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## Economic Development and The Problem With The Problem-Solving Approach

Justin Desautels-Stein

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## **ECONOMIC DEVELOPMENT AND THE PROBLEM WITH THE PROBLEM-SOLVING APPROACH**

**JUSTIN DESAUTELS-STEIN\***

### ABSTRACT

*Scholars and practitioners alike have recently pointed to the idea of a “new moment” in the field of law and economic development, as well as a hope for a fruitful rethinking of political economy. The idea is that we have passed out of the period of high “neoliberalism,” associated at one time with Reagan, Thatcher, and the so-called Washington Consensus and now eclipsed by the ascendancy of the Obama Administration. The hope attending the new consensus is that, in the wake of neoliberal law and policy, the field of law and development might be on the verge of a new round of experimental work going beyond the old patterns of “free competition—state intervention” discourse. This Article affirms the notion of a new moment, but is pessimistic about its meaning. After surveying two phases in the intellectual history of global law and development, the Article turns to what Duncan Kennedy has described as the “third globalization,” a statement on the characteristic qualities of contemporary legal thought. In setting out these qualities, I argue that they constitute a form of legal pragmatism that is both new and illustrative of our present condition. As for what this pragmatism means in terms of providing a post-neoliberal direction for law and development, the argument surveys the current exchange between two rival forms of pragmatic governance: minimalism and experimentalism. The conclusion is darker than we might like: although there does indeed seem reason to believe in a new turn towards problem-solving in the field of economic development, it is a turn in which our legal pragmatism too often promotes the old discursive patterns from which we had hoped to escape.*

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\* Associate Professor, University of Colorado Law School. I am thankful for some general comments on a prior version of this Article I received from Amy Cohen, David Kennedy, and Brian Tamanaha. This Article is an expanded version of an essay first published as *Experimental Pragmatism in the Third Globalization*, 9 CONTEMPORARY PRAGMATISM (2012).

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I. INTRODUCTION

The major claim in this Article is that the field of law and economic development is helpfully understood in the light of an alliance between “liberal legalism”<sup>1</sup> and “legal pragmatism.”<sup>2</sup> Building off of Duncan Kennedy’s suggestion that much (if not all) of American Legal Thought is constituted through a series of globalizing forms of legal consciousness,<sup>3</sup> the present argument holds that the current situation of the law and development field is shaped by the confluence of two elements. On the one hand, law and development practitioners work from a playbook that is largely an assemblage of artifacts left over from prior moments in the history of liberal legalism. The two basic pieces in the assembly include a neoformalist commitment to the Rule of Law, and a neofunctionalist

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1. For a discussion of liberal legalism in the sense that I am here suggesting see Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387 (2012) and Justin Desautels-Stein, *Liberal Legalism and the Two State Action Doctrines*, 6 N.Y.U. J. L. & LIB. (forthcoming 2012).

2. Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565 (2007).

3. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., 2006).

commitment to balancing techniques that purport to mediate conflicting considerations. On the other hand, law and development practitioners are committed to a pragmatic, “problem-solving” approach that sees itself as “freestanding”<sup>4</sup> of ideological relationships with particular worldviews. Thus, unlike the lawyer of bygone days who understood herself to see law as managing a fairly crisp line between market and state, or a law which had as its function the production of social welfare with little interest in the line between market and state, today’s pragmatic lawyer believes in neither of these images of liberal law. She only believes in the pragmatic necessity of shifting between the images as the situation demands, enabling a fluidity in the quest for solving problems.

Of course, there are different sorts of problem-solving, and in the fields of regulation and economic development, there are two obvious candidates. On the one side is the “minimalism” of certain forms of behavioral economics, sometimes associated with the likes of Cass Sunstein and the “nudge.”<sup>5</sup> On the other side is the experimentalism of “new governance” theorists like Charles Sabel and William Simon.<sup>6</sup> In this Article, I situate these new forms of legal pragmatism in the context of Kennedy’s story of legal thought, and my own take on liberal legalism. Like many scholars of the moment, I agree that global thinking about market-state relations in the development discourse has reached a new position, albeit a deeply troubled one. In contrast to the hope that pragmatism might triumph over formalism,<sup>7</sup> for example, I see the new pragmatism as *enabling* formalism instead of disarming it, and *broadening* the blind spots of law and economics, instead of shrinking them.

In order to see how this happens, it is necessary to layer over Duncan Kennedy’s excellent architecture a story of liberalism and pragmatism and the manner in which legal pragmatism has splintered in the context of contemporary legal thought. Taking notice of this splintering is crucial, since some forms of pragmatism are busily entrenching the stock defaults of liberal legalism, while others at least have an intention of displacing, if not dispensing them.

In the discussion that follows, I introduce Duncan Kennedy’s three styles of legal thought, and place them in the context of liberal legalism

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4. Thomas Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21 (1996).

5. See *infra* note 201 and accompanying text.

6. See, e.g., Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

7. David Trubek, “The Rule of Law” in *Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 3, at 74, 93.

and development economics. In particular, I suggest that legal pragmatism provides an effective way of understanding how liberal legalism has been disaggregated and reassembled in contemporary legal thought, and examine the rise and fall of neoliberalism as illustrating two parts of our present legal pragmatism. That is, instead of seeing two periods of disenchantment—one after the 1970s and another in the early 21st century—I argue that what emerged after 1970 was a single form of legal consciousness that incorporates both a vital neoformalism as well as a chastened one. The discussion concludes with a brief look at two forms of legal pragmatism: “minimalism” and “experimentalism.” Taking the recent work of Charles Sabel and William Simon as illustrative of the experimentalist position, the analysis first asks whether their brand of experimental pragmatism is “contemporary” in Duncan Kennedy’s sense of the word, and if so, whether it might provide the sort of regulatory apparatus David Kennedy has in mind for a new, heterogenous alliance.<sup>8</sup>

My answers are only preliminary, and will hopefully be the starting point in further work. If we are looking for a conceptual bottom line here, perhaps it can be said that a genuinely experimental style of problem-solving embraces a single proposition: the liberal narrative of “market and state” should be displaced in favor of a counter-narrative which asks “which market” and “which state”?<sup>9</sup> Or, to put it another way, perhaps experimentalism might be stretched to oppose the traditional images of liberal legalism by dismissing the idea that any particular agent—whether that be a centralized government agency or the World Bank and IMF or a particular recipe of private law rights—can see the future of economic development and offer instructions for how to get there.<sup>10</sup>

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8. David Kennedy, *Law and Development Economics: Toward a New Alliance* (2011) (on file with author). For contrasting views, see, e.g., Kevin E. Davis & Michael J. Trebilock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895 (2008); Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209 (2011); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy*, 1–33 (Carnegie Endowment Working Papers No. 30, 2002), available at <http://carnegieendowment.org/2002/09/10/mythmaking-in-rule-of-law-orthodoxy/47s4>.

9. Sanjay Reddy, *Beyond the State Versus Market*, 40 DEVELOPMENT 7 (1997); see also ROBERTO M. UNGER, *FREE TRADE REIMAGINED* (2007); Charles Sabel, *Bootstrapping Development: Rethinking the Role of Public Intervention in Promoting Growth* (Nov. 14, 2005) (unpublished manuscript), available at <http://www2.law.columbia.edu/sabel/papers.htm>; David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* 1–34 (Univ. of Wis. Legal Studies Research Paper Series, Paper No. 1075, 2009), available at <http://ssrn.com/abstract=1349163>.

10. Charles Sabel & Sanjay Reddy, *Learning to Learn: Undoing the Gordian Knot of Development Today*, 50 CHALLENGE 73, 74 (2007).

In terms of what defines the content of an experimental style of development economics, it's difficult to pinpoint in the absence of a concrete problem to solve. To do otherwise might, as Sanjay Reddy has suggested, undermine an appreciation of the "enormous and perhaps inexhaustible constellation of yet unrealized possibilities" about the shape of a democratized market economy.<sup>11</sup> After all, experimentalists don't believe in the possibility of being guided by right propositions, since propositions can only be tested for their merit in the heat of actual experiences in the here and now. As Reddy and Sabel have cautioned, it is best to consider an experimental approach "not as an effort to lay foundation stones of a new cathedral of development thinking, but rather as an offering in the bazaar of collaborative work on a theme that concerns us all."<sup>12</sup> For example, one vision of a democratized market economy might be

characterized by the overcoming of segmentation and subordination. It would favor deconcentration and delegation over centralization of function and authority. It would distribute widely the fruits of ownership as well as the privileges of control. It would seek as primary ends full employment and the inclusion of the excluded in the productive life of society. . . . Simultaneously, such an economy would not be predicated on the sacrifice of material prosperity, but rather would seek out areas of overlap between material enhancement and the realization of democratic ends. Finally, such an economy should strive to assure that the conceptions of collective identity and of democratic possibility and responsibility, in relation to which it gains life, do not end at arbitrary boundaries, including those of the nation.<sup>13</sup>

As Sabel and Simon have argued, the experimentalist style of administration is happening. Still in its infancy, it may be too soon to judge much of its work, but at least in the United States and the European Union, experimental pragmatism is hard at work. A next phase in the research agenda should take a cue from these developments, and interrogate the possibilities of a nascent experimentalism in the developing world.

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11. Reddy, *supra* note 9, at 8.

12. Sabel & Reddy, *supra* note 10, at 76.

13. Reddy, *supra* note 9, at 9.

## II. TWO MODES OF LEGAL CONSCIOUSNESS

A. *The First Globalization: Classical Legal Thought*

In Duncan Kennedy’s map of American Legal Thought, a notion of “legal consciousness” is framed in the language of semiotics, where a consciousness is comprised of *langue* and *parole*.<sup>14</sup> The *langue* provides the fundamental elements of the consciousness—its mode of reasoning, its conceptual vocabulary, and the like. In contrast is *parole*, which consists in the actual speech-acts, the legal arguments themselves that are spoken in the mode of the *langue*. Thus, while *parole* is relatively indeterminate within the context of the structure of the *langue*, the *langue* itself is identifiable as a discrete set of ideas. According to Kennedy, the *langue* of classical legal thought (“CLT”) is a combination of three big ideas: (1) individualism, (2) a strict separation of the private sphere of the common law rules from the public sphere of coercive state regulation, and (3) a strategy of judicial interpretation known rather infamously as formalism.<sup>15</sup> Taken together, Kennedy described the basic mode of reasoning in CLT as “the will theory,”<sup>16</sup> which I might also characterize as a distillation of classic liberal legalism.<sup>17</sup>

To get a feel for this style, it might be helpful to recall John Locke’s argument about property rights and freedom of contract in his *Second Treatise of Government*.<sup>18</sup> In Locke’s version of the state of nature, individuals enjoyed certain natural rights as a matter of their membership

14. Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147 (2001). More generally, see FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally & Albert Sechehaye eds., Roy Harris trans., Open Court 1986) (1983).

15. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, *supra* note 3, at 25–36.

16. *Id.* See also ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form”*, 100 COLUM. L. REV. 94 (2000); Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031(2004); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

17. Though Kennedy did at an earlier point explicitly connect liberalism into his narrative, his more recent work avoids any reference to the notion that liberalism plays a role in legal consciousness. As a consequence, I should be very clear here that any arguments herein for connections between “liberal legalism” and Kennedy’s analysis of legal consciousness are mine alone, and still very tentative. For a discussion of liberal legalism in this sense, see Justin Desautels-Stein, *The Market as a Legal Concept*, *supra* note 1.

18. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1689). For classic discussions of Locke, see, e.g., C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962); BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY (1972); ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975).

in the human race. These rights were fundamentally about individual freedom, and as a consequence, they were rights that clearly distinguished the “individualized” human being from the world of Aristotelian political animals. Individuals were morally autonomous, subject to no higher authority to which they had not consented. In this natural state of free and equal individuals, market transactions evolved. Because people have natural ownership over their persons, they also have natural ownership over the labor their bodies produce. Once that labor is mixed with a good, the good logically becomes that individual’s property. As property-owners, intelligent individuals tend to buy and sell their goods for a profit.

Thus, in Locke’s state of nature things were pretty swell, except for the fact that a person’s property was never really very secure. So, in order to actually create a market order, Locke believed it was necessary to legalize property and the trade of property, or freedom of contract. As a result, Locke argued for a deliverance from the state of nature into a political society wherein the chief end of a new constitutional authority would be the creation and maintenance of property and contract rights.<sup>19</sup>

The three elements of Kennedy’s model of classical legal thought are vividly illustrated in this famous little story. The actors are highly individualized in the sense that we are working after the major break with Aristotelian ideas about the function and purpose of human beings; society is split into a private sphere of pre-political (and pre-legal) natural rights and a public sphere of arbitrary government and law; the work of jurists in the public sphere are tasked with the enforcement of those natural truths born in the private sphere but that are only realizable once they have been legalized. To be clear, Kennedy is not suggesting that CLT was operating as early as the 17th century; in fact he doesn’t see it as emerging as a recognizable style until after the Civil War. With a reign of more than half a century, CLT as a form of legal consciousness began its slow decline towards the end of the Nineteenth Century, and was finally branded *gauche* by World War II.<sup>20</sup>

#### *B. The Second Globalization: Social Legal Thought and Development Economics*

In contrast to the high individualism of CLT, a new mode of legal analysis, which Kennedy calls social legal thought, or “the social,” involved a different set of ideas about how to use law as a means for

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19. Desautels-Stein, *The Market as a Legal Concept*, *supra* note 1, at 410–23.

20. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, *supra* note 3, at 37.



arranging the social world.<sup>21</sup> The *langue* of social legal consciousness involved ideas about social interdependence, the application of technical expertise to the resolution of social problems, a preference for public administration over free competition, a wider appreciation of civil and political rights, and a judicial strategy of purposive interpretation that sought to generate legal conclusions on the basis of perceived social needs. Thus, where jurists operating in the CLT style would often seek the resolutions of legal disputes via direct deductions from the natural truths of the private, pre-political sphere, jurists in the social style would more generally look for answers by asking questions about the social function of a given legal regime.<sup>22</sup> Once we knew what a law was supposed to accomplish, and when we know whether we wanted it accomplished that way, we could only then go on to say whether a legal dispute should be resolved in one direction or another.<sup>23</sup>

In the same way that the *langue* of CLT might be characterized as a classic style of “liberal legalism” *à la* Locke, the *langue* of social legal consciousness might be characterized as the crystallization of “modern liberalism.”<sup>24</sup> Modern liberal legalism does not have the same sort of

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21. *Id.* at 37–59.

22. For two rather different challenges to this story, see BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010); Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195 (2010).

23. There are few limits to the sorts of available examples of the new purposive, instrumentalist, functionalist jurisprudence that took off around this time. Perhaps the most famous example is Roscoe Pound’s *The Scope and Purpose of Sociological Jurisprudence* published in three parts between 1911 and 1912. 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1911–1912). For discussion, see Julius Stone, *Roscoe Pound and Sociological Jurisprudence*, 78 HARV. L. REV. 1578 (1964–1965).

24. Doctrinally, the canonical break with CLT was represented in the overruling of *Lochner v. New York*, 198 U.S. 45 (1905), by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In the field of theories of capitalism, this shift is well-captured in the writings of thinkers like PAUL BARAN, *MONOPOLY CAPITAL* (1966); PAUL BARAN, *THE POLITICAL ECONOMY OF GROWTH* (1957); JOHN GAILBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1993); ABBA P. LERNER, *THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS* (1944). In politics, this is captured in the process of the New Deal establishment. See, e.g., DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS* (1998). In law, legal realism probably embodies at least the critique of property and contract rights, if not the embrace of the welfare state. For discussion, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE* (2001); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (2011). According to Roberto Unger, there are three characteristics of the modern liberal style. “First, its continuing commitment to the welfare state and to investment in the people, as both an end in itself and a condition of economic success; second, a desire to rid the regulated market economy of statist, corporatist, and oligopolistic constraints upon economic flexibility and innovation, especially in the transition to a postfordist style of industrial organization, accompanied by sympathy toward bottom-up association and participation by people in local government and social organization; and third, an unabashed institutional conservatism, expressed in skepticism about large projects of institutional reconstruction and in the acceptance of the current legal forms of market economies, representative democracies, and free civil societies.” UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?*, *supra* note 16, at 10. Modern

canonical representatives as classic liberalism, but its shortage of Olympian authorship is made up for in the staggering breadth of the writing that has been done in its service. A likely candidate for the master of the modern liberal style is Keynes,<sup>25</sup> but representatives are available from both the left and the right of the Keynesian emphasis on welfarism, administration, and employment.<sup>26</sup> Indeed, Frank Knight, a founding member of the Chicago School, and Henry Carter Adams, one of the early writers in the first wave of institutional economics, have much in common with respect to a new role for law—a role that would stand in deep tension with judicial commitments to the will theory.<sup>27</sup>

Let's take two examples of social legal thought, one from the Supreme Court and one from the academy. In the Supreme Court's 1948 decision in *Shelley v. Kraemer*,<sup>28</sup> the topic was restrictive covenants: the capacity of property owners to prospectively determine to whom their land could, and could not, eventually pass. The controversial aspect of these covenants, however, was that they excluded the possibility on the basis of race. After a black family took ownership of a home that had been subject to a racially restrictive covenant, a neighboring family brought an action to enjoin the purchasers from taking residence. The Missouri Supreme Court agreed with the neighbors and held the covenant to be effective and enforceable. In approaching the question, the court was appropriately modest as the modern style would indicate: the majority did not hold all private agreements to have the color of state action, even though our notions of "bargain" and "ownership" would be meaningless in the absence of some constituting legal regime.<sup>29</sup> Thus, the division between the independent market and the regulating state still held firm: "[R]estrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of

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liberalism was just as concerned with economic development as was its classic ancestor, but where the classic style was preoccupied with how to establish a legal framework for market society (just as is today's development practitioner), the modern liberal style was created to deal with the consequences of the free competition model. As Roberto Unger has explained, the modern style sought to keep "present institutional arrangements while controlling their consequences: by counteracting, characteristically, through tax-and-transfer or through preferment for disadvantaged groups, their distributive consequences." *Id.* at 29. See also Desautels-Stein, *The Market as a Legal Concept*, *supra* note 1, at 423–44.

25. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, *supra* note 3, at 57.

26. For an interesting discussion of Keynes, Laski, and Hayek, see KENNETH R. HOOVER, *ECONOMICS AS IDEOLOGY* (2003).

27. See Desautels-Stein, *The Market as a Legal Concept*, *supra* note 1, at 432–44.

28. 334 U.S. 1 (1948).

29. FRIEDRICH A. HAYEK, *LAW, LEGISLATION, LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 35 (1976).

those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.”<sup>30</sup> That dividing line, though it would hold, was nevertheless about to take a beating: “But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements.”<sup>31</sup> Voluntary agreements between individuals seeking to buy and sell land, the court explained, did not implicate the state. The judicial enforcement of those agreements, however, did.

Several beliefs common to social legal thought are here: (1) free competition in the market can have morally repugnant results; (2) government needs to intervene, aggressively if need be, to counteract those tendencies if the market is to be sustainable; (3) some amount of space, necessarily left undefined, should be left to the natural sphere of the market. *Shelley* brings it home: the court was deeply troubled by the social consequences of an unchecked property/contract matrix with respect to racial inequalities; the court argued for a more “realistic” view of the state, which definitively exercised its power not only through the executive and the legislature, but through its courts as well; the court still managed to carve out an area where the state was believed absent.

On the academic side, the corpus of work from Harold Lasswell, Myres McDougal, and later W. Michael Reisman, or what was more colloquially known as “McDougal & Associates,” is similarly illustrative. Like many others of their generation,<sup>32</sup> Lasswell and McDougal were post-realists in the sense that they were deeply informed by early 20th century attacks on both the liberalism and formalism of classic legal thought. That is, they were convinced of not only the morally unacceptable nature of *laissez-faire*, but also the intellectual bankruptcy of formalistic thinking about law and policy. Legal realists, and those like Lasswell and McDougal who were working in the early wake of the realist onslaught, were all beholden to the emergence of American Pragmatism.<sup>33</sup> The hand of John Dewey, for instance, is explicit in the work of famous realists like Felix Cohen and

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30. *Shelley*, 334 U.S. at 13.

31. *Id.* at 13–14.

32. See generally MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1979).

33. See generally SCHLEGEL, *supra* note 24.

Walter Wheeler Cook,<sup>34</sup> as well as in the tremendously influential work of Lasswell and McDougal.<sup>35</sup>

Lasswell and McDougal's "Policy Perspective" steadily developed over the course of the 20th century as what is probably best understood as an international variant of the legal process school. At bottom, the idea was to take many of Dewey's insights and elevate them beyond critique and into institutional form. This new institutionalism would be guided by the freshest of cutting edge thinking about real social problems, the functional nature of law, an understanding of the deeply political nature of law, and a process-oriented program in which a legal regime would be put under constant pressure for reappraisal due to persistent exposure to local instances of problem-solving. In Dewey's fashion, the basic goals of the regime would be very broad—in their case, it was "human dignity"—and the actual meaning of the goal would only be discovered through practice, and not before it. The goal values could be achieved only through "continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest net contribution to the over-arching goal."<sup>36</sup> To the extent that the goal might find itself manifested differently in the specifics of various local contexts, these "varying detailed practices by which the overriding goals are sought need not necessarily be fatal . . . but can be made creative in promoting [our goals]."<sup>37</sup>

Of course, given that Lasswell and McDougal's approach became a school of thought in its own right, it would be misleading to suggest that these were the indelible hallmarks of the New Haven School, but at least in 1959, this much was clear. In that year, Lasswell and McDougal published one of the seminal tracts of their new post-realist policy approach in "The Identification and Appraisal of Diverse Systems of Public Order."<sup>38</sup> As mentioned, the fundamental point of departure was premised on avoiding old debates about the distinction between law and politics, or state and market. In order to bypass administrative hangups like these, the new policy perspective required open-mindedness from its

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34. *Id.*

35. Lasswell, a scholar of political science, psychology, communications, and law, worked directly in Dewey's shadow while at the University of Chicago in the 1920s. For discussions of the approach of the New Haven School, see *McDougal's Jurisprudence*, 79 AM. SOC'Y INT'L L. PROC. 266 (1985); Symposium, *The New New Haven School*, 32 YALE J. INT'L L. 299 (2007).

36. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 5 (1959) (emphasis omitted).

37. *Id.* at 6.

38. See McDougal & Lasswell, *supra* note 36.

agents whereby “the institutional details of all systems of public order are open to reconsideration in the light of the contribution they will make to the realization of human dignity in theory and fact.”<sup>39</sup> The basic architecture involved a series of tasks for the administrator: (1) orient oneself to the largest possible context of evolving social processes;<sup>40</sup> (2) develop an understanding of how local communities generate expectations about the process of authoritative decision-making, whether these decisions are located in the public or private sphere;<sup>41</sup> (3) take a view of regulation as a mixture of prescriptive norms, softer recommendations, the application of both hard and soft norms, and an ongoing appraisal of the work of the norms at the street-level;<sup>42</sup> and (4) keep in mind the broader framework goal of furthering human dignity, and in keeping with post-realist preference for process over rule, think of this goal as deliberately open-ended and as “a social process in which values are widely and not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power.”<sup>43</sup>

Roughly around the time that the US Supreme Court began its courtship of the modern liberal style and scholars like Lasswell and McDougal started building their post-realist machinery, lawyers and economists began an effort to theorize the export of the industrial model of economic development to the Third World. There is little doubt that attempts in the West to “civilize,” “modernize,” and “develop” the non-West began well before World War II.<sup>44</sup> Nevertheless, the notion that it

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39. *Id.* at 6.

40. *Id.* at 7–8.

41. *Id.* at 8.

42. *Id.* at 9–10.

43. *Id.* at 11.

44. As John Ohnesorge has similarly pointed out, “Today’s histories of law and development typically begin during the modernization era of the 1950s and 1960s, though this fails to address the central role of law and legal imposition in the era of colonization. However, it is fair to date the current mode of law and development activities to the 1960s, when primarily Western governments, institutions, and academics became involved with the legal systems of many developing and newly-independent countries.” John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L ECON. L. 219, 222–23 (2007). There is any number of points in the historical record that might be chosen as a starting point for the West’s “civilizing” mission. An example would be the work of Francisco Vitoria, who in the early Sixteenth Century advised King Charles of the Habsburg Empire on the legalities and arguments in favor of the conquest of the New World. Among these arguments was the idea that through exposure to Spanish culture and Christian religion, the Indians would engage in trade and generate economic development in the European tradition. Francisco Vitoria, *On the American Indians*, in VITORIA: POLITICAL WRITINGS 278–84 (Anthony Pagden & Jeremy Lawrance eds., 2008). For discussions of Vitoria, see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2007); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1 (1986). More generally, see MARTTI KOSKENIEMI, THE GENTLE CIVILIZER OF NATIONS (2002).

was at this time that the Western industrialized nations first took hold of the idea—in the wake of a frightening, postwar economic climate—is commonplace in the literature on development studies.<sup>45</sup> To be sure, there is much sense to the argument that, surveying a broken Europe, the United States perceived a brave new market waiting to be opened in the colonized world. But two obstacles stood in the way. First, the former colonies would need to establish their political independence so they could transact in the global economy as sovereign states.<sup>46</sup> Next, they would need to develop their economies in line with modern industrialized societies.<sup>47</sup> These two problems called for a division of labor, where diplomats and lawyers would handle the former, and economists would tackle the latter. Thus was born the field of development economics.

The names Ragnar Nurkse, Paul Rosenstein-Rodan, Albert Hirschman, Arthur Lewis, and Walt Whitman Rostow, are typically associated with this first wave of work in the 1950s, all of whom were generally influenced by Keynes.<sup>48</sup> As a result, their prescriptions for economic development all tended to gravitate around a core set of ideas. Among them were a focus on savings and investment, methods for augmenting demand over worries about supply shortages, and above all an image of an aggressive, large-scale, interventionist government. Markets were important, to be sure, but only insofar as they produced results in keeping with theories of distributive justice, and not because of any particular ideals the rules of the market might have otherwise symbolized.

As a result of this confined idea about market performance, tasks that the market might fail should be picked up by state agencies. Consequently, some of the big ideas that came out of this period were the theory of the big push (the idea that a synchronized plan of several major industrial investments would lead to a chain reaction of “virtuous circles”

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45. See, e.g., JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 98 (2009).

46. For discussion of the decolonization process under international law, see ANGHIE, *supra* note 44; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2006).

47. For histories, see ALICE H. AMSDEN, *THE RISE OF THE REST: CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES* (2001); H. W. ARNDT, *ECONOMIC DEVELOPMENT: THE HISTORY OF AN IDEA* (1987); GERALD M. MEIER, *BIOGRAPHY OF A SUBJECT: AN EVOLUTION OF DEVELOPMENT ECONOMICS* (2005); GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* (2002). For critical analysis, see ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995); *RETHINKING DEVELOPMENT ECONOMICS* (Ha-Joon Chang ed., 2003).

48. *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1936) was Keynes' most influential text. For some recent examinations of Keynes, see MICHAEL S. LAWLOR, *THE ECONOMICS OF KEYNES IN HISTORICAL CONTEXT* (2006); DONALD MARKWELL, *JOHN MAYNARD KEYNES AND INTERNATIONAL RELATIONS* (2006).

multiplying their effects through the economy);<sup>49</sup> the theory of unbalanced growth (the idea that massive investment in only key industrial sectors, due to scarcity of resources, would create supply bottlenecks elsewhere in the economy, with the effect of creating pressure for new investment “linkages” between industry partners);<sup>50</sup> the theory of surplus labor (the idea that the problem of having too few workers employed in higher-income positions could be remedied through transferring workers from agriculture to industry without doing harm to the agricultural sector due to the establishment of more efficient means of labor);<sup>51</sup> the theory of stages of growth (the idea that all developed societies move through a series of progressive stages, including the destruction of traditional society and the setting of industrialization’s “preconditions,” and the “take-off” into sustained development).<sup>52</sup>

Though also writing in this same period, writers like Raul Prebisch,<sup>53</sup> Andre Gunder Frank, and Gunnar Myrdal belong to a separate group of development economists due to their shared theses about how the structure of trade relations was deeply flawed in a way that favored the West at the expense of the rest.<sup>54</sup> For Prebisch and his early version of dependency theory, the idea was that as long as industrialized nations export manufactured goods, and the Third World exports raw materials for use in those goods, the benefits of trade would always accumulate at the center, and at the risk of harming the periphery.<sup>55</sup> Following this diagnosis, some

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49. RAGNAR NURKSE, PROBLEMS OF CAPITAL FORMATION IN UNDERDEVELOPED COUNTRIES (1953); Paul Rosenstein-Rodan, *The Theory of the Big Push*, in LEADING ISSUES IN ECONOMIC DEVELOPMENT 3d (Gerald Meier ed., 1976).

50. ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1958).

51. W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labour*, 22 MANCH. SCH. ECON. SOC. 139 (1954).

52. W. W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO (1960).

53. See generally *Commercial Policy in the Underdeveloped Countries*, 49 AM. ECON. REV. 251 (1959); *The Economic Development of Latin America and Its Principal Problems*, U.N. Dep’t of Econ., U.N. Doc. E/CN.12/89/rev.1, U.N. Sales No. 1950.II.G.2 (1950).

54. Two other well-known economists that are also said to belong to the “heterodox” school include Clarence Ayres and Gunnar Myrdal. CYPHER & DIETZ, *supra* note 45, at 180. Both writers were associated with institutional economics, which Cypher and Dietz define as an academic focus on the “institutions of an economy, that is, the forms of productions, ownership, work processes, and ideologies which combine to create an economy and society. . . . Since, furthermore, such institutions are subject to evolutionary change, the process of studying economics should also properly be evolutionary.” *Id.* For representative publications, see C.E. Ayres, *Economic Development: An Institutional Perspective*, in LATIN AMERICA’S ECONOMIC DEVELOPMENT 89 (James L. Dietz ed., 1991); GUNNAR MYRDAL, THE CHALLENGE OF WORLD POVERTY (1970).

55. This idea also became associated with the work of Hans Singer, and what was later labeled the “Prebisch-Singer Hypothesis.” See H.W. Singer, *Terms of Trade and Economic Development*, in THE NEW PALGRAVE: ECONOMIC DEVELOPMENT (John Eatwell et al. eds., 1989); JOHN TOYE &

development economists tailored their proposals to a refashioning of the internal markets of developing countries in order to shift away from raw exports and towards manufactured goods.<sup>56</sup> The basic idea was that governments first needed to set up strict tariff barriers, barring access to foreign firms wishing to sell manufactured goods in the local market. If the developing state failed to do this, and left its borders open to “free trade,” local producers would never stand a chance in bringing cheap and simple durable goods to market. If foreign competition was eliminated, local producers could slowly build their infant industries, and while consumers would suffer insofar as they faced less choices in the market, this was viewed as the kind of strong medicine required to move forward. Thus, this strategy substituted local manufactured goods for imports as a vehicle for the industrialization process.

All in all, the 1960s and ‘70s had its share of optimists and critics, arguing in turn for in many cases large, and in other cases very large amounts of state “control” over developing markets.<sup>57</sup> In terms of a general consensus among economists at the “center,” the 1960s was probably a decade in which there was more hope than pessimism, touched off with the exciting prospect that much of the developing world was about to take flight via the logic of Rostow’s theory of growth (published in 1960), and the anointing by the United Nations of the coming years as a

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RICHARD TOYE, *THE UN AND THE GLOBAL POLITICAL ECONOMY* (2004). “In this perspective, the more advanced center countries tend to reap the gains from international trade and investment at the expense of the less-developed periphery. Indeed, trade relations between the center and periphery reinforce higher levels of development in the center countries, while maintaining a relatively lower level of development and poverty in the periphery. In Prebisch and Singer’s analysis, then, free trade can actually be harmful to the peripheral, less-developed nations.” CYPHER & DIETZ, *supra* note 45, at 175.

56. “The principal characteristic of structuralism is that it takes as its object of investigation a ‘system,’ that is, the reciprocal relations among parts of a whole, rather than the study of the different parts in isolation. In a more specific sense this concept is used by those theories that hold that there are a set of social and economic structures that are unobservable but which generate observable social and economic phenomena.” J.G. Palma, *Structuralism*, in *THE NEW PALGRAVE: ECONOMIC DEVELOPMENT*, *supra* note 55, at 316. Gerald Meier has described dependency theory as contending that “development problems of the periphery are to be understood in terms of their insertion into the international capitalist system, rather than the terms of domestic considerations.” MEIER, *supra* note 47, at 66. The problems of dependence by the developing countries on the developed world “may refer not only to deterioration in the peripheral country’s terms of trade but also to unequal bargaining power in foreign investment, transfer of technology, taxation, and relations with multinational corporations.” *Id.* For representative writing, see PAUL A. BARAN, *THE POLITICAL ECONOMY OF GROWTH*, *supra* note 24; CELSO FURTADO, *THE ECONOMIC GROWTH OF BRAZIL* (1963). The name for this shift is *import substitution industrialization*. For discussion, see CYPHER & DIETZ, *supra* note 45, at 271–98.

57. David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 3, at 95, 98–110.



“Decade of Development.”<sup>58</sup> Alas, the 1970s witnessed substantial disillusionment with these theories, as evidence mounted in opposition to the idea that economic development in the Third World was really happening, or at least, happening in any sort of predictable or consistent way.<sup>59</sup>

Perhaps even more importantly, 1973 marked the beginning of transition in the global economy.<sup>60</sup> It was in that year that the Organization of Petroleum Exporting Countries (“OPEC”) announced its price hike on oil exports, sending the world market into a tizzy. The Third World took an especially hard hit, forced to look for loans to replenish their quickly diminishing foreign exchange reserves. The process by which these nations ultimately found a new source of cash, though well-known and well-told, remains bizarre.<sup>61</sup> OPEC states witnessed a hurricane of incoming profits as a result of the price increase, so much so that many states simply didn’t have enough available opportunities to invest the funds. Needing somewhere to grow the money, they turned to the large investment banks in New York, London, and elsewhere. These banks, in turn, then faced the difficulty of finding enough borrowers to generate the interest they would have to pay the OPEC states. Where could the banks turn? Oddly, those very countries being squeezed by the price hike, and looking for loans to cover their increasing deficits, were the perfect market for the banks. Thus, the banks created the idea of the “sovereign borrower,” and the phenomenon known as petrodollar recycling—the movement of Third World payments to OPEC states, funneled to the

58. President John F Kennedy inaugurated the “Development Decade” in an address before the United Nations General Assembly in 1961. “[We] must not divert our eyes or our energies from the harsh realities that face our fellow men. Political sovereignty is but a mockery without the means of meeting poverty and illiteracy and disease. Self-determination is but a slogan if the future holds no hope. That is why my nation, which has freely shared its capital and its technology to help others help themselves, now proposes officially designating this decade of the 1960s as the United Nations Decade of Development.” President John F. Kennedy, Address Before the General Assembly of the United Nations (Sept. 25, 1961), available at <http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Address-Before-the-General-Assembly-of-the-United-Nations-September-25-1961.aspx>. For discussion, see RICHARD JOLLY, LOUIS EMMERIJ, DHARAM GHAI & FREDERIC LAPEYRE, UN CONTRIBUTIONS TO DEVELOPMENT THINKING AND PRACTICE 85 (2004).

59. Gerald Meier writes: “Concern about government failure became a landmark turning point in the thinking about development in the 1970s and 1980s. Contrary to the early development economists’ advocacy of centralized government interventions to remedy market failures, an orthodox reaction now focused on government failure and its antidote of neoclassical economics.” MEIER, *supra* note 47, at 81.

60. See generally SCOTT NEWTON, THE GLOBAL ECONOMY 1944–2000: THE LIMITS OF IDEOLOGY (2004).

61. For discussion, see CYPHER & DIETZ, *supra* note 45, at 529–48.

private investment banks, and loaned back to the Third World in order to make payments to OPEC.

In contrast to these developments in development economics, what of the modern style of liberal legalism? Was it true that lawyers were only concerned with making colonies into sovereigns? While it cannot be denied that international lawyers were certainly preoccupied with “decolonization,” by and large it was domestic lawyers, coming from the social sciences, who worked to assist the developing world in the establishment of transplanted legal systems. Looking back from 1974, Marc Galanter and David Trubek saw the “law and development” movement as having six propositions animating this project.<sup>62</sup> First, the state must be recognized as the focal point of social control, though the state should never be viewed as a moral end in itself.<sup>63</sup> Its purpose is to facilitate the efforts of individuals to pursue their preferences, though these preferences are subject to the state’s coercive restrictions. Second, the state’s facilitative and coercive functions are always subject to the legal order which consists of general, universal, and neutral constraints on public authority.<sup>64</sup> Third, the rules in the legal order are “consciously designed to achieve social purposes” by a democratically organized electorate in which all members are free and equal in their opportunities to make their voices heard.<sup>65</sup> Fourth, these rules are applied equally, and consistently with their purposes.<sup>66</sup> Fifth, the judiciary is the central institution in the legal order, since it has the last word on a particular rule’s social meaning.<sup>67</sup> Sixth, these rules have a quasi-organic quality inasmuch as citizens have largely internalized the rules, and officials take the rules as guides before listening to their private and personal bases for decision-making.<sup>68</sup> Taken together, “a legal system is an integrated purposive entity which draws on the power of the state but disciplines that power by its own autonomous and internally derived norms.”<sup>69</sup>

In this period before the rise of neoliberalism and the Rule of Law program, the primary focus of lawyers trying to use law as a means of economic development was to take this set of modern liberal ideas, and

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62. David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies*, 1974 WIS. L. REV. 1062 (1974).

63. *Id.* at 1071.

64. *Id.*

65. *Id.*

66. *Id.* at 1072.

67. *Id.*

68. *Id.*

69. *Id.*

teach it to the judges, lawyers, and law students of the Third World.<sup>70</sup> The hope was that, just as this image of an empowered class of legal professionals in the Western world generated the modern market society, so would it to do the same elsewhere.<sup>71</sup> As for what *precisely* it would do, the idea was that a transplanted liberal legal order would promote freedom, equality, community, and ultimately enhance social welfare through a series of spillover effects. Liberalization in one sector of developing society, be it through import substitution or the creation of an Anglo-American judiciary, would hopefully bring about a ripple of modernizing effects. Deng Xiao Ping's effort to liberalize China's economy in 1978, for example, was widely believed to be a precursor to liberal democracy and civil rights.<sup>72</sup>

Despite the fundamental focus on legal education, this period was nevertheless accompanied by an armada of changes to the legal fabric of the importing society: "Import substitution' industrialization demanded the creation of numerous public law institutions, established by statute and implemented by public law bureaucracies: exchange controls, credit licensing schemes, tariffs, subsidy programs, tax incentives, price controls, national commodity monopolies."<sup>73</sup> These transformations were new to most developing states, "replacing colonial law, overturning customary law, and offering a largely public law framework for economic exchange."<sup>74</sup> An explicit focus by "law and development" practitioners on the strengthening of local legal elites, and the need for a background recognition that a transplanted image of the modern welfare state brought with it a dense web of legal requirements, was also accompanied by a perceived need for international laws that could track the ground rules and govern the development process from "above." Most notably, the motivation in giving law and development an international orientation drew from the ideas spinning out of dependency theory: if there was something broken in terms of international trade, international law seemed the natural hope for legislating a "revision of the global economic and political order."<sup>75</sup>

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70. David Trubek, *supra* note 7, at 76–77.

71. Trubek & Galanter, *supra* note 62, at 1075. For a contemporary critique of the economic mind-set, see RENTS, RENT-SEEKING, AND ECONOMIC DEVELOPMENT: THEORY AND DEVELOPMENT IN ASIA (Mushtaq Khan & KS Jomo eds., 2000).

72. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2006).

73. David Kennedy, *Political Choices and Development Common Sense*, *supra* note 57, at 102.

74. *Id.*

75. *Id.* at 115. Although much of the inspiration for this movement came from scholars living in the Third World, international lawyers based at the Columbia and N.Y.U. Law Schools were pivotal.

The shift to international law was largely taken by international lawyers from the Third World, and the most prominent manifestation in this context was the call for a “New International Economic Order.”<sup>76</sup> Articulated as a Declaration at a session of the United Nations General Assembly, the ideas behind the NIEO were big ones: the new international legal order would be “based on equity, sovereign equality, interdependence, common interest, and cooperation among all states irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, and make it possible to eliminate the widening gap between the developed and developing countries.”<sup>77</sup> The movement crystallized in Mohammad Bedjaoui’s *Towards a New International Economic Order*, published in 1979, but was already being excavated only a few years later for the lessons of its failure.<sup>78</sup>

### III. THE THIRD GLOBALIZATION: LEGAL PRAGMATISM

Thus far, we have reviewed the first two phases in Duncan Kennedy’s story of American Legal Thought. I provided a snippet of Lockean property theory as a way of glimpsing the basic style of classical legal thought, and touched on the Supreme Court’s *Shelley* decision and the early vision of the New Haven School as reflections of “the social.” In addition, I relayed a very cursory telling of the conventional beginnings of the field known as “law and development,” and situated that field in the context of modern liberalism and social legal thought. In the discussion that follows, I first present Kennedy’s third phase of legal consciousness, and then reframe it in the language of pragmatism and liberalism. I then suggest that the pragmatic “problem-solving” approach of contemporary legal thought is nicely illustrated in the current posture of the law and development field. After a review of the neoliberal pairing of the Rule of Law ideal with the World Bank’s subsequent interest in the “conflicting considerations” approach, the discussion then turns to “experimental

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*See, e.g.*, WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964); Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT’L L. (1976); Thomas Franck, *The New Development, Can American Law and Legal Institutions Help Developing Countries?*, 12 WIS. L. REV. 767 (1972).

76. For a recent discussion, see BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

77. Declaration of the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974).

78. David Kennedy, *Political Choices and Development Common Sense*, *supra* note 57, at 117–28.

pragmatism.” Many scholars are now seeking shelter in the term, offering it as a route out of the contemporary gridlock. From the perspective of liberal legalism, the discussion asks whether an experimentalist perspective on problem-solving, at least in the hands of influential scholars like Charles Sabel, William Simon, and Cass Sunstein, provides us with such a route. My conclusion is hedged, but ultimately suggests that experimentalism will have a really hard time being “experimental” so long as its methods are so deeply rooted in the liberal styles of the 20th century.

#### *A. Neoformalism and the Conflicting Considerations Approach*

In his description of contemporary legal thought, Duncan Kennedy has suggested that the present mode of legal analysis consists in the transformed elements of both CLT and social legal consciousness.<sup>79</sup> That is, where we might be tempted to see a social antithesis to a classical thesis, there is no synthesis to be found in contemporary legal thought. There is no new, dominant set of ideas that can be contrasted with the ideas of previous periods. Instead, we have the debris left over after the attack on CLT, as well as the debris left over from the various critiques deployed against the social, including those movements that emerged in the 1970s like neoliberal styles of legal discourse in the form of the law and economics approach, neoformalist critiques from within the discourse of modern liberalism, like liberal constitutionalism and republicanism, and styles of critique attempting to stand outside of liberal legalism altogether, like critical legal studies.

Consequently, Kennedy suggests that while contemporary legal thought lacks a large integrating concept, we can nevertheless identify two basic and ultimately contradictory kinds of *langue*: neoformalism, transformed from its origins in CLT, and the balancing of conflicting considerations, transformed from its functionalist origins in social legal consciousness. There is no end to the sorts of examples we might choose to illustrate the combination of these modes of reasoning, and so to take one at random, consider the U.S. Supreme Court’s 2008 decision in *Medellin v. Texas*.<sup>80</sup> The case was a controversial one, dealing with the double approach of the United States judiciary to the International Court of Justice’s *Avena* decision,<sup>81</sup> and a subsequent executive order from U.S.

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79. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, *supra* note 3, at 63–73.

80. 552 U.S. 491 (2008).

81. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12 (Mar. 31).

President George W. Bush seeking to implement that decision.<sup>82</sup> The dispute made its way to the ICJ via a complaint from Mexico against the United States, in which the former claimed that the latter had violated certain rights due to Mexican nationals under the Vienna Convention on Consular Relations. The ICJ ruled that U.S. officials had failed to fulfill those obligations, and President Bush ordered the state courts of Texas to review the conviction of the identified Mexican nationals in light of *Avena*.<sup>83</sup>

The question before the Supreme Court was what to make of all this. After sweeping aside the idea that the US Supreme Court was obliged to follow orders either from the ICJ or the US President, the Court sought to independently answer the question of whether the US had certain obligations under the Vienna Convention, and in the parlance of the controversy, whether that treaty was self-executing. The Court was split. Writing for the majority, Chief Justice Roberts made a series of sharply defined *neoformalist* moves.

First, Roberts acknowledged the validity and efficacy of international law. “No one disputes that the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States.”<sup>84</sup> Roberts made it clear that the relevant question here was not whether international legal obligations exist, *per se*, but whether in this case it was possible to deduce a directly effective legal obligation from any relevant treaties regarding these Mexican nationals residing in Texas. This question, it turned out, was easy. The majority’s approach was this: Once the relevant texts are examined, a court is obliged to follow a legal formula instructing it to search out any language providing a private party with a right to enforce the treaty. Upon finding such language, a court should determine that the treaty is directly effective in court. Without the language, it’s not. Roberts didn’t find anything on point, and in the absence of the operative words, the majority concluded with a third point: “where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the courts to impose one on the States through lawmaking of their own.”<sup>85</sup> This conception regarding an important distinction between law-making and law-applying, where the business of law-makers is necessarily ideological and the business of law-appliers is objective, was further elaborated in Justice Robert’s critique of Justice Breyer’s dissent.

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82. *Medellin*, 552 U.S. at 502.

83. *Id.* at 503.

84. *Id.* at 504.

85. *Id.* at 513–14 (quoting *Sanchez-Lamas v. Oregon*, 548 U.S. 331, 347 (2006)).

In making an argument that has all the hallmarks of the *conflicting considerations* approach, Breyer suggested that the presence or absence of certain language is totally beside the point.<sup>86</sup> In contrast to Roberts' focus on formal rules, Breyer's claim was that the "case law suggests practical, context-specific criteria" that should be used to help a court decide whether a treaty was self-executing. Breyer's approach demanded answers to a series of fact-based questions, such as the purpose of the treaty, its historical and political context, and whether the treaty seemed more or less focused on judicial application or not. Breyer recognized that these sorts of questions did not yield "a simple test, let alone a magical formula."<sup>87</sup> But given the actual and realistic unavailability of a meaningful textual approach like Roberts', the focus on the function of the treaty and the effort to balance all the extraneous factors is all a court can really ever hope to do.

The majority was unhappy with this response. Justice Roberts argued that Breyer's notions were notoriously ad hoc, indeterminate, incapable of actually providing predictable guidance, and probably most important of all, "tantamount to vesting with the judiciary the power not only to interpret but also to create the law."<sup>88</sup>

*Medellin* provides a good example of how the language of classic liberalism and modern liberalism oscillates in the standard moves of our contemporary jurisprudence. That is, as Kennedy rightly argues, the modes of reasoning that defined classical legal thought and social legal thought have not been borrowed wholesale from prior moments in the history of our jurisprudence. We have not looked into the closets of our parents, and thrilled at the sight of clothes thought hideous by a former generation. Contemporary legal thought is a new breed: neoformalism is not the will theory, and the conflicting considerations approach is not welfarist functionalism.

These insights into the present situation do not, however, require us to see contemporary legal consciousness as only a pile of scattered debris. One possibility is that there actually is a new integrating concept, a new *langue* that can explain and embody the strange union of the transformed elements of the classic and modern forms of liberal legalism. That integrating concept could be something called "pragmatism."<sup>89</sup> An

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86. *Id.* at 549.

87. *Id.* at 550.

88. *Id.* at 516.

89. Desautels-Stein, *At War with the Eclectics*, *supra* note 2; see also Justin Desautels-Stein, *Extraterritoriality, Antitrust, and the Pragmatist Style*, 22 EMORY INT'L L. REV. 499 (2008).

immediate question is whether pragmatism is new, and our intuition may very well be to say that its not. Let us then disaggregate the term a bit in order to see if there is something about pragmatism that is indigenous to contemporary legal consciousness.

A first category is “philosophical pragmatism.”<sup>90</sup> This is a pragmatism that holds itself out as a way of thinking about epistemology, ethics, is-oughts, universals, consequentialism, and other standards in the canons of moral and political philosophy.<sup>91</sup> The founding triumvirate, as is well known, includes Charles Sanders Peirce, William James, and John Dewey. There may be less consensus when we start to think about the availability of a body of work called “neo-pragmatist,” but the nature of the conversation is pretty familiar. It’s a conversation about the likes of Richard Rorty, Hilary Putnam, Stanley Fish, Jurgen Habermas, Richard Bernstein, and others that have attempted to interpret the older generation of pragmatists in light of a more particular theory of what philosophical pragmatism entails.<sup>92</sup> With respect to either brand of philosophical pragmatism, it is clear that neither is couched as a theory of law. To be sure, many of these scholars have applied the prior work to legal questions, but it’s always a matter of philosophy applied to law, not pragmatism as a theory of law first.<sup>93</sup>

In contrast to philosophical pragmatism is a second category, popularized by Richard Posner.<sup>94</sup> This is an “everyday pragmatism” in the vernacular. It is the pragmatism that is constantly deployed in the newspapers, by pundits and politicians.<sup>95</sup> It is almost universally understood in the context of the United States as a badge of honor to be known as a pragmatist. These pragmatists are against ideology, against

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90. For discussion, see JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* (1957); WILLIAM JAMES, *THE WILL TO BELIEVE: AND OTHER ESSAYS IN POPULAR PHILOSOPHY* (1979); HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* (2002); HILARY PUTNAM, *REASON, TRUTH, AND HISTORY* (1981); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979). For representatively general treatments, see *CLASSICAL AMERICAN PRAGMATISM: ITS CONTEMPORARY VITALITY* (Sandra B. Rosenthal et al. eds., 1999); LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001); JOHN P. MURPHY, *PRAGMATISM: FROM PIERCE TO DAVIDSON* (1990); *THE PRAGMATIC TURN IN PHILOSOPHY: CONTEMPORARY ENGAGEMENTS BETWEEN ANALYTIC AND CONTINENTAL THOUGHT* (William Eggington & Mike Sandbothe eds., 2004); *PRAGMATISM, CRITIQUE, JUDGMENT: ESSAYS FOR RICHARD J. BERNSTEIN* (Seyla Benhabib & Nancy Fraser eds., 2004); *THE RANGE OF PRAGMATISM AND THE THE LIMITS OF PHILOSOPHY* (Richard Shusterman ed., 2004).

91. Desautels-Stein, *At War with the Eclectics*, *supra* note 2, at 576–86.

92. *Id.*

93. *Id.*

94. *Id.* at 595.

95. *Id.*



foundational theory, against theories of truth or right. They will do what they need to do in order to get it done. Whatever works. Action-oriented thinking. “Just Do It.”<sup>96</sup> President Obama has consistently portrayed himself as a pragmatist, and against ideology, in precisely the same way that his opponents on the right do the same thing.<sup>97</sup>

Of course, there are many complaints about everyday pragmatism. One is that it appears to have nothing at all do with its philosophical cousin. Among many other things, philosophical pragmatism is explosive. For the believer, it renders so many propositions about the known world into fuzz. Everything opens up for the serious pragmatist, where the well-known saying about William James becomes a saying about everything: “He was so extremely natural that there was no knowing what his nature was, or what to expect next.”<sup>98</sup> In this way of thinking, nature becomes a site of constant knowing and unknowing, where little if anything can be said about the way things ought to be done. It is an undeniably subversive approach to world order. In contrast, the everyday pragmatist is a soldier in favor the status quo. She doesn’t believe in a so-called ideology, wanting only to tinker at the margins, slowly and incrementally. It’s a view of the world that basically takes it as it is, hoping to slowly make it better, but knowing that it’s already pretty good to begin with.

A third category of pragmatism is legal pragmatism, and it is legal pragmatism that may offer us a language that can capture the modes of reasoning we see in our contemporary jurisprudence. In terms of mapping legal pragmatism itself, there appear to be several varieties.<sup>99</sup> One is “eclectic pragmatism.” Eclectic pragmatism is easy to understand, since it is essentially the layering of everyday pragmatism onto the problematics of legal discourse. Just as everyday pragmatism is alienated from philosophical pragmatism, so is eclectic pragmatism. It is this divorce that has led writers like Posner, Rorty, and Tom Grey to all make the claim for

96. Apparently, Nike’s famous slogan came about after an ad man praised Nike for its brazenly “can-do” attitude, and said, “You Nike guys, you just do it.” Nike’s Just Do It Advertising Campaign, Center for Applied Research, *available at* <http://www.cfar.com/Documents/nikecomp.pdf>.

97. In transforming himself in preparation for his candidacy for President, Newt Gingrich attempted to situate himself more pragmatically. *See, e.g.*, Sheryl Gay Stolberg, *For Gingrich in Power, Pragmatism, not Purity*, N.Y. TIMES, Dec. 20, 2011.

98. MENAND, *THE METAPHYSICAL CLUB*, *supra* note 90, at 77 (quoting George Santayana).

99. In this Article, I am concerned with “eclectic pragmatism” and “experimental pragmatism.” Another, increasingly popular style of legal pragmatism is “economic pragmatism,” which is distinct from both neoclassical and behavioral law and economics. *See, e.g.*, RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); Desautels-Stein, *At War with the Eclectics*, *supra* note 2, at 595–605, 611–22.

a legal pragmatism “freestanding” from the work of James, Dewey, and company.

Before moving on to the other forms of legal pragmatism, the connection between eclectic pragmatism and contemporary legal consciousness deserves another word. After all, we might intuitively see a connection between the “conflicting considerations” approach and eclectic pragmatism, but what of neoformalism? How does eclectic pragmatism ally with a style of jurisprudence which seems at first blush to be in tension with the basic commitments of the everyday pragmatist?

In order to properly understand these questions, we need to distinguish between the self-identified legal pragmatist as an individual agent, either in the guise of a judge or administrator or whoever, and legal pragmatism as a form of legal consciousness. In the first case, we can look to the works of scholars like Cass Sunstein as representative of an idea about a status-quo jurisprudence, based on an attraction to context and an abhorrence towards grand theory and foundations.<sup>100</sup> The work of law should be a law that works, solving problems through an appreciation of economics, sociology, political science, and whatever other forms of knowledge-production may help us steadily move forward in the elaboration of a “better” law. In this sense, the eclectic pragmatist does not seem readily susceptible to the dynamics of neoformalism and its attachment to rights and right thinking.

When we recognize that eclectic pragmatism is also a sensibility, and not merely a professional identity, this tension quickly fades. The average judge, the average associate at a law firm, the average policy wonk, the average “American,” doesn’t hold the same sorts of quasi-consequentialist

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100. Here I am referring to Sunstein’s theory of “minimalism.” Sunstein describes minimalism in the following way: “Minimalists are skeptical of rights fundamentalism, certainly when the Court is initially confronting difficult questions. They fear that expansive conceptions of rights may be confounded by unanticipated situations. Nor do minimalists have much enthusiasm for the idea of democratic primacy; they fear that a wholesale rejection of rights claims will prove embarrassing or worse in the future. Minimalists prefer small steps over large ones. . . . To support that preference, minimalists invoke several considerations. The initial point is pragmatic: as Chief Justice Roberts’s comments suggest, no consensus may be possible on a more ambitious ruling. . . . There is an independent point, closely connected with the argument for trimming. Insofar as they are shallow, minimalist rulings show a kind of respect to those with competing commitments on issues of principle and policy. If a ruling can command agreement from people with fundamentally different views, it demonstrates respect to those people, and even shows them a degree of charity. To the extent that judges have a degree of diversity, the respect that they show one another extends to their fellow citizens as well. When judges embrace shallowness, minimalists seek to obtain some of the virtues of the ‘overlapping consensus’ defended in accounts of political liberalism.” Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1081–83 (2009).

commitments of a Sunstein or Farber.<sup>101</sup> They are rather far more inclined to use whatever mode of reasoning will be the most successful in achieving their given ends. This is the mindset in which it becomes *normal* to hear big-firm associates, and even partners, talk of using critical legal studies, *when it works*. It doesn't matter what critical legal studies, or behavioral law and economics, or public choice theory, or human rights law, might actually mean in terms of its political stakes. *The only thing that matters* for the eclectic pragmatist is that they select the mode of reasoning, whether it falls within the *langue* of formalism or the *langue* of functionalism, that wins. If it gets the client what he wants, use it. If it gets a politician elected, do it. If it solves our problems, try it.

The notion that this form of legal pragmatism might constitute a contemporary legal consciousness comes into view when we bring liberal legalism back into the story. If classical legal consciousness was related to classic liberalism, and social legal consciousness was related to modern liberalism, where is liberalism in the legal consciousness that we have today?

Eclectic pragmatism instructs us on the merits of having lost faith in either the classic or modern styles of liberal legalism. We no longer believe in the dominance of the will theory as *the* way in which to understand the role of law in the constitution of society, and we also no longer believe in the dominance of state interventionism as *the* universal corrective. And in the light of eclectic pragmatism, this is a moral good. In this view, faith in any particular liberal approach gets in the way of getting what we want, and getting what we want is what matters. The eclectic pragmatist has most assuredly lost faith in both classic liberalism and modern liberalism, which accounts for why contemporary legal thought consists in the *transformed* elements of CLT and the social, and not just a blending of those elements. But here's the key: the eclectic pragmatist *has not* lost faith in liberalism. Indeed, what appears to have shaped up is a sort of "pragmatist liberal legalism" in which the jurist is completely committed to the vocabulary of classic and modern liberals, but at the same time denies the faith that classic and modern liberals had in the rightness of their respective modes of legal reasoning. The eclectic pragmatist also has faith, but it is a faith rooted in the rightness of liberalism, but not in any one of its predominant modes.

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101. Desautels-Stein, *At War with the Eclectics*, *supra* note 2, at 593–94.

Legal pragmatism thus sustains the paradoxical alliance between neoformalism and policy balancing. It keeps the two going—without pragmatism, we might very well see a different form of legal consciousness. If we weren't committed to a crass vision of "what works," something else would be necessary to justify the continuation of a much maligned style of formalism. At the same time, it is eclectic pragmatism that inoculates policy balancing from fatal critique. It is pragmatism that makes it possible to say: "We do these things because they work, not because they're right."

### *B. Law & Development in the Third Globalization*

Just as the law and development movement in the middle years of the 20th century reflected the consciousness of social legal thought, so does the contemporary style of law and development policy reflect the pragmatist consciousness of contemporary legal thought. As discussed below, the contemporary phase of the field tracks the bifurcated nature of the third globalization's legal pragmatism, housing both orientations that take neoformalism as a point of departure and orientations that take neoformalism as merely one variable in a constellation of conflicting considerations.

#### *1. Neoliberalism and the Rule of Law*

The emergence of neoformalism and neoliberalism in the last decades of the 20th century was attended by a war cry: "The Rule of Law!" Of course, at its most fundamental, the idea is hardly one over which neoliberals hold a monopoly. Indeed, classic and modern liberalism share a great deal of common ground with regard to a general conception of the Rule of Law.<sup>102</sup> This conception has several elements.

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102. For discussions of the "Rule of Law" in general see Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008); RELOCATING THE RULE OF LAW (Gianluigi Palombella & Neil Walker eds., 2009); Colloquium, *The Rule of Law Papers*, 43 INT'L LAW. 1 (2009); RULES OF LAW AND LAWS OF RULING (Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Julia Eckert eds., 2009); BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003); THE RULE OF LAW: HISTORY, THEORY AND CRITICISM (Pietro Costa & Danilo Zolo eds., 2007); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); Brian Z. Tamanaha, *The Dark Side of the Relationship Between The Rule of Law and Liberalism*, 3 N.Y.U. J. L. & LIB. 516 (2008); Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 3, at 253; ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 48–58 (1976).

First is the principle of legal autonomy.<sup>103</sup> That is, liberal law must be autonomous from the society that it is meant to govern, for if law is unable to maintain a degree of independence from its subjects, the distinction between law and politics collapses.<sup>104</sup> At the same time, liberal law must also be autonomous from any particular religious or moral code, since the identification of law with morality would render useless the whole idea of society being governed by a set of rules to which it has consented.<sup>105</sup> Another way of putting this is that, in liberal society, it is essential that rulers be constrained by something other than their own personal worldviews; the law must be autonomous from personal morality, and autonomous from personal politics.<sup>106</sup> Legal autonomy must also be institutionally viable—the Rule of Law cannot be applied and interpreted by a political body, namely the legislature, and so a separation of powers is necessary to inoculate the judiciary from the political nature of rule-creation and to set in motion the judicial nature of rule-ascertainment.<sup>107</sup> Due to the necessity of keeping rule-ascertainment autonomous from rule-creation, liberal law also requires the idea of legal reasoning to be autonomous from other forms of reasoning, such as happens in politics, economics, or religion.<sup>108</sup>

A second aspect of liberal law is legislative generality.<sup>109</sup> Liberal law should not cater to the preferences of any particular group, but must instead be couched in universal, neutral terms.<sup>110</sup> In this way, generality is said to bring with it a sense of procedural fairness, as the motivating idea is to make general prescriptions for the population without favoring

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103. Most scholars seem attracted to an idea of “Relative autonomy”. Among other things, classic and modern liberals share a belief in the constitutive power of law. That is, liberalism holds as a political prerequisite the possibility of a legal order which exists independently of the market, but is at the same time capable of shaping the foundational materials of market society. Traditionally, liberals have stressed the law’s independence from economics and politics, and neglected the details of law’s background role in economic theory. The reason legal independence or autonomy has been understood as a critical component of the liberal program, since this is the only way to guarantee that the sovereign will exercise its power in a neutral and general way, constrained by preexisting norms and prohibited from ruling on the basis of its own preferences or ideological outlook. For discussions of relative autonomy, see Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the ‘Relative Autonomy’ of the Law*, 11 L. & SOC’Y REV. 571 (1977); Hugh Baxter, *Autopoiesis and the ‘Relative Autonomy’ of Law*, 19 CARDOZO L. REV. 1987, 1994 (1998).

104. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 76–88 (2005).

105. UNGER, LAW IN MODERN SOCIETY, *supra* note 102, at 83–103.

106. Waldron, *supra* note 102, at 6–7.

107. UNGER, LAW IN MODERN SOCIETY, *supra* note 102, at 83–103.

108. *Id.*

109. *Id.*

110. Waldron, *supra* note 102 at 6–10.

substantive conceptions of what it means to lead a good life.<sup>111</sup> General legislation must also be clear, public, and predictable, so that the general population is easily able to understand and rely on a set of norms that will guide their expectations as they compete in market society.<sup>112</sup>

A third and related aspect of liberal law is the uniform interpretation and application of the law through the courts.<sup>113</sup> Just as a violation of legislative generality would undermine the liberal value of a free and equal citizenry, so too would the persistence of judicial preferences in the application of the law rob citizens of their right to have the law administered equally and without regard to political dispositions.<sup>114</sup>

With respect to the rhetorical power of the Rule of Law ideal, consider the contrasting works of Friedrich Hayek and Roberto Unger. Both agree that liberal law requires a commitment to autonomy, generality, and uniformity. They also agree that liberal law is substantively characterized by a set of background rules, which are then offset by a set of bureaucratized regulations, or foreground rules. With regard to the evolution of these background rules over time, Hayek and Unger both emphasize their connection with customary law, the relationship of custom to the Rule of Law, and the liberal need for the constitution to safeguard the Rule of Law from state interference.<sup>115</sup> As Unger has said, “The animating idea is the effort to make patent the hidden legal content of a free political and economic order. This content consists in a system of property and contract rights and in a system of public-law arrangements and entitlements safeguarding the private order.”<sup>116</sup>

Hayek explained that the Rule of Law, which he also called “rules of just conduct,” evolved because it was successful—it beat out other rules,

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111. See generally MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998); ROBERT DAHL, ON DEMOCRACY (2000).

112. Waldron, *supra* note 102, at 6–7.

113. UNGER, LAW IN MODERN SOCIETY, *supra* note 102, at 83–103.

114. Of course, there is a deep and wide disagreement about how these elements are actually worked out in the liberal style of Rule of Law discourse, and it is unnecessary here to do more than scratch the surface. The reason for this is that in the discussion that follows, most references to a Rule of Law ideal emerge in the contexts of the classic and neoliberal images, and thankfully, both of these entail a set of crisp ideas about what the Rule of Law should mean. The deep ambiguities that muddy the water come in two other situations which this discussion primarily avoids: searching for a definition of the Rule of Law in the context of modern liberalism, or searching for a definition *in abstracto*.

115. Principally, I focus on Unger’s KNOWLEDGE AND POLITICS (1975), LAW IN MODERN SOCIETY, *supra* note 102, and WHAT SHOULD LEGAL ANALYSIS BECOME?, *supra* note 16, and on Hayek’s THE ROAD TO SERFDOM (1944), THE CONSTITUTION OF LIBERTY (1960) and LAW, LEGISLATION, AND LIBERTY, *supra* note 29.

116. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME?, *supra* note 16, at 41.

or customs, because it made for better lives.<sup>117</sup> It would be a mistake to believe, however, that the adherents of these customs ever consciously promulgated them, or may have even been able to articulate them. Customs were, instead, manifested in the regularity of practice: “The important point is that every man growing up in a given culture will find in himself rules, or may discover that he acts in accordance with rules—and will similarly recognize the actions of others as conforming or not conforming to various rules.”<sup>118</sup> What follows from this spontaneous and organic conception of rules is the idea that they cannot be attributed to any conscious, deliberate, human design.<sup>119</sup> For Hayek these rules of conduct are therefore, by definition, pre-political, just as in the same way that the growth of organic compounds or the arrangements of magnetic fields are wholly natural.<sup>120</sup> These customary rules form the core of the Rule of Law.

While the Rule of Law is the essence of the liberal legal order, Hayek reminds that where foreground rules are necessarily distributive, the Rule of Law is “independent of any common purpose,” blindly and equally applicable to all.<sup>121</sup> Real freedom, as a result, is therefore conditioned on a choice of background rules (the Rule of Law) over foreground rules (legislation), where the Rule of Law is understood as permissive and enabling, and legislation is prohibitive and coercive.<sup>122</sup> Hayek helpfully concludes that everything he has discussed with regard to the rules of conduct operating in the spontaneous order and the willy-nilly legislative caprice of governmental organization, tracks exactly the distinction between private and public law, respectively.<sup>123</sup> Also, and again, Hayek says that with regard to constitutional law, its fame has been misconceived. Constitutional law’s job is simply to “secure the maintenance of *the law*”<sup>124</sup>—meaning the common law of property and contract. Unger underlines the point as well when he explains that, as a first way of protecting the liberal principles of property and contract, courts rely on interpretive methods to shift rules that have tended towards distributive, non-neutral policies back towards the Rule of Law.<sup>125</sup> When this is not enough, “[t]he back-up policing practice is constitutional

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117. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE*, *supra* note 29, at 18.

118. *Id.* at 19.

119. *Id.* at 28.

120. *Id.* at 39–40.

121. *Id.* at 50.

122. *Id.* at 32–42.

123. *Id.* at 132.

124. *Id.* at 134.

125. UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?*, *supra* note 16, at 41.

invalidation, striking down those instances of redistribution through law that cannot be preempted through improving interpretation.”<sup>126</sup>

Hayek firmly believed that liberal law led to the most just kind of society men could feasibly attain, and this justice flowed from the primal waters of property and contract law. Finally abandoning the feudal road, Hayek argued that the “decisive step” in humanity’s progressive evolution was the discovery of the bargain.<sup>127</sup> But the ability to consistently determine what belonged to who, and how to trade one thing for another, depended on the development of property and contract rules.<sup>128</sup> If this never were to happen, ideas like “ownership” and “bargain” would never have had any real meaning.<sup>129</sup> Hayek argued that these new rules of conduct were the mechanisms of coexistence, were definitively non-coercive, and had as their central function the creation of a society in which people with different outlooks on life, with different values for different products, could live together in peace.<sup>130</sup> What was required was a law that told no man what he ought to do, but could “tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him.”<sup>131</sup> Though Hayek imagined the private law as non-coercive and pre-political in a very strong sense, he nevertheless did, like Locke before him, believe that the market brought with it more than a sustainable peace (essential as that was), but a just society as well. It was not that either of them thought that the moral content of property and contract would generate any particular constellation of social outcomes, but rather that it was the *process* of the private law that was just.<sup>132</sup> “In this respect what has been correctly said of John Locke’s view on the justice of competition, namely, that ‘it is the way in which competition is carried on, not its results, that count,’ is generally true of the liberal conception of justice, and of what justice can achieve in a spontaneous order.”<sup>133</sup>

Though Unger and Hayek have substantially similar descriptions of the liberal Rule of Law, they part ways when it comes to its evaluation. For Hayek’s neoliberalism, private law governance was the only way to guarantee a maximum of freedom and equality. For Unger and similar

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126. *Id.* at 42.

127. HAYEK, THE MIRAGE OF SOCIAL JUSTICE, *supra* note 29, at 109.

128. *Id.*

129. *Id.* at 35.

130. *Id.* at 110.

131. *Id.* at 37.

132. *See generally* SANDEL, *supra* note 111.

133. HAYEK, THE MIRAGE OF SOCIAL JUSTICE, *supra* note 29, at 38.



critics, the abandonment of social organization to the private law is to acquiesce in persistent and entrenched hierarchies and stark inequalities;<sup>134</sup> is to embrace an institutional fetishism proclaiming the naturalness of one set of legal, political, and economic arrangements;<sup>135</sup> is to mask the political choices embedded in the liberal style of property and contract law, and the benefits these choices typically confer on the wealthy at the expense of the poor;<sup>136</sup> is to indulge a fantasy in which the judiciary's job of ascertaining the Rule of Law is any less subject to political and moral capture than the legislature's job of rule creation;<sup>137</sup> is to pretend that the courts are somehow less arms of the state than other government agencies.<sup>138</sup> As Morris Cohen once wrote, "in actual life real freedom to do anything, in art as in politics, depends upon acceptance of the rules of our enterprise."<sup>139</sup>

To follow Hayek down his road is also to mistakenly substitute the notion of technical expertise in the administration of the Rule of Law for the distributional nature of policy choice.<sup>140</sup> In a recent essay attacking the use of property rights as a background rule for economic development, David Kennedy suggested that a Hayekian advocacy in favor of "clear and strong property rights" fails to understand the highly disaggregated and stratified nature of property law regimes that exist in the industrialized states.<sup>141</sup> "Property in a market economy has no ideal form separate from the warp and woof of social and economic struggle in that society. Before 'property rights' can be strong or weak, they must be allocated and defined—a process which in every Western society has been inseparable from struggles over political and social objectives."<sup>142</sup> In making this argument plain, Kennedy cites several examples of contested choices over different kinds of property regime from the choices to empower women or

134. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME?, *supra* note 16, at 17.

135. *Id.* at 8.

136. See JOHN COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1959); RICHARD ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914). Robert L. Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923); Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 27 (1927).

137. See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (2005).

138. Mark Tushnet & Gary Peller, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 791–98 (2004).

139. Cohen, *The Basis of Contract*, *supra* note 136, at 591.

140. David Kennedy, *Political Choices and Development Common Sense*, *supra* note 57.

141. David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development* (Brown University–Law, Social Thought & Global Governance Research Paper No. 1, 2009), available at <http://ssrn.com/abstract=1468549>.

142. *Id.* at 2.

corporations to independently inherit and transfer property, to choices to terminate the rights of serfs to the commons in favor of yeoman rights to enclosed grazing lands, to choices about the allocation of water rights in the American west, to choices over what should constitute “fair use” in the context of intellectual property debates.<sup>143</sup> In these situations and many more, which set of answers will be “strong and clear”? In every case, the condition of any given property regime will always bear the marks of the political debates in which they were forged. “Consequently, property rights are less a legal ‘system’ than a historical record of winners, losers and social accommodation in economic and political struggles over a nation’s direction. In this sense, neo-liberal orthodoxy is wrong to suggest that the establishment of property rights of a particular kind is a *pre-condition* to a market economy.”<sup>144</sup>

Another typical problem associated with liberal property rights, and also articulated in Kennedy’s piece, is the critique of a determinate relationship between public and private law. As Hayek made clear, the liberal style rests on a strong sense in which property rights (and private law more generally) preexist the regulatory law of the state. But when we take Hayek seriously, and find that property and contract have no meaning until backed with the coercive power of the state, little ground is left to stand upon in which the Rule of Law is understood as somehow less an act of state than some bureaucrat’s administrative decision. As Kennedy explains, “property rights are, in the end, only as strong as one’s ability to bring the state into play as their enforcer.”<sup>145</sup> Hayek would be hard pressed to disagree. But disagree he would with a third problem: “[I]t is simply meaningless to say that property rights *in general* are ‘strong’ or ‘clear’ without specifying just who ought to have a strong entitlement against whom or for just whom the application of the state’s enforcement power ought to be clear and predictable in what circumstances.”<sup>146</sup> When it is remembered that Property law creates rights and duties between people, and not relationships between people and things, it is easier to focus on the fact that strong rights entail strong duties, and the process of economic development inevitably requires political choices about who gets those rights, and who will be held to corresponding duties. As Unger put it, “[T]he facilitative devices of contract and private law will be used by those who, in a sense, are already organized. The organized can find in

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143. *Id.* at 4–5.

144. *Id.* at 6.

145. *Id.* at 10.

146. *Id.* at 12.

their legally sanctioned association reinforcement for their pre-existing advantage.”<sup>147</sup> The choice, as a consequence, is whether and where the development expert wishes to facilitate opportunity for advantage—a choice that cannot be avoided when establishing the background rules of property and contract.

Hayek’s Rule of Law is central to the neoliberal style in a way that it was not for the modern style. To be sure, the modern style advocates the benefits of an expansive legal system, but it is less concerned about a strict relationship between a legal core called the Rule of Law and a body of regulations threatening to “plan” or “intervene.” In fact, the modern style intentionally blurs this distinction. After the neoliberal revival, a crisp image of property, contract, and constitutionalism replaced the distributive functionalism and process-oriented jurisprudence of the prior generation.<sup>148</sup>

But it would be a mistake to assume that this shift represented a simple substitution of “conservative” policies in exchange for “liberal” ones. The forces pushing the new view of “Rule of Law”<sup>149</sup> and development came at once from a burgeoning human rights movement on the one hand,<sup>150</sup> and the free marketers associated with the Washington Consensus on the other.<sup>151</sup> In both cases, the common effect was to produce a view of economic development that required the establishment of private rights guarded by an overarching constitutional order. The difference consisted simply in *which* rights, and *which* order. Nevertheless, and despite this confluence, the clear weight of law and development reform in this period

147. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME?, *supra* note 16, at 17.

148. See generally David Kennedy, *Political Choices and Development Common Sense*, *supra* note 57; Trubek, *supra* note 7.

149. For general discussions of the “Rule of Law” in the context of development, see PER BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA* (2006); KENNETH DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006); *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., 2007); MICHAEL TREBILCOCK & RONALD DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT* (2008); *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 3; John Ohnesorge, *The Rule of Law*, 3 ANN. REV. L. & SOC. SCI. 99 (2007); Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209 (2011).

150. The case that is often thought of as the trigger for the human rights movement was decided in 1980, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). For a description of the case and its impact, see Harold Koh, *Filártiga v. Peña -Irala: Judicial Internalization of the Customary International Law Norm Against Torture*, in *INTERNATIONAL LAW STORIES* 45 (John Noyes et al. eds., 2007). For discussion of the human rights in the development movement, see Roland Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT’L L. 287 (1983).

151. Thomas Carothers, *Rule of Law Temptations*, 33 FLETCHER F. WORLD AFF. 49, 51 (2009).

sat in favor of private law over public. After Reagan and Thatcher, private law ruled.<sup>152</sup>

The new view of law attended a new view of economics. The problem, according to this view, had not been with market failure, but government failure, i.e. the public sector had become overextended, led astray by the allure of bad economics (big pushes, etc.), and was generally in the business of creating economic distortions that had the effect of promoting systemic inefficiencies. The thinking behind this reversal should be familiar: monetarist policy, radiating out of its center at the University of Chicago,<sup>153</sup> regarded government regulation as naturally at odds with the principles of freedom and justice, understood the primary role of government to be a protector of property rights, believed in a strong relationship between market rationality and the role of prices in mobilizing and allocating resources, and sought the elimination of all barriers to free trade, the privatization of industry, and the implementation of special kinds of loans to the Third World trading cash for commitments to battle inflation, corruption, rent-seeking, and so forth.<sup>154</sup>

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152. Among the most influential texts on the importance of the common law is Richard Posner's *ECONOMIC ANALYSIS OF LAW* (1973). For critical responses, see Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 *HOFSTRA L. REV.* 509 (1980); Jules Coleman, *The Normative Basis of Economic Analysis of Law*, 34 *STAN. L. REV.* 1105 (1982) (reviewing RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981)). Elsewhere I have described the shift in normative discussion from the one that took place at the time when writers like Posner, Coleman, and Ronald Dworkin were debating the merits of the new law and economics, to the contemporary one: "Posner's Kantian adventures were by no means the extent of the normative defense. Indeed, much more recently, Louis Kaplow and Stephen Shavell have argued that the norm of personal welfare, as mediated by the efficient allocation and production of social resources, should be the only principle with which the legal decision-maker should be armed. In particular, Kaplow and Shavell have argued that (1) fairness considerations either end up serving a welfare interest, or if they are altogether independent of a welfare criterion, they systematically produce undesirable social consequences; (2) fairness considerations are at best subsidiary to welfare considerations and are at worst in conflict with human welfare, and as a consequence; (3) deontic preferences for justice or fairness should be abandoned in favor of efficient allocations of goods that best approximate the needs of social welfare.

This approach to a normative defense of the law and economics approach is quite different than the round of arguments made in the 1980s. Kaplow and Shavell presume that there is something intuitively desirable about efficiency as a first principle, and once it is claimed that fairness considerations violate that first principle, the burden falls on deontologists to show how fairness can, in fact, serve efficient ends. The big difference between the two debates is that what was once understood as an issue for actual debate in terms of justification and legitimation (i.e., whether efficiency and wealth-maximization could be normatively defended on moral grounds), now happily operates as the default position where the burden is on non-welfare considerations to show how they do not threaten social welfare" Desautels-Stein, *At War with the Eclectics*, *supra* note 2, at 603.

153. For history on the Chicago School, see STEVEN MEDEMA, *THE HESITANT HAND* 160–96 (2009). For a critical review, see DAVID HARVERY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007).

154. One of the figures commonly associated with the neoliberal shift is Anne Krueger, who at times held high positions at both the World Bank and the International Monetary Fund. Krueger helped consolidate the idea that the major problems in development economics had centered on

Some neoliberal stylists believed that by using law and politics—and an enormous amount of political pressure via the World Bank and IMF—developed countries could force open the borders of the Third World; structure its internal markets through the deployment of Western-style bank systems, insurance plans, and commercial, corporate, intellectual property, and securities law; and pry domestic producers off of their state-sponsored dependencies. Local industry would be forced to compete, and ultimately thrive.<sup>155</sup> The keener among them, like Hernando de Soto, also knew that all of these efforts were, in geological terms, secondary.<sup>156</sup> In his influential work *THE MYSTERY OF CAPITAL*, de Soto asked what could be made of the enormous failure of the developing world to modernize? The “mystery” could be explained away in two words: *property rights*. “Why has the genesis of capital become such a mystery? Why have the rich nations of the world, so quick with their economic advice, not explained how indispensable formal property is to capital formation?”<sup>157</sup> The answer was that for too long, people had looked at houses or lakes as natural things, and not as commodities. For too long, people had not taken the imaginative step of seeing a house or a lake as energy waiting to be tapped, waiting to be turned into a value.<sup>158</sup>

After extensive research throughout the developing world, de Soto was convinced that the problem of development was centered precisely here, in the problem of property rights. The world was ready for “take-off,” but it was law, or rather the lack thereof, that kept most of the world in poverty. It wasn’t that people didn’t have property, but that they did not have their property recorded in the legal system. If one’s house is not properly recorded, de Soto explained, that house could not then take on its critical function as a capital asset. And without capital, development would remain a dream. As de Soto suggested:

In the West, this formal property system begins to process assets into capital by describing and organizing the most economically and

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government failures, and not failures in the market. Particularly, the problem with large state apparatuses was that they tended to create windfalls of unearned income in the private sector, facilitating the weakening of industry and its dependence on governmental subsidies. This is what became known as a “rent-seeking society.” See ANNE KRUEGER, *POLITICAL ECONOMY OF POLICY REFORM IN DEVELOPING COUNTRIES* (1993).

155. For discussion of conditionality and structural adjustment, see CYPHER & DIETZ, *supra* note 45, at 555–90.

156. Hernando de Soto has been an especially influential voice in the literature on economic development. Among the personalities choosing to voice their high praise of his work, *THE MYSTERY OF CAPITAL* (2000), were Margaret Thatcher, Ronald Coase, and Milton Friedman.

157. *Id.* at 48.

158. *Id.* at 44.

socially useful aspects about assets, preserving this information in a recording system—as insertions in a written ledger or a blip on a computer disk—and then embodying them in a title. A set of detailed and precise legal rules governs this entire process. . . . They capture and organize the potential value of an asset and so allow us to control it. Property is the realm where we identify and explore assets, combine them, and link them to other assets. The formal property system is capital’s hydroelectric plant. This is the place where capital is born.<sup>159</sup>

## 2. *Neoliberal Constitutionalism*

In the classic liberal style of framing the relation between state and market, property and contract rights are viewed as constitutive of market society. Without a properly legalized system of property and contract, markets can’t happen. As Locke explained in his *Second Treatise*, however, private law wasn’t enough to make the market. What was also needed was a constitutional government, the chief end of which was the protection of property rights from both private infringement and arbitrary interference on the part of the state. Consequently, classic liberal legalism demands a strong form of property and contract rights and a constitutional guarantee for the maintenance of those rights.<sup>160</sup> While liberal legalism in the neoliberal mode doesn’t involve as crude a sense about constitutionalism, Hayek makes it clear enough that Locke’s idea was basically correct.

In the context of law and development, the constitutional layer is arguably provided by the involvement of international financial institutions. As Danny Nicol has suggested,

[T]he transnational constitution can be perceived as a kind of insurance policy guaranteeing the preservation of a particular variety of capitalism. Its object is to lock in place a system of privatisation and commercial liberty, so that things will not change very much when new governments are elected. Thus the new constitutional law serves to guard against the possibility that future governments might abandon the creed of private enterprise.<sup>161</sup>

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159. *Id.* at 46–47.

160. For a full discussion, see DANNY NICOL, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* (2010); Desautels-Stein, *Liberal Legalism and the Two State Action Doctrines*, *supra* note 1.

161. NICOL, *supra* note 160, at 19.

For some, this insurance policy is available for inspection in the work of the WTO. While Nicol and others are clearly opposed to the neoliberal emphasis on property rights complemented by the emerging idea that international law should provide a constitutional scheme for the guarantee of free competition in the global economy, others, like Ernst-Ulrich Petersmann, view this idea in a more favorable light.

The perspective that underlines Petersmann's approach is that there is an ideological alliance between the agents of international human rights law and trade law that has long gone unnoticed.<sup>162</sup> Petersmann has argued that "in order to [be] democratically acceptable, global integration law (e.g. in the WTO) must pursue not only 'economic efficiency' but also 'democratic legitimacy' and 'social justice' as defined by human rights."<sup>163</sup> This perception is part of a larger project of Petersmann's, in which he has suggested that the WTO should constitutionalize along the lines of the European Union and integrate human rights law with the machinery of free trade and commerce.<sup>164</sup> The idea is to essentially marry human rights and market freedoms in a way so as to create a new liberal bargain of pre-commitments: domestic entities will give up their interventionist rights in good faith on the belief that the upper-level constitutional commitments to economic rights will be for the greatest benefit. This scheme is not only justified by economic thinking, but by the moral, democratic, and constitutional legitimacy of human rights law as well.

According to Petersmann, the EU offers the world—and especially the WTO—an illuminating example of how human rights and market freedoms are inherently dependent on one another, and how they should be fused. The lessons from European integration for the WTO flow from what Petersmann calls the functional theory of integration: "the view that economic market integration can progressively promote peaceful cooperation and the rule of law beyond economic areas, thereby enabling more comprehensive and more effective protection of human rights than

162. Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19 (2000); see also Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991).

163. Petersmann, *Global Compact*, *supra* note 162, at 624.

164. For a thorough discussion on constitutionalizing the WTO, see Deborah Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39 (2001).

has been possible in traditional state-centred international law.”<sup>165</sup> The benefits of this integration work not only for human rights, but also the establishment of human rights like the rights to property and contract that go a long way towards nourishing the foundations for successful markets.<sup>166</sup> “Wherever freedom and property rights are protected, individuals start investing, producing and exchanging goods, services and income.”<sup>167</sup>

These lessons point Petersmann to the conclusion that “UN human rights law and WTO rules offer mutually beneficial synergies for rendering human rights and the social functions and democratic legitimacy of the emerging global integration law more effective.”<sup>168</sup> The way forward is to realize a “Global Compact,” initiated by the United Nations, which would demand of all international organizations a binding cognizance of “human rights, the rule of law, democracy and ‘good governance.’”<sup>169</sup> To this extent, the WTO appellate body would come to “protect human rights in the trade policy area.”<sup>170</sup>

### 3. *Conflicting Considerations at the World Bank*

Just as consensus emerged in the late 1970s and ‘80s that the first wave of development economics had been a failure, so did neoliberal practice come under similar scrutiny in the years around the turn of the Twenty First Century.<sup>171</sup> Unlike prior moments in the movement, however, faith in one style of law and economics failed to transfer to some better rival. Instead, the current phase of thinking has accepted, again, that markets cannot supply the conditions of economic success. Regulation is important, too, though, the contemporary expert will admit, markets are

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165. Petersmann, *Global Compact*, *supra* note 162, at 631.

166. *Id.* at 627–32. Petersmann is also making reference to Mary Robinson’s work, *Making the Global Economy Work for Human Rights*, in *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* (Gary Sampson ed., 2001).

167. Petersmann, *Global Compact*, *supra* note 162, at 629.

168. *Id.* at 632.

169. *Id.* at 642.

170. *Id.*

171. Writing a bit ahead of the curve, Joseph Stiglitz called this transition “new development economics.” Joseph Stiglitz, *The New Development Economics*, 14 *WORLD DEVELOPMENT* 257 (1986). In this posture, the neoliberal reaction against the notion of market failures has been diluted: “market failures, particularly those related to imperfect and costly information, may provide insights into why the LDCs have a lower level of income and why so many find it difficult to maintain existing current differentials, let alone catch up . . . . The kinds of market failures with which I have been concerned are markedly different from those that were the focus of attention some two decades ago.” Joseph Stiglitz, *Markets, Market Failures, and Development*, 79 *AM. ECON. REV.* 197, 201 (1989); *see also* JOSEPH STIGLITZ, *WHITHER SOCIALISM?* (1994).



also key. Property rights are essential, but so is democracy. Free trade is a major engine of growth, but tariffs can be critical in many areas. There are certain principles, such as competition, which consistently generate the best results, but it must also be admitted that there is no single plan, and that every region may call for a special solution. Development practitioners have returned to the idea that “development” must mean something other than efficient business practice, and that it should include an idea of development as freedom.<sup>172</sup> Thankfully, promotion of the Rule of Law bestows blessings on both those that are in pursuit of liberal democracy and the liberal market. Taken together, few practitioners today have kept faith with either the modern or neoliberal styles of law and economics, and have turned instead to a crude pragmatism.<sup>173</sup> The way forward, many today would agree, lies in the balancing of these often conflicting considerations.<sup>174</sup>

Among the most influential locations for work on Rule of Law development is the World Bank, which at the Bank has been big business. Over the past decade, the Bank has published several major reports outlining its financial activities related to the Rule of Law, and the rationale for its commitment.<sup>175</sup> Among these is the International Financial Corporation’s annual report, *Doing Business*, the purpose of which is to “provide an objective basis for understanding and improving the regulatory environment for business.”<sup>176</sup> The reasoning behind the project is that emerging industries in the developing world require a set of good rules and institutional arrangements, which necessarily shape the background of successful economic activity. These “good” rules include “rules that establish and clarify property rights and reduce the costs of resolving disputes, rules that increase the predictability of economic interactions and rules that provide contractual partners with core protections against abuse.”<sup>177</sup> The project’s method is to track the

172. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); see also MARTHA NUSSBAUM AND AMARTYA SEN, *THE QUALITY OF LIFE* (1993); MARTHA NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011).

173. David Kennedy, *Political Choices and Development Common Sense*, *supra* note 57, at 152.

174. For an interesting discussion on the nature of the law and development field, its past, and its future, see Colloquy, *Symposium: The Future of Law and Development*, 104 NW. U.L. REV. COLLOQUY 164 (2009). Though there is hardly consensus on what way forward might be counted as the best, there is no doubt that many scholars are experiencing the feeling of being at a crossroads. For discussion, of the “what works” approach, see Mariana Prado, *Should We Adopt a “What Works” Approach in Law and Development?*, 104 NW. U.L. REV. COLLOQUY 174 (2009).

175. WORLD BANK, *DOING BUSINESS* 2010 (2009).

176. *Id.* at v.

177. *Id.*

operation of such rules through the quantification of ten indicators, including (1) starting a business, (2) dealing with construction permits, (3) employing workers, (4) registering property, (5) getting credit, (6) protecting investors, (7) paying taxes, (8) trading across borders, (9) enforcing contracts, and (10) closing a business.<sup>178</sup> As a reflection of its modest legal pragmatism, the project is neither focused on more or less regulation as necessarily an indicator of economic growth or inefficient rent-seeking: “some *Doing Business* indicators give a higher score for more regulation, such as stricter disclosure requirements in related-party transactions. Some give a higher score for a simplified way of implementing existing regulation, such as completing business start-up formalities in a one-stop shop.”<sup>179</sup> Similarly, the project has discarded the idea that there is a single, linear route to developmental progress. Quoting Colombia’s minister of commerce, the 2010 report explains that economic development is “not like baking a cake. . . . But we can take certain things, certain key lessons, and apply those lessons and see how they work in our environment.”<sup>180</sup>

In 2010, the *Doing Business* report suggested that certain reforms had begun to crystallize.<sup>181</sup> As a threshold matter, the report found that those countries most successful in instituting regulatory reform were those committed to a large-scale increase in the competitiveness of their local firms. This may sound tautological, but the report goes on to say that the most successful states, like Singapore and China, continue to “push forward and stay proactive” by following de Soto’s recommendations to make business simpler and easier to begin. Another common element of success is comprehensiveness: “Over the past 5 years Colombia, Egypt, Georgia, FYR Macedonia, Mauritius and Rwanda each implemented at least 19 reforms. . . . This broad approach increases the chances of success and impact.”<sup>182</sup> This “comprehensive” approach includes a lowering of the cost of entry for foreign competitors through free trade.<sup>183</sup> Successful reformers are also “inclusive,” meaning that they are eager to establish private-public partnerships and gravitate towards long-term plans.<sup>184</sup>

Another Bank project relevant to the development of the Rule of Law is its compendium of all Bank financed activities in “justice reform,”

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178. *Id.* at 10.

179. *Id.* at v.

180. *Id.* at viii.

181. *Id.*

182. *Id.* at 8.

183. *Id.*

184. *Id.*

*Initiatives in Justice Reform*.<sup>185</sup> The rationale for the Bank's commitment to the Rule of Law is stated at the beginning of the report: The Bank's mission is to reduce worldwide poverty, and the Rule of Law is seen as a "fundamental element of economic development and poverty reduction."<sup>186</sup> The Rule of Law is both an "end in itself, but also a means of facilitating the achievement of other development objectives."<sup>187</sup> "This focus reflects an understanding by the Bank and its member countries that the rule of law and justice are crucial to both growth and equity in countries throughout the world."<sup>188</sup> The Bank's belief in the law's constitutive power is rooted in data. *Initiatives* cites confirming statistics from the Bank's Country Policy and Institutional Assessment indicators, the World Bank Institute's governance indicators, the *Doing Business* indicators mentioned above, and the Business Environment and Enterprise Performance Survey, as all supporting the view that law reform is a necessary ingredient in establishing more efficient business practices.<sup>189</sup> *Initiatives* also cites the Rule of Law as an important economic aid insofar as corruption is a major obstacle to the development of market society.<sup>190</sup> "Good Governance" are the watchwords.<sup>191</sup>

Another leading source of thinking about Rule of Law development is the Carnegie Endowment for International Peace, and in particular, its Vice President for Studies, Thomas Carothers. In a recent follow-up to his influential "The Rule of Law Revival,"<sup>192</sup> Carothers criticizes intergovernmental institutions and domestic aid agencies for taking too soft a view of what the Rule of Law actually requires in its implementation.<sup>193</sup> In Carothers' view, Rule of Law advocates, which he believes to be almost everybody, everywhere, tend to make several kinds of mistakes. First, the widespread consensus on the political and economic benefits of Rule of Law development is an empty one. Even if it is assumed that leaders are serious about implementing a legal development

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185. WORLD BANK, *INITIATIVES IN JUSTICE REFORM 2009* (2008). The 2009 *Initiatives* report outlines three central themes of justice reform. First is "court management and performance." Second is "access to justice," which is, as it sounds, the effort to make courts more accessible to the people. Third is "legal information and education." *Id.* at 5.

186. *Id.* at 2.

187. *Id.*

188. *Id.*

189. *Id.* at 2–3.

190. *Id.* at 3.

191. For discussion, see JAMES THUO GHATTI, *WAR, COMMERCE, AND INTERNATIONAL LAW* (2010).

192. Thomas Carothers, *The Rule-of-Law Revival*, 77 *FOREIGN AFF.* 95 (1998).

193. Carothers, *The Rule of Law Temptations*, *supra* note 151, at 51–53.

strategy, which is often a poor assumption, it must be recognized that advocates often have wildly different ideas about just which kinds of rules they want to transplant and entrench.<sup>194</sup> Perhaps they are classic liberal property rights; perhaps they are rights enumerated in the United Nations Declaration on Minority Rights. The fact of this disparity empties much of the meaning of a “consensus” about the Rule of Law. Second, Carothers identifies a trend by “authoritarian” government to depoliticize their Rule of Law commitments.<sup>195</sup> Referring to the public law constitutionalism of the 1990s, Carothers pointed out how Rule of Law projects converged with democratic reform projects, producing an idea of law with substantive, welfarist commitments. More recently, advocacy for the Rule of Law from countries like Russia and China have delinked the Rule of Law, and especially the idea of “rights,” from democratic reform. The upshot is a Rule of Law bereft of its politically desirable spillover effects.<sup>196</sup> A third mistake that Carothers sees gaining in prevalence is the idea that the Rule of Law can be grown organically if only certain institutional elements are put in place.<sup>197</sup> The idea that a liberal legal system can flower after a little soil and sunlight are added, Carothers explained, was debunked long ago, only to be revived again in the twenty-first century.<sup>198</sup> If Rule of Law development is to succeed, these and other mistakes need to be addressed.<sup>199</sup>

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194. *Id.*

195. *Id.* at 53–54.

196. *Id.*

197. *Id.* at 55–59.

198. *Id.*

199. Carothers’ critiques might resemble the arguments surveyed in Part II in association with what I termed a “critical” style. To be sure, Carothers’ and his colleagues’ work is certainly critical, but it is more appropriately situated amidst the pragmatism of a post-neoliberal style than the anti-liberalism of critical theory. For example, Carothers emphasizes the variability of Rule of Law work, but appears to assume that “liberal” and “conservative” ideas about the Rule of Law are determinate. He emphasizes the political nature of Rule of Law work, but cabins political effects to the public sector, lamenting the loss of democratic development while neglecting the distributional effects of a classic liberal common law regime. He points out that the Rule of Law cannot have an organic, evolutionary quality about it, but his text still seems constrained by a set of disappointments that have produced a vision of law funneled by what Unger has called the convergence thesis: due to the steady march of institutional progress (and decline), we face a very limited set of choices about what law might become. Whatever the case may ultimately be, and whether Carnegie scholars are better understood as eclectic pragmatists or anti-liberal critics, the fact is that in the contemporary period of thinking about the role of law in economic development, most experts have lost faith in either the classic or modern liberal styles of imaging the proper balance between state and market action. The same holds true for constitutional scholars thinking about the same question in the context of constitutional state action doctrine.

### C. *The Experimental Path*

In the discussion above, legal pragmatism was introduced as a way of understanding the relationship between the neoformalist and balancing tendencies that Duncan Kennedy has attributed to contemporary legal thought. In particular, the culprit was a distinct breed known as “eclectic pragmatism.” In addition to eclectics, however, there are two other forms of legal pragmatism on the contemporary scene, economic pragmatism and experimental pragmatism. I will pass over economic pragmatism for the sake of space, but do wish to note that it is a style of pragmatism that places a tremendous amount of weight on the norm of allocative efficiency while at the same time avoiding being just another name for neoclassical law and economics. The champion of this style is Richard Posner. The focus of this section, however, is experimentalism, and it takes a recent text from William Simon and Charles Sabel as representative. The relevant questions are (1) whether experimental pragmatism is indigenous to contemporary legal thought or better understood as a revival of modern liberalism, and (2) whether experimental pragmatism offers anything worthwhile in the context of development economics.<sup>200</sup>

In their most recent work on the topic, Sabel and Simon situate experimental pragmatists against two rival styles of law and policy work.<sup>201</sup> On one side is the well-known “minimalism” of Sunstein & Associates<sup>202</sup> and on the other is what Sabel and Simon call the “command

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200. For the purposes of this discussion, I am limiting the coverage here to Sabel & Simon, *Minimalism and Experimentalism*, *supra* note 6, and Simon, *Solving Problems vs. Claiming Rights*, *supra* note 6.

201. “Experimental Pragmatism” seems like a label that is perfectly consistent with Sabel and Simon’s usage here. My suspicion is that their main complaint would be that the label is redundant since *all* pragmatism is experimentalist. My response there would simply be to the abundance of work done by self-identified pragmatists that so clearly does not embody the kind of experimentalism they are espousing. This may very well boil down into what is “really” pragmatism and what is not, replaying the same debates that emerged after Peirce, Dewey, and James claimed that the term was being misused. My intention here is most certainly *not* to claim that Sunstein is actually and truly a pragmatist. It is rather that scholars like Sunstein self-identify with the term, and have enough in common with a rough and vernacular sense of pragmatism to justify calling them pragmatists as such. What is necessary, however, in the process of diluting the name “pragmatism” is to make sure that we carefully distinguish its strains, since they at least claim to be different creatures. There is a very large literature here. Sample works include Amy J Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 *LAW & SOC. INQUIRY* 503 (2008); Charles Sabel & Michael Dorf, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998); Charles Sabel and William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015 (2004); Symposium, *Symposium on New Governance*, 2010 *WIS. L. REV.* 227.

202. See, e.g., CASS SUNSTEIN & RICHARD THALER, *NUDGE* (2008); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471

and control” model of administration.<sup>203</sup> Sunstein’s minimalism is a stock example of the eclectic brand of contemporary legal pragmatism, and I will use “minimalism” and “eclecticism” interchangeably. While Sunstein seems to, occasionally, write more like an economic pragmatist than an eclectic pragmatist, regardless of where we put him there seems little doubt that he is deploying a contemporary form of legal pragmatism that is not experimental pragmatism. The command and control model, against which Sabel and Simon contrast both minimalism and experimentalism, is similar to the modern liberalism of Duncan Kennedy’s period of social legal thought. Thus, I use “command and control,” “modern liberalism,” and “social legal thought” interchangeably.

For Sabel and Simon, minimalism is a new style of administration forged in the context of contemporary legal thought as a corrective for the failures of the mid-century welfare state.<sup>204</sup> Though they do take minimalism as heavily focused on the neoclassical conception of efficiency analysis and the advantages of market simulation, Sabel and Simon do not equate it either with the neoliberal apparatus that emerged in the 1980s. Minimalism stands for something other than the free-market orientation of neoliberalism or the “command and control” ethos of modern liberalism, trying to take the good from both and shuffling their insights as needed.<sup>205</sup> Minimalism is skeptical about both the wisdom of leaving too much power and discretion to clearly irrational market actors, but also leaving too much discretion to regulators who are clearly subject to capture. Markets fail, governments fail, and minimalism is set to offer a balanced approach to governance that understands both the strengths and weaknesses of the modern and neoliberal styles.<sup>206</sup> Without transcending either, it recombines both in an attraction to the status quo, “static efficiency,” more of a market-based approach to welfare, and more of a government-based approach to nudging market choices in the “right” direction.

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(1998).

203. Sabel & Simon, *Minimalism and Experimentalism*, *supra* note 6 at 54.

204. *Id.* at 57.

205. *Id.* at 56–60.

206. *Id.* at 60–68.

### *1. The Basics*

Sabel and Simon situate experimental pragmatism along two dimensions, “Regulation” and “Social Welfare,” which might grossly be characterized as proxies for the “form” and “substance” of experimentalism, respectively. In contrast to the minimalist habit of using efficiency as a chief norm in the crafting of regulatory regimes, experimental pragmatists are keener on regimes guided by a premium on reliability. In the literature on management theory, reliability is a term of art, involving an administrative outlook where the hope is for managers and workers to operate in an atmosphere where learning and adaptation to changing circumstances is constantly fostered. Conceivably inefficient or nonoptimal eventualities are regarded as opportunities for growth, and the emergence of problem areas or defects are absorbed into a perpetual process of reassessment and reappraisal.

Sabel and Simon appropriately recognize that some might counter that reliability concerns are simply concerns of a more broadly conceived idea about efficiency. But as Sabel and Simon explain, there does seem to be a real tension between experimentalist techniques and efficiency techniques to the extent that the economic pragmatist will be preoccupied with strong market signals like price, where the experimental pragmatist is looking at a broad spectrum of signals, including those that are weak, subtle, and deserve on-the-spot complex discretion. If too much attention is paid to price, the focus on efficiency can undermine a regulatory framework of reliability. For the efficiency-minded, cost-benefit analysis and regimes that create mock-markets, like tradable emission programs, the main driver is a static assessment of price. Instead of a default openness to a host of varying sorts of signals and norms, the efficiency paradigm generates a tunnel vision for simplicity and short-term costs, which Sabel and Simon suggest is ultimately counterproductive. Experimental pragmatists believe that our broadly defined goals, whatever they might be, will best be served through complex responses with a view for the long-run, and not the reverse.

As we saw in the work of Lasswell and McDougal, this kind of big picture view is explicitly rooted in John Dewey’s pragmatism. They write:

Experimentalism takes its name from John Dewey’s political philosophy, which aims to precisely accommodate the continuous change and variation that we see as the most pervasive challenge of current public problems. Policies should be “experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted

upon, and subject to ready and flexible revision in the light of observed consequences.”<sup>207</sup>

Sabel and Simon understand this prime directive to involve a perspective that, at bottom, rejects the idea that regulation works best through the articulation of clear goals and the aggressive implementation of those goals. The focus instead is on Dewey’s notion of inquiry: the experimental pragmatist is not too worried about precisely defined goals precisely because our goals only come into focus in the actual process of doing, and not before the doing has been done. It’s just a mistake to set out a goal of optimizing a particular industry since the notion of optimizing may very well fool the regulator into chasing chimerical ideas instead of realizing, in the day-to-day, the intertwined twists and turns of crisis and victory. Sabel and Simon write: “In the realm of uncertainty, policy aims cannot be extensively defined in advance of implementation; they have to be discovered in the course of problem solving.”<sup>208</sup>

For the experimental pragmatist, following Dewey, the first lesson requires the establishment of a very broad framework goal, but a goal that must be open to constant revision. That is, the goal should be allowed to change after we come to understand the goal as it seems to present itself in the march of the routine. Next, our policymaker or legal analyst at the center will want to devolve as much discretion as possible to local actors, since it’s in the local that the routine is most clearly understood. The local actors produce, record, compile, and report results as regularly as possible back to the center, and together the local actors and the administrators at the center coordinate and evaluate. The framework goals themselves are periodically evaluated in light of the process, helping dissolve the distinction between the initial “value” and the “facts” to which the value are ostensibly applied—a distinction key to the work of economic pragmatists.

In the context of regulation, Sabel and Simon suggest that this approach involves a structural design in which all the players, whether public or private, whether at the center or periphery, are induced into a culture of self-reporting and self-critique which will excel in the on-going work of getting done what we want to get done that is absent in the mainstream.<sup>209</sup> Another advantage is that it avoids the critique of the

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207. Sabel & Simon, *Minimalism and Experimentalism*, *supra* note 6, at 78 (quoting JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 203 (1927)).

208. *Id.* at 56.

209. *Id.* at 83–89.



welfare state which pointed to the inefficiency of the bureaucrat, ultimately unable to get her hands on the information relevant to the deployment of her apparent expertise. She could never know the market as well as the market knew itself. In contrast, the experimentalist lives in a sea of data—it just keeps on flowing in, flowing out, frothing about: the local is on a par with the center here, as opposed to the old idea of the interventionist state.<sup>210</sup>

In the context of social welfare, Sabel and Simon push the conversation away from the form of rule-making and towards its content.<sup>211</sup> The minimalist apparatus of experimental pragmatism will be helpful in certain issue areas, Sabel and Simon suggest, “[b]ut the approach seems implausible or question begging with respect to many of the most important problems.”<sup>212</sup> The crux of the assertion is that eclectic pragmatists have failed to adequately take stock of the basic social changes in the playing field over the last half-century. In order to properly figure out the role of government in the distribution of wealth and resources (if that’s even the right question), experimentalists are in tune with the realities of 21st century social structures in ways that minimalists are not.

The reasons for this are plain. The minimalist approach to social welfare involves the same approach as it did to regulation: it is eclectic, and based on a scheme of constantly recombining the assumptions of modern liberals and neoliberals. The minimalist toolkit, as it were, ends around 1980. To be sure, the minimalist approach of eclectic pragmatists represents an alternative to the command and control model of modern liberalism, as well as the libertarian feel of the Washington Consensus, but what is new about it is the eclectic mixing of the ideas—not the arrival of a new image of market-state relations.

According to Sabel and Simon, the substantive proposals of experimental pragmatists with regard to the proper role of market and state are not dated to the 1980s, but not because a new idea about political economy has emerged. If this were the case, it might be an example of the old-fashioned distinction between fact and value, goal and implementation. Instead, experimental pragmatists are current in a way that eclectics are not because eclectic pragmatists have sought to adapt the assumptions of the New Deal and the Washington Consensus to the present, instead of leaving those assumptions behind in favor of finding

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210. *Id.*

211. *Id.* at 89–93.

212. *Id.* at 69.

our answers in the real world of problem-solving. For example, Sabel and Simon explain how the basic points of departure for New Deal thinking involved an architecture of social insurance built around tax and transfer cash distributions and framed in terms of market-labor relationships.<sup>213</sup> The idea was to target the everyman—an able-bodied English-speaking white male with a traditional nuclear family tracked into a job in which he'd stay for forty years. Instead of grasping the fundamental changes in society with respect to what kinds of people are now able to work, where they work, in what languages they work, and so on, Sabel and Simon argue that minimalists have “sought to preserve the New Deal emphasis on standardized, rule-defined cash benefits while broadening the scope of both the social insurance and public assistance programs.”<sup>214</sup> Minimalists, on this view, are behind the times.

In order to make law more functional and better attuned to social needs, experimental pragmatists are eager to do away with presumptions from the past. The policy approach of the experimentalist should be on the lookout for changing trends and incorporate a close-up focus on “highly individuated planning, pervasive policy measurement, and efforts to aggregate and disseminate information about effective practices.”<sup>215</sup> The mechanism, as already stated, is public participation. In a way that distances itself from the pessimism of behavioral economics and resembles the literature on deliberative democracy, experimental pragmatists seek out operational plans in which local communities are leading the way in figuring out what is working out through public sharing, thinking, and critiquing. These local efforts need to be harmonized through a central system, but instead of the center giving the periphery a set of rules about the role of the state in the market, local groups should be always thinking about what is working best, for whom, and where.

## 2. *Experimentalism Considered*

So where does Sabel and Simon's discussion fit into Duncan Kennedy's map of American Legal Thought? As I have previously argued, minimalism is a stock example of eclectic pragmatism, which is a motivating property in the “Third Globalization” of contemporary legal thought. Sabel and Simon would likely agree that minimalism is a

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213. *Id.* at 69–70.

214. *Id.* at 70.

215. *Id.* at 89.

contemporary posture, since they expressly articulate it as a current alternative to the command and control style of modern liberalism. Similarly, if they were to accept the premises of the Three Globalizations story, they would also accept the idea that experimental pragmatism fits in the contemporary mode, given that they see experimentalism as the other current alternative.

Just being an alternative to modern liberalism, however, is not enough to merit a place on Kennedy's map. To get there, we need to see some combination of neoformalism and a balancing approach. As I have argued elsewhere, eclectic pragmatism, including Sunstein's version of it, does seem to capture a sensibility in which the jurist or policy expert is encouraged to shift between form and function, truth and consequence, in whatever way appears to fit the current need. What is new here is the accepted nature of the eclecticism—where at one point we may have identified a dominant faith in an individual will theory, or an expert bureaucracy, we now have faith only in the mantra of “doing what works.”

While this may be a fair description of the minimalism in Sabel and Simon's article, does it also capture experimentalism? Are experimental pragmatists similarly committed to a consequentialist view of neoformalist/balancing techniques? And if so, what distinguishes them from the eclectics?

Of course, an articulation of just what it is that distinguishes experimentalists from eclectics was the whole point of Sabel and Simon's article. To be sure, there can be no doubt that there are real and meaningful differences here, and if it were put to a vote between the two I would certainly be a card-carrying member of the experimentalist party. But despite the operational contrasts, experimentalism and eclecticism seem anchored in a broadly similar orientation that becomes more and more clear when we take the birds-eye view. Consider the following.

First, Sabel and Simon appear intent on presenting experimentalism as an administrative style that has already been planted. It's not a utopian vision of a world yet to be—in fact, they argue that there has been “a fundamental policy reorientation along experimentalist lines in the United States, the European Union, and elsewhere since the 1990s. . . . Some of the Obama Administration's most important initiatives, including the Food Safety Modernization Act and the Race to the Top education program, can only be understood in experimentalist terms.”<sup>216</sup> Indeed, there is a growing list of examples of experimentalist work in the world to which Sabel and

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216. *Id.* at 55–56.

Simon are supplementing, not starting from scratch. From Toyota to the US Navy, EPA's Project Excel to the Nuclear Regulatory Commission, developments in child welfare reform to information trading at the WTO, experimentalist approaches seem everywhere.<sup>217</sup> Of course, Sabel and Simon don't want to go too far, and they are sure to remind that experimentalism is in its infancy. It's young and unproven, but operating in the here and now.

It is in this sense that minimalism and experimentalism therefore share a common ground in that they are both a part of the contemporary landscape—they are both practical, applicable modes of administration in the second decade of the 21st century. Consequently, as experimental approaches become more prevalent, they will likely take more of the blame going round, of which there is plenty to share. If this is right, and experimentalism is a meaningful aspect of contemporary legal thought, then an initial complaint might hold that Kennedy's picture of the Third Globalization is incomplete. If the Third Globalization is a confluence of neoformalist techniques and balancing approaches, and experimentalism is something else, is the map wrong?

I don't think that it is, and this leads to a second point about the common ground upon which eclectics and experimentalists are working. Sabel and Simon hammer home the idea that experimentalism is better than eclecticism, and in the context of minimalist style of regulation their chief complaint is that minimalism just doesn't work. They take efficiency as the grundnorm in play, and show how in case after case a singular focus on efficiency, optimal performance, and the techniques that make good on those norms (like cost-benefit analysis and cap-and-trade) are poor performers when it comes to actually doing what the regulations hope to do. Sabel and Simon explain how efficiency concerns undermine the fruitfulness of new learning opportunities<sup>218</sup> and sacrifice better results for quicker results,<sup>219</sup> while cost-benefit analysis persistently gets the measurements of the costs and the benefits all wrong, or puts too much emphasis on centralized decision-making procedures unaccompanied by local assessments.<sup>220</sup> Like cost-benefit analysis, Sabel and Simon see problems with cap-and-trade also involving workability.<sup>221</sup> These problems, however, are problems at the margins. Sabel and Simon admit

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217. *Id.* at 83–89.

218. *Id.* at 62.

219. *Id.* at 62–63.

220. *Id.* at 64–65.

221. *Id.* at 66–69.

that cost-benefit analysis and cap-and-trade techniques are valuable, and efficiency is a truly great idea, but they're just not as valuable as eclectics would like to think.

The upshot here is that the experimentalist critique of eclectic proposals flows out of a set of premises shared by the eclectics. In fact, Sabel and Simon's critique appears to portray an eclecticism in itself, chiding minimalists for being too preoccupied with a single norm—efficiency—at the expense of other norms which might also be valuable, if not more so. Indeed, as discussed above, a strong sense of eclectic pragmatism avoids any singular faith in a given approach, and to the extent minimalism really is in orbit around one vision of the market, this would suggest a more appropriate labeling of economic pragmatism, if not the neoliberalism of the Chicago School. Experimentalism, on the other hand, is safely situated in the Third Globalization given its attraction to a bevy of norms, *including* efficiency, at least in the context of this one text. Remember, theirs is not a critique of efficiency, it is a complement to it.

A third point regarding Sabel and Simon's mapping of experimentalism, minimalism, and modern liberalism has to do with what they see as the proper fit between law and policy, and the social world they are meant to govern. Sabel and Simon understand “the most pervasive challenge of current public problems” to be “the continuous change and variation” in society,<sup>222</sup> and that “experimentalist regimes are especially well suited for circumstances in which effective public intervention requires local variation and adaptation to changing circumstances.”<sup>223</sup> Minimalists, Sabel and Simon argue, continue to operate on the old and outdated assumption of modern liberalism (and/or neoliberalism), while experimentalism is precisely fashioned to craft an administrative style that makes law responsive to today's social needs.

It is here in Sabel and Simon's critique of minimalist social welfare proposals that doubts creep in as to whether experimental pragmatism is indeed a contemporary legal style. There is no doubt that an idea about making law responsive to social needs is an emblem of contemporary legal thought, but it is well known that it is here only as a relic of social legal thought. Indeed, it is a juristic technique that is more than a hundred years old at this point, and what may distinguish experimentalists is their somewhat neo-realist<sup>224</sup> tenacity for a teleological jurisprudence. Whereas the fit between law and social need is a part of every serious policy

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222. *Id.* at 78.

223. *Id.* at 56.

224. *See, e.g.*, Symposium, *Is it Time for a New Legal Realism?*, 2005 WISC. L. REV. 335 (2005).

program, experimentalists like Sabel and Simon don't see it as just a "part"—it's key.

This central focus on changing social circumstance demands cognizance of the relation between experimental pragmatism, realism, and the sorts of functionalist projects found in the work of post-realists like Lasswell and McDougal.<sup>225</sup> There's no basis for thinking that the work of Sabel and Simon is merely a rerun of the work of Lasswell and McDougal, because it's clearly not. But despite the differences, they look more and more marginal when we focus on the nature in which both scholarly duos build off a strong diet of Dewey, take a complex view of the relation between law and politics, eschew sharply defined policy goals in favor of broadly stated framework goals that will be progressively defined through works of individual practice, and advocate the need for constant flows of information in an ongoing process of reappraisal.

So what? Should the filial relation between experimental pragmatism and post-realist projects from the likes of Lasswell and McDougal encourage us to locate Sabel and Simon in the bygone era of social legal thought? If the experimental critique of minimalist regulation is clearly in the mode of the Third Globalization, and its critique of minimalist social welfare policy is of a piece with the Second, what to do?

A fourth point about Sabel and Simon's discussion of experimentalism, minimalism, and modern liberalism might carry the day. In an article from 2004, Simon discussed the relation between "legal liberalism" and "legal pragmatism."<sup>226</sup> In the context of the mapping at work in this discussion, Simon appears to equate legal liberalism with modern liberalism; he associated it with a penchant for plaintiffs in tort and civil rights cases, defendants in criminal cases, a prioritization of moderate forms of equality and liberty, and a tendency to track the liberal-left side of the political spectrum.<sup>227</sup> As a consequence, Simon's liberalism clearly does not include the legalism of either Locke or Hayek. As for "legal pragmatism," Simon means for the label to describe experimentalism, and while he does admit that there are various breeds, his analysis is solely focused on the experimental style.<sup>228</sup>

Simon's critique of liberal legalism is slippery. Coming from a deep baseline in critical legal studies,<sup>229</sup> there is little doubt about the

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225. *See supra* notes 36–43.

226. Simon, *Solving Problems vs. Claiming Rights*, *supra* note 6.

227. *Id.* at 130.

228. *Id.* at 131–32.

229. *Id.* at 146.

adversarial posture of Simon's pragmatism. At the same time, however, Simon seemed to be going out of his way to paint the critique as one coming from *within* liberalism. After surfacing some common complaints from critical theory, Simon distances himself from them. Noting that these critiques "remain important and, on some points, powerful," Simon's pragmatist approach would be "more grounded in the basic commitments of political liberalism."<sup>230</sup> Moving into the rest of the discussion, as a consequence, the reader may have expected legal pragmatism as the coming of something like a friendly amendment, and not as much of a radical overturning of liberal legalism.

Towards the middle of the article, Simon explains his reasoning:

At the risk of overemphasizing the contrast, I have formulated and organized the premises so as to emphasize their differences with Legal Liberalism. It is debatable whether the Legal Pragmatist perspective is best seen as a competitor to the Legal Liberalism that addresses itself to the whole field of lawyering, or rather as a complement that purports to be more appropriate to a range of situations but that concedes as a significant range to the Legal Liberal approach.<sup>231</sup>

At the end, Simon left this relational question for another day, leaving us wondering whether an ultimate answer might be less useful than a forward-looking perspective on better discourse, whether it's called liberal or pragmatic or whatever.

Though I do admire Simon's cautious tone, and appreciate the complicated nature of the question, I find it appropriate to come down with an answer here: Sabel and Simon are liberals. Now, in saying as much I don't mean to identify them necessarily as modern liberals working in the language of social legal thought, exiling them from the terrain of the Third Globalization. Not at all. What I do mean to say is that experimental pragmatism, like eclectic pragmatism, depends on a toolkit that remains entirely comprised of the stuff of classic, modern, and neoliberalism. If, for example, we were to join Sabel and Simon with Lasswell and McDougal, we would expect to see the former pair joining the latter pair's unquestionable loyalty to the modern liberal style. Sabel and Simon have lost faith in a single style of liberal legalism, as have all natives of contemporary legal thought. And yet, while they have no faith

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230. *Id.*

231. *Id.* at 173.

in any one style, their optimism is buoyed by a belief in the power of deliberative democracy and the truth of the liberal, autonomous, rational self.

To sum up, Sabel and Simon have argued that experimentalism is operational, and therefore a real administrative style in the contemporary scene. Of course, not everything that is happening is illustrative of contemporary legal thought—a great many instances are just holdovers from traditions of the past. But Sabel and Simon's claim is that it is indeed new, and that it is explicitly formulated as an alternative to the command and control style of modern liberalism. Second, the experimentalist critique of minimalist regulation is clearly consistent with an eclectic preoccupation with “what works,” and for Sabel and Simon, a great deal of the minimalist regulatory apparatus just doesn't. It wasn't that efficiency concerns, cost-benefit analysis, or cap-and-trade programs suffered from political or philosophical defects, but rather that they didn't perform in the manner in which Sunstein & Associates would hope. Third, the experimentalist critique of minimalist social welfare suggested a heavy reliance on the jurisprudential style of social legal thought and modern liberalism. The reliance was so heavy, and so important, that it was enough to doubt whether experimentalism might be better located in the Second Globalization. Fourth, experimental pragmatism appears to be ultimately committed to liberal legalism. This commitment is not to any single style of liberal legalism, but rather to the common liberal vocabulary to be found in the *langue* of classical and social legal thought.

As a consequence, I think we can reach the tentative conclusion that experimentalism is like minimalism in that they are both strands of the legal pragmatism animating so much of contemporary legal thought. This is a legal pragmatism that is notable for its attention to neoformalism, attraction to the weighing of conflicting interests, and belief in the combination of various styles of legal liberalism in the service of what works. Eclectic pragmatism, and its minimalist programs, is on all fours with this description. Experimental pragmatism, in contrast, favors function over form and deliberation over balancing. Experimentalism is therefore less central to the dominant conception of contemporary legal thought (which is a good thing for experimentalists), but indigenous to contemporary legal thought all the same: It has more functionalism than minimalism, and less formalism, but it is similarly committed to a pervasive if disenchanting liberalism.



## IV. CONCLUSION

The election of Barack Obama in 2008 was seen in some quarters as a final shift away from the “free-market” conservatism of the Bush regime, if not the end of an era of neoliberalism nearly forty years old.<sup>232</sup> This shift was similarly identified in the context of international development policy even before President Obama’s election, as disillusionment with “shock therapy” programs administered by the so-called Washington Consensus became more apparent and intense.<sup>233</sup> To be sure, very few have suggested a wholesale return to the New Deal governmentalism of the mid-20th century, for as President Obama said himself in an eminently contemporary fashion, “[t]he question we ask today is not whether our government is too big or too small, *but whether it works*.”<sup>234</sup> What we are striving towards is “a strategy no longer driven by ideology and politics but one that is based on a realistic assessment of the sobering facts on the ground.”<sup>235</sup> In fact, the suggestion that we are in the midst of a paradigm shift seems to take its cue from this new sense about pragmatism over purity, a new focus on what works, what will get the job done.<sup>236</sup>

Veteran observers of the field seem to think as much. David Trubek, for example, wrote in 2006 of the mounting criticisms of the neoliberal policy establishment,<sup>237</sup> and of how these complaints appeared to have “succeeded in opening up the discourse. The moment seems more open,

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232. Ed Rubin has recently written: “By the end of his two terms in office, Bush had not only wrecked the nation, but also wrecked the model of government that had dominated national politics for twenty-eight years. The purpose of this essay is to explore the possibility that the Obama Administration will develop a new model, a new approach to governing America.” Edward Rubin, *Can the Obama Administration Renew American Regulatory Policy?*, 65 U. MIAMI L. REV. 357 (2011). See also Peter Boyer, *Getting to No: The Republican Dilemma in the Age of Obama*, THE NEW YORKER, Sept. 28, 2009, at 32.

233. Among the most well-known critics include Joseph Stiglitz and Amartya Sen. See, e.g., ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Joseph Stiglitz, Senior Vice President & Chief Economist, World Bank, Keynote Address at the Annual Bank Conference on Development Economics, *Whither Reform? Ten Years of Transition* (Apr. 28, 1999).

234. President Barack Obama, Inaugural Address (Jan. 20, 2009) (transcript available at <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html>) (emphasis added).

235. See Ryan Lizza, *The Consequentialist*, THE NEW YORKER, May 2, 2011, available at [http://www.newyorker.com/reporting/2011/05/02/110502fa\\_fact\\_lizza#ixzz1i3mwMs2j](http://www.newyorker.com/reporting/2011/05/02/110502fa_fact_lizza#ixzz1i3mwMs2j) (“Obama’s aides often insist that he is an anti-ideological politician interested only in what actually works. He is, one says, a ‘consequentialist.’”).

236. The argument is made explicitly in the literature on “experimental pragmatism.” See, e.g., Sabel & Simon, *Minimalism and Experimentalism*, *supra* note 6; Simon, *Solving Problems vs. Claiming Rights*, *supra* note 6.

237. Trubek, *supra* note 7, at 74.

the discourse more fluid.”<sup>238</sup> But Trubek’s assessment was characteristically cautious: “So the question is this: in this period of rethinking and partial doubt, is there a real chance for the recognition of alternative development strategies and of very different legal paths that can be followed on the road to economic growth and political freedom? Is it possible, for example, that acceptance of pragmatism could replace faith in formalism . . . ?”<sup>239</sup> Trubek answered in the affirmative, hopefully seeing in the present “a turning point, a moment in which it is possible to go beyond critique of orthodoxy to reconstruction.”<sup>240</sup>

Another well-known critic of international development discourse, David Kennedy, has more recently offered a similarly optimistic view of a new and unfolding moment.<sup>241</sup> Kennedy suggests that just as a new space opened up after the discrediting of the first wave of development practice and in the Reagan-Thatcher *zeitgeist*, we have also witnessed a similar eventuality in the chastening of neoliberalism. Kennedy writes, “When the unity and self-confidence of development economics ebbs, as occurred in the nineteen seventies and is again the case today, and the details and context for policy seem more salient, ideas about law and institutions often lie closer to the surface in discussions of development policy.”<sup>242</sup> The result, Kennedy and Trubek agree, is that a new chance is on offer in which previously unorthodox approaches to law, economics, and sociology, might find themselves, quite surprisingly, in a mainstream alliance. The hope for such a “heterogenous alliance,” Kennedy explains, is for it “to expand the potential for institutional, doctrinal and policy *experimentation*—to embolden the policy class to accept the need for economic, political and ethical choice and improve the tools by which they can come to that challenge free of unhelpful professional habits and deformations.”<sup>243</sup>

The aim of this Article has been to build on the framework already sketched by Trubek and Kennedy, and bring focus to the possibility of “a new moment” in the law and development field. For some, these novel

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238. *Id.* at 93.

239. *Id.*

240. *Id.*

241. David Kennedy, *Law and Development Economics*, *supra* note 8. For contrasting views see, e.g., Kevin Davis & Michael Trebilock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895 (2008); Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209 (2011); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment Working Papers, No. 30, 2002).

242. David Kennedy, *Law and Development Economics*, *supra* note 8, at 1.

243. *Id.* at 56 (emphasis added)

characteristics may have something to do with an evolving triumph of pragmatism and experimentalism over formalism and ideology, of Obama over Bush. I think that the identification of a new pragmatic experimentalism on the scene is precisely right, and that pragmatism has a great deal to do with the new turn in development policy. However, my unfortunate suspicion is that we may have less reason to welcome the “new moment” once we take a closer look at the sort of pragmatism that seems to have captured the spirit of the time.<sup>244</sup>

In doing so, I adopted the same intellectual history of law that has played a role in Trubek and Kennedy’s work—that of Duncan Kennedy’s essay “Three Globalizations of Law and Legal Thought.”<sup>245</sup> In that work, Kennedy argues that since the US Civil War, lawyers, judges, and policymakers in the United States have participated in three phases of a global legal consciousness. Each phase globalized, Kennedy explains, at times representing the movement of legal ideas from Europe to the US, and at others in the reverse. The first globalization involved the transmission of “classical” ideas from Europe to the US, the second globalization involved more of a back and forth cross-Atlantic movement of “social” legal ideas, and the third globalization, in which we are now living, holds the United States at the core. What is helpful to understand about the map is that not everything that is happening now is necessarily indigenous to the contemporary legal thought of the third globalization. It’s better to think of contemporary legal thought as a style or aesthetic than a period of time, such that we may very well see contemporary jurists operating in the outdated mode of, say, classical legal thought, just as contemporary musicians might perform in a style that was for more popular a hundred years ago.

This Article has sought to shed light on the question of whether the field of law and development has entered a new moment—a phase which can be meaningfully distinguished from the modern liberalism and neoliberalism of prior times. The argument has been in the affirmative, and following the lead of Duncan Kennedy, David Trubek, and David Kennedy, it has been in agreement with the idea that contemporary legal thought is comprised of contrasting tendencies. Where the present discussion has veered off has been in its suggestion that contemporary legal thought is housed in a pragmatic structure that enables and maintains minimalist commitments to neoformalism and balancing techniques,

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244. My thinking here follows the poststructuralist approach of Arturo Escobar in ENCOUNTERING DEVELOPMENT 42 (1995).

245. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, *supra* note 3.

instead of being emancipated by a pragmatism that rebukes them. This enabling pragmatism is of a specific kind, however, and it boasts an eclecticism and minimalism drawn from an apparently endless wellspring of “everyday” “can-do attitudes” about “getting the job done.” This is a vulgar, everyday pragmatism, and it provides the basis for the dominant legal pragmatism of today.

If contemporary legal thought is going to witness a new moment of a more hopeful kind, it will have to shake itself out of the problem-solving ethos of eclectic pragmatism. This will be a tall order, essentially requiring the will to terminate the interminable circles of liberal legalism and its recycled images of market and state. Perhaps experimentalism is the way to go, and just as experimentalists would have it, we’ll never really know for sure. All we can do is try, and then keep trying.