Harv. L. Rev.* 84, 99 (1959).

⁴⁸ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 19 (1959).

⁴⁹ Felix Frankfurter, *The Supreme Court of the United States*, in *Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938*, at 30 (E.F. Pritchard & Archibald Macleish eds., 1939).

⁵⁰ *Haley v. Ohio*, 332 U.S. 596, 603 (1948).

⁵¹ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 532 (1947)

in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.⁵²

To be sure, Frankfurter seems not to have doubted that he possessed the requisite “poetic sensibilities.”

Because the ontology of law was procedure, the sense that the judge needed a sixth sense “beyond logical, let alone quantitative proof” translated into concrete doctrinal stances in matters of processes and procedures even as it reinforced lawyers’ monopoly over such matters. When it came to deciding what was a “case or controversy”—a crucial constitutional limitation on the jurisdiction of the federal courts—Frankfurter insisted that only the “expert feel of lawyers” could resolve the issue.⁵³ The same was true of Due Process, a concept that Frankfurter insisted—in contradistinction to his antagonist Hugo Black—was “neither fixed nor finished.”⁵⁴ Indeed, Due Process was also a “feeling”:

Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment of those whom the Constitution entrusted with the unfolding of the process.⁵⁵

As his repeated invocation of the language of sensibility and feeling and divination suggests, Frankfurter had long been suspicious of too much clarity and definition: “In administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalization unnourished by the realities of ‘law in action.’”⁵⁶ To be sure, Frankfurter’s fear of too much clarity was born out of a Holmesian skepticism of “knowledge that”: “Alert search for enduring standards by which the judiciary is to exercise its duty in enforcing those provisions of the Constitution that are expressed in what Ruskin called ‘chameleon words,’ needs the indispensable counterpoise of sturdy doubts that one has found those standards.”⁵⁷ But it was also about walling off his own expertise over procedure from the prying analyses of critics.

At the same time, Frankfurter’s aversion to clarity was linked to his common lawyerly assertion about how law *should* change: slowly and imperceptibly. Insistence upon

⁵² Felix Frankfurter, *The Judicial Process and the Supreme Court*, in *Of Law and Men: Papers and Addresses of Felix Frankfurter, 1939-1956*, at 39 (Philip Elman ed., 1956).

⁵³ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150-51 (1951).

⁵⁴ Felix Frankfurter, *The Judicial Process and the Supreme Court*, in *Of Law and Men*, supra note 52, at 35.

⁵⁵ *McGrath*, 341 U.S. at 162-63 (Frankfurter, J., concurring).

⁵⁶ Frankfurter, *Task of Administrative Law*, in *Law and Politics*, supra note 49, at 236.

⁵⁷ Felix Frankfurter, *John Marshall*, in *Government Under Law* 21 (1956).

continuity went along with a recognition of the necessity of change, but change would be folded into continuity through common lawyerly skill. In 1939, Frankfurter employed breathtakingly traditionalist common lawyerly language when he stated that “the Court’s influence has been achieved undramatically and imperceptibly, like the gradual growth of a coral reef, as the cumulative product of hundreds of cases, individually unexciting and seemingly even unimportant, but in their total effect powerfully telling in the pulls and pressures of society.”⁵⁸ This emphasis on imperceptible change translated into a refusal to plunge too quickly into decision. Procedure proved critical here. In 1934, Frankfurter had written with approval: “The Court has . . . evolved elaborate and often technical doctrines for postponing if not avoiding constitutional adjudication.”⁵⁹ As his career on the Court wore on, he began to urge delay: “The rational process of trial and error implies a wary use of novelty and a critical adoption of change. . . . What evil would be encouraged, what good retarded by delay?”⁶⁰

Frankfurter’s emphasis on procedure—with its common lawyerly extolment of continuity, delay, and gradualism, on the one hand, and arrogation of monopoly, on the other—found by far its most conservative expression in the writings of his law clerk and protégé, Alexander Bickel, who would become perhaps the most celebrated constitutional theorist of the post-World War II period.

Bickel opted for “the exquisite balance” between adhering to a legal “principle” and also keeping that “principle” in abeyance through recourse to common lawyerly, procedural devices.⁶¹ Doing so, he maintained, was the “secret of the [Court’s] ability to maintain itself in the tension between principle and expediency.”⁶² As he put it: “A sound judicial instinct will generally favor deflecting the problem in one or more initial cases, for there is much to be gained from letting it simmer, so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion.”⁶³

From the mid-1960s until his death, Bickel retreated ever further into political and legal conservatism. It is this Bickel that Robert Bork, then Solicitor General of the United States, would laud for his “reconstitution of a conservative intellectual tradition in this country.”⁶⁴

⁵⁸ Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* 3-4 (1939).

⁵⁹ Felix Frankfurter, *The Supreme Court of the United States, in Law and Politics*, supra note 49, at 25.

⁶⁰ *Radio Corp. of Am. v. United States*, 341 U.S. 412, 425-27 (1951).

⁶¹ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 155 (2d ed. 1986) (1967). My discussion of Bickel here is drawn entirely from Kunal M. Parker, *How Law Should Avoid Mistakes: Alexander Bickel’s Modernist Jurisprudence of “Mood,”* in *Law’s Mistakes* 44 (Austin Sarat et al. eds., 2016).

⁶² Bickel, supra note 61, at 69.

⁶³ *Id.* at 176 (reference to the *Garner* case).

⁶⁴ Robert H. Bork, Alexander M. Bickel, *Political Philosopher*, 1975 *Sup. Ct. Rev.* 419, 419 (1975).

In important part, Bickel's rage centered on the jurisprudence of the later years of the Warren Court. For Bickel, the Warren Court of the mid-1960s and beyond lost the imprecise, ambiguous, common lawyerly proceduralism that Bickel felt was essential for legal "principles" to take gradual effect. Instead, the path chosen by the Warren Court was one of excessive clarity or, put differently, too much "knowledge that." In the opening chapter of *The Supreme Court and the Idea of Progress*, entitled "The Heavenly City of the Twentieth Century Justices" (a riff on the title of the historian Carl Becker's influential 1932 history of the eighteenth-century philosophers, *The Heavenly City of the Eighteenth Century Philosophers*), Bickel attacks the Court's historical teleology as follows:

The Justices of the Warren Court thus ventured to identify a goal. It was necessarily a grand one—if we had to give it a single name, that name . . . would be the Egalitarian Society. And the Justices steered by this goal . . . in the belief that progress, called history, would validate their course, and that another generation, remembering its own future, would imagine them favorably.⁶⁵

In embracing this altogether too clear philosophy, the Warren Court was engaged in a "heedless break with the past."⁶⁶ At the same time, Bickel fretted about "the rate at which the Court has wreaked itself upon . . . society . . . and the rate at which . . . society as a whole seems to be hurtling towards its future."⁶⁷ From his increasingly Burkean perspective, the Court seemed, like the French Revolutionaries, perpetually to be engaging in "some luxuriant outburst of theory."⁶⁸

In general, what Bickel found lacking in the Warren Court's application of legal "principles" was precisely the common lawyerly quality of imperceptibility. He complained about the Court's abandonment of "a wise suspense in forming opinions, wise reserve in expressing them, and wise tardiness in trying to realize them."⁶⁹ The Court's "first obligation" was, he maintained, "to move cautiously, straining for decisions in small compass, more hesitant to deny principles held by some segments of the society than ready to affirm comprehensive ones for all, mindful of the dominant role the political institutions are allowed, and always anxious first to invent compromises and accommodations before declaring firm and unambiguous principles."⁷⁰

Bickel's Burkean, common lawyerly impulse to brake the rate of change fused perfectly with the Legal Process understanding of the ontology of law as process, procedure, and method. Nothing provided greater refuge from reckless and rapid change, after all, than a commitment to procedure, that most lawyerly part of law. In *The Morality of Consent*, Bickel lauded the "hard-core of procedural provisions, found chiefly in the

⁶⁵ Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 13-14 (2d ed. 1978) (1970).

⁶⁶ Bickel, *supra* note 65, at 87.

⁶⁷ *Id.* at 100.

⁶⁸ Alexander M. Bickel, *The Morality of Consent* 24 (1975).

⁶⁹ Bickel, *supra* note 65, at 31.

⁷⁰ Bickel, *supra* note 68, at 26.

Bill of Rights” that possessed a “relative definiteness of terms” and “definiteness of history.”⁷¹ The Warren Court had prided itself on “cutting through legal technicalities, in piercing through procedure to substance. *But legal technicalities are the stuff of law, and piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is.*”⁷²

IV. Conclusion

I have attempted a history of the shift from the nineteenth-century regime of “knowledge that” to the early twentieth-century regime of “knowledge how.” From the perspective of someone writing in the early twenty-first century, this shift seems, at best, to have been a rather provisional one. We live today in a world teeming with different knowledges, many of which claim to offer definitive explanations of the world and its history. “God” and “knowledge that” seem to be back. Perhaps they never went away. The late nineteenth and early twentieth century attack on foundations, and the modernist sensibility to which it gave rise, seem like the fragile artefacts of another age. But the story is more complicated.

To those caught up in the shift from “knowledge that” to “knowledge how,” it was real, exciting and terrifying. For American common lawyers, in particular, the challenges were acute. Throughout the nineteenth century, the common law had constrained the space of American democratic self-making in the name of logic, reason, morality, antiquity, and continuity. It had asserted its superiority over the law-making of legislatures as a matter of substance and method. In the early twentieth century, however, the attack on the common law’s foundations had eroded its claims to check the space of democratic self-making in the name of substance. Accordingly, just like modernist thinkers in the arts and sciences, who turned inward on themselves by focusing on method, process, and procedure, American common lawyers, faced with the inexorable rise of legislatures and administrative agencies, reimagined their role as being about the specification of methods, processes, and procedures. In the early twentieth century, many argued, law should serve the processual role of specifying the outlines and boundaries of the many components of the modern state.

In the most general sense, this narrative illustrates the protean character of the common law—if not of law generally—in the context of regime change. As the knowledge regime shifted from “knowledge that” to “knowledge how,” thereby making certain kinds of common lawyerly languages untenable, common lawyers refitted the common law. Reaching into the arsenal of common lawyerly claims and discourses, they transformed the role of the common law from one of substance into one of procedure.

More perplexing, however, is how common lawyerly languages survived as the common law adjusted to the change from “knowledge that” to “knowledge how.” If the

⁷¹ Id. at 29 (quoting Frankfurter, *Law and Politics*, supra note 49, at 10, 12).

⁷² Id. at 121 (emphasis added).

attack on foundations that produced that shift from “knowledge that” to “knowledge how” was iconoclastic—motivated, in Peter Gay’s terms, by the lure of heresy and a commitment to self-scrutiny—what is one to make of the way the common law’s new role as procedure came, once again, to be invested with the mystical qualities that the common law had traditionally claimed for itself? If common lawyers once claimed to be possessed of an “artificial perfection of reason” inaccessible to the average man, twentieth-century common lawyers—even as they accepted the Holmesian critique and transformed the common law into procedure—would claim to operate on the basis of “expert feel,” “imponderables,” divination, and poetic sensibilities inaccessible to non-lawyers. It is in the perplexing marriage of skepticism and mystification, as revealed, for instance, in the writings of Felix Frankfurter, that the true challenge of thinking the common law’s career in a time of regime change inheres. This also suggests—and here I self-consciously undermine the very historical narrative I have advanced—that “knowledge that” continued to pervade the world of “knowledge how.” Modernism might have been an attack on “God.” But it turned to “God” to realize itself.