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PRAGMATIC LIBERALISM: THE OUTLOOK OF THE DEAD

JUSTIN DESAUTELS-STEIN*

Abstract: At the turn of the twentieth century, the legal profession was rocked in a storm of reform. Among the sparks of change was the view that “law in the books” had drifted too far from the “law in action.” This popular slogan reflected the broader postwar suspicion that the legal profession needed to be more realistic, more effective, and more in touch with the social needs of the time. A hundred years later, we face a similarly urgent demand for change. Across the blogs and journals stretches a thread of anxieties about the lack of fit between legal education and legal work and the meaning of best practice in a world still flailing in the economic wake of 2008. In a sense, we are experiencing a collective crisis of legal identity. This Article confronts this crisis with the instinct that many of the profession’s challenges are symptomatic of a deeper, structural crisis about what it means to “think like a lawyer.” We are often told that the key takeaway of legal education has precisely to do with this phrase, which we can unpack as referring to the mastery of a set of techniques, patterns, and modes of legal reasoning. But what if these techniques were themselves in a state of crisis? What if it turned out that the deeply conflicted nature of legal thought was a source of the surface problems with which we are more familiar? It is with these questions in mind that this Article diagnoses the crisis in contemporary legal thought.

INTRODUCTION

Most of us know the unpleasantness of crisis. Of course, the crises we have known are sometimes not all that crisis-like, such as when we face the “crisis” of what to wear tonight or where to eat. Of the more serious sort, there are the usual suspects. There is the well-chronicled crisis of teen angst. There is the mid-life crisis with its Corvettes and the crisis of old-age, grasping for the point of it all. There is the schizophrenic. And then there are other types of

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identity crisis: questions about racial, ethnic, or cultural belonging, religious affiliation, sexuality, and so on. But of whatever kind the crisis is, if it is for real, we tend to expect the presence of a deep internal conflict giving rise to the search for meaningful identity.¹

Now, if the idea of identity crisis is relatively familiar, what if we turn from so-called personal identities to professional ones?² Does a crisis of “legal identity” even make sense? If it does make sense, then there is little doubt that, at least here in the United States, it is an identity in crisis.³ Worries range from those about the transformation of the job market for law school graduates to the nature of the big firm to legal education’s inadequacy in tracking the real demands on the practicing lawyer.⁴ Of course, some of these concerns are not really all that new.⁵ But whatever we think of the pedigree of any one of these anxieties, it is difficult to deny that here in the second decade of the twenty-first century the legal profession is under assault.⁶ Crisis is upon us.

¹ My intention is not to engage in Erikson’s original sense of “identity crisis” or other more technical uses. See generally ERIK ERIKSON, *Identity Crisis in Perspective*, in LIFE HISTORY AND THE HISTORICAL MOMENT (1975). Rather, I’m using it more in the vernacular sense of an unexpected danger threatening to destabilize the identity of some given system. See THE SHORTER OXFORD ENGLISH DICTIONARY: ON HISTORICAL PRINCIPLES 1311 (W.R. Trumble & Stevenson eds., 5th ed. 2002). For a more ambitious treatment of “crisis” as a historical concept, see REINHART KOSELLECK, *THE PRACTICE OF CONCEPTUAL HISTORY: TIMING HISTORY, SPACING CONCEPTS* 236–47 (2002).

² In speaking of professional identities, I don’t mean to refer to more familiar kinds of “career crisis.” See, e.g., Robert J. Sternberg, *Coping with a Career Crisis*, CHRON. OF HIGHER EDUC. (Jan. 27, 2014), http://chronicle.com/article/Coping-With-a-Career-Crisis/144191/?cid=cr&utm_source=cr&utm_medium=en, archived at <http://perma.cc/AN9K-F5G2> (discussing career crises as distinct obstacles, such as resigning from a poorly fitting position). My target is something deeper and more systemic.

³ In this Article, I exclude other anxieties often associated with the legal profession, including the ethical aspects of lawyering, lawyer jokes, and the like.

⁴ See, e.g., JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* (2013); Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?pagewanted=all>, archived at <http://perma.cc/Z7P9-P675>; Jacob Gershman, *Number of LSAT Test Takers is Down 45% Since 2009*, WALL ST. J., Oct. 31, 2013, <http://blogs.wsj.com/law/2013/10/31/number-of-lsat-test-takers-is-down-45-since-2009/>, archived at <http://perma.cc/HJ52-5TPJ>; Katherine Mangan, *Law Deans Confront a “New Normal” as Schools Adjust to Job Market Changes*, CHRON. OF HIGHER EDUC., Jan. 6, 2013, <http://chronicle.com/article/Law-Deans-Confront-a-New/136507/>, archived at <http://perma.cc/MLN9-SFKW>.

⁵ See, e.g., Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

⁶ See, e.g., Paul Campos, *Legal Academia and the Blindness of the Elites*, 37 HARV. J.L. & PUB. POL’Y 179, 180 (2014). Of course, it isn’t necessary to agree with this particular view of the problem in order to think that in the United States there is presently a crisis of legal identity. See generally PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998).

And so, it is in this shadow that this Article confronts the question of our professional identity as lawyers. This confrontation begins with a suspicion. Perhaps what we presently experience as the surface manifestations of a legal profession in disarray can be analyzed as problems going to the very core of what it means to “think like a lawyer.”⁷ Or to put this suspicion another way, what if the anxieties plaguing law schools and firms alike are symptoms of a more serious ambiguity at the heart of our legal identity? If the profession is indeed in a state of crisis, perhaps the root of it has something to do with our confusion about what it means to do a lawyer’s work.

Ultimately, this Article presents the following thesis: underlying the profession’s problems sits a distinct manner of organizing, shaping, and finally stabilizing the way we think about what counts as a legal problem or solution. This “manner” is the product of two very different outlooks that have only recently come into contact with one another. They are “liberal legalism”⁸ and “legal pragmatism,”⁹ and, as I discuss below, the recent encounter between the two has yielded “pragmatic liberalism.”¹⁰ Pragmatic liberalism, I suggest, is the deeper, structural source of the identity crisis now plaguing the legal profession.¹¹ As a result, if we hope to successfully realize calls for legal reform,

⁷ See generally KARL LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON LAW AND LAW SCHOOL* (2008).

⁸ This term has quite a bit of baggage. In addition to its association with critical legal studies, it has also become an object of inquiry among some historians. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 85, 265 n.52 (1996). Laura Kalman, for example, prefers to call it “legal liberalism” due to the “pejorative” connotations she identifies with “liberal legalism.” Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *FORDHAM L. REV.* 87, 89 n.9 (1997). But more important than the order in which the words are arranged is the meaning we attach to the phrase. *Id.* at 90 (arguing that “legal liberalism” is fundamentally connected with the progressive social agenda that emerged after World War II). My own use of “liberal legalism” is much broader. See generally Justin Desautels-Stein, *The Market as a Legal Concept*, 60 *BUFF. L. REV.* 387 (2012) [hereinafter Desautels-Stein, *Market*]; Justin Desautels-Stein, *A Structuralist Approach to the Two State Action Doctrines*, 7 *N.Y.U. J.L. & LIBERTY* 254 (2013) [hereinafter Desautels-Stein, *State Action*].

⁹ Legal pragmatism is another phrase with a patchwork of meanings. See generally Brian E. Butler, *Law as a Democratic Means: Deweyan Jurisprudence and Democratic Experimentalism*, 9 *CONTEMP. PRAGMATISM* 241 (2012) (providing a helpful discussion on the meaning of the term); Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 *MICH. ST. L. REV.* 565 (2007) [hereinafter Desautels-Stein, *Eclectics*] (discussing legal pragmatism).

¹⁰ See *infra* notes 205–331 and accompanying text.

¹¹ These references to “structure,” as explained below, are semiotic in orientation. See *infra* notes 49–92 and accompanying text. This Article’s use of legal semiotics here is rather different from Jack Balkin’s much more well-known usage. See generally J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 *RUTGERS L. REV.* 1 (1986); J.M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669 (1990); J.M. Balkin, *The Promise of Legal Semiotics*, 69 *TEX. L. REV.* 1831 (1991). Balkin’s usage of the

we need to better understand what it is that we are reforming. At the end of the day, the object of reform must be these deeper sources of contemporary legal thought; that is, pragmatic liberalism itself.

This Article's portrayal of pragmatic liberalism and its structuring role in contemporary legal thought unfolds as follows. Part I begins with legal method, for the reason that there simply is no neutral or natural way of approaching "contemporary legal thought."¹² After all, what counts?¹³ The legal thoughts of all people everywhere? Or only the legal thoughts of the elites? But who are the elites? How do we know? Although these questions may have once been answered with ease, in today's legal historiography, claims about periodization are relentlessly deconstructed.¹⁴ The historiographical method I am interested in here, and that emerged in this post-objectivist world of deconstruction, is "structuralist."¹⁵ The term "structuralism" has been used to mean many things,¹⁶ but here I use it to refer to that brand of social theory grounded in the semiotics of

term is not without its critics. See generally Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779 (1991); Pierre Schlag, "Le Hors de Texte C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990). But see generally J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131 (1994) (responding to criticisms).

¹² See *infra* notes 49–92 and accompanying text. See generally Symposium, *Theorizing Contemporary Legal Thought*, 78 LAW & CONTEMP. PROBS. (forthcoming 2015).

¹³ Robert Gordon's work has proved especially interesting on these questions. See generally Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in THE HISTORIC TURN IN THE HUMAN SCIENCES (Terrence J. McDonald ed., 1996); Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) [hereinafter Gordon, *Critical Legal Histories*].

¹⁴ For examples of how these questions are deconstructed and analyzed, see generally William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997); Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMAN. 323 (2004); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002).

¹⁵ See HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* 7 (1975); HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 139 (1987). For other examples of this historiographical method, see generally HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* (1978); HAYDEN WHITE, *THE FICTION OF NARRATIVE: ESSAYS ON HISTORY, LITERATURE, AND THEORY, 1957–2007* (2010); HAYDEN WHITE, *FIGURAL REALISM: STUDIES IN THE MIMESIS EFFECT* (1999). For a discussion of White's work, see generally Symposium, *Hayden White: Twenty Five Years On*, 37 HIST. & THEORY (1998).

¹⁶ For examples of differing uses of the term, see generally EDWARD THOMPSON, *THE POVERTY OF THEORY* (1978); Nicola Faith Sharpe, *Process over Structure: An Organizational Behavioral Approach to Improving Corporate Boards*, 85 S. CAL. L. REV. 261 (2012).

the Swiss linguist Ferdinand de Saussure.¹⁷ With this lens, structuralism presents a method for analyzing social practices as discrete language-systems.¹⁸ In establishing the conceptual frame of reference for my approach to contemporary legal thought, I look at law in semiotic terms: specific instances of legal argument are likened to a lexicon or working vocabulary of law, while the broader field of legal production is likened to the constitutive grammar that controls the forms of the lexicon.¹⁹ This distinction tracks Saussure's famous pairing of grammar (*langue*) and lexicon (*parole*).²⁰

After this brief summary, the discussion turns to the most developed attempt we have so far in getting at the content of contemporary legal thought: Duncan Kennedy's recent work on legal structuralism.²¹ Kennedy's understanding of contemporary legal thought provides the point of departure for my own. Kennedy has developed three overlapping structures of legal thought ranging from the US Civil War to the present.²² He labels them "classical legal thought," "social legal thought," and "contemporary legal thought."²³ With respect to the first two structures, Kennedy describes them in semiotic terms, and suggests that for each structure we can distinguish between surface-level legal arguments (*parole*) and a deep grammar governing and shaping the form

¹⁷ For discussions on Saussure's work, see generally THE CAMBRIDGE COMPANION TO SAUSSURE (CAROL SANDERS ED., 2004); JONATHAN CULLER, FERDINAND DE SAUSSURE (1986); ROY HARRIS, READING SAUSSURE: A CRITICAL COMMENTARY ON THE COURS DE LINGUISTIQUE GÉNÉRALE (1987); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (1959) [hereinafter SAUSSURE, GENERAL COURSE]; FERDINAND DE SAUSSURE, WRITINGS IN GENERAL LINGUISTICS (2002).

¹⁸ See generally, e.g., CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND (1966) (exploring structuralism in anthropological field). In the hands of the French intellectual elite, structuralist analyses took a given field, say fashion, and suggested that the style of dress in a particular community could be explained as a language-system. JONATHAN CULLER, *Introduction*, in STRUCTURALISM: CRITICAL CONCEPTS 3 (2006). Just as French is governed by a deep grammar and syntax (*langue*), scholars like Roland Barthes suggested that there was a language of fashion—fashion was *spoken* through the medium of dress. See generally ROLAND BARTHES, THE FASHION SYSTEM (1990). And just as French utterances might take a mind-boggling number of forms (what Saussure called "*parole*"), so too are there many, many ways to dress.

¹⁹ See *infra* notes 49–54 and accompanying text. For an overview of the application of structuralist methodology to law, see Justin Desautels-Stein, *Structuralist Legal Histories*, in LAW AND CONTEMPORARY PROBLEMS (forthcoming 2015).

²⁰ See SAUSSURE, GENERAL COURSE, *supra* note 17, at 73.

²¹ See *infra* notes 56–92 and accompanying text. For examples of this recent work, see generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*]; Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary Legal Thought*, 25 L. & CRITIQUE 91 (2014) [hereinafter Kennedy, *Hermeneutic*].

²² Kennedy, *Three Globalizations*, *supra* note 21, at 19–22.

²³ *Id.*

of those arguments (*langue*).²⁴ In contemporary legal thought, however, Kennedy resists the idea that there is a “contemporary” grammar that is as integrated or developed as in the prior structures.²⁵ In fact, Kennedy suggests that contemporary legal thought lacks integration,²⁶ leading to a question we might more typically associate with art historians than with legal scholars: Is there a contemporary at all?²⁷

Part II next moves away from Kennedy’s characterizations and towards my own. In my approach to classical and social legal thought, I reorient these systems in the language of liberal legalism.²⁸ Though a familiar player in the early legal structuralist works of the 1970s and early 1980s,²⁹ liberal legalism became less popular as an object of analysis as the twentieth century came to a close.³⁰ In my account, liberal legalism is front and center. The target of my structuralist approach is neither “American law” nor “global law,” but is exclusively limited to the language of liberal legalism, wherever in the world it might reside.

As for what it is, for the purposes of this analysis I take liberal legalism as a family of ideas about the appropriate social function of law derived from the likes of Thomas Hobbes, John Locke, Immanuel Kant, Jeremy Bentham, John Stuart Mill, Friedrich Hayek, and John Rawls.³¹ The ideas of these thinkers are often in conflict, and it is a mistake to understand them as all speaking with the same voice. In certain ways, however, a master-*langue* underlies the surface

²⁴ *Id.* at 23.

²⁵ *Id.* at 63.

²⁶ *Id.*

²⁷ See, e.g., RICHARD MEYER, WHAT WAS CONTEMPORARY ART? 259–61 (2013).

²⁸ See *infra* notes 93–204 and accompanying text.

²⁹ For examples of liberal legalism’s role in early structuralist works, see generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981). For examples of the use of legal liberalism during this time, see generally P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

³⁰ For discussion, see generally Justin Desautels-Stein, *supra* note 19.

³¹ See, e.g., ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 63–103 (1975) (discussing liberal political theory). By referencing a “family of ideas,” I am only very casually nodding in the direction of Wittgenstein’s concept of family resemblances. In this essay, I only incidentally, if I do at all, speak in the tradition of the analytic philosophy of language. On family resemblances, see generally LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 66 (4th ed. 2009). On the philosophy of language, see generally JOHN SEARLE, CONSCIOUSNESS AND LANGUAGE (2002).

distinctions between them, coalescing in a uniting grammar.³² This grammar discloses a loose series of binary pairs. First is the pair of ideas about the relation between “individual” and “state.”³³ Second is a pair about the relation between “market” and “state.”³⁴ Third is a relation between “natural law” and “positive law,”³⁵ often translated through a particular contrast between adjudication and legislation.³⁶ By dunking Kennedy’s structures of legal thought in the waters of liberal legalism, “classical legal thought” becomes “classic liberalism” and “social legal thought” becomes “modern liberalism.”

Part III next turns from this discussion of liberal legalism and takes on the second culprit accounting for today’s crisis of legal identity: legal pragmatism. In so doing, this Article translates Kennedy’s concept of “contemporary legal thought” into “pragmatic liberalism.”³⁷ That is, and unlike Kennedy, I suggest that contemporary legal thought is a new, viable, and integrated legal structure, and that its basis is pragmatic liberalism.³⁸ Kennedy, on the other hand, describes contemporary legal thought as the altered debris left over after the assaults on the classical and social structures.³⁹ In my view, Kennedy’s description is more help-

³² As will hopefully become clear, my intention in emphasizing liberal legalism is not to offer a defense of the sorts of intellectual history associated with Louis Hartz. See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955). For better examples of what I’m after here, see generally ALISDAIR MACINTYRE, *AFTER VIRTUE* (1980); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF LEGAL ARGUMENT* (2006).

³³ See Karl Marx, “*On the Jewish Question*,” in KARL MARX: *SELECTED WRITINGS* 60 (David McLellan ed., 2d ed. 2000) (“Liberty, therefore, is the right to do everything that harms no one else. The limits within which anyone can act *without harming* someone else are defined by law, just as the boundary between two fields is determined by a boundary post [T]he right of man to liberty is based not on the association of man with man, but on the separation of man from man. It is the *right* of this separation, the right of the *restricted* individual, withdrawn into himself.”)

³⁴ See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 141 (Beacon Press 2001) (“Economic liberalism was the organizing principle of society engaged in creating a market system. Born as a mere penchant for nonbureaucratic methods, it evolved into a veritable faith in man’s secular salvation through a self-regulating market.” *Id.* Polanyi continued, “[N]evertheless, [t]he road to the free market was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism This paradox was topped by another. While laissez-faire economy was the product of deliberate state action, subsequent restrictions on laissez-faire started in a spontaneous way. Laissez-faire was planned; planning was not.” *Id.* at 146–47.

³⁵ See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 185–212 (1997).

³⁶ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 164–66 (1986).

³⁷ *Cf.*, Justin Desautels-Stein, *Experimental Pragmatism in the Third Globalization*, 9 *CONTEMP. PRAGMATISM* 181, 187–89 (2012) [hereinafter Desautels-Stein, *Experimental Pragmatism*].

³⁸ I should be clear: my description of pragmatic liberalism ought not to be confused for a defense of pragmatic liberalism. Although I do not present a critique of pragmatic liberalism in this Article, I am not an apologist for it.

³⁹ Kennedy, *Three Globalizations*, *supra* note 21, at 63–71.

fully understood as a story about liberal legalism and its devolution over the twentieth century.⁴⁰ Today, classic liberalism and modern liberalism emerge as the outlooks of the dead, offering the jurist a deeply conflicted toolkit of discredited and overused modes of legal argument.⁴¹

But what is fascinating is the sublimation of this apparently neurotic quality of contemporary legal thought. There is something in the contemporary that not only shields the jurist from worries about the failings of liberal legalism, but something that additionally encourages the jurist to feel confident about the workability of the toolkit.⁴² Though we may have lost faith in the singular power of either the classical or modern grammar, we are oddly complacent about using some combination of those grammars so long as the job gets done. So long as it *works*.⁴³ As a result, the semiotic *langue* of contemporary legal thought may be defined by the pragmatic oscillation between the classic and modern legal styles of navigating liberalism's master-*langue*. This "pragmatic oscillation" is itself a grammar—the grammar of contemporary legal thought.

⁴⁰ For further discussion on this point, see generally Desautels-Stein, *Structuralist Legal Histories*, *supra* note 19.

⁴¹ For related accounts, see generally David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002).

⁴² On this point, I have been especially influenced by ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 108–10 (1996) [hereinafter UNGER, LEGAL ANALYSIS]; ROBERTO MANGABEIRA UNGER, THE SELF AWAKENED: PRAGMATISM UNBOUND (2009). I believe that Duncan Kennedy's recent engagement with Paul Ricoeur's "hermeneutic or restoration" is moving in a similar direction. Kennedy, *Hermeneutic*, *supra* note 21, at 107 ("In developing the notion of a hermeneutic of suspicion as something common to Freud, Nietzsche and Marx, Paul Ricoeur insisted that it is part of a matched pair, or has a twin, called 'hermeneutics as the restoration of meaning.' 'The contrary of suspicion, I will say bluntly, is faith. What faith? No longer, to be sure, the first faith of the simple soul, but rather the second faith of one who has engaged in hermeneutics, faith that has undergone criticism, post-critical faith.'" Kennedy argues that:

The hermeneutic of the restoration of legal meaning animates the method of construction in induction/deduction, or the positing of overarching purposes of the legal order in teleological reasoning. It is a disposition, like the disposition of its twin to doubt and unmask, a tendency, in this case to search for and find values immanent in the body of legal materials, to believe in those values, and to deploy the techniques of legal argument to develop and apply them to shape the legal order through time.

Id. at 107–08.

⁴³ For an illustration of the pragmatist sensibility I'm describing, see Paul Lipp, *Is Practicing Law Like Creating Art?* A.B.A. J. (Nov. 21, 2013), http://www.abajournal.com/legalrebels/article/is_practicing_law_like_creating_art/, archived at <http://perma.cc/ZCP4-S8WU> ("[L]aw is a system, and the bigger and more complex the system, the less effective 'art' style approaches are in getting good results. Uniqueness may be more of a negative than a positive. Most sophisticated legal work is 'pattern matching,' applying the most similar known example to the problem at hand to help achieve the desired result. That's neither art nor commodity; it's just the appropriate method for the problem at hand.").

When legal pragmatism mixes with the liberal legalist modes of reasoning operating today in the work of lawyers and judges alike, the result is a very strange outlook indeed: pragmatic liberalism.

No doubt, some readers will be skeptical that the discussion so far has anything to do with the crisis now plaguing the legal profession. For them, it may very well be interesting to think about the “neuroses” of legal thought, but when it comes down to whether students are adequately prepared for the “new normal,” or whether the old law school curriculum makes any sense in the twenty-first century, the push needs to be in the direction of reform that really works in practice, and away from the abstractions of high theory. Of course, one sort of reply points out that rather than having supplied an objection, my imagined reader has merely evidenced precisely the kind of pragmatic sensibility that I am trying to diagnose. Another reply suggests that the instinct to establish a hard line between something called theory and another thing called practice is an instinct with its own theoretical pre-requisites.⁴⁴ That is, when we prioritize the apparently practical over the apparently theoretical, and believe in the possibility of somehow engaging in “un-theorized” forms of practice, we mistake this kind of prioritizing as somehow pre-theoretic, which it never is.⁴⁵ As I explain below, pragmatism is itself a theoretical outlook.⁴⁶

It is in this context that I cannot help but recall Pierre Schlag’s well-known image of the night-hikers.⁴⁷ It is worth quoting at some length:

Suppose that you are walking on a road and you come to a fork. This calls for a decision, for a choice. So you ask your companions: “Which fork should we take? Where should we go?” You all begin to talk about it, to consider the possibilities, to weigh the considerations. Given these circumstances, given this sort of problem, the questions, “Where should we go? What should we do?” are perfectly sensible.

⁴⁴ I don’t want to be misunderstood here for suggesting that the pragmatist sensibility merely needs to be reversed, and that theory ought to dominate practice. Rather, it is the very distinction between theory and practice which is problematic. For further discussion on the distinction, see generally PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 1, 29 (1977); STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989).

⁴⁵ As Herbert Marcuse commented in a rather different situation, “[t]he divorce of thought from action, of theory from practice, is itself part of the unfree world. No thought and no theory (alone) can undo it.” HERBERT MARCUSE, *REASON AND REVOLUTION*, at xii (1941).

⁴⁶ See *infra* notes 212–214 and accompanying text.

⁴⁷ See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 805–06 (1991).

But now suppose that it gets dark and the terrain becomes less familiar. You are no longer sure which road you are on or even if you are on a road at all. So you ask, “where are we?” One of your companions says “I don’t know—I think we should just keep going forward.” Another one says, “I think we should just go back.” Yet another says “No, I think we should go left.” Now given the right context, each of these suggestions can be perfectly sensible. But not in this context. Not anymore. On the contrary, you know very well that going forward, backward, left or in any other direction makes no sense unless you happen to know where you are. So, of course, you try to figure out where you are. You look around for telltale signs. You scan the horizon. You try to reconstruct mentally how you got here in the first place. You explore. You even start thinking about how to figure out where you are.

Meanwhile, if your companions keep asking “But what should we do? Which road should we take?,” you are likely to think that these kinds of questions are not particularly helpful. The questions (Where should we go? Which fork should we take?) that seemed to make so much sense a short time back have now become a hindrance. And if your companions keep up this sort of questioning (Which road should we take? Which way should we go?), you’re going to start wondering about how to get them to focus on the new situation, how to get them to drop this “fork in the road” stuff and start using a different metaphor.⁴⁸

It strikes me that our present crisis of legal identity has much in common with Schlag’s depiction. The situation has darkened, and the terrain is unfamiliar, or at least less familiar than it once was. But what should we do? How to reform? My instinct is to chasten the pragmatist sensibility lashing us “forward,” and ask instead some deeper questions about just what it is that’s going on here. Perhaps, that is, our efforts will benefit more from mapping the crisis and figuring out how it is that we arrived, rather than just taking the plunge. Further still, we will need a compass, and it is in the service of that need that the discussion now turns.

⁴⁸ See *id.*

I. THE STRUCTURALIST METHOD

Legal structuralism is a view of law informed by semiotics, and in particular, Ferdinand de Saussure's theory of language. As a result, legal structuralism is indebted to Saussure's distinction between the French terms *langue* and *parole*.⁴⁹ For Saussure, *langue* refers to the fundamental rules of syntax in the linguistic structure.⁵⁰ As Saussure explained, the *langue* represents "the whole set of linguistic habits which allow an individual to understand and be understood."⁵¹ The *langue* is consequently social in nature and determinate in scope: individuals cannot make up their own grammar. The *langue* is a system of syntactical constraints operating equally on each language speaker. Its contents are fixed and closed, and in the context of the system, universal.⁵² In contrast to the underlying grammar of the language-system is the language's lexicon: *parole*. *Parole* refers to the open, arbitrary, and individually-created speech-acts uttered in conformity with the deep structure of the *langue*.⁵³ Thus, where *langue* is unconscious and out of sight, *parole* is intentional and visible. Where *langue* represents a field of coercion, *parole* is free. And where *parole* is apparent and everywhere, *langue* is only discoverable through an analysis of the common qualities demonstrable in *parole*.⁵⁴

In the middle decades of the twentieth century, thinkers catapulted semiotics into a broader theorization of society known as structuralism.⁵⁵ Through-

⁴⁹ TERRENCE HAWKES, STRUCTURALISM AND SEMIOTICS 9 (2003).

⁵⁰ SAUSSURE, GENERAL COURSE, *supra* note 17, at 77.

⁵¹ *Id.*

⁵² *Id.* at 73.

⁵³ *Id.* at 76.

⁵⁴ See ROSALIND COWARD & JOHN ELLIS, LANGUAGE AND MATERIALISM: DEVELOPMENTS IN SEMIOLOGY AND THE THEORY OF THE SUBJECT 12 (1977).

⁵⁵ Borrowing from Troubetzkoy, Lévi-Strauss explained that:

First, structural linguistics shifts from the study of *conscious linguistic* phenomena to the study of their *unconscious* infrastructure; second, it does not treat *terms* as independent entities, taking instead as its basis of analysis the *relations* between terms; third, it introduces the concept of *system*—"Modern phonemics does not merely proclaim that phonemes are always part of a system; it *shows* concrete phonemic systems and elucidates their structure"—; finally, structural linguistics aims at discovering *general laws*, either by induction "or . . . by logical deduction, which would give them an absolute character."

Claude Lévi-Strauss, *Structural Analysis in Linguistics and in Anthropology*, in 1 JONATHAN CULLER, STRUCTURALISM: CRITICAL CONCEPTS, 33 (2006). See generally PETER CAWS, STRUCTURALISM: THE ART OF THE INTELLIGIBLE (1988) (providing additional discussion); THE STRUCTURALISTS: FROM MARX TO LÉVI-STRAUSS (Richard T. De George & Fernande M. De George eds., 1972) (same).

out his career, Duncan Kennedy has built out of these efforts a structuralist approach to law.⁵⁶ He has developed three overlapping structures of legal thought ranging from the U.S. Civil War to the present.⁵⁷ He labels them “classical legal thought,” “social legal thought,” and “contemporary legal thought.”⁵⁸

The first structure involved the transmission of “classical” ideas from Europe to the United States (1850–1914),⁵⁹ the second involved more of a back and forth cross-Atlantic movement of “social” legal ideas (1900–1968),⁶⁰ and the third, in which we are now living, holds the United States at the core (1945–2000).⁶¹ As for what was globalizing, Kennedy re-introduced from his earlier work the notion of “legal consciousness.”⁶² Legal consciousness was not a political ideology or a philosophy of law or a body of doctrine. It rather consisted in a “conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments.”⁶³ Kennedy thus described legal consciousness in explicitly structuralist terms, dividing it into *langue* and *parole*,⁶⁴ and using Claude Levi-Strauss’ concept of *bricolage*⁶⁵ as an explanation for how legal consciousness reveals itself in any given legal argument.⁶⁶

Kennedy first described “classical legal thought,” a language-system anchored by 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

⁵⁶ DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 8 (2006).

⁵⁷ Kennedy, *Three Globalizations*, *supra* note 21, at 19–22. It is tempting to confuse each of these periods of legal thought as a mapping of anything and everything a jurist might have been doing at a particular time, as if we might say, “here we have a description of postwar law, and there a statement on law after the Cold War.” That isn’t what this is. *See id.* Kennedy isn’t telling a “total history” of legal thought, but is interested instead in constructing a genealogy of legal structures. *See id.* Further, Kennedy’s approach to legal description is phenomenological: he wants to construct an image of law as experienced by the jurist, and avoid any reference to what may or may not have been “really happening” anywhere at a given time. *See id.* What was globalizing, and what was experienced, was a mode of legal thought, a style of thinking. To be sure, there’s a connection with the “real” here, but the “real” isn’t an object from which the analyst makes a dutiful copy.

⁵⁸ *Id.*

⁵⁹ KENNEDY, *supra* note 56, at 20.

⁶⁰ *Id.* at 21.

⁶¹ *Id.* at 19.

⁶² *Id.* at 22.

⁶³ *Id.*

⁶⁴ *Id.* at 23.

⁶⁵ LÉVI-STRAUSS, *supra* note 18, at 16–36, 150.

⁶⁶ *Id.* I previously illustrated some of this space between *langue* and *parole* in the context of international law. *See generally* Justin Desautels-Stein, *The Judge and the Drone*, 56 ARIZ. L. REV. 117 (2014).

regulation, and (3) legal formalism.⁶⁷ Taken together, Kennedy described the basic mode of reasoning in classical legal thought as “the will theory.” Kennedy explained that “the private law rules of the ‘advanced’ Western nation states were well understood as a set of rational derivations from the notion that government should protect the rights of legal persons. . . .”⁶⁸ In this way, the classical mindset provides the jurist with a way of doing law; a way that instructs the user to think of law as a system of objects, logically related and autonomous from a jurist’s moral preferences.

This particular idea gets at formalism that as Kennedy explains, is an aspect of the *langue* for classical legal thought. Formalism plays a deep, “pre-reflective” role in legal work, located in the Saussurean grammar (*langue*) that makes the discourse (*parole*) possible. The more familiar interpretive practice known as “textualism” is a cousin of formalism, though the two strategies deploy rather different techniques.⁶⁹

Kennedy’s second mode of legal consciousness is “social legal thought.”⁷⁰ Kennedy situates social legal thought as a language-system that appeared on the scene towards the end of the nineteenth century, and that was spoken with decreasing frequency by the last third of the twentieth.⁷¹ 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 judicial strategy of purposive interpretation that sought to generate legal conclusions on the basis of perceived social needs.⁷² Thus, where jurists operating in the classical style sought 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.⁷³ Once we knew what a law was supposed to accomplish, and whether we wanted the relevant social goal accomplished that way, only then could we go on to say whether a legal dispute

⁶⁷ Kennedy, *Three Globalizations*, *supra* note 21, at 25.

⁶⁸ *Id.* at 26.

⁶⁹ Formalism is a mode of legal reasoning whereby the jurist resolves a legal dispute on the basis of deducing answers from relevant legal principles. Textualism, in contrast, involves the sense that a legal dispute can be resolved on the basis of meanings immanent in some relevant text. Both formalist and textualist strategies aspire to objectivity. On textualism, see generally William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)).

⁷⁰ Kennedy, *Three Globalizations*, *supra* note 21, at 37.

⁷¹ *Id.* at 38.

⁷² *Id.*

⁷³ *Id.*

should be resolved in one direction or another.⁷⁴ That is, the grammar of social legal thought instructed its user to couple functional jurisprudence to a set of ideas, namely, interdependence, “social justice,” and a new breed of liberalism that at once distanced itself from its classical ancestor on the one side and from Marxism on the other.⁷⁵

Thus, in contrast with the formalism associated with classical legal thought, we can associate “legal functionalism” with social legal thought.⁷⁶ For the functionalist, adjudication consists of adapting laws to evolving social purposes and crafting legal decisions in the light of the social needs to which law is its ardent servant.⁷⁷ Interestingly, functionalists believed that their toolkit was just as “objective” as the formalists believed their approach to be.⁷⁸ The difference is in how the idea of objectivity is grounded.⁷⁹ Whereas formalists ground objectivity in the individual jurist’s capacity to reason his way towards a “correct” legal conclusion, functionalists ground objectivity in the jurist’s ability to gather the kind of empirical data that will compel a “correct” legal decision.⁸⁰

In his descriptions of both classical legal thought and social legal thought, Kennedy tries to show that these modes of legal consciousness have no “essence.”⁸¹ What he means by this is that he denies the plausibility of a fundamental center around which the structures of legal thought might revolve. Legal consciousness is not left or right. “Classical legal thought was liberal in either a conservative or a progressive way, according to how it balanced public

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Gordon, *Critical Legal Histories*, *supra* note 13, at 58; Kennedy, *Hermeneutic*, *supra* note 21, at 7.

⁷⁷ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functionalist Approach*, 35 COLUM. L. REV. 809, 809 (1935).

⁷⁸ Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1154 (1985).

⁷⁹ *Id.* at 1240.

⁸⁰ See generally, e.g., *Babcock v. Johnson*, 191 N.E.2d 279 (N.Y. 1963) (turning to legal functionalism in a pivotal moment in the so-called “Conflicts Revolution”)

⁸¹ Kennedy, *Three Globalizations*, *supra* note 21, at 39. As Kennedy described his approach in 1997, he suggested that it could be understood as the “bleeding together of surrealism with the structuralist critique of the scientism and humanism of both Liberalism and Marxism, under the sign of Friedrich Nietzsche. . . . [A]s long as it’s convincing that there is something in [modernism/postmodernism] that can be talked about, it doesn’t seem important to get the genealogy just right.” DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 348 (1997) [hereinafter KENNEDY, CRITIQUE]. For one of Kennedy’s more explicit attempts to bring Foucault into his approach, see generally Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991). For Chris Tomlins’s discussion regarding connections between Kennedy and Foucault, see Christopher Tomlins, *The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy’s Three Globalizations*, 78 LAW & CONTEMP. PROBS. (forthcoming 2014) [hereinafter Tomlins, *Legal Mind*].

and private in market and household. The Social could be socialist or social democratic or Catholic or Social Christian or fascist (but not communist or classic liberal).”⁸² Legal consciousness, Kennedy explains, is “the common property” of the left and the right.⁸³

From this, we might gather that, despite having told us otherwise, Kennedy actually does think that these structures of legal thought have an essence—an essence that might have something to do with “liberalism.” After all, it would seem from these last lines that Kennedy believes that the projects of classical legal thought, whether progressive or conservative, are always already liberal.⁸⁴ We might also gather that Kennedy doesn’t see liberalism as ideological (though we know that he does), since classical legal thought (liberalism?) was deployed from both the left and the right. But later, he says that “over the course of the twentieth century, the mainstream ideas of the first globalization turned from a ‘consciousness,’ within which a multitude of political projects were at least possible, into an ‘ideology,’ classic liberalism and then neoliberalism.”⁸⁵

As for social legal consciousness, Kennedy is similarly ambiguous about the role of liberalism in the story. Kennedy suggests that social legal thought could take a socialist form, which would clearly present a non-liberal strain of the social and force the conclusion that social legal thought could not be “essentially” liberal.⁸⁶ But this doesn’t actually seem to be what Kennedy really thinks about the social, for he states later that people working in the mode of social legal thought “were anti-Marxist, just as much as they were anti-laissez-faire. *The goal was to save liberalism from itself.*”⁸⁷ And what, in terms of ideology, did the saving of liberalism entail? Well, very little, actually. As in the case of classical legal thought, one could work in the social from all sorts of angles, both left and right. Because of this agnosticism about a proper normative direction, Kennedy states that the social was a legal consciousness similar to classical legal thought. And yet, Kennedy brings liberalism in again as something appearing like more than just a political project, but as an essential quality of legal consciousness itself. Discussing the place of Keynes in the social, Kennedy explains, “Keynes was perhaps its genius, even though the save-it-from-itself strategy should operate at the state and international levels, leav-

⁸² Kennedy, *Three Globalizations*, *supra* note 21, at 22.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 28.

⁸⁶ *Id.* at 39.

⁸⁷ *Id.* at 38.

ing the Classical Legal Thought (“CLT”) structure of private property and free contract intact.”⁸⁸

In discussing Kennedy’s structuralist approach to legal history, I have emphasized this issue of whether a mode of legal consciousness has an “essence” due to concerns about “totalization,” “essentialism,” and the possibility of foundational structures anchoring the universals of human existence.⁸⁹ As Michel Foucault explained, structuralism went wrong when its advocates worked towards a totalizing view of the object: “A total description draws all phenomena around a single centre—a principle, a meaning, a spirit, a world-view, an overall shape”⁹⁰ In some contexts, these concerns materialized in what became known as the “post-structuralist” or “deconstructionist” critique of structuralism.⁹¹ When Kennedy first developed the elements of legal structuralism, some

⁸⁸ *Id.*

⁸⁹ JOHN STURROCK, STRUCTURALISM 122 (2003). A common complaint was that structuralism was oriented towards universals and empirical science. HERBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS, at xv (1982) (“The structuralist approach attempts to dispense with both meaning and the subject by finding objective laws which govern all human activity.”).

⁹⁰ MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 10 (A.M. Sheridan Smith trans., 1972). To see what Foucault means here in slightly more concrete terms, it is helpful to move towards an example that will continue to work for us throughout the Article: “political economy” and the legal relation between “market” and “state.” How might one begin to explore the meaning of a category like political economy? *See id.* at 159. Where do you start? *How* do you start? It would be a mistake, Foucault argued, to assume at the outset that the category “political economy” was a unified structure fundamentally centered by some secret set of rules—a *langue*. *See id.* at 11. To do so, post-structuralists would suggest, is to make the mistake of the totalizing structuralists who were apparently seeking an underlying grammar for all things falling in the category of political economy. For Foucault, in contrast, the *actual* “political economy” is far too messy for it to plausibly be characterized in the terms of Saussure’s *langue* and *parole*. *See id.* It is too liquid—not here and neither now nor then—constantly moving, shifting, dispersed. If there is “political economy,” it surely lacks an underlying syntax, and there can be no grammatical structure organizing its meaning. *See id.* If at the outset you thought of political economy as a stable entity susceptible to a neutral study, whereby you might examine and differentiate its various elements in order to get a glimpse of the deep, unconscious rules governing those elements, Foucault assures you you’ve gone off the rails. Political economy has no totalizing/stabilizing center—there is no historical continuity linking events together like links in a chain. As soon as you get your hands on any one element—what Foucault called a *statement*—you’ll find nothing there. *See id.* at 115. The text “is caught up in a system of references to other books, other texts, other sentences: it is a node within a network.” *Id.* at 23.

⁹¹ *See, e.g.*, EVE TAYLOR BANNET, STRUCTURALISM AND THE LOGIC OF DISSENT (1989); EMILE BENEVISTE, PROBLEMS IN GENERAL LINGUISTICS (1971); MARK POSTER, CRITICAL THEORY AND POSTSTRUCTURALISM (1989). It’s common to see Roland Barthes’s *S/Z* as a transition piece from structuralism to post-structuralism. *See* ROLAND BARTHES, *S/Z: AN ESSAY* 3–27 (Richard Miller trans.) (1975); *see also* Bjornar Olsen, *Roland Barthes: From Sign to Text*, in *READING MATERIAL CULTURE* 165 (Christopher Tilley ed., 1990) (discussing Barthes’s shift from structuralism to post-structuralism).

critics worried that his work was veering precisely towards totalization.⁹² To be fair, it is easy enough to understand why post-structuralist legal scholars were as anxious as they were about this. The problem now is that in his newer, post-poststructuralist works, Kennedy's presentations of legal consciousness are deeply ambivalent: these presentations are of what, exactly? Is it all of American law, all of global law? Something less?

II. PRECURSORS TO CONTEMPORARY LEGAL THOUGHT

This Part examines liberal legalism through the lens of legal structuralism, exploring the classic and modern structures of legal thought. In doing so, I give special attention to the field of political economy.⁹³ I unpack political economy in the liberal distinction between “market” and “state.”

My use of legal structuralism takes Kennedy's understanding of classical legal thought and social legal thought as its point of departure, but then reorients his conceptions in a very specific way.⁹⁴ The target of my structuralist

⁹² See, e.g., GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 115 (1995).

⁹³ See *infra* notes 156–204 and accompanying text. My analysis of liberal legalism and its relation with contemporary legal thought is not dependent on the example of political economy. I believe that the analysis extends across a number of legal domains, including race and gender. I do not believe that the domain of political economy is somehow more important than gender and race—far from it. In fact, my hope is that further research will ensue in these fields, either strengthening or complicating the structuralist analysis I present here. I have produced the beginnings of a legal structuralist analysis of race in Justin Desautels-Stein, *Race as a Legal Concept*, 2 *COLUM. J. RACE & L.* 1 (2012) [hereinafter Desautels-Stein, *Race as a Legal Concept*].

⁹⁴ Much of my thinking about structuralism and liberal legalism has its roots in a few sentences from Robert Gordon's well-known essay, *Critical Legal Histories*:

What the parties are struggling over is the power to interpret and to have applied in their favor the (contradictory) implications of a common set of premises. For example, because most of the actual work of elaborating the basic terms of political discourse is done by people at the top of the social pyramid, a historian would, *to a limited extent*, be able to tell the story of the rise of a structure as an elite's attempt to rationalize elite privileges and the story of its fall as the collapse of the elite's Empire of Reason under siege from the enemies below One could concede this point to the structuralists and still ask them to embed their story in a narrative context that would at least supply *subjects* and *occasions* to the narrative to show that it is human beings with reasons and motives, not disembodied Spirits, who drive the manufacture of legal concepts: Who pushed which arguments on what occasions and why? What happened to set off the arguments? What happened to destabilize previously stable conventions? We ought to have a rule of style: no sentence without a subject; no intellectual move without a reason—even if the particular subject and reason may sometimes be largely incidental to the grander thematic history of legal consciousness.

Gordon, *Critical Legal Histories*, *supra* note 13, at 118–19.

method is neither the totalization of “American law” nor “global law.” It is rather the particular image of liberal legalism—nothing more, nothing less. In making liberal legalism my target, I distinguish liberal *styles* and liberal *concepts*.⁹⁵ As for the styles of liberal legalism, I construct them out of an explicit encounter between Kennedy’s two modes of legal consciousness and liberal legalism. “Classical Legal Thought” becomes “classic liberalism”⁹⁶ and “Social Legal Thought” becomes “modern liberalism.”⁹⁷

With respect to legal concepts as they are structured in liberal legalism, I employ two ideal types of rules: background and foreground.⁹⁸ Background rules are *constitutive* of the legal concept, meaning, without those basic foundational rules, the concept would not exist.⁹⁹ Background rules might be situated all the way back in the unconscious *langue*, but they also may operate closer up in the direction of *parole*.¹⁰⁰ Foreground rules may also be located in the *langue*, but they perform quite differently. Foreground rules are those meant to respond to the play of the background rules.¹⁰¹ They are regulatory in nature, and not constitutive of the concept.¹⁰² Each liberal style has its own particular orientation towards the relation between background and foreground rules: an orientation that sits at the deeper levels of the style’s structure.¹⁰³

At least in my focus on the “market” as a legal concept,¹⁰⁴ the classic liberal style emphasizes background rules and finds few reasons for foreground rules at all.¹⁰⁵ Modern liberalism has a strong emphasis on foreground rules, but still retains a commitment to the idea of background rules.¹⁰⁶ What will

⁹⁵ Desautels-Stein, *Market*, *supra* note 8, at 395–98.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ For discussion of these intermediary levels in the structure, see generally Desautels-Stein, *The Judge and the Drone*, *supra* note 66; Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

¹⁰¹ Desautels-Stein, *Market*, *supra* note 8, at 395.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ I should emphasize to the reader that, in the diachronic accounts that follow, my intention is adamantly not to produce either a traditional work in the mode of a history of ideas, nor in the mode of Cambridge School contextualism. Rather, my hope is to perform more in the mode of a less familiar conceptual or structuralist historiography. For an overview of the debates within intellectual history, see generally RETHINKING EUROPEAN INTELLECTUAL HISTORY (Darrin M. McMahon & Samuel Moyn, eds. 2014). On conceptual history, see generally KOSELLECK, *supra* note 1. On structuralist history, see generally Justin Desautels-Stein, *Back in Style*, 25 L. & CRITIQUE 141 (2014).

¹⁰⁵ Desautels-Stein, *Market*, *supra* note 8, at 395.

¹⁰⁶ See Desautels-Stein, *Race as a Legal Concept*, *supra* note 93, at 3–10.

become apparent in the summary discussion that follows is that a belief in background rules is a belief that inevitably conjures up the illusion of natural necessity, whether it's a natural market or a natural form of human identity, like race.¹⁰⁷ The reason for this is that background rules are often characterized as hardly rules at all, but instead as values that are both true and just as a matter of natural reason, convenience, evolution, or whatever.¹⁰⁸ Because foreground rules are by definition understood in relation to background rules, a liberal style that emphasizes foreground rules inevitably conjures up the illusion of a heavily interventionist state.¹⁰⁹ The critique is precisely that these are illusions: the choice between natural markers of market activity and human identification and the interventionist state is a chimerical choice—the only actual choice is between different sets of rules—rules that are inevitably laden with political meaning and distributive consequences.¹¹⁰

As I discuss throughout, this Article associates legal formalism with the classic liberal tendency to emphasize background rules over foreground rules, and legal functionalism with the modern liberal tendency to emphasize foreground rules over background rules. The reason for this association is this: the style of classic liberalism presents an image of market and state sharply divided by the line of natural reason. For the jurist operating in the classic style, disputes over the proper amount of governmental intervention in the market ought to be conclusively resolved through deduction from natural rules identified through the use of reason and collected in the slate of background rules. This is legal formalism. For the jurist operating in the modern mode, in contrast, the appropriate limits of state regulation are defined much more in terms of the purpose of the regulation in question and the nature of the social problem meant to be addressed. These regulations take the form of foreground rules, and the mode of interpreting them is legal functionalism. We can present these associations in the following picture, which are then discussed in detail below.

Classic Liberalism is to Legal Formalism and Strong Background Rules

as

Modern Liberalism is to Legal Functionalism and Strong Foreground Rules

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ For a recent illustration, see generally BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

A. Classic Liberalism and the Market/State Distinction

As we will see, the classic liberal style places a tremendous amount of weight on background legal rules, and pays very little, if any, attention to the necessity of foreground rules. Here, I suggest John Locke's *Second Treatise* and the United States Supreme Court's 1873 decision in *The Civil Rights Cases* as illustrative of the classic liberal style of constructing a market.

As a mercantilist writing before the advent of Quesnay and the Physiocrats almost a hundred years later,¹¹¹ Locke's *Second Treatise* of 1689¹¹² was hardly a herald for classical economics in any technical sense, and his ideas about self-interest certainly had little to do either with the invisible hand or a rational maximand.¹¹³ Nevertheless, Locke's analysis of the state of nature, and the role of government in relation to the state of nature elaborated a style that would serve not only the classical views of Smith, Ricardo, Bentham, and Mill, but also the views of the marginalists like Marshall, Jevons, and later thinkers ranging from Hayek to Coase to Posner.¹¹⁴ Here's how the very famous image was produced.

Locke began with the question of how, in some hypothetical state (or perhaps, the "barbarism" of "America"), the land which God had bestowed upon all of mankind might be justifiably appropriated and transformed into personal property.¹¹⁵ In this pre-political "natural condition,"¹¹⁶ Locke argued, human beings have natural rights.¹¹⁷ First among such rights is a right of self-preservation which, for Locke, entailed a right of *ownership* over one's body.¹¹⁸

¹¹¹ For discussion of the physiocrats, see STEVEN G. MEDEMA, *THE HESITANT HAND: TAMING SELF-INTEREST IN THE HISTORY OF ECONOMIC IDEAS 14–17* (2009). On mercantilism, see Lars G. Magnusson, *Mercantilism, in A COMPANION TO THE HISTORY OF ECONOMIC THOUGHT 46–59* (Warren J. Samuels et al. eds., 2003).

¹¹² JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 12 (Paul Negri & Tom Crawford eds., Dover Publ'ns 2002) (1689). For discussion on Locke's work, see generally JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE TWO TREATISES OF GOVERNMENT* (1969); E.J. Hobsbawm, *The Crisis of the Seventeenth Century, in CRISIS IN EUROPE: 1560–1660*, at 5, 27 (Trevor Aston ed., 1965); Peter Laslett, *The English Revolution and Locke's Two Treatises of Government*, 12 *CAMBRIDGE HIST. J.* 40 (1956).

¹¹³ See C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE 197–211* (1962).

¹¹⁴ See generally MEDEMA, *supra* note 111 (providing further discussion); W. W. ROSTOW, *THEORISTS OF ECONOMIC GROWTH FROM DAVID HUME TO THE PRESENT: WITH A PERSPECTIVE ON THE NEXT CENTURY* (1990) (same).

¹¹⁵ LOCKE, *supra* note 112, at 12.

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.* at 3–4.

¹¹⁸ *Id.* at 12–13.

Regardless of their status or identity, so went the implication, all people have a right to their person.

This right over one's body was the beginning of a chain of ideas that gets Locke to a natural market system.¹¹⁹ Because a person owns their body, Locke suggests, they also own their labor, the physical demonstration of power performed by the body.¹²⁰ Now, say such a Lockean rights-bearing person walks over to an unclaimed orchard, picks some apples, and takes them home.¹²¹ This person now has a *property right* in the apples. Why? Certainly, the apples weren't his before he picked them, and all men could have laid a good claim on them. But, says Locke, after our man here mixed his own labor with the apple, the apple was his since no one else had a right of ownership over his labor.¹²² Thus, to the extent people labor over the common goods of the earth, they may justifiably exclude others from particular goods to the extent they have mixed their labor into those goods, creating natural rights of property.¹²³ The essence of this natural right of property is the justifiable deployment of force in the exclusion of others from one's "own" property.¹²⁴

So far so good, but keep in mind, we are still in the state of nature here, and government has yet to enter this classic liberal image. Locke next explains that there is a natural prohibition on the taking of too much of the earth's common bounty.¹²⁵ To take so many apples that the harvester might not be able to eat them all, and so some would go to waste, Locke suggests, would be to violate natural law.¹²⁶ But the answer lies not in providing a limit as to how much the harvester might take from the orchard. In fact, it is virtuous for him to take as many apples as he can, even all of them if it's possible.¹²⁷ The reason

¹¹⁹ *Id.* at 22 ("And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them. . . ."); see also JOHN LOCKE, *Some Considerations on the Consequences of the Lowering of Interest, and Raising the Value of Money* (1691), in 4 THE WORKS OF JOHN LOCKE 3, 7 (1824) ("[F]or money being a universal commodity, and as necessary to trade as food is to life, every body must have it, at what rate they can get it, and unavoidably pay dear, when it is scarce; and debts, no less than trade, have made borrowing in fashion.").

¹²⁰ LOCKE, *supra* note 112, at 12–13.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 69.

¹²⁵ *Id.* at 14.

¹²⁶ *Id.* at 17.

¹²⁷ See MACPHERSON, *supra* note 113, at 212 ("[T]he greater productivity of the appropriated land more than makes up for the lack of land available for others. This assumes, of course, that the increase in the whole product will be distributed to . . . those left without enough land. Locke makes this assumption.").

for Locke's encouragement of accumulation, despite his own warnings about waste, is that Locke believed that the invention of currency had solved the problem.¹²⁸ With money in play, our harvester should gather up as much as he can, and sell it for the highest value—a value that will be commensurate with the amount of labor he has poured into the good.¹²⁹ In accumulating more money in the form of gold and silver, Locke saw the growth of the national economy and the consolidation of the nation-state.¹³⁰

Locke thus establishes rights of ownership and trade in a hypothetical state of nature, but as is well-known, Locke's intention was hardly to remain hypothetical. Like Hobbes, Locke also saw the state of nature as fundamentally flawed, and Locke believed the natural goodness of property rights to be in jeopardy so long as they remained pre-political.¹³¹ Thus, Locke exhorted our harvester and his friends to leave the state of nature and enter into a social contract wherein they would consensually establish a constitutional government.¹³² But why? Why were property rights jeopardized in the state of nature? Articulating what would later become known as the Rule of Law ideal,¹³³ Locke worried that in a pre-legal (and here we are to understand law as "positive law") state of nature, contract and property rights might suffer under-enforcement.¹³⁴ How might we be sure that promises will be upheld, property respected, and crimes punished? Locke believed that in order for a market to truly come into being and operational, it would need to leave the state of nature and enter political society.¹³⁵ Only in the context of positively enforced rules of property and contract might a market be effective,¹³⁶ and indeed, as Locke explained, the "chief end . . . of the commonwealth was the protection of property."¹³⁷

As a consequence, Locke arrived at the apparent validity of natural property rights—rights wherein individuals could justifiably appropriate land and goods from the common heritage of mankind and exclude others from such land and goods. Locke then derived from natural reason the applicability of

¹²⁸ LOCKE, *supra* note 112, at 22.

¹²⁹ PIERRE MANENT, AN INTELLECTUAL HISTORY OF LIBERALISM 43 (1995).

¹³⁰ ROBERT L. HEILBRONER & WILLIAM MILBERG, THE MAKING OF ECONOMIC SOCIETY 47–48 (12th ed. 2008).

¹³¹ THOMAS HOBBS, LEVIATHAN 111–12 (Dutton 1965); Locke, *supra* note 112, at 57.

¹³² MACPHERSON, *supra* note 113, at 256–57.

¹³³ See, e.g., A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107–22 (1885).

¹³⁴ Locke, *supra* note 112, at 40.

¹³⁵ *Id.* at 39.

¹³⁶ *Id.*

¹³⁷ *Id.* at 57.

certain natural limits on how much we should accumulate, only to push for the legalization of property and contract in the political realm, *free* of any natural limits on how much one might take and exclude others from enjoying.

Ultimately, Locke presents us with an image of a market legally constructed out of the background rules of property and contract. Any conceivable reason for the state to act in the service of regulating the market through foreground rules—here understood as countering the effects of the background rules of property and contract—are left to the contingencies of natural reason.

To see how this concept of the market, with its commitment to strong background rules, “materialized” a couple hundred years later, consider briefly the United States Supreme Court’s 1883 decision in *The Civil Rights Cases* holding that the Civil Rights Act of 1875 was unconstitutional.¹³⁸ Confronting the Court in this case was a question about how to identify appropriate forms of governmental interference in the natural workings of the market. The Act’s purpose was to ensure to all U.S. citizens, regardless of race, “full and equal enjoyment” of public places like hotels and theaters.¹³⁹ Writing for the majority, Justice Bradley explained that the Act’s authority was grounded in the newly-adopted Fourteenth Amendment to the U.S. Constitution, and if the Act could not be properly derived from the Amendment, it amounted to an unconstitutional piece of legislation.¹⁴⁰

Ablly demonstrating Locke’s theory of the relation between market and state, the Court ultimately struck down the Civil Rights Act as an instance of unconstitutional interference in the proper workings of the private sphere of the market.¹⁴¹ Citing to the language of the Fourteenth Amendment prohibiting the state from denying to any person equal protection of law, the Court emphasized that Congress had failed to understand that it was only “state action of a particular character that was prohibited.”¹⁴² The infringement of individual rights, such as the barring of a person from a restaurant on account of their race, could only come under the ambit of the Fourteenth Amendment if the infringement was required by some legislative act.¹⁴³ If a person decides not to sell his apples to another, this sort of purely private action could not be undone by Congressional action. The Fourteenth Amendment did not “authorize con-

¹³⁸ 109 U.S. 3, 25–26 (1883).

¹³⁹ *Id.* at 4.

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at 25–26.

¹⁴² *Id.* at 11.

¹⁴³ *Id.* at 11–12.

gress to create a code of municipal law for the regulation of private rights.”¹⁴⁴ Instead, the Court reasoned, Congress could only correct pieces of state legislation that had impaired individual rights—it couldn’t adopt laws, like the Civil Rights Act, which attempted to legislate for the market.¹⁴⁵ Thus, because the plaintiffs were unable to point to state laws barring them from these establishments on the basis of their race, and since these instances of discrimination were purely private, they had no cause of action.¹⁴⁶ The Fourteenth Amendment spoke to their claim, and since the Civil Rights Act failed to conform to the Amendment’s state action requirement, the Court struck it down.¹⁴⁷

Confronting the Court in this case was a question about how to identify appropriate forms of governmental interference in the natural workings of the market. The fact that this is a market case is often obscured by its racial aspects, but what is the central dispute here but a claim about the alienation of goods and services?¹⁴⁸ The question becomes, in Locke’s conceptual terms, a question about the role of government in the management of the economy, and for the Court, the answer is simple. Unless private rights are jeopardized by an act of government itself, disputes about the allocation of resources must be left to the private law of property and contract, and to the private-law enforcing code of the criminal law. And what counts as state action? For the Court, once again, it’s easy.

In the classic liberal style, the market’s background rules are not acts of state, even though they may have a governmental imprimatur. The reason for this way of cabining only certain kinds of state action as “state action” is that the market’s background rules have been imported from the state of nature. They are organic, real, true—precisely in a way that the Congressional attempt to regulate the market through the Civil Rights Act was an artificial, false, and arbitrary interference with the natural workings of the private sphere.

In sum, the classic liberal style is committed to an image of a strong market, only made possible in the shadow of the state and through the critical but very narrow background rules of property and contract. As a set of economic policies aimed at the strengthening of the relatively novel idea of the Westphalian state through growth in the manufacturing industry and the hoarding of national currency reserves, mercantilism simply provided one window through

¹⁴⁴ *Id.* at 12.

¹⁴⁵ *See id.* at 13.

¹⁴⁶ *Id.* at 13–14.

¹⁴⁷ *See id.* at 25–26.

¹⁴⁸ For a broad treatment of the intersection of race and the market in this sense, see generally Anthony Paul Farley, *The Colorline as Capitalist Accumulation*, 56 *BUFF. L. REV.* 953 (2008).

which one might view Locke's image of the relation between market and state. Indeed, a hundred years later when Quesnay assaulted mercantilism with his *Tableau Economique*,¹⁴⁹ and later still when Smith assaulted the physiocrats in his *Inquiry into the Nature of and Causes of the Wealth of Nations*,¹⁵⁰ it was hardly the case that Locke's classic liberal image was cast aside.

To the contrary, what is commonly called classical economics in the range from Hume and Smith to Ricardo and Marx explicitly relied on precisely this style of political economy—a style in which a market is constructed on the basis of background legal rules. The market is then understood as an engine of growth, and the state itself is left to do little more than supply the background rules and tie itself to a constitutional abstention from meddling in the market in any way not demanded by natural reason.¹⁵¹ At the same time, it is also the case that this was hardly a time without change: the mercantilist emphasis on manufacturing was different from the physiocrats' emphasis on agriculture,¹⁵² and Smith's argument for the harmony of individual self-interest and the national interests was different from both.¹⁵³ But what is common in this stretch of economic thought is what has already been said: a sharp split between the natural, moral, universal world of property, contract, and trade, and the political, arbitrary, and derivative world of the state. If we want to know how the market ought to work, what the state ought to do in facilitating its operation through free and full competition among rational market players, and how government may assist in the market's capacity to self-regulate, the answers are available—inscribed in the heart of the man willing to reason his way there.¹⁵⁴

As discussed below, the modern liberal approach to the market/state distinction is quite different. Whereas the classic liberal approach is associated with strong background rules and formalistic modes of legal reasoning, the modern liberal approach prefers foreground rules and trades in formalism for a hefty dose of legal functionalism.

¹⁴⁹ See generally FRANCOIS QUESNAY, *TABLEAU ECONOMIQUE* (3rd ed. 1971).

¹⁵⁰ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 29–30 (Edwin Cannan ed., Arlington House 1966) (1776).

¹⁵¹ Desautels-Stein, *Market*, *supra* note 8, at 398–423.

¹⁵² See LIONEL ROBBINS, *A HISTORY OF ECONOMIC THOUGHT: THE LSE LECTURES* 95–103 (Steven G. Medema & Warren J. Samuels eds., 1998).

¹⁵³ MEDEMA, *supra* note 111, at 20–23.

¹⁵⁴ SMITH, *supra* note 150, at 29–30. For a standard Marxist critique, see GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 47 (Rodney Livingstone trans., MIT Press 1971) (1968). For a standard welfare critique, see JOHN MAYNARD KEYNES, *THE END OF LAISSEZ-FAIRE* 39–49 (1926). For a contemporary defense, see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7–21 (1962).

B. Modern Liberalism and the Market/State Distinction

What we have seen so far is a structure of legal thought with the following characteristics. In the context of political economy, the classic liberal style begins with a deep commitment to background rules. These background rules are considered natural and inviolable, and they serve as the *langue* for the system. The foundational grammar of these background rules does all the work for the jurist, and, if we move more specifically into a semiotic posture, we might say that the classic liberal understands the grammar to come ready-made with everything the jurist needs in order to speak it. Thus, the classic liberal jurist uses a distinctly formalistic mode of legal reasoning in the passage from grammatical structure (strong background rules) to lexical use (resolutions of discrete instances of legal conflict.)

In the modern liberal structure, the grammar shifts around. Unlike the classic liberal and his obsession with natural boundaries between market and state, the modern liberal is more relaxed about the idea that there is a natural line somewhere. For the modern liberal, the grammar is oriented around the acceptability of strong foreground rules, i.e., a court ought to allow the legislative branch a great deal of discretion in what it regards as necessary forms of market regulation. The question of how much discretion is appropriate was not defined in terms of formal boundaries, but rather in terms of the functions of the law in question and the nature of the social problem that law was meant to address. Modern liberalism's focus on foreground rules should not, however, be understood as merely the reverse of the classic liberal mode. The *langue* for classic liberalism involves a heavy reliance on the formal availability of background rules, with almost no cognizance of a need for foreground rules at all. The *langue* for modern liberalism, in contrast, involves a heavy reliance on the functional availability of foreground rules, as well as a continued belief both in the presence of background rules and their ultimate value. That is, the modern liberal doesn't reject the need for background rules or even think much about tinkering with their context—it's just that he's not anxious about the natural boundary between market and state. I illustrate the modern liberal style with discussion of the economist Henry Carter Adams and the Supreme Court's well-known decision in *Shelley v. Kraemer*.¹⁵⁵

But first, we must return to our story. The political economy of classic liberalism hit its stride over the course of the nineteenth century, coming into its own as the dominant fighting faith of an imperial era.¹⁵⁶ As it was peaking,

¹⁵⁵ See *infra* notes 166–204 and accompanying text.

¹⁵⁶ See, e.g., E.J. HOBBSBAWM, *THE AGE OF EMPIRE, 1875–1914*, at 9–10 (1987).

however, a number of critical views were also coming into view. Indeed, as early as 1844, Karl Marx was already busy demolishing the concept of the rights-bearing individual sitting at the heart of the classic liberal structure.¹⁵⁷ Marx, however, signals the end of the classical economic thought, focused as he was on the work of Ricardo and other classicists.¹⁵⁸ By the 1870's and '80's, the professional discipline of economics was entering an extremely turbulent period in which the neoclassicism of welfare economics and the more left-leaning work of institutional economists emerged,¹⁵⁹ and one that would eventually signal the beginnings of a new style of political economy, a style we can call modern liberalism.¹⁶⁰

The welfare school of economics, gaining traction by the turn of the century and slipping out of the limelight by the Great Depression, accepted the basic premises of classic liberalism, but sought to enrich and refine a scientific understanding of market competition.¹⁶¹ Relevant to the present discussion was the idea promoted by neoclassicists like Marshall and Pigou that in certain cases the involuntary transfer of wealth from some individuals to others could be in the interest of social welfare.¹⁶² Through new mathematical understandings of concepts like marginal utility, diminishing returns, and supply and demand,¹⁶³ welfare economists were highlighting a major element in modern liberalism: an entrenched suspicion that markets were not self-regulating after all, and that when "left alone," markets fail.¹⁶⁴ For economists like Marshall, however, a nuanced understanding of how markets can fail did not lead to the conclusion that the state should intervene.¹⁶⁵

¹⁵⁷ Karl Marx, *On the Jewish Question* (1843), reprinted in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 216 (Lloyd D. Easton & Kurt H. Guddat eds. & trans., 1967).

¹⁵⁸ ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES AND IDEAS OF THE GREAT ECONOMIC THINKERS* 56 (rev. ed. 1964).

¹⁵⁹ See Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1025 (1990).

¹⁶⁰ See Desautels-Stein, *Market*, *supra* note 8, at 423–43.

¹⁶¹ DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* 13 (2008).

¹⁶² Cf. Peter Groenewegen, *English Marginalism: Jevons, Marshall, and Pigou*, in A COMPANION TO THE HISTORY OF ECONOMIC THOUGHT 252, 257 (1992).

¹⁶³ See ROSTOW, *supra* note 114, at 153–60.

¹⁶⁴ See generally KEYNES, *supra* note 154, at 39–49.

¹⁶⁵ MEDEMA, *supra* note 111, at 54–76. Proposals for more muscular state action were pushed far more aggressively, however, in the work of institutional economists like Thorstein Veblen, Richard Ely, and John Commons. See Joseph Dorfman, *The Background of Institutional Economics*, in INSTITUTIONAL ECONOMICS: VEBLLEN, COMMONS, AND MITCHELL RECONSIDERED 1, 30 (1963); Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499, 521–29 (2011).

Henry Carter Adams's famous essay, *The Relation of the State to Industrial Action*,¹⁶⁶ nicely illustrates the seeds of what would become the dominant ethos for modern liberals.¹⁶⁷ Adams began with some caveats. First, he wasn't interested in establishing a Marxist critique of the very foundations of economic liberalism.¹⁶⁸ Foundational concepts like "individual rights" and "free competition" were basically good concepts; the problem had been that in the hands of classic liberals, policy-makers had lost sight of the proper way to go about constructing the right kind of environment in which rights and a competitive market might flourish.¹⁶⁹ For example, Adams argued that in the classic liberal style, free competition was believed to be facilitated through the aggregated effects of the individual pursuit of self-interest.¹⁷⁰ In fact, Adams pointed to the contrary, markets could never be expected to function in this way.¹⁷¹ In might be the case that in certain industries, the well-being of the whole was accelerated through a relentless focus on individualism.¹⁷² But this certainly wasn't a law of nature, and in other industries sketched out in the essay, Adams argued for a substantial disconnect between social welfare and individual gain.¹⁷³ There was simply no reason to ever expect an invisible hand—whether the hand was God's or the sovereign's—benevolently transforming the baker's selfishness into the brewer's benefit.¹⁷⁴

Adams argued that in order to make good on the fundamentally sound classic liberal insights into the benefits of a freely competitive market, much more attention needed to be paid to the legal requirements necessary to actually fashion "free competition."¹⁷⁵ In doing so, two points needed emphasis. One was that the lens through which competition was to be analyzed should neither be the individual nor the state.¹⁷⁶ The answer lay neither in a *laissez-faire* ap-

¹⁶⁶ Henry Carter Adams, *Relation of the State to Industrial Action*, 1 PUBLICATIONS AM. ECON. ASS'N 7, 34 (1887).

¹⁶⁷ For further discussion of Adams, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 81–82 (1992); see generally A.W. Coats, *Henry Carter Adams: A Case Study in the Emergence of the Social Sciences in the United States, 1850–1900*, 2 J. OF AM. STUDIES 177 (1968) (discussing the work of Henry Carter Adams). On the rise of the social sciences, see generally DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1992).

¹⁶⁸ Adams, *supra* note 166, at 12.

¹⁶⁹ *Id.* at 35.

¹⁷⁰ *Id.* at 17.

¹⁷¹ *Id.*

¹⁷² *Id.* at 20–21.

¹⁷³ *Id.* at 18–19. These examples include the railroad industry, paper-mills, and workers' unions.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 35.

¹⁷⁶ *Id.* at 38.

proach to individualism, nor in a socialist focus on government.¹⁷⁷ The truly “American” approach, Adams suggested, was to view both the individual and the state as servants of the social.¹⁷⁸

Society was the key concept, the concept around which the idea of free competition could usefully be deployed.¹⁷⁹ And in espousing this new notion of the social, Adams argued for a new orientation towards the state.¹⁸⁰ Unlike classic liberals and their entrenched hostility towards state actors, Adams explained how the key elements in a properly competitive marketplace demanded a great deal of state intervention, and in some cases, state ownership.¹⁸¹ Market failures were real, pervasive, and intense. In order for society to be adequately protected from market failure, the state would be required to intervene, and often.¹⁸² This was the modern liberal emphasis on “social needs” over individual rights, and interdependence over autonomy. It was also the beginnings of a shift away from worries about protecting the natural workings of the market, and towards worries about market failures. In short, these are the beginnings of the welfare state.¹⁸³

But where is law in this story? In much of the work that would become associated with modern liberalism, there is little concern with tinkering with the background rules of private law.¹⁸⁴ Was Adams worried about the “free play” of the background rules, or property rights, freedom of contract, and the tort and criminal law norms meant to regulate these rights? Absolutely. As Adams explained at length, a narrow focus on property and contract rights could

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 65–66.

¹⁸¹ *Id.*

¹⁸² See, e.g., LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 104–08 (Osmond K. Frankel ed., 1935) (“Regulation is essential to the preservation and development of competition, just as it is necessary to the preservation and best development of liberty. . . . For excesses of competition lead to monopoly, as excesses of liberty lead to absolutism.”).

¹⁸³ See generally SIDNEY FINE, *LAISSEZ-FAIRE AND THE GENERAL-WELFARE STATE: A STUDY IN CONFLICT IN AMERICAN THOUGHT 1865–1901* (6th prtg. 1978); ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* (1960); ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* (1958); ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER 1919-1933* (1957).

¹⁸⁴ A critical focus on the primary legal requisites of competitive society is one way of distinguishing the modern liberals from their rivals on the left. Adams was clear about this in a way that many modern liberals were not, as when he identified the four “legal facts” upon which modern industrial society was built: “Private property in land, private property in labor, private property in capital, and the right of contract for all alike.” Adams, *supra* note 166, at 35.

not support the idea of free competition on their own.¹⁸⁵ Left to themselves, background rules warped themselves into wildly disparate social configurations, loading tremendous amounts of wealth and resources into certain social segments at the expense of others. To be sure, the modern liberal style is certainly worried about the unregulated effects of the background rules.

Nevertheless, while the modern liberal had these concerns, they translated into efforts to restrain, manage, and channel the effects of background rules. They did not translate into efforts to actually alter the basic premises on which the background rules were based.¹⁸⁶ Consequently, we can say that whereas the classic liberal style emphasizes a strict reliance on background rules as the economic engine, the modern liberal style is much more interested in foreground rules. Foreground rules are the sorts of state acts Adams had in mind when he called for a new effort to “socialize” the classic liberal notion of free competition. This would require the state to intervene in any number of ways: *regulating, reacting, and responding* to social forces believed to preexist the foreground rules themselves. Thus, as background rules are imagined to be constitutive of the market, foreground rules are imagined to be responsive to a market that is already there, requiring the chastening hand of government.¹⁸⁷

The modern liberal style also had its own jurisprudential approach to the interpretation of the new regime of regulations pumping out of the growing administrative state. Unlike the “formalistic” approach associated with classic liberalism, modern liberals are fascinated by an instrumental, purposive, or “functionalist” jurisprudence. In keeping with Adams’ focus on society, functionalism taught judges to interpret rules in light of ever-changing social needs and purposes.¹⁸⁸

In 1948, in *Shelley v. Kraemer*, the United States Supreme Court held that judicial enforcement of a racially restrictive housing covenant violated the Equal Protection Clause.¹⁸⁹ A well-known instance of the modern liberal style, this state action case involved a dispute between African-American petitioners seeking to purchase a home from white homeowners willing to sell, and white residents of neighboring properties who were party to a restrictive covenant that prohibited purchases of the property by anyone not belonging to the “Cau-

¹⁸⁵ *Id.* at 35–40.

¹⁸⁶ For a discussion of this general tendency, see UNGER, *LEGAL ANALYSIS*, *supra* note 42, at 29 (The modern style seeks 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.”).

¹⁸⁷ See Desautels-Stein, *Market*, *supra* note 8, at 396.

¹⁸⁸ Kennedy, *Hermeneutic*, *supra* note 21, at 8.

¹⁸⁹ 334 U.S. 1, 4, 6, 20 (1948).

casian race.”¹⁹⁰ The residents seeking to enforce the restrictive covenant claimed that the dispute was a matter to be resolved solely by private law, and that in contrast to the views of the petitioners, the equal protection clause of the Fourteenth Amendment was irrelevant.¹⁹¹ No one disputed that had the covenants been the result of a governmental act, they would have violated the Equal Protection Clause.¹⁹² Thus, the dispositive issue was whether there was any state action in the case—if there was none, then this was a matter to be resolved by Missouri courts and through the law of property.¹⁹³ The Supreme Court of Missouri was persuaded by this view, finding in favor of enforcing the restrictive covenants.¹⁹⁴

What should be apparent here is that if a court were to decide the dispute in the classic liberal style, the African-American petitioners would have no recourse to constitutional provisions. The case would present a clear instance of commercial transaction, properly constituted through the rules of property and contract—the market’s background rules. *Shelley*, however, does not present us with a classic liberal analysis of the market. The Court began by admitting that this was a dispute between private actors, buyers and sellers, and free of legislative enactment.¹⁹⁵ Nevertheless, the Court argued that there was still state action here—*judicial* action by Missouri courts in the enforcement of the contracts.¹⁹⁶

Another way to make the point: the *Shelley* Court had no intention of making sacred the market’s background rules—background rules were arbitrary acts of state in precisely the same way as foregrounded acts of legislation. One may wonder why, however, the Court was able to break with such a clear tradition of state action, harking back to *The Civil Rights Cases*. There are any number of conceivable answers here, but among the most relevant with respect to our aim in establishing a modern liberal style is the reference to a functionalist or instrumental interpretive approach hinted at towards the end of the decision.¹⁹⁷ After rejecting a sharp public-private distinction and recognizing the viability of a theory of judicial state action, the Court sought to highlight the *purpose* of the Fourteenth amendment.¹⁹⁸ The critical question for the court

¹⁹⁰ *Id.* at 5–6.

¹⁹¹ *See id.* at 7–9.

¹⁹² *Id.* at 11.

¹⁹³ *See id.* at 13–14.

¹⁹⁴ *Id.* at 6.

¹⁹⁵ *See id.* at 13–14.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 22–23.

¹⁹⁸ *See id.*

was not about a formal theory of state action; it was a question of whether the ultimate purpose of the amendment was served by a judicial enforcement of restrictive covenants.¹⁹⁹ The Court's conclusion was that it was not:

[I]t is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.²⁰⁰

To recap, my renderings of the classic liberal and modern liberal styles are at once deeper and narrower than Kennedy's presentations of classical legal thought and social legal thought. They are deeper in that they push Kennedy's descriptions of *langue* into a master-*langue*, that of liberal legalism. With this depth, I believe, comes the sort of "edifying" power that the early structuralists found and that was later renounced in the encounter with post-structuralism.²⁰¹ At the same time, the classic liberal and modern liberal styles are also narrower, or less ambitious, than the presentations of classical legal thought and social legal thought. At times, Kennedy's description of a mode of legal thought flirts

¹⁹⁹ See *id.* at 23.

²⁰⁰ See *id.*

²⁰¹ DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* 97 (2008) ("The power of structuralist methodology is that it shows that what at first appears to be an infinitely various, essentially contextual mass of utterances (*parole*) is in fact less internally various and less contextual than that appearance. It does this by 'reducing' many of the particular elements of the discourse to the status of operational devices of other elements."). Some of Roland Barthes' work, particularly *S/Z*, is commonly seen as a transition between structuralism to poststructuralism. See, e.g., Olsen, *supra* note 91, at 165 ("What is considered as his shift from structuralism to poststructuralism denotes the third phase [in Barthes' work], of which *SZ* is diagnostic. This shift was clearly influenced by *Tel Quel* textualism and the writings of Derrida and Kristeva."). But I believe both Foucault and Barthes are better understood as *refining* structuralism, and not going *post* structuralism. For Foucault, the analysis of an object assumed at the start that the object might really exist in space and time. FOUCAULT, *supra* note 90, at 26. But in going on to describe it, he would take nothing for granted. None of the historical landmarks, none of the divisions, none of the heroes were available:

I shall accept the groupings that history suggests only to subject them at once to interrogation; to break them up and to see whether they can be legitimately reformed; or whether other groupings should be made; to replace them in a more general space which, while dissipating their apparent familiarity, makes it possible to construct a theory of them.

Id. Like Barthes, Foucault wanted to "demolish" the object in order to erect a composition of it. *Id.* at 29. For my discussion of Barthes, see Desautels-Stein, *supra* note 104, at 151–58.

with the sense that it is about all law, everywhere.²⁰² The style of legal structuralism that I have been practicing in this Part eliminates this ambivalence.²⁰³

In the context of political economy, the structuralist approach constructed simulacra in which particular liberal styles of arguing about legal concepts emerged. In the classic liberal style, markets appeared in the light of a strong public/private distinction, and were legalized through a powerful reliance on the background rules of private law—rules achieving moral supremacy through their association with the natural world. In the modern liberal style, markets continued to be generated out of the master-*langue* of the public/private distinction, but the distinction was articulated differently. Here, legal concepts are constructed with more of a tilt towards the foreground rules associated with the political world and the need to assist those groups disadvantaged by the natural background rules. The background/foreground divide isn't abolished in modern liberalism—it is chastened.

The discussion of classic liberalism and modern liberalism now brings us to the third structure in our story: “contemporary legal thought.” Like Duncan Kennedy, I believe that an appreciation of the contemporary aspect of legal consciousness requires a familiarity with its intellectual priors—in this case, the left-over fragments of the classic and modern styles.²⁰⁴ Contemporary legal thought is not, however, merely the cobbling together of broken pieces. Rather, as I argue below, the “contemporary” may be constructed as something more: *pragmatic liberalism*. Rather than seeing contemporary legal thought as an unsynthesized amalgam, pragmatic liberalism suggests the presence of an integrating grammar and a general field of legal production.

III. WHAT IS CONTEMPORARY LEGAL THOUGHT?

In this Part, Section A.1 continues the discussion of classic and modern liberalism from above, and moves forward to the apparently bifurcated condition of contemporary legal thought.²⁰⁵ It is bifurcated in the sense that it is constituted by the twin pillars of neo-formalism and neo-functionalism. This discussion of neo-formalism and neo-functionalism tracks, respectively, the pres-

²⁰² See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 213 (1979).

²⁰³ See *supra* notes 49–199 and accompanying text. Kennedy approaches a similar position in his discussion of the transgressive artifact: “A basic [modernist/postmodernist] goal is to create a style at the same time that you destroy a style. Once the style is there in the artifacts or performances, other people can adopt or adapt it to their purposes.” KENNEDY, *CRITIQUE*, *supra* note 81, at 343.

²⁰⁴ Kennedy, *Three Globalizations*, *supra* note 21, at 20–22.

²⁰⁵ See *infra* notes 217–238 and accompanying text.

ence in the legal materials of classic liberalism and modern liberalism.²⁰⁶ To be sure, it is a mistake to think that formalism is essentially classical, or that functionalism is essentially modern.²⁰⁷ But as we have already seen in the context of the market, the category of classical liberalism is associated both with strong background rules and a formalistic strategy of making those rules appear natural and necessary.²⁰⁸ As for modern liberalism, the market is constructed in a way that favors strong foreground rules, and which largely depends on functionalist arguments for securing their legitimacy.²⁰⁹ In the structure of contemporary legal thought, the *langue* is defined by an oscillation between formalistic and functionalist modes of legal reasoning—a constantly recurring waltz between the classics and the moderns.

After briefly placing these pillars (neo-formalism and neo-functionalism) in some historical context, Section A.2 illustrates their pragmatic relation by looking to a handful of cases once again dealing with the Market/State distinction.²¹⁰ Here, however, rather than look to more state action cases, I give attention to the question from a different jurisprudential angle. In these cases, the issue before the Court is framed as a question of just *how much* market activity the state should be allowed to regulate, as opposed to *whether* the market should be regulated. These cases are particularly helpful insofar as they are not limited to any specialized field of law, but rather deal with constitutional law, antitrust law, securities law, and discrimination law. In case after case, the Supreme Court oscillates between the neo-formal and neo-functional, switching tactics as easily as outfits. The Court's oscillation may seem a jumble of contradictory modes of legal reasoning. I argue to the contrary, and suggest that our contemporary experience of these conflicting modes is rather one of stabilization.²¹¹

This suggestion of stability rests on the theory of “legal pragmatism,” discussed in Section B.²¹² I use legal pragmatism in two different senses, each of which refers to *langue* and *parole*, respectively. At the level of *langue* or gram-

²⁰⁶ See *infra* notes 231–238 and accompanying text.

²⁰⁷ It is a mistake for the reason that it is entirely possible to present the market as a legal concept in the modern style using formalistic modes of legal reasoning, just as it is possible to construct the classic style in functionalist terms. This may be, on the whole, somewhat unusual, but it is logically coherent. What's more, this switching may have been far more typical than the histories normally suggest. See *generally*, HORWITZ, *supra* note 167 (describing the market in conjunction with the rise of legal formalism).

²⁰⁸ See *supra* notes 112–154 and accompanying text.

²⁰⁹ See *supra* notes 156–216 and accompanying text.

²¹⁰ See *infra* notes 241–303 and accompanying text.

²¹¹ See *infra* notes 328–331 and accompanying text.

²¹² See *infra* notes 304–331 and accompanying text.

mar, I describe a pragmatist sensibility operating at a systemic or structural level of control. In this deep sense, it is neither necessary nor expected that a jurist would self-consciously adopt a pragmatist approach to the legal material. At this level, I refer to pragmatic liberalism as the grammar which makes sense of the easy oscillation between discredited modes of legal argument—the discredited modes of formalism and functionalism we associate with classic liberalism and modern liberalism. At the level of *parole* or lexical usage, legal pragmatism is much more of a self-conscious posture. It is this discussion that most commentators on legal pragmatism will find most familiar, as I refer to popular pragmatists such as Richard Posner and William Simon.²¹³ Thus, I situate legal pragmatism both as: (i) a deep grammar accounting for and stabilizing our contemporary forms of legal argument; and (ii) a particularly contemporary and self-conscious mode of deploying legal arguments.²¹⁴

A. The Contemporary Alliance Between Neo-Formalism and Neo-Functionalism

Section A.1 begins by recounting the “neoliberal” backlash against the modern liberals.²¹⁵ Unlike in prior moments of legal history, however, neoliberalism failed to dominate legal thought in the manner achieved by either classic or modern liberalism. Instead, and by the last years of the twentieth century, it had become apparent among political elites that a neoliberal return to formalism and strong background rules would not solve problems of political economy. At the same time, there was little interest in a full-on return to the modern liberal focus on strong foreground rules and functionalism, either. The result was a twenty-first century hodge-podge of remnants left over from these prior periods: an eclectic assortment of “neo-formalist” and “neo-functionalism” modes of reasoning, awkwardly operating in tandem. This strange eclecticism is explored through a survey of Supreme Court decisions in Section A.2.²¹⁶ The purpose of this survey is to set up my discussion of legal pragmatism to follow.

1. The Rise and Fall of the Neoliberals

As I have suggested, the pragmatic structure of contemporary legal thought becomes visible once we are accustomed with the prior structures of classic and modern liberalism. In the story so far, classic liberal ideas about the

²¹³ See *infra* notes 310–365 and accompanying text.

²¹⁴ See *infra* notes 308–331 and accompanying text.

²¹⁵ See *infra* notes 217–238 and accompanying text.

²¹⁶ See *infra* notes 239–302 and accompanying text.

appropriate sphere of market performance were assaulted in the early decades of the twentieth century.²¹⁷ Similarly, a couple generations later, modern liberalism fell out of favor as well, losing its spot as the dominant grammar of legal discourse.²¹⁸ Margaret Thatcher's election in 1979 as Prime Minister is indicative of the "neoliberal" shift.²¹⁹ For Thatcher and company, the "social" focus of modern liberalism had been illusory—there was "no such thing as society, only individual men and women."²²⁰ In that same year, Paul Volcker, chairman of the U.S. Federal Reserve Bank, reversed the modern commitment to full employment in favor of a full-frontal attack on inflation, launching what later came to be known as the "Volcker Shock."²²¹ In 1980, Ronald Reagan was elected president, deploying a set of policies aimed at the systemic deregulation of industry, tax and budget cuts, and the downsizing of organized labor.²²² In 1982, the International Monetary Fund ("IMF") purged itself of its Keynesian influences and leveraged the beginnings of its well-known structural adjustment programs against the developing world in return for debt rescheduling.²²³ As David Harvey has described it, this exploding new style of political economy proposed that:

[H]uman well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices Furthermore, if markets do not exist . . . then they must be created, by state action if necessary State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the

²¹⁷ See *supra* notes 155–203 and accompanying text.

²¹⁸ See Desautels-Stein, *Market*, *supra* note 8, at 444 (discussing the beginning of neoliberalism).

²¹⁹ DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 22–23 (2005)

²²⁰ *Id.* (“[C]onfronting trade union power, attacking all forms of social solidarity that hindered competitive flexibility . . . dismantling or rolling back the commitments of the welfare state, the privatization of public enterprises (including social housing), reducing taxes, encouraging entrepreneurial initiative, and creating a favourable business climate to induce a strong inflow of foreign investment . . .”).

²²¹ *Id.*

²²² YERGIN & STANISLAW, *supra* note 161, at 169.

²²³ See JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT, at xviii (3d ed. 2009) (“Briefly put, [the “Washington Consensus”] was the encapsulation of mainstream development thinking in the early 1990s. What poor nations needed, it was argued, was . . . better organization. Better organization was something of a code word that meant, primarily, shifting resources away from the state sector into areas assumed to be of much higher value in the private sector.”).

state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit.”²²⁴

For some, this shift away from modern liberalism was christened “neoliberalism.”²²⁵ For these commentators, the new “Washington Consensus” represented a return to classic liberal ideas about the autonomy of the market, making out a “new” classic liberalism.²²⁶ In the typology of this Article, “neoliberalism” is a little awkward.²²⁷ It doesn’t make much sense to call the emergence of another kind of liberal style a *new* liberalism, since the mode of reasoning that replaced modern liberalism was merely another variety of liberalism itself. That said, what became obvious in the last decades of the twentieth century was that the manner of thinking about the relation between the state and the market had changed, and changed towards something more like *laissez-faire* than the welfare state.²²⁸ In all instances of the new style, courts were increasingly inclined to privilege the background rules of the market over the foreground rules associated with the state.²²⁹ This often came into view accompanied by well-worn arguments for “rights” and more formal modes of legal reasoning.²³⁰

If neoliberalism was in the groove by 1980, it would be a mistake to think that its argumentative structure was dominating American legal thought in a way similar to how modern liberalism and classic liberalism were dominant in their respective times.²³¹ Alongside the re-surfacing of neoliberal legal formalism was an approach to problem-solving much more centered in ad hoc, all-

²²⁴ Harvey, *supra* note 219, at 2.

²²⁵ See generally ANDREW LANG, *WORLD TRADE AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* 52–57 (2011) (characterizing the trend as “neo-liberalism”).

²²⁶ See, e.g., DEEPLAK LAL, *REVIVING THE INVISIBLE HAND: THE CASE FOR CLASSICAL LIBERALISM IN THE TWENTY-FIRST CENTURY* 62–90 (2006).

²²⁷ In other works, I have brought focus to the neoliberal style. See Desautels-Stein, *Market*, *supra* note 8, at 444; Desautels-Stein, *State Action*, *supra* note 8, at 297. In those works, however, my intention was not to elaborate “pragmatic liberalism,” but more specifically the relation between the classic, modern, and neoliberal modes of legal argument. As I argue in this Article, I believe that neoliberalism is helpfully understood as a component of pragmatic legal consciousness, rather than as a mode independent of it.

²²⁸ See, e.g., RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 1–12 (2003).

²²⁹ See Desautels-Stein, *State Action*, *supra* note 8, at 297.

²³⁰ Kennedy, *Hermeneutic*, *supra* note 21, at 48.

²³¹ *Id.*; see also Tomlins, *Legal Mind*, *supra* note 81, at 18.

things-considered “policy analysis.”²³² In this mode, the judge eschewed principled rights-based analysis and reliance on categorical defaults and favored the idea that a judge’s role—in the absence of clear statutory or constitutional guidance—was to weigh competing considerations in an effort to find the most reasonable resolution.²³³ This sort of ad hoc balancing was not, however, merely a continuation of modern functionalism. For the modern liberal, functionalism counseled the judge in the direction of a right answer informed by social study and serious empirical investigation.²³⁴ For the functionalist, adjudication could still be “objective” to the extent that social problems were resolvable by indisputably better policy decisions.²³⁵ The balancing tests of the late twentieth century and still on the books today, for better or worse left behind these aspirations for objectivity.²³⁶ The most that could be said of this mode of reasoning was that we might hope to find consensus about what might count as reasonable in any given situation.²³⁷

Though contemporary legal thought is not merely the confluence of these two ideas, the combination of neo-formalism and neo-functionalism forms its basic architecture.²³⁸ At first sight, this is pretty strange. After all, the formalist approach to legal reasoning was a thesis challenged and overcome by the functionalist antithesis of modern liberalism. Debunked in their own times, formalism and functionalism have seemingly come back from the dead, only now to sit obliviously in the strange milieu of contemporary legal thought. What might be termed the “neo-functionalism” side of contemporary legal thought reminds us of classic liberalism’s collapse, while the neo-formalist side reminds us of our disenchantment with modern liberalism. As a consequence, contemporary legal thought emerges as an interminable oscillation between outlooks of the dead.

²³² See, e.g., ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 29–32 (1996) (describing the development of an effects test to extraterritorial jurisdiction).

²³³ This is also consistent with Pierre Schlag’s portrayal of legal aesthetics. See Schlag, *supra* note 41, at 1075.

²³⁴ Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 270 (1978) (“[T]he Court, including its most liberal members, set in motion a distinctive style of legal analysis characteristic of modern American legal consciousness . . .”).

²³⁵ See, e.g., Peller, *supra* note 78, at 1155.

²³⁶ Kennedy, *Hermeneutic*, *supra* note 21, at 20.

²³⁷ *Id.*

²³⁸ Kennedy, *Three Globalizations*, *supra* note 21, at 22.

2. Interpreting the Market/State Distinction in Contemporary Legal Thought

In order to illustrate the oscillating dynamic between “neo-formalist” and “neo-functional” modes of legal reasoning in contemporary legal thought, I come back to the Supreme Court’s jurisprudence dealing with the Market/State distinction. However, unlike the state action cases discussed above, the cases discussed in this Section approach the Market/State distinction from another angle: the question here is whether the Court should allow the application of foreground rules to market activity when that activity has an “extraterritorial” component.²³⁹ As I have said, these cases are especially useful in drawing out the pragmatic basis of contemporary legal thought due to their lack of focus on any one legal domain. They cover the gamut, ranging from business law to human rights and everything in between. In each instance, the cases keep alive the contradictory legacies of the classic and modern liberal modes of constructing a market.

Nevertheless, before moving into the discussion, it is worth making an important clarifying point. The discussion of the cases that follow and the argumentative strategies therein is intended to illustrate the deeper structure of contemporary legal thought—the *langue*. That is, my point is not that any given Supreme Court justice shifts between the strategies, interchanging their preferences at will. That is not the argument at all, particularly since it is rather apparent that some justices are committed to a single set of interpretive techniques. Rather, the purpose of this discussion is to show how the broader field of legal argument is structured in such a way that the members of the Court may consistently deploy contradictory modes of interpretation without disrupting or destabilizing the surface experience of legal thought.²⁴⁰ Or to put this another way, while there may very well be a crisis of legal identity operating at the deep structure of contemporary legal thought, pragmatism serves to mask the effects of that contradiction and produce a sensation that, at the structural level, everything seems to be working just fine.

That said, let us now turn to the cases. In the early decades of the twentieth century, courts adhered to a formal presumption against the “extension” of U.S. law outside of U.S. territory. The underlying rationale behind this presumption, most prominently displayed in Oliver Wendell Holmes, Jr.’s majority opinion in the 1909 United States Supreme Court Case of *American Banana Co. v. United Fruit Co.*, appears to be that sovereigns enjoy rights of independ-

²³⁹ See *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1228–31 (2011) (providing a recent general treatment).

²⁴⁰ See *infra* notes 241–303 and accompanying text.

ence and autonomy that were unavoidably undermined by the fact of extraterritorial applications of U.S. law.²⁴¹ Coupled with this respect for sovereign rights is a preference for less rather than more “government intervention.”²⁴² By putting in place a strong presumption that congressional statutes (foreground rules) only apply to restricted spaces of market activity, courts shrink rather than expand the scope of regulatory power. As I’ve argued above, this is a classic liberal tendency for prioritizing background rules over foreground rules.²⁴³

In contrast is the U.S. Court of Appeals for the Second Circuit’s 1945 decision, *United States v. Aluminum Co. of America (Alcoa)*, which held that an aluminum company had monopolized the interstate and foreign “virgin” aluminum ingot market in violation of the Sherman Antitrust Act.²⁴⁴ Judge Learned Hand’s decision in *Alcoa* shifted away from a formal default for sovereign rights and towards a more purposive analysis of social interests.²⁴⁵ This was the beginning of the “effects test” that would take root in U.S. antitrust and securities law.²⁴⁶ It is also indicative of a counter-preference to give government more leeway in its efforts to regulate the market: rather than formally limit the scope of federal power, the “effects test” gave courts room to apply congressional directives to a broader sphere of activity. This is a common feature of the modern style, in which foreground rules are given deference.

By the end of the twentieth century, these vying approaches merged into a contradictory framework in which neo-formalistic constraints on federal power rode shotgun with neo-functional balancing tests. A slate of recent decisions is illustrative of this bifurcated aspect of contemporary legal thought.

As discussed above, the 1970s serve as a rough marker for the beginnings of the contemporary style. It was during this time that the modern appreciation of governmental discretion really declined, and in its place emerged a throw-back view about the self-regulating market.²⁴⁷ The less federal intervention, so the new thinking went, the better. In 1991, in *EEOC v. Arabian American Oil Company (Aramco)*, the U.S. Supreme Court held that Title VII of the Civil

²⁴¹ See 213 U.S. 347, 347–48 (1909).

²⁴² *Id.* at 356.

²⁴³ See *supra* notes 229–230 and accompanying text.

²⁴⁴ See 148 F.2d 416, 420–23, 447 (2d Cir. 1945).

²⁴⁵ *Id.* at 443–44. For a well-known extension of this approach, see *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 608–15 (9th Cir. 1977).

²⁴⁶ For an extension of this approach in securities law, see *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972).

²⁴⁷ See *infra* notes 217–238 and accompanying text.

Rights Act of 1964 did not apply to employment actions against American citizens employed in foreign countries by U.S. businesses.²⁴⁸ Chief Justice William Rehnquist’s well-known opinion in that case is representative of the “neoliberal” mode.²⁴⁹ The dispute was between a U.S. citizen-plaintiff and two U.S. corporations, and it concerned a question of whether an American employee could exercise rights under Title VII against an American employer when the discrimination took place outside of U.S. territory.²⁵⁰ Consistent with pretty much every decision in this area, Rehnquist began by conceding that Congress had the power to regulate employment discrimination in a situation like this—the question was whether Congress had intended to intervene in the employer-employee relationship when it was centered overseas.²⁵¹

The EEOC argued that Congress had clearly intended to regulate just these forms of market transactions, and that this intent was apparent in the language of Title VII.²⁵² Although Rehnquist admitted that there was language in the statute that could plausibly support the idea that Congressional power ought to be extended in such a way, the language just wasn’t clear enough.²⁵³ The Court concluded that in the face of a presumption against extending the scope of federal regulation over U.S. citizens, the EEOC “failed to present sufficient affirmative evidence that Congress intended Title VII to apply” to American employers and employees when the conduct in question had a foreign element.²⁵⁴

In 1993, just two years later, the U.S. Supreme Court decided *Hartford Fire Insurance Co. v. California*.²⁵⁵ Like in *Aramco*, the question was whether a piece of federal legislation ought to regulate market activity when it takes place beyond U.S. borders.²⁵⁶ What was different was that here the legislation at issue was the Sherman Act rather than the Civil Rights Act of 1964, and in addition to American defendants, a British reinsurance company was being sued as well.²⁵⁷ Of interest is the fact that Justice David Souter’s majority opin-

²⁴⁸ 499 U.S. 244, 244, 259 (1991).

²⁴⁹ *See id.*

²⁵⁰ *Id.* at 247.

²⁵¹ *See id.* at 248.

²⁵² *See id.* at 248–49.

²⁵³ *See id.* at 250–51.

²⁵⁴ *Id.* at 259.

²⁵⁵ 509 U.S. 764, 769–70 (1993).

²⁵⁶ Compare *Hartford Fire*, 509 U.S. at 769–70 (considering whether the Sherman Antitrust Act ought to apply to American citizens in foreign markets), with *Amarco*, 499 U.S. at 246 (determining whether Title VII applies to employment actions against American citizens employed by U.S. businesses abroad).

²⁵⁷ *Hartford Fire*, 509 U.S. at 798.

ion provides an alternative view of formalistic legal reasoning—one that has much in common with Rehnquist’s opinion in *Aramco*. For Souter, the presumption that carried so much force in *Aramco* is nowhere to be seen. He seemed to share very little of the deep anxiety the *Aramco* Court exhibited about extending the scope of federal regulation to American employees doing business elsewhere. In this case, in contrast, the idea that Congress ought to be able to regulate market conduct abroad—and even the conduct of foreign nationals—is accepted easily.²⁵⁸ Because the decisions of British reinsurers had a substantial effect on U.S. commerce, the Court bypassed *Aramco*’s constricted view of federal power and acquiesced in the propriety of Congress regulating anti-competitive behavior.²⁵⁹ Although one may have wished that the Court had followed the Ninth Circuit’s extension of the *Alcoa* approach or the balancing tests of the Third Restatement on Foreign Relations, it wasn’t to be.²⁶⁰ The question for the Court was *not* whether, all things considered, the application of the Sherman Act was the most functional or reasonable choice. This was a question couched in the language of legal formalism: it was simply the *right* choice.²⁶¹

In 2010, the United States Supreme Court held in *Morrison v. National Australia Bank Ltd.* that the Securities Exchange Act of 1934 did not reach transactions made purely on foreign exchanges.²⁶² *Morrison* represents a more recent example of an opinion leveraging the language of legal formalism.²⁶³ The case involved a claim by Australian plaintiffs against an Australian Bank in U.S. District Court for the Southern District of New York for violations of the Securities and Exchange Act of 1934 and its related administrative addenda.²⁶⁴ The claim concerned fraudulent over-valuations of the Bank’s common stock—valuations that included the assets of a U.S. based mortgage-servicing

²⁵⁸ See *id.* at 798–99.

²⁵⁹ See *id.*

²⁶⁰ See *Timberlane Lumber Co.*, 549 F.2d at 608–15 (extending the *Alcoa* approach); LOWENFELD, *supra* note 232, at 228–32.

²⁶¹ *Hartford Fire*, 509 U.S. at 799 (“No conflict exists . . . ‘where a person subject to regulation by two states can comply with the laws of both.’ Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law.”) (citations omitted). The Court further noted: “We have no need . . . to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.”) *Id.*

²⁶² See 561 U.S. 247, 273 (2010).

²⁶³ See *id.*

²⁶⁴ See *id.* at 251–52.

company.²⁶⁵ The district court dismissed the Australian plaintiff's class action for lack of subject-matter jurisdiction on the theory that their claim was largely unrelated to U.S. markets.²⁶⁶ Both the Second Circuit and the Supreme Court affirmed the district court's ruling.²⁶⁷

Justice Antonin Scalia's decision for the Court emphasized the presumption against extending the scope of federal regulation.²⁶⁸ Does the Exchange Act authorize extraterritorial jurisdiction? In a line of cases dating back into the heady years of the welfare state (and functionalist modes of legal reasoning), the Second Circuit had answered this question in the affirmative.²⁶⁹ Unlike the Supreme Court's apparent quest for a "magic formula" in *Aramco*, the Second Circuit's long-standing approach to the text of the Exchange Act involved a functional analysis of what Congress sought as the broad purpose of the Act and its role in the market. After all, to ask whether the Exchange Act authorizes "extraterritorial jurisdiction" doesn't exactly produce a clear answer. The lack of explicit text only furnishes an interpretive solution if the one doing the judging has already picked an interpretive method disposed towards textual closure. But even Scalia concedes that his brand of "neo-formalism" isn't required by the text of the Constitution.²⁷⁰

In a functionalist frame of mind, the Second Circuit was historically more interested in whether the purpose of the Act was to regulate market transactions that might have certain effects on U.S. markets.²⁷¹ If they did, Congress probably would have wanted the Act to apply. Scalia condemned this approach, explaining, "[t]here is no more damning indictment of the 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases.'"²⁷² For Scalia, functionalism presents us with little more than "judicial-speculation-made-law."²⁷³

²⁶⁵ See *id.*

²⁶⁶ See *id.* at 252.

²⁶⁷ *Id.* at 252, 273.

²⁶⁸ See *id.* at 256–57.

²⁶⁹ See *id.* at 256–58.

²⁷⁰ See, e.g., SCALIA & GARNER, *supra* note 69, at 4.

²⁷¹ For discussion, see Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 659 n.31 (2011); William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687, 691–92 (2011); Austin L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1697–1700 (2012).

²⁷² *Morrison*, 561 U.S., at 257–59 (alteration in original).

²⁷³ *Id.* at 260.

In a concurrence, Justice John Paul Stevens explained that while he agreed with the result in the case, he disagreed with Scalia's rejection of the idea that Courts ought to "flesh out" an "elaboration" of congressional texts in light of evolving social needs.²⁷⁴ For Stevens, this is *exactly* what courts are supposed to do with congressional texts.²⁷⁵ But it would be a mistake to characterize Stevens' decisions in this area as uniformly functionalist. In another concurrence, this time in the context of the Endangered Species Act, Stevens argued in an explicitly formalist mode.²⁷⁶ Confronted with the question of whether the Act applied to federal action in Egypt and Sri Lanka, Justice Stevens employed a textualist strategy in support of a highly conclusory analysis of the Act's text: was there an express statement in the Act indicating congressional intent to extend its reach beyond U.S. borders?²⁷⁷ Answering in the negative,²⁷⁸ Stevens' energetic approach to *Morrison* was off the radar.

Justice Stephen Breyer, in contrast, has consistently argued in favor of balancing tests and policy analysis. In 2004, the U.S. Supreme Court held in the case *F. Hoffman-La Roche Ltd. v. Empagran S.A.* that the Sherman Act did not apply to price-fixing conduct where the foreign and domestic effects of the conduct were independent of each other.²⁷⁹ As evidenced in his much-discussed decision in *Empagran*, Breyer avoided the Court's formalistic approach to the effects test in *Hartford Fire Insurance Co.*, and instead asked whether it would be "reasonable" to allow the Sherman Act to apply to a dispute with considerable foreign connections.²⁸⁰ The dispute involved a worldwide price-fixing conspiracy among vitamins manufacturers, and there was no doubt that the illegal activity had an effect on U.S. vitamins markets.²⁸¹ The question for the Court was whether the Federal Trade and Antitrust Improvements Act barred the application of U.S. law to the instant claim—a claim by a

²⁷⁴ See *id.* at 276–77 (Stevens, J., concurring).

²⁷⁵ See *id.*

²⁷⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 586–87 (1992) (Stevens, J., concurring).

²⁷⁷ See *id.*

²⁷⁸ *Id.*

²⁷⁹ See 542 U.S. 155, 158–59 (2004).

²⁸⁰ See *id.* at 165 (2004) ("But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*? Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial."); *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987)) ("determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent to which other nations regulate, and the potential for conflict.").

²⁸¹ *Id.* at 159–60.

foreign plaintiff against foreign defendants for injuries that were suffered beyond U.S. borders.²⁸² Breyer was unwilling to assume that the foreign injuries were entangled with domestic injuries, and as a consequence placed the question entirely in the Restatement on Foreign Relations' framework of reasonableness: "Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question."²⁸³

Breyer's neo-functionalism is similarly illustrated in his concurring opinion in *Kiobel v. Royal Dutch Petroleum Co.*, a 2013 case in which the U.S. Supreme Court held that the Alien Tort Statute did not extend to violations of the "law of nations" which occur within the boundaries of a foreign nation.²⁸⁴ In that case, Nigerian nationals residing in the U.S. brought a claim under the Alien Tort Statute against British, Dutch, and Nigerian corporations.²⁸⁵ As rendered by Chief Justice John Roberts, the Court's opinion explained that congressional regulation of foreign corporations operating on foreign territory found no basis in the text of the statute.²⁸⁶ Tellingly, Chief Justice Roberts stated that "the question is not what Congress has done but instead what courts may do."²⁸⁷ This is a splendid example of the neoliberal anxiety about "big government;" the job of the judiciary is not to expand congressional reach. To do otherwise runs the risk of forcing courts into the business of making law.

In his concurring opinion, Breyer explained that the text of the statute is not determinative of the question at all.²⁸⁸ For him, the Court's task is to identify the purposes of a statute, as well as the manner in which those purposes track the needs of the United States.²⁸⁹ Breyer believed that the statute ought to be relevant when "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."²⁹⁰ For

²⁸² *Id.*

²⁸³ *See id.* at 166 (emphasis added); *supra* note 280 and accompanying text (presenting Justice Breyer's comments on the Restatement on Foreign Relations).

²⁸⁴ 133 S. Ct. 1659, 1662–65 (2013). *Kiobel* has already generated a good deal of commentary. *See, e.g.,* Symposium, *The New Territorialism and the Supreme Court*, 99 CORNELL L. REV. (forthcoming Sept. 2014).

²⁸⁵ *Kiobel*, 133 S. Ct., at 1662–63.

²⁸⁶ *Id.* at 1665.

²⁸⁷ *Id.* at 1664.

²⁸⁸ *See id.* at 1673–74 (Breyer, J., concurring).

²⁸⁹ *See id.*

²⁹⁰ *Id.* at 1674.

neo-functionalists like Justice Breyer, the text operates as a medium through which the judge engages in an activity, as opposed to a determinate grid from which the jurist gleans ready-made answers, as is the case for Scalia and Roberts.

At times, Justice Anthony Kennedy has employed a similar argumentative strategy.²⁹¹ In 2008, the U.S. Supreme Court held in *Boumediene v. Bush* that inmates at Guantanamo Bay, Cuba still had the habeas corpus privilege.²⁹² The U.S. government's position was that noncitizens designated as enemy combatants detained outside of U.S. territory had no claims on constitutional protections whatsoever.²⁹³ In order to test this claim, Kennedy began with a lengthy exploration through the "history and origins" of the habeas writ.²⁹⁴ Although Kennedy explained that "[t]he broad historical narrative of the writ and its function is central to our analysis Diligent search by all parties reveals no certain conclusions."²⁹⁵ For Kennedy, neither historical evidence pointing to the purpose of the writ or its intended geographical scope, nor did a "categorical or formal conception of sovereignty . . . provide a comprehensive or altogether satisfactory explanation"²⁹⁶ The problem with both the Government's and the petitioner's positions, Kennedy explained, was that "[b]oth arguments are premised . . . upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions."²⁹⁷

Kennedy's path towards a resolution was ultimately illuminated neither by textual analysis nor the historical purpose of the writ. Instead, Kennedy turned towards the mantra of "practical considerations."²⁹⁸ Finding a concern with prudence shot through the relevant precedent, Kennedy lauded a "functional approach"²⁹⁹ and a mode of analysis supported by "objective factors and

²⁹¹ *But see generally* United States v. Windsor, 133 S. Ct. 2675 (2013) (exemplifying Justice Kennedy's occasional deviation from this argumentative strategy); Citizens United v. FEC, 130 S. Ct. 876 (2010) (same).

²⁹² 553 U.S. 723, 732 (2008).

²⁹³ *Id.* at 739.

²⁹⁴ *See id.* at 739–46.

²⁹⁵ *Id.* at 746.

²⁹⁶ *Id.* at 750–51.

²⁹⁷ *Id.* at 752. Justice Scalia responded to this point by claiming that, if true, this would require the Court to defer to the Court of Appeals, and not open up towards a discretionary evaluation of "practical considerations." *Id.* at 832, 840 (Scalia, J., dissenting).

²⁹⁸ *Boumediene*, 553 U.S. at 759 (majority opinion).

²⁹⁹ *Id.* at 764.

practical concerns, not formalism.”³⁰⁰ As a result, Kennedy suggested that the instant question be resolved by balancing the citizenship and wartime status of the detainees, the location of the apprehension and detention, and the practical considerations relevant to whether the plaintiff should get a habeas claim.³⁰¹ Ultimately, Kennedy concluded that there were “few practical barriers to the running of the writ.”³⁰²

To be clear, the point of the preceding pages has not been to identify a partisan split on the Court. There’s plenty of literature on that over-wrought point.³⁰³ What’s interesting here is the methodological split, not the split on the merits. In cases like *Morrison* and *Kiobel*, functionalist and formalist modes of argument are vying in the same temporal location. They each enjoy a similar amount of pedigree and respect, suggesting a situation in which the residue of 1980’s neo-formalism and Obama-era neo-functionalism sit uncomfortably together, neither holding a dominant foothold in the storehouse of legal materials. A *langue* seems missing here in the way that it was present at the heights of classical and social legal thought.

A basic grammar for contemporary legal thought might seem like it’s missing, but I don’t think that it is. This is legal pragmatism at the level of explaining the systemic relation between cases like *Boumediene*, *Empagran*, *Ar-amco*, and *Morrison*. My suggestion is not that we see individual judges as practicing legal pragmatism; some of them would no doubt reject such a characterization. Rather, my argument is that legal pragmatism explains the sustained and conflicted deployment of argumentative outlooks that have returned from the dead. Further, when we bring legal pragmatism into conversation with liberal legalism, the product is the *langue* of contemporary legal thought: pragmatic liberalism.

B. The Basis of Contemporary Legal Thought: Pragmatic Liberalism

In the discussion that follows, I describe the emergence of legal pragmatism: the theory making sense out of the apparent schizophrenia we’ve canvassed in the extraterritoriality cases.³⁰⁴ In my view, the encounter between the

³⁰⁰ *Id.* For Justice Scalia’s response to this point in particular, see *id.* at 836–42 (Scalia, J., dissenting).

³⁰¹ *Id.* at 766 (majority opinion).

³⁰² *Id.* at 770.

³⁰³ See generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (discussing the role of the Supreme Court as a political institution).

³⁰⁴ See *infra* notes 308–327 and accompanying text.

recent arrival of legal pragmatism and the debris of liberal legalism (i.e. classic and modern) has produced a new structure of legal thought: pragmatic liberalism. My description of pragmatic liberalism therefore begins with an account of legal pragmatism.³⁰⁵ It starts in Section B.1 with a general review of the self-conscious deployment of legal pragmatism.³⁰⁶ This is legal pragmatism at the lexical level of *parole*, rather than as grammar. In contrast, Section B.2 turns to the space in which pragmatism assists in the stabilization of the apparently contradictory situation of conflicting modes of legal reasoning.³⁰⁷ This is pragmatic liberalism working at the deep level of grammar (*langue*). We can therefore think of legal pragmatism as functioning on two very different planes: (1) at the lexical plane of legal argument, and (2) at the grammatical or systemic plane, explaining and compelling the persistence of conflicting modes of legal reasoning.

1. Legal Pragmatism

Is contemporary legal thought merely a kind of conceptual thrift store, crammed with musty odds and ends? Admittedly, it is tempting to see it this way. When we read the decisions from above, they come across as a scrambled field of argumentative strategies with little in the way of tying them together. Despite this sensation, I believe there's something else going on here, and my suggestion is that something called "legal pragmatism" has much to do with our contemporary situation.³⁰⁸ In other words, it is no accident that contempo-

³⁰⁵ See *infra* notes 308–331 and accompanying text.

³⁰⁶ See *infra* notes 308–327 and accompanying text.

³⁰⁷ See *infra* notes 328–331 and accompanying text.

³⁰⁸ Although legal pragmatism is sometimes thought of as an early twentieth century phenomenon, I believe that it is a distinctly contemporary structure of legal argument. Desautels-Stein, *Experimental Pragmatism*, *supra* note 37, at 187. To be sure, "legal pragmatism" is often dated back to Oliver Wendell Holmes, Jr. and the legal realists. See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 806 (1989). But Holmes and the later realists are not examples of the juristic mind structured by pragmatic liberalism. In fact, Holmes is not a great representative of classic liberalism or modern liberalism either, and realists like Robert Hale are representative of neither. Desautels-Stein, *Market*, *supra* note 8, at 461. It is true that American pragmatist philosophy had some influence on thinkers like Holmes, Walter Wheeler Cook, and others, but we might want to label the result as it is not "legal pragmatism" of the sort described here. Desautels-Stein, *Experimental Pragmatism*, *supra* note 37, at 190. See generally JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995) (discussing, in part, Walter Wheeler Cook and pragmatic logic). Pragmatic liberalism is the pragmatic oscillation between the discredited moves we associate with formalism (classic liberalism) and functionalism (modern liberalism), but Holmes and the realists were writing in the midst of classic liberalism and the very beginnings of modern liberalism. See David Kennedy, "The Rule of Law," *Political Choices, and Development Common Sense*, in Trubek & Santos, *supra* note 21, at 95. Or to put the point differently, in the early twentieth century, when the

rary legal thought is comprised of neo-functional and neo-formalist modes of legal reasoning. Rather, it is the work of a new and integrating language of law: legal pragmatism. Before I explain more directly the relation between legal pragmatism and contemporary legal thought, let me first give a brief outline of legal pragmatism itself.³⁰⁹

It is helpful to begin with what Richard Posner has called “everyday pragmatism.”³¹⁰ This is the vulgar and vernacular form of pragmatism walking the streets, alive in the newspapers, and serving as the manifesto for so much of President Barack Obama’s governing platform.³¹¹ Rather than referring to it as everyday pragmatism, I prefer the more descriptive label “eclectic pragmatism.”³¹² When situated in the context of legal analysis, eclectic pragmatism takes on several features.³¹³ First, eclectics are skeptical of “big theory.” Whatever advantages might have been available in the past, the days of grand theorizing are mostly over, since for eclectics it is generally not useful to approach a problem with a pre-conceived set of abstractions. In almost every case, a big theory or ethical abstraction will be over—or under—inclusive. It will either

realists were getting to work, modern liberalism’s fame was only just emerging and the pragmatic reaction to modern liberalism’s demise was still in the distant future.

³⁰⁹ For a recent discussion of legal pragmatism, see generally John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012). For other influential treatments, see generally STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2005); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

³¹⁰ Posner, *supra* note 309, at 4.

³¹¹ See, e.g., Transcript: Inaugural Address of Barack Obama, WASH. POST (Jan. 20, 2009) http://media.washingtonpost.com/wpsrv/politics/documents/Obama_Inaugural_Address_012009.html, archived at <http://perma.cc/9S5W-HMZ7> (“[t]he question we ask today is not whether our government is too big or too small, *but whether it works . . .*”) (emphasis added).

³¹² See Desautels-Stein, *Eclectics*, *supra* note 9, at 590–91 (“The eclectic style has a taste for consequentialism, a mild dose of empirical study mixed with a gentle historical gloss, a lukewarm dissatisfaction with legal formalism and grand theory, is preoccupied with adjudication, and gets queasy around ‘political issues.’ This queasiness, or political nausea, comports with Rorty and Fish’s belief that it is very important to maintain a separation between the private world of metaphysical contemplation and the public world of political and legal discourse. The other elements consist in an affirmation of the private pragmatist mode of reasoning: ‘an encompassing orientation towards inquiry—one that stresses the agent’s perspective; the interaction of impulse, habit, and reflection; and a holistic approach to justification.’ The confluence of these two elements—an affirmation of pragmatic decision-making and an affirmation of a separation between philosophy and law—produces eclectic pragmatism.”) (citations omitted).

³¹³ For explanations of legal pragmatism that inspired this account, see generally Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163; Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21 (1996); Posner, *supra* note 309; Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *PRAGMATISM IN LAW AND SOCIETY* 89–97 (Michael Brint & William Weaver eds., 1991).

have too much or too little, never quite finding itself in what astronomers call the Goldilocks position.

This first feature leads into the second. Problems need to be addressed on a case-by-case basis. Problem-solving is at its best when it is ad hoc, getting a feel as best it can for the facts at hand. Some problems with similar features may require one sort of solution on a given day, and yet a very different answer on another. For the eclectic, however, this is not incoherence or inconsistency; it is responsibility and respect. It orients the pragmatist towards the actual world, and away from abstraction. Beyond distrust of grand theory and affinity for ad hoc decision-making, the eclectic pragmatist is fairly catholic about the means required to solve a particular problem. The mantra is “doing what works.” That is, it becomes somewhat meaningless to worry about whether a certain methodology is “conservative” or “liberal,” or associated with any particular ideological position. If it will “get the job done,” why not give it a spin?

A third feature of eclectic pragmatism is a willingness on the part of the eclectic to deploy formalist modes of legal reasoning when the situation seems to require it. Thus, eclecticism is not nearly as hostile with respect to formalism as was the functionalism of modern liberalism. Of course, the tried and true eclectic doesn't actually have any faith in formalism—but just the same, he doesn't have any faith in functionalism either. He only has faith in shifting his resources to the tools that seem most likely to resolve the problem. Posner has suggested that this “openness” involves an implicit understanding on the part of a judge that at times she will decide like a Justice Breyer or Justice Kennedy, while at others like a Justice Scalia or Chief Justice Roberts.³¹⁴ These are the “formalist pockets” that riddle the “case-by-case” fabric of pragmatic adjudication.³¹⁵ If a particular case is “better” handled in a classical style, the option is there. If the modern outlook is more “appropriate,” go for it. The problem for the eclectic pragmatist does not lie in the need to keep faith with a special mode of reasoning or problem-solving. The problem is only ever the problem itself, and solving it. It does not matter too much how it gets solved, just so long as it does.

A fourth feature involves the pragmatist's embrace of the status quo. Pragmatists are interested in change and progress, but only very gradually. Politics could be better; law could be better; the economy could be better; everything could be. And it will be, in all likelihood. But the route between here and there is one to be taken incrementally, minimally, even *naturally*. Reforms

³¹⁴ Posner, *supra* note 309, at 59–60.

³¹⁵ *Id.*

ought not to be revolutionary, but should take their cues from the status quo. This centrism is not necessarily a result of a belief about the superiority of any particular ideas animating the world; it is rather that the world is pretty good as it is, and probably the best it has ever been. Until someone shows how life might be better, we should make do with what we have.

The tried and true eclectic comes off as hard-working, free of ideological influence, and focused on the here-and-now rather than the ivory tower. He's all DIY, and it's no small wonder why pragmatism has achieved such popularity. The eclectic pragmatist is the man of the day, swimming in the zeitgeist, having traded in a useless faith in ideas for a practical faith in "problem-solving."

But, of course, pragmatism has its problems, too.³¹⁶ Problem-solving is surely necessary, but who sets the problem in the first instance? In addressing her problem, how is it that she came to frame *this* and not *that* as a "problem"? Why does she consistently choose one kind of problem, ignoring the rest? How does she know exactly when what she's been doing has "worked"? What does "problem-solving" even mean in a context where "problems" are merely patterns of discourse? What if it was the case that the discourse of "pragmatic problem-solving" was actually the problem itself? How would we solve *that* problem? And what of all the people that don't think that the world is all that great, and aren't as happy to let "nature" take its course? Who is it that counts in deciding about the status of the status quo? Does pragmatic problem-solving privilege certain sorts of people over others? Eclectics rarely confront these problems, given the pragmatic necessity of just getting along with business as usual. Faced with these questions, the eclectic responds: "Stop nagging, I'm working!"

Illustrative of the eclectic position are pragmatists like Cass Sunstein, Tom Grey, Daniel Farber, and even Richard Rorty, who—unlike the Justices of the Supreme Court—come much closer to personally emulating the features of eclectic pragmatism I discussed above. Of course, my abstract description doesn't really capture each of their positions in their entirety, and to be sure, there are tremendous differences among them as well. But for each of these thinkers there is value in explicitly bringing pragmatist arguments into the legal work itself.³¹⁷

Although eclectic pragmatism dominates the lexicon (*parole*) of contemporary legal thought, there are other varieties of legal pragmatism that break

³¹⁶ See Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 544–45 (2008).

³¹⁷ See Desautels-Stein, *Eclectics*, *supra* note 9, at 590–91.

with the eclectic mold. It is beyond the scope of this Article to spend much time with them, but two other noteworthy groups of legal pragmatists are the economists and experimentalists.³¹⁸ Economic pragmatists, like Richard Posner, begin in the posture of the eclectic pragmatist. Nevertheless, when it comes down to determining the most practical or the most reasonable approach to the problem they are hoping to solve, they turn to the discipline of economics for assistance.³¹⁹ It is for this reason that the distance between economic pragmatists and traditional law and economics scholars ends up closing so quickly. In contrast, experimental pragmatists like William Simon go in a quite different direction.³²⁰ Although they also begin in the eclectic posture, they turn towards the pragmatist philosophers for assistance, and in particular John Dewey.³²¹ Thus, while all three camps of legal pragmatists (eclectics, economists, experimentalists) are singing to the tune of the “everyday” sensibility I described above, they sing at different volumes. The eclectics are shouting from the mountain-tops. The economists are pretty loud, too, though they muddle the chorus with a bevy of not-very-pragmatic sounding ideas. And as for the experimentalists, we can recognize the same eclectic motifs, but there’s a good deal more riffing going on here as well.

Another way of making this point about the differentiated lexicon of legal pragmatism is to focus on the way in which all pragmatists understand the distinction between law and politics. In every case, these pragmatists share a post-classical starting point with the affirmation that “law *is* politics.” As discussed earlier in the Article, the master-*langue* of liberal legalism posits a distinction between a natural, pre-political world and an artificial, public space. The liberal concept of the individual derives its content from an argument about human nature, and the concept of society is understood as the necessary mechanism for enabling and protecting the individual will. In liberalism, “law” emerges as the essential tool for separating the public from the private, and the individual from the social. Where “politics” remains subjective and capricious, “law” stands out as authoritative and objective. This sharp distinction between law (adjudication) and politics (legislation) was a key aspect of the classic style,

³¹⁸ *Id.*

³¹⁹ See, e.g., Richard A. Posner, *Legal Pragmatism*, 35 METAPHILOSOPHY 147, 152 (2004).

³²⁰ For broad discussion, see generally Amy Cohen, *The Law and Political Economy of Food: Reflections on Size, Scale, and Contemporary Legal Thought*, 78 LAW & CONTEMP. PROBS. (forthcoming 2015).

³²¹ See generally William H. Simon, *The Institutional Configuration of Deweyan Democracy*, 9 CONTEMP. PRAGMATISM 5 (2012).

and alive but muted in the modern. In both cases, law was something other than politics.

When the cry “law *is* politics!” rang through law schools in the 1970’s and ‘80’s,³²² many modern liberals probably felt a splash of déjà vu.³²³ After all, modern liberalism was baptized in the realist call for the politics of law.³²⁴ 1980, however, was not 1930, and in the eyes of the new critics, the time was ripe for a reawakening.³²⁵ For these thinkers, the calcification of modern liberalism during the legal process years resulted in a bland and bleary-eyed recognition that law was political in some unthreatening way, but blind to politics in all the ways that mattered.³²⁶ In a way reminiscent of the taming of modern liberalism after the realist reformation, legal pragmatism similarly domesticated the heretics of the 1970’s and ‘80’s, culminating in a mainstream acceptance of the commonplace idea that “law is politics.”³²⁷ Today, we are once again face to face with the bland and bleary, nodding in agreement with the political basis of law while seemingly oblivious to what such recognition requires in fact. This is the outlook of legal pragmatism: the outlook of the dead.

At the same time, however, pragmatists espouse a confidence in the belief that while law is political, it is also something very different from politics. Rights talk, in both its “liberal” associations with civil rights and its “conservative” associations with property/contract rights, is a reflection of this belief. Although we might suspect that this view of an autonomous law (i.e., legal rights precede political determinations) is an outlier in the pragmatist lexicon, I don’t think that it is. Recall that legal pragmatists navigate the machinery of classic liberalism in addition to that of modern liberalism. The pragmatic belief in movement, oscillation, and the ad hoc facilitates the redemption of a classic liberal belief in autonomous rights, so long as such redemption is only temporary, only strategic. This is a mode of legal consciousness which actively and affirmatively sustains the idea of rights talk; indeed, there is no reason to dis-

³²² For a prominent instance of the slogan in print, see John Henry Schlegel, *Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference of Critical Legal Studies*, 36 STAN. L. REV. 391, 411 (1984). For a prominent instance of the reaction, see generally Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

³²³ See generally, e.g., ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990).

³²⁴ See HORWITZ, *supra* note 167, at 1–31.

³²⁵ Roberto Mangabeira provides an example of this reawakening. See generally ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

³²⁶ Peller, *supra* note 78, at 1154–55.

³²⁷ See, e.g., Louis Henkin, *How Nations Behave* 88–98 (1979).

pense with it. In the view of the eclectic, it is a mistake to throw anything away, regardless of its history. It may suit your purposes tomorrow.

2. Grammar and Faith

In now moving from pragmatism as lexicon to pragmatism as grammar, let us come back to the slate of Supreme Court decisions discussed above.³²⁸ The Court swung back and forth, allowing the majority in some instances to interpret the scope of governmental intervention broadly, while at others permitting a more favorable view of market autonomy.³²⁹ Neither position appears to have a dominant hold on the contemporary legal mind. We see the Court arbitrarily shifting between the neo-formalist and neo-functionalist modes of reasoning we have already associated with classic liberalism and modern liberalism, respectively.³³⁰

In my view, the decisions illustrate more than a field in ruins. Instead, I see it as the work of eclectic pragmatism. To clarify once more, I should say that I don't think that any of the justices I've discussed are necessarily self-conscious "eclectics" in the way that I have described it. My argument is rather that eclectic pragmatism explains the systemic and apparently contradictory oscillation between modes of reasoning by mediating the idea of contradiction in such a way that it only rarely comes across as a conflict that warrants any attention. Eclectic pragmatism does not carry a brief for either Justice Breyer's neo-functionalism or Justice Scalia's neo-formalism—it carries a brief for a language of legal thought entirely content with a systemic case of incoherence. "Whatever works" is the contemporary response—the eclectic's response.

Consequently, eclectic pragmatism offers a counter-narrative about the contemporary situation. This is not, the eclectic suggests, a state of ruin in which the field of argument has been destabilized. On the contrary, contemporary legal thought is thoroughly stabilized by legal pragmatism. Or to be more precise, it is legal pragmatism that sustains and nourishes the *appearance* of stability, pushing out of sight the suspicion that our pragmatic style of argument is defined by the conflict between opposable and discredited modes of legal reasoning, outlooks that have long since died in battle.

To push this idea further, I want to tie it in explicitly to the semiotic *langue*. As discussed above, in classical liberalism the jurist's work was governed by a certain grammar. That grammar was constituted by a family of ideas

³²⁸ See *supra* notes 241–303 and accompanying text.

³²⁹ See *id.*

³³⁰ Kennedy, *Three Globalizations*, *supra* note 21, at 63.

including individualism, legal formalism, and a strong preference for quasi-natural background rules over the artificiality of foreground rules. In modern liberalism, the grammar shifted towards social interdependence, legal functionalism, and a general preference for foreground rules over background rules. In both cases, I suggested that the modern and classic modes shared common ground in a meta-grammar of liberal legalism.

But, we can now finally ask, what of the relation between speaker and the language? In each of the classic and modern liberal styles, there was an expectation that there was something essentially right about arguing in either a classical or modern mode. That is, jurists did not tend to see these modes as “styles” or “argumentative strategies” at all—but as jurisprudential theories somehow connected to objectivism and the Rule of Law. In classic liberalism, for example, jurists operating within the structure experienced their relation to the law as necessitated by the Rule of Law itself. In modern liberalism, there was a similar belief: only here there was the intuition that rather than defending the Rule of Law from within the legal materials, they saw the Rule of Law as necessitating a thick connection with social needs and interests. It seems unnecessary to suggest that the faith of a jurist in a legal structure operates at any obviously conscious level. In fact, I am suggesting that faith in the system functions mostly at the grammatical level of syntax (*langue*).

One might wonder whether anyone has faith in contemporary legal thought. After all, if my presentation has any accuracy, it would seem that one of the chief characteristics of contemporary legal thought is an eclectic back-and-forth between legal zombies. Classic liberalism became unfashionable, as did modern liberalism, and today we appear to operate on the presumption that there is nothing essentially right about either of those deadened modes of legal consciousness. But it is here that we can glimpse the grammar of pragmatic liberalism peeking through.

The contemporary jurist has lost faith in classic liberalism and modern liberalism. She believes that neither individualism mixed with strong background rules, nor social interdependence mixed with strong foreground rules, provide us with the “right” way to “think like a lawyer” or, more ambitiously, defend the Rule of Law. But, and here is the key, the pragmatic liberal does have faith, and she has faith in the meta-grammar of liberal legalism itself. Thus, unlike in prior modes of thought, the pragmatist’s faith is unattached to particular ideas about the relation between market and state, public and private, individual and society. The contemporary pragmatist neither believes in *laissez-faire* nor the welfare state. But she does believe that markets are *there*, and

while she's lost faith in any special theory to explain the distinction between market and state, she does have faith in the idea that some combination of liberal ideas might do the job.³³¹ But the primal scene of the pragmatic liberal's faith is not even in the idea of the combination—it is a belief in “doing what works,” and doing what works with the building blocks of liberal legalism.

It is the coming together of faith in the meta-grammar and a loss of faith in the exclusivity of either the classic or modern modes which sustains the apparent incoherence and fragmentation of contemporary legal thought. It is also what constitutes a new *langue* for the pragmatic liberal, a *langue* which includes the contents of the classic and modern styles, plus the essential faith that out of some combination of these broken pieces workable solutions will become available. It is for this reason that the basis of contemporary legal thought is “pragmatic liberalism”: the jurist pragmatically and confidently slides back and forth between the ruins of liberalism's intellectual past. But it is a mistake to understand this merely as a description of the random banging around of the classical and modern styles. Pragmatism *mediates* and *sustains* the oscillation between the fragments of the classic liberal and modern liberal styles. Pragmatism provides the structure, and persuades us that the structure is worth defending.

CONCLUSION

As was explicit in this Article's opening pages, and as has been implicit throughout, we are in the midst of a crisis of legal identity. The crux of that crisis is pragmatic liberalism. As I intimated above, pragmatic liberalism might be likened to a sublimated neurosis. Like any neurosis, the deep conflict in contemporary legal thought between neo-formalist and neo-functionalist modes of reasoning produces anxieties. These anxieties are now running the gamut, generating concerns that range from the pedantic to the hysterical. But whatever the sort, we seem to have arrived at a consensus in the legal profession, and it is a consensus about the fact that something is deeply wrong.

Upon reflection, it would be surprising if this underlying conflict in legal thought failed to generate these anxieties. After all, it was in the context of late nineteenth century imperialism and revolution that modern liberals first launched their critiques of capitalism. These were high stakes, to say the least. And a hundred years later, the so-called neoliberal attack on the moderns was

³³¹ This point resonates with Duncan Kennedy's view that “the experience of legal argument as operations defines the ‘tone’ of modern legal consciousness, the loss of the sense of the organic or unmediated in legal thought.” KENNEDY, *supra* note 201, at 131.

as explosive, in its way. The stakes in these debates, and in the transitions from classic liberalism to modern liberalism and beyond, have always been so. This is all to say that when addressing the question of what it means to “think like a lawyer today,” and when we confront the surprising alliance between the outlooks of the dead, who wouldn’t expect problems? Contradictory impulses about how to argue, about how to frame problems, and about how to resolve them can hardly be healthy, can it?

And it is here that we witness the genius of pragmatism, since it is precisely the mission of pragmatism to convince us that everything’s just fine and that for however vicious might have been the assaults on the classic and modern liberal outlooks, we are impervious today. Of course, everything isn’t fine at all in terms of legal thought—the conflict between the classic and modern zombie armies rages on. But legal pragmatism counsels us at the deepest levels that faith in the master grammar of liberal legalism is warranted, that the conflict is really only a “theoretical” difficulty, and that if we turn our attention to what works, it will keep on working.

But it is for this very reason that I am suggesting we see pragmatic liberalism as a sublimated neurosis. The neurotic condition of contemporary legal thought is clear. But it is only clear when we bypass pragmatist complaints to the contrary and dig into its structural depths. Legal pragmatism pushes the conflict away, mediates it, and produces the sensation that for whatever problems we may be experiencing as a legal profession, as a collective identity, those problems will be resolved with a pragmatic response. We never actually get at the real conflict, the real terms in the debate between liberalism and its others. We never get there because pragmatism is always forcing a lawyer’s thinking away from the real trouble and towards the more socially acceptable postures of “problem-solving” and eclecticism, and sometimes, philistinism. It is in this sense that pragmatism is a defense mechanism, sublimating the neurosis of contemporary legal thought.

But is it necessary to understand pragmatism in this way? Is pragmatic liberalism inherently unhealthy, always enabling our crises of legal identity rather than ending them? I very much doubt that as a structure of legal thought, pragmatism is a natural sickness. Perhaps the pragmatic oscillation between rival liberal theories is just what we need. Perhaps a direct confrontation with the deadened state of contemporary legal thought might prove too much, and so it is, on this view, pragmatism itself which facilitates our ascent into an increasingly better world. Without the mediating power of pragmatic liberalism, perhaps the anxieties we experience today would prove trifling next to the raw terror of thinking like a lawyer in a world bereft of our pragmatist protector.

Maybe. But I suspect we have more to gain than lose in digging deeper into the intellectual sources of our profession’s internal conflicts. If we return to Pierre Schlag’s image of the night-hikers, it might very well turn out that

those pragmatists, so set on moving forward despite their blindness, had been right all along. It might turn out that pragmatism is a blessing, not a curse. But unless and until we stop and interrogate the structural depth of the crisis in contemporary legal thought, we just won't know. And I'm all for knowing. Aren't you?