

*EXPERIMENTAL PRAGMATISM
IN THE THIRD GLOBALIZATION*

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Pragmatism dominates contemporary legal thought, but knowing this isn't knowing so much. Legal pragmatism means different things to different people, and as this essay argues, minimalist and experimentalist forms of regulation both share a broadly pragmatic sensibility about law and democracy. As a consequence, we need to tease out the various threads of legal pragmatism in the hope of distinguishing the pragmatisms that work from the ones that don't, or less pragmatically, the ones that are just from the ones that are not. This knowledge will come from an ongoing assessment of the political stakes imminent in the pragmatisms, and an understanding of where and when pragmatists might have parted ways from their liberal roots. Of course, we may very well want to keep these roots. But unless we know something about the new pragmatic liberalism, and from whence it came, the interminable circles of tired discourse against which we use our James and Dewey to rally, will remain curiously unbroken.

1. INTRODUCTION

It's a tricky business setting out to say something meaningful about long swaths of history, if not a silly one. When we find ourselves wanting to argue how a particular idea had a special purchase at a particular moment amidst some population, trouble's surely on its way: How concrete is the idea? Who actually held it? Why did it matter? Were they elites, and if so, why is a focus on elites so important? What about the social history of the idea? What about the effects of the idea on the ground? Were they less or more important? How did the effects play themselves out? Universally? And what caused the idea in the first place? Is the idea important at all, or should we focus on the material conditions in which the idea arose? Why do we care?¹

So yes, intellectual history is tricky business, but as the early Pragmatist philosophers taught us,² we needn't fear the briar patch if the trip's worth our while,

and in this case, I believe that it is.³ In this essay, I follow the intuition that one type of such history—the mapping of American Legal Thought—is a tremendously fruitful project, and look to locate a still obscure though surely ascending mode of legal reasoning known as “experimental pragmatism.”⁴ Though there are several maps to choose from,⁵ my methodological point of departure relies on Duncan Kennedy’s analysis in his “Three Globalizations of Law and Legal Thought.”⁶

In that work, Kennedy argues that since the US Civil War, lawyers, judges, and policymakers in the United States have been participants in three phases of a global legal consciousness. Each phase globalized, Kennedy explains, at times representing the movement of legal ideas from Europe to the US, and at others in the reverse. The first globalization involved the transmission of “classical” ideas from Europe to the US, the second globalization involved more of a back and forth cross-Atlantic movement of “social” legal ideas, and the third globalization, in which we are now living, holds the United States at the core. What is helpful to understand about the map is that not everything that is happening now is necessarily indigenous to the contemporary legal thought of the third globalization. It’s better to think of contemporary legal thought as a style or aesthetic than a period of time, such that we may very well see contemporary jurists operating in the mode of, say, classical legal thought, just as contemporary musicians might perform in a style that was for more popular a hundred years ago.

The immediate question is therefore whether experimental pragmatism is a contemporary style—a style of law and policy that we would recognize as indigenous to the present moment. In the discussion that follows, I will cautiously answer this question in the affirmative. Unlike the unusual fashionista intent on wearing a 17th century peruke to the corner coffeeshop, experimental pragmatism appears to be an established aspect of the administrative landscape. Thus, if we have a map of contemporary legal thought without a spot for experimentalism, then it probably should. More importantly, experimental pragmatists like Charles Sabel and William Simon seem committed to the use of an eclectic regulator approach, along with a broadly “liberal”⁷ view of social welfare, both of which are hallmarks of the contemporary mode of the third globalization. Consequently, the essay will conclude

with a finding that experimental pragmatists are natives in the third globalization, even if they display extraordinary affinities with workers in the second.

Before moving on to the story of the three globalizations, and the place of experimental pragmatism in that story, it's important to underline the importance of the effort. One value in play is the value we place on understanding our legal world. To the extent we are able to do it well, mapping the structures of legal reasoning enables us to see coherence where we once saw chaos, and the rhyme of doctrinal choice if not the reason. More importantly, however, is the connection between mapping and the urgent need for reform. This connection reveals itself in two ways.

On the one hand, the rooting of a particular mode of legal thought in its political and social context assists in the important work of unsettling our received expectations about the provenance of our beliefs. When we recall the bloodied origins of classic liberalism, the terrible choices at stake in the shift to modern liberalism, the weird and chilly emergence of neoliberalism, and the Willy Wonka world that seemed to make treats out of them all—when we recall these contexts we bring focus to the political stakes in the various styles of our contemporary administrative expertise. On the other hand, mapping experimentalism on the terrain of American Legal Thought gives us a handle on what to make of its reformist potential. Unless we know something about the styles against which experimentalists and everybody else implicitly situate themselves, we cannot know whether we are repeating history, repeating renewal. The effort to locate experimentalism on the map helps us to understand the political stakes in play, as well as to know whether it is really something new. These are values we all should find desirable, and in answering the question of where experimentalism fits in the third globalization, we are in their service.

2. TWO MODES OF LEGAL CONSCIOUSNESS

The First Globalization: Classical Legal Thought. In what has become an increasingly standard way of looking at the map, we can begin with what Duncan Kennedy has coined “classical legal thought” (“CLT”) or classical legal consciousness.⁸ In Kennedy’s usage, legal consciousness is framed in the language of semiotics, where a consciousness is comprised of *langue* and *parole*.⁹ The *langue*

consists of fundamental elements of the consciousness—its mode of reasoning, its conceptual vocabulary, and the like. In contrast is *parole*, which consists in the actual speech-acts, the legal arguments themselves that are spoken in the mode of the *langue*. Thus, while *parole* is indeterminate within the context of the structure of the *langue*, the *langue* itself is identifiable as a discrete set of ideas.

According to Kennedy, the *langue* of CLT is a combination of three big ideas: (1) individualism, (2) a strict separation of the private sphere of the common law rules from the public sphere of coercive state regulation, and (3) a strategy of judicial interpretation known rather infamously as formalism.¹⁰ Taken together, Kennedy described the basic mode of reasoning in CLT as “the will theory,”¹¹ which I might also characterize as a distillation of classic liberal legalism.¹² To get a feel for this style, it might be helpful to recall John Locke’s argument about property rights and freedom of contract in his *Second Treatise of Government*.¹³

In Locke’s version of the state of nature, people possessed certain natural rights as a matter of their membership in the human race. These rights were fundamentally about individual freedom, and as a consequence, they were rights that clearly distinguished the “individualized” human being from the world of Aristotelian political animals. Individuals were morally autonomous, subject to no higher authority to which they had not consented. In this natural state of free and equal individuals, market transactions evolved. Because people have natural ownership over their persons, they also have natural ownership over the labor their bodies produce. Once that labor is mixed with a good, the good logically becomes that individual’s property. As property-owners, intelligent individuals tend to buy and sell their goods for a profit. Thus, in Locke’s state of nature things were pretty swell, except for the fact that a person’s property was never really very secure. So, in order to actually create a market order, Locke believed it was necessary to legalize property and the trade of property, or freedom of contract. As a result, Locke argued for a deliverance from the state of nature into a political society wherein the chief end of a new constitutional authority would be the creation and maintenance of property and contract rights.¹⁴

The three elements of Kennedy's model of classical legal thought are vividly illustrated in this famous little story. The actors are highly individualized in the sense that we are working after the major break with Aristotelian ideas about the function and purpose of human beings; society is split into a private sphere of pre-political (and pre-legal) natural rights and a public sphere of arbitrary government and law; the work of jurists in the public sphere are tasked with the enforcement of those natural truths born in the private sphere but that are only realizable once they have been legalized. To be clear, Kennedy is not suggesting that CLT was operating as early as the 17th century, for in fact he doesn't see it as emerging as a recognizable style until after the Civil War. With a reign of more than half a century, CLT as a form of legal consciousness began its slow decline towards the end of the Nineteenth Century, and was finally branded as a *gauche* style of legal analysis by World War II.¹⁵

The Second Globalization: Social Legal Thought. In contrast to the high individualism of CLT, this new mode of legal analysis, which Kennedy calls social legal thought, or "the social," involved a different set of ideas about how to use law as a means for arranging the social world.¹⁶ 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. Thus, where jurists operating in the CLT style would often seek the resolutions of legal disputes via direct deductions from the natural truths of the private, pre-political sphere, jurists in the social style would more generally look for answers by asking questions about the social function of a given legal regime.¹⁷ Once we knew what a law was supposed to accomplish, and when we know whether we wanted it accomplished that way, we could only then go on to say whether a legal dispute should be resolved in one direction or another.¹⁸

In the same way that the *langue* of CLT might be characterized as a classic style of "liberal legalism" *ala* Locke, the *langue* of social legal consciousness might be characterized as the crystallization of "modern liberalism."¹⁹ Modern liberal legalism does not have the same sort of canonical representatives as classic liberalism, but its

shortage of Olympian authorship is made up for in the staggering breadth of the writing that has been done in its service. A likely candidate for the master of the modern liberal style is Keynes,²⁰ but representatives are available from both the left and the right of the Keynesian emphasis on welfarism, administration, and employment.²¹ Indeed, Frank Knight, a founding member of the Chicago School, and Henry Carter Adams, one of the early writers in the first wave of institutional economics, have much in common with respect to a new role for law—a role that would stand in deep tension with judicial commitments to the will theory.²²

Let's take two examples of social legal thought, one from the Supreme Court and one from the academy. In the Supreme Court's 1948 decision in *Shelley v. Kraemer*,²³ the topic was restrictive covenants: the capacity of property owners to prospectively determine to whom their land could, and could not, eventually pass. The controversial aspect of these covenants, however, was that they excluded the possibility on the basis of race. After a black family took ownership of a home that had been subject to a racially restrictive covenant, a neighboring family brought an action to enjoin the purchasers from taking residence. The Missouri Supreme Court agreed with the neighbors and held the covenant to be effective and enforceable. In approaching the question, the court was appropriately modest as the modern style would indicate: the majority did not hold all private agreements to have the color of state action, even though our notions of "bargain" and "ownership" would be meaningless in the absence of some constituting legal regime.²⁴ Thus, the division between the independent market and the regulating state still held firm: "restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."²⁵ That dividing line, though it would hold, was nevertheless about to take a beating: "But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."²⁶ Voluntary agreements

between individuals seeking to buy and sell land, the court explained, did not implicate the state. The judicial enforcement of those agreements, however, did.

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

On the academic side we might take the corpus of work from Harold Laswell, Myres McDougal, and later W. Michael Reisman, or what was more colloquially known as “McDougal & Associates,” as illustrative. Like many others of their generation,²⁷ Laswell and McDougal were post-realists in the sense that they were deeply informed by early 20th century attacks on both the liberalism and formalism of classic legal thought. That is, they were convinced not only of the morally unacceptable nature of *laissez-faire*, but were equally certain about the intellectual bankruptcy of formalistic thinking about law and policy. Legal realists, and those like Laswell and McDougal who were working in the early wake of the realist onslaught, were all beholden to the emergence of American Pragmatism.²⁸ The hand of John Dewey, for instance, is explicit in the work of famous realists like Felix Cohen and Walter Wheeler Cook,²⁹ as well as in the tremendously influential work of Laswell and McDougal.³⁰

Laswell and McDougal’s “Policy Perspective” steadily developed over the course of the 20th century as what is probably best understood as an international variant of the legal process school. At bottom, the idea was to take many of Dewey’s insights and elevate them beyond critique and into institutional form. This new institutionalism would be guided by the freshest of cutting edge thinking about real social problems, the functional nature of law, an understanding of the deeply political

nature of law, and a process-oriented program in which a legal regime would be put under constant pressure for reappraisal due to persistent exposure to local instances of problem-solving. In Dewey's fashion, the basic goals of the regime would be very broad—in their case, it was “human dignity”—and the actual meaning of the goal would only be discovered through practice, and not before it. The goal values could be achieved only through “continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest net contribution to the overarching goal.”³¹ To the extent that the goal might find itself manifested differently in the specifics of various local contexts, these “varying detailed practices by which the overriding goals are sought need not necessarily be fatal...but can be made creative in promoting [our goals].”³²

Of course, given that Laswell and McDougal's approach became a school of thought in its own right, it would be misleading to suggest that these were the indelible hallmarks of the New Haven School, but at least in 1959, this much was clear. In that year, Laswell and McDougal published one of the seminal tracts of their new post-realist policy approach in “The Identification and Appraisal of Diverse Systems of Public Order.”³³ As mentioned, the fundamental point of departure was premised on avoiding old debates about the distinction between law and politics, or state and market. In order to bypass administrative hang-ups like these, the new policy perspective required of its agents an open-mindedness whereby “the institutional details of all systems of public order are open to reconsideration in the light of the contribution they will make to the realization of human dignity in theory and fact...”³⁴ The basic architecture involved a series of tasks for the administrator: (1) orient oneself to the largest possible context of evolving social processes;³⁵ (2) develop an understanding of how local communities generate expectations about the process of authoritative decision-making, whether these decisions are located in the public or private sphere;³⁶ (3) take a view of regulation as a mixture of prescriptive norms, softer recommendations, the application of both hard and soft norms, and an ongoing appraisal of the work of the norms at the street-level;³⁷ and (4) keep in mind the broader framework goal of furthering human dignity, and in keeping with post-realist preference for process over rule, think of this

goal as deliberately open-ended and as “a social process in which values are widely and not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power.”³⁸

3. LEGAL PRAGMATISM IN CONTEMPORARY LEGAL THOUGHT

The Third Globalization of Law and Legal Thought. In his description of contemporary legal thought, Duncan Kennedy has suggested that the present mode of legal analysis consists in the transformed elements of both CLT and social legal consciousness.³⁹ That is, where we might be tempted to see a social antithesis to a classical thesis, there is no synthesis to be found in contemporary legal thought. There is no new, dominant set of ideas that can be contrasted with the ideas of previous periods. Instead, we have the debris left over after the onslaught on CLT, as well as the debris left over from the various critiques deployed against the social, including those movements that emerged in the 1970s like neoliberal styles of legal discourse in the form of the law and economics approach, neoformalist critiques from within the discourse of modern liberalism, like liberal constitutionalism and republicanism, and styles of critique attempting to stand outside of liberal legalism altogether, like critical legal studies.

Consequently, Kennedy suggests that while contemporary legal thought lacks a large integrating concept, we can nevertheless identify two basic and ultimately contradictory kinds of *langue*: neoformalism, transformed from its origins in CLT, and the balancing of conflicting considerations, transformed from its functionalist origins in social legal consciousness. There is no end to the sorts of examples we might choose to illustrate the combination of these modes of reasoning, and so to take one at random, consider the U.S. Supreme Court’s 2008 decision in *Medellin v. Texas*.⁴⁰ The case was a famous and controversial one, dealing with the double approach of the United States judiciary to the International Court of Justice’s *Avena* decision,⁴¹ and a subsequent executive order from US President George W. Bush seeking to implement that decision.⁴² The dispute made its way to the ICJ via a complaint from Mexico against the United States, in which the former claimed that the latter had violated certain rights due to Mexican nationals under the Vienna Convention on Consular Relations. The ICJ ruled that US officials had failed to

fulfill those obligations, and President Bush ordered the state courts of Texas to review the conviction of the identified Mexican nationals in light of *Avena*.⁴³

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

First, Roberts acknowledged the validity and efficacy of international law. “No one disputes that the *Avena* decision...constitutes an *international* law obligation on the part of the United States.”⁴⁴ Roberts made it clear that the relevant question here was not whether international legal obligations exist, *per se*, but whether in this case it was possible to deduce a directly effective legal obligation from any relevant treaties regarding these Mexican nationals residing in Texas. This question, it turned out, was easy. The majority’s approach was this: Once the relevant texts are examined, a court is obliged to follow a legal formula instructing it to search out any language providing a private party with a right to enforce the treaty. Upon finding such language, a court should determine that the treaty is directly effective in court. Without the language, it’s not. Roberts didn’t find anything on point, and in the absence of the operative words, the majority concluded with a third point: “where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the courts to impose one on the States through lawmaking of their own.”⁴⁵ This conception regarding an important distinction between law-making and law-applying, where the business of law-makers is necessarily ideological⁴⁶ and the business of law-appliers is objective, was further elaborated in Justice Robert’s critique of Justice Breyer’s dissent.

In making an argument that has all the hallmarks of the *conflicting considerations* approach, Breyer suggested that the presence or absence of certain language is totally beside the point.⁴⁷ In contrast to Roberts’ focus on formal rules, Breyer’s claim was that the “case law suggests practical, context-specific criteria” that should be used to

help a court decide whether a treaty was self-executing. Breyer's approach demanded answers to a series of fact-based questions, such as the purpose of the treaty, its historical and political context, and whether the treaty seemed more or less focused on judicial application or not. Breyer recognized that these sorts of questions did not yield "a simple test, let alone a magical formula."⁴⁸ But given the actual and realistic unavailability of a meaningful textual approach like Roberts', the focus on the function of the treaty and the effort to balance all the extraneous factors is all a court can really ever hope to do.

The majority was unhappy with this response. Justice Roberts argued that Breyer's notions were notoriously ad hoc, indeterminate, incapable of actually providing predictable guidance, and probably most important of all, "tantamount to vesting with the judiciary the power not only to interpret but also to create the law."⁴⁹

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

These insights into the present situation do not, however, require us to see contemporary legal consciousness as only a pile of scattered debris. One possibility is that there actually is a new integrating concept, a new *langue* that can explain and embody the strange union of the transformed elements of the classic and modern forms of liberal legalism. That integrating concept could be something called "pragmatism."⁵⁰

At this point, we should be extremely careful about how we use the word. An immediate question is whether pragmatism is new, and at least on the account of the relationship between Cook and Dewey, between philosophical pragmatism and

legal realism, our intuition may very well be to say that pragmatism is hardly new at all. Let us then disaggregate the term a bit in order to see if there is something about pragmatism that is indigenous to contemporary legal consciousness.

A first category with which we can all feel comfortable is “philosophical pragmatism.” This is a pragmatism that holds itself out as a way of thinking about epistemology, ethics, is/oughts, universals, consequentialism, and other standards in the canons of moral and political philosophy.⁵¹ We also feel good about the identity of the players, and especially about the role of the big three: Charles Sanders Peirce, William James, and John Dewey. There may be less comfort when we start to think about the availability of a body of work called “neo-pragmatist,” but the nature of the conversation is pretty familiar. It’s a conversation about the likes of Richard Rorty, Hilary Putnam, Stanley Fish, Jurgen Habermas, Richard Bernstein, and others that have attempted to interpret the older generation of pragmatists in light of a more particular theory of what philosophical pragmatism entails.⁵² One thing we can say with comfort about either brand of philosophical pragmatism is that it is not couched as a theory of law. To be sure, many of these scholars have applied the prior work to legal questions, but it’s always a matter of philosophy applied to law, not pragmatism as a theory of law first.⁵³

In contrast to philosophical pragmatism is a second category, popularized by Richard Posner.⁵⁴ This is the “everyday pragmatism” in the vernacular. It is the pragmatism that is constantly deployed in the newspapers, by pundits and politicians.⁵⁵ It is almost universally understood in the context of the United States as a badge of honor to be known as a pragmatist. These pragmatists are against ideology, against foundational theory, against theories of truth or right. They will do what they need to do in order to get it done. Whatever works. Action-oriented thinking. “Just Do It.”⁵⁶ President Obama has consistently portrayed himself as a pragmatist, and against ideology, in precisely the same way that his opponents on the right do the same thing.⁵⁷

Of course, there are many complaints about everyday pragmatism. One is that it appears to have nothing at all do with its philosophical cousin. Among many other things, philosophical pragmatism is explosive. For the believer, it renders so

many propositions about the known world into fuzz. Everything opens up for the serious pragmatist, where the saying of William James becomes a saying about everything: “William James was so natural, there was no way of knowing what he’d do next.”⁵⁸ In this way of thinking, nature becomes a site of constant knowing and unknowing, where little if anything can be said about the way things ought to be done. It is an undeniably subversive approach to world order. In contrast, the everyday pragmatist is a soldier in favor the status quo. She doesn’t believe in a so-called ideology, but she only wants to tinker at the margins, slowly and incrementally. It’s a view of the world that basically takes it as it is, hoping to slowly make it better, but knowing that it’s already pretty good to begin with.

A third category of pragmatism is legal pragmatism, and it is legal pragmatism that may offer us a language that can capture the modes of reasoning we see in our contemporary jurisprudence. In terms of mapping legal pragmatism itself, there appear to be several varieties.⁵⁹ One is “eclectic pragmatism.” Eclectic pragmatism is easy to understand, since it is essentially the layering of everyday pragmatism onto the problematics of legal discourse. Also, just as everyday pragmatism is alienated from philosophical pragmatism, so is eclectic pragmatism. It is this divorce that has led writers like Posner, Rorty, and Tom Grey to all make the claim for a legal pragmatism “freestanding” of the work of James, Dewey, and company.

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

In order to properly understand these questions, we need to distinguish between the self-identified legal pragmatist as an individual agent, either in the guise of a judge or administrator or whoever, and legal pragmatism as a form of legal consciousness. In the first case, we can look to the works of scholars like Cass Sunstein and Daniel Farber as representatives of an idea about a status-quo jurisprudence, based on an attraction to context and an abhorrence towards grand

theory and foundations. The work of law should be a law that works, solving problems through an appreciation of economics, sociology, political science, and whatever other forms of knowledge-production may help us steadily move forward in the elaboration of a “better” law. In this sense, the eclectic pragmatist does not seem readily susceptible to the dynamics of neoformalism and its attachment to rights and right thinking.

When we recognize that eclectic pragmatism is also a sensibility, and not merely a professional identity, this tension quickly fades. The average judge, the average associate at a law firm, the average policy wonk, the average “American,” doesn’t hold the same sorts of quasi-consequentialist commitments of a Sunstein and Farber. They are rather far more inclined to use whatever mode of reasoning will be the most successful in achieving their given ends. This is the mindset in which it becomes *normal* to hear big-firm associates, and even partners, talk of using critical legal studies, *when it works to do so*. It doesn’t matter what critical legal studies, or behavioral law and economics, or public choice theory, or human rights law, might actually mean in terms of its political stakes. *The only thing that matters* for the eclectic pragmatist is that they select the mode of reasoning, whether it falls within the *langue* of formalism or the *langue* of functionalism, that wins. If it gets the client what he wants, use it. If it gets a politician elected, do it. If it solves our ethical problems, try it.

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

Eclectic pragmatism instructs us on the merits of having lost faith in either the classic or modern styles of liberal legalism. We no longer believe in the dominance of the will theory as *the* way in which to understand the role of law in the constitution of society, and we also no longer believe in the dominance of state interventionism as *the* universal corrective. And in the light of eclectic pragmatism, this is a moral good. In this view, faith in any particular liberal approach gets in the

way of getting what we want, and getting what we want is what matters. The eclectic pragmatist has most assuredly lost faith in either classic liberalism or modern liberalism, which accounts for why contemporary legal thought consists in the *transformed* elements of CLT and the social, and not just a blending of those elements. But here's the key: the eclectic pragmatist *has not* lost faith in liberalism. Indeed, what appears to have shaped up is a sort of "pragmatist liberal legalism" in which the jurist is completely committed to the vocabulary of classic and modern liberals, but at the same time denies the faith that classic and modern liberals had in the rightness of their respective modes of legal reasoning. The eclectic pragmatist also has faith, but it is a faith rooted in the rightness of liberalism, but not in any one of its predominant modes.

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

4. MAPPING EXPERIMENTAL PRAGMATISM

Legal pragmatism appears to involve three major threads. After eclecticism is economic pragmatism and experimental pragmatism. I will pass over economic pragmatism for the sake of space, but only take note that it is a style of pragmatism that places a tremendous amount of weight on the norm of allocative efficiency, while at the same time avoiding being just another name for neoclassical law and economics. The champion of this style is Richard Posner.⁶⁰ The rest of this essay is focused on the third style of legal pragmatism, experimentalism, and it takes a recent text from William Simon and Charles Sabel as a representation.⁶¹

In their most recent work on the topic, Sabel and Simon situate experimental pragmatists against two rival styles of law and policy work.⁶² On the one side is the well-known "minimalism" of Sunstein & Associates⁶³ and on the other is what Sabel

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

Before going further, I should clarify that I take Sunstein’s minimalism as a stock example of the eclectic brand of contemporary legal pragmatism, and I will use “minimalism” and “eclecticism” interchangeably. Depending on the text upon which we wish to focus (and there are a lot of texts), Sunstein is either performing as an eclectic pragmatist or an economic pragmatist. These do seem to be distinct styles of legal analysis, and Richard Posner most clearly represents economic pragmatism, while an obvious example of eclectic pragmatism is found in the writing of Justices Breyer and Anthony Kennedy. Sunstein’s minimalism seems to veer back and forth between being more or less economically inclined, but regardless of whether we put him in the camp with the eclectics or economists, there seems little doubt that he is deploying a contemporary form of legal pragmatism.

As for the command and control model against which Sabel and Simon contrast both minimalism and experimentalism, this model is of a piece with what I have been calling the modern liberalism of Duncan Kennedy’s period of social legal

thought. Thus, I use “command and control,” “modern liberalism,” and “social legal thought” interchangeably. In the remainder of this section the discussion will first summarize the basic ideas of experimental pragmatism as worked out in Sabel and Simon’s “Minimalism and Experimentalism in the Administrative State.” It will then go on to ask whether Sabel and Simon’s cartography seems right: (1) Does experimental pragmatism deserve a distinct location in the terrain of contemporary legal thought, or is it subsumed under the broader groupings of eclectic and economic pragmatism? (2) Does experimental pragmatism provide us with a distinctive break with the jurisprudence of modern liberalism, or is it best understood as a throwback, an attempt to recapture a spirit lost?

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

Sabel and Simon appropriately recognize that some might counter that reliability concerns are simply concerns of a more-broadly conceived idea about efficiency. But as Sabel and Simon explain, there does seem to be a real tension between experimentalist techniques and efficiency techniques to the extent that the economic pragmatist will be preoccupied with strong market signals like price, where the experimental pragmatist is looking at a broad spectrum of signals, including those that are weak, subtle, and deserve on-the-spot complex discretion. If too much attention is paid to price, the focus on efficiency can undermine a regulatory framework of reliability. For the efficiency-minded, cost-benefit analysis and regimes

that create mock-markets, like tradable emission programs, the main driver is a static assessment of price. Instead of a default openness to a host of varying sorts of signals and norms, the efficiency paradigm generates a tunnel vision for simplicity and short-term costs, which Sabel and Simon suggest is ultimately counter-productive. Experimental pragmatists believe that our broadly defined goals, whatever they might be, will best be served through complex responses with a view for the long-run, and not the reverse.

As we saw in the work of Lasswell and McDougal, this kind of big picture view is explicitly rooted in John Dewey's pragmatism. They write, "Experimentalism takes its name from John Dewey's political philosophy, which aims to precisely accommodate the continuous change and variation that we see as the most pervasive challenge of current public problems. Policies should be 'experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted upon, and subject to ready and flexible revision in the light of observed consequences...'"⁶⁴ Sabel and Simon understand this prime directive as involving a perspective that at bottom rejects the idea that regulation works best through the articulation of clear goals and the aggressive implementation of those goals. The focus instead is on Dewey's notion of inquiry: the experimental pragmatist is not too worried about precisely defined goals precisely because our goals only come into focus in the actual process of doing, and not before the doing has been done. It's just a mistake to set out a goal of optimizing a particular industry since the notion of optimizing may very well fool the regulator into chasing chimerical ideas instead of realizing, in the day-to-day, the intertwined twists and turns of crisis and victory. Sabel and Simon write: "In the realm of uncertainty, policy aims cannot be extensively defined in advance of implementation; they have to be discovered in the course of problem-solving."⁶⁵

For the experimental pragmatist, following Dewey, the first lesson requires the establishment of a very broad framework goal, but a goal that must be open to constant revision. That is, the goal should be allowed to change after we come to understand the goal as it seems to present itself in the march of the routine. Next, our policymaker or legal analyst at the center will want to devolve as much discretion

as possible to local actors, since it's in the local that the routine is most clearly understood. The local actors produce, record, compile, and report results as regularly as possible back to the center, and together the local actors and the administrators at the center coordinate and evaluate. The framework goals themselves are periodically evaluated in light of the process, helping dissolve the distinction between the initial "value" and the "facts" to which the value are ostensibly applied—a distinction key to the work of economic pragmatists.

In the context of regulation, Sabel and Simon suggest that this approach involves a structural design in which all the players, whether public or private, whether at the center or periphery, are induced into a culture of self-reporting and self-critique which will excel in the on-going work of getting done what we want to get done that is absent in the mainstream. Another advantage is that it avoids the critique of the welfare state which pointed to the inefficiency of the bureaucrat, ultimately unable to get her hands on the information relevant to the deployment of her apparent expertise. She could never know the market as well as the market knew itself. In contrast, the experimentalist lives in a sea of data—it just keeps on flowing in, flowing out, frothing about: the local is on a par with the center here, as opposed to the old idea of the interventionist state.

In the context of social welfare, Sabel and Simon push the conversation away from the form of rule-making and towards its content. The minimalist apparatus of experimental pragmatism will be helpful in certain issue areas, Sabel and Simon suggest, "but the approach seems implausible or question begging with respect to many of the most important problems."⁶⁶ The crux of the assertion is that eclectic pragmatists have failed to adequately take stock of the basic social changes in the playing field over the last half-century. In order to properly figure out the role of government in the distribution of wealth and resources (if that's even the right question), experimentalists are in tune with the realities of 21st century social structures in ways that minimalists are not.

The reasons for this are plain. The minimalist approach to social welfare involves the same approach as it did to regulation: it is eclectic, and based on a scheme of constantly recombining the assumptions of modern liberals and

neoliberals. The minimalist toolkit, as it were, ends around 1980. To be sure, the minimalist approach of eclectic pragmatists represents an alternative to the command and control model of modern liberalism, as well as the libertarian feel of the Washington Consensus, but what is new about it is the eclectic mixing of the ideas—not the arrival of a new image of market-state relations.

According to Sabel and Simon, the substantive proposals of experimental pragmatists with regard to the proper role of market and state are not dated to the 1980s, but not because a new idea about political economy has emerged. If this were the case, it might be an example of the old-fashioned distinction between fact and value, goal and implementation. Instead, experimental pragmatists are current in a way that eclectics are not because eclectic pragmatists have sought to adapt the assumptions of the New Deal and the Washington Consensus to the present, instead of leaving those assumptions behind in favor of finding our answers in the real world of problem-solving. For example, Sabel and Simon explain how the basic points of departure for New Deal thinking involved an architecture of social insurance built around tax and transfer cash distributions and framed in terms of market-labor relationships. The idea was to target the everyman—an able-bodied English-speaking white male with a traditional nuclear family tracked into a job in which he'd stay for forty years. Instead of grasping the fundamental changes in society with respect to what kinds of people are now able to work, where they work, in what languages they work, and so on, Sabel and Simon argue that minimalists have “sought to preserve the New Deal emphasis on standardized, rule-defined cash benefits while broadening the scope of both the social insurance and public assistance programs.”⁶⁷ Minimalists, on this view, are behind the times.

In order to make law more functional and better attuned to social needs, experimental pragmatists are eager to do away with presumptions from the past. The policy approach of the experimentalist should be on the lookout for changing trends and incorporate a close-up focus on “highly individuated planning, pervasive policy measurement, and efforts to aggregate and disseminate information about effective practices.”⁶⁸ The mechanism, as already stated, is public participation. In a way that distances itself from the pessimism of behavioral economics and resembles the

literature on deliberative democracy, experimental pragmatists seek out operational plans in which local communities are leading the way in figuring out what is working out through public sharing, thinking, and critiquing. These local efforts need to be harmonized through a central system, but instead of the center giving the periphery a set of rules about the role of the state in the market, local groups should be always thinking about what is working best, for whom, and where.

Pragmatism, Realism, Liberalism. In this Section, I want to situate Sabel and Simon's discussion in the context of Duncan Kennedy's map of American Legal Thought. As has already been said, I take minimalism as a strong illustration of eclectic pragmatism, which I have argued to be a motivating property in the "Third Globalization" of contemporary legal thought. Sabel and Simon would likely agree that minimalism is a contemporary posture, since they expressly articulate it as a current alternative to the command and control style of modern liberalism. Similarly, if they were to accept the premises of the Three Globalizations story, they would also accept the idea that experimental pragmatism fits in the contemporary mode, given that they see experimentalism as the other current alternative.

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

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

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

First, Sabel and Simon appear intent on presenting experimentalism as an administrative style that has already been planted. It's not a utopian vision of a world yet to be—in fact, they argue that there has been “a fundamental policy reorientation along experimentalist lines in the United States, the European Union, and elsewhere since the 1990s...Some of the Obama Administration's most important initiatives, including the Food Safety Modernization Act and the Race to the Top education program, can only be understood in experimentalist terms.”⁶⁹ Indeed, there is a growing list of examples of experimentalist work in the world to which Sabel and Simon are supplementing, not starting from scratch. From Toyota to the US Navy, EPA's Project Excel to the Nuclear Regulatory Commission, developments in child welfare reform to information trading at the WTO, experimentalist approaches seem everywhere. Of course, Sabel and Simon don't want to go too far, and they are sure to remind that experimentalism is in its infancy. It's young and unproven, but operating in the here and now.

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

I don't think that it is, and this leads to a second point about the common ground upon which eclectics and experimentalists are working. Sabel and Simon hammer home the idea that experimentalism is better than eclecticism, and in the context of minimalist style of regulation their chief complaint is that minimalism just doesn't work. They take efficiency as the grundnorm in play, and show how in case after case a singular focus on efficiency, optimal performance, and the techniques that make good on those norms like cost-benefit analysis and cap & trade are poor performers when it comes to actually doing what the regulations hope to do. Sabel and Simon explain how efficiency concerns undermine the fruitfulness of new learning opportunities⁷⁰ and sacrifice better results for quicker results,⁷¹ while cost-benefit analysis persistently gets the measurements of the costs and the benefits all wrong, or puts too much emphasis on centralized decision-making procedures unaccompanied by local assessments.⁷² Like cost-benefit analysis, Sabel and Simon see problems with cap & trade also involving workability.⁷³ These problems, however, are problems at the margins. Sabel and Simon admit that cost-benefit analysis and cap & trade techniques are valuable, and efficiency is a truly great idea. They're just not as valuable as eclectics would like to think.

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

A third point regarding Sabel and Simon's mapping of experimentalism, minimalism, and modern liberalism has to do with what they see as the proper fit between law and policy and the social world they are meant to govern. Sabel and Simon understand "the most pervasive challenge to current public problems" to be "the continuous change and variation" in society,⁷⁴ and that "experimentalist regimes are especially well-suited for circumstances in which effective public intervention requires local variation and adaptation to changing circumstances."⁷⁵ Minimalists, Sabel and Simon argue, continue to operate on the old and out-dated assumption of modern liberalism (and/or neoliberalism), while experimentalism is precisely fashioned to craft an administrative style that makes law responsive to today's social needs.

It is here in Sabel and Simon's critique of minimalist social welfare proposals that doubts creep in as to whether experimental pragmatism is indeed a contemporary legal style. There is no doubt that an idea about making law responsive to social needs is an emblem of contemporary legal thought, but it is well-known that it is here only as a relic of social legal thought. Indeed, it is a juristic technique that is more than a hundred years old at this point, and what may distinguish experimentalists is their somewhat neo-realist⁷⁶ tenacity for a teleological jurisprudence. Whereas the fit between law and social need is a part of every serious policy program, experimentalists like Sabel and Simon don't see it as just a "part"—it's key.

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

practice, and advocate the need for constant flows of information in an on-going process of reappraisal.

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

A fourth point about Sabel and Simon's discussion of experimentalism, minimalism, and modern liberalism might carry the day. In an article from 2004, Simon discussed the relation between "legal liberalism" and "legal pragmatism."⁷⁷ In the context of the mapping at work in this discussion, Simon appears to equate legal liberalism with modern liberalism: he associated it with a penchant for plaintiffs in tort and civil rights cases, defendants in criminal cases, a prioritization of moderate forms of equality and liberty, and a tendency to track the liberal-left side of the political spectrum. Simon's liberalism clearly does not include, as a consequence, the legalism of either Locke or Hayek. As for "legal pragmatism," Simon means for the label to describe experimentalism, and while he does admit that there are various breeds, his analysis is solely focused on the experimental style.

Simon's critique of liberal legalism is slippery. Coming from a deep baseline in critical legal studies,⁷⁸ there is little doubt about the adversarial posture of Simon's pragmatism. And the article is titled "the pragmatist challenge to legal liberalism" after all. At the same time, however, Simon seemed to be going out of his way to paint the critique as one coming from *within* liberalism. After surfacing some common complaints from critical theory, Simon distances himself from them. Noting that these critiques "remain important and, on some points, powerful," Simon's pragmatist approach would be "more grounded in the basic commitments of political liberalism."⁷⁹ Moving into the rest of the discussion, as a consequence, the reader may have expected legal pragmatism as the coming of something like a friendly amendment, and not as much of a radical overturning of liberal legalism.

Towards the middle of the article, Simon addressed the issue directly. Simon explained, “At the risk of overemphasizing the contrast, I have formulated and organized the premises so as to emphasize their differences with Legal Liberalism. It is debatable whether the Legal Pragmatist perspective is best seen as a competitor to the Legal Liberalism that addresses itself to the whole field of lawyering, or rather as a complement that purports to be more appropriate to a range of situations but that concedes as a significant range to the Legal Liberal approach.”⁸⁰ At the end, Simon left this relational question for another day, wondering whether an ultimate answer might be less useful than a forward-looking perspective on better discourse, whether it’s called liberal or pragmatic or whatever.

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

To sum up, there appear to be three reasons for believing experimental pragmatism to be a representation of Duncan Kennedy’s description of contemporary legal thought. First, Sabel and Simon have argued that experimentalism is operational, and therefore a real administrative style in the contemporary scene. Of course, not everything that is happening is illustrative of contemporary legal thought—a great many instances are just holdovers from traditions in the past. But Sabel and Simon’s claim is that it is indeed new, and that it is explicitly formulated as an alternative to the command and control style of modern

liberalism. Second, the experimentalist critique of minimalist regulation is clearly consistent with an eclectic preoccupation with “what works,” and for Sabel and Simon, a great deal of the minimalist regulatory apparatus just doesn’t. It wasn’t that efficiency concerns, cost-benefit analysis, or cap & trade programs suffered from political or philosophical defects, but rather that they didn’t perform in the manner in which Sunstein & Associates would hope. Third, the experimentalist critique of minimalist social welfare suggested a heavy reliance on the jurisprudential style of social legal thought and modern liberalism. The reliance was so heavy, and so important, that it was enough to doubt whether experimentalism might be better located in the Second Globalization. Fourth, experimental pragmatism appears to be ultimately committed to liberal legalism. This commitment is not to any single style of liberal legalism, but rather to the common liberal vocabulary to be found in the *langue* of classical and social legal thought.

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

5. CONCLUSION

Legal pragmatism is a dominating quality of contemporary legal thought, but knowing this isn’t knowing too much. Legal pragmatism means different things to different people, and as this essay has argued, minimalism and experimentalism share a broadly pragmatic sensibility about law and its administration. It is therefore incumbent to tease out the various threads of legal pragmatism in the hope of

distinguishing the pragmatisms that work from the ones that don't, or more ambitiously, the ones that are just from the ones that are not. This knowledge will come from an ongoing assessment of the political stakes imminent in the pragmatisms, and an understanding of where and when we have jumped the liberal ship.

Of course, we may very well want to stay on the ship—it certainly has its benefits. But unless we know something about the new pragmatic liberalism, and from whence it came, the interminable circles of tired discourse against which we use our James and Dewey to rally, will remain curiously unbroken.

NOTES

1. For two examples from the literature on critical legal studies, see Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984), p. 57; John Henry Schlegel, "Does Duncan Kennedy Wear Boxers or Briefs? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture, and the History of Intellectuals," *Buffalo Law Review* 45 (1997), p. 277.
2. William H. Simon, "The Institutional Configuration of Deweyan Democracy," *Contemporary Pragmatism* (2012).
3. For discussion of an aesthetic approach, see Pierre Schlag, "The Aesthetics of American Law," *Harvard Law Review* 115 (2002), p. 1047.
4. Justin Desautels-Stein, "At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis," *Michigan State Law Review* 2007 (2007), p. 565.
5. For example, Morton Horwitz, *The Transformation of American Law, 1870-1960* (Harvard University Press, 1979); Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1997); David Kennedy and William Fisher, *The Canon of American Legal Thought* (Princeton University Press, 2006).
6. Duncan Kennedy, "Three Globalizations of Law and Legal Thought 1850-2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David Trubek and Alvaro Santos (Cambridge: 2006), pp. 25—36.
7. For my understanding of this very broad term, see Justin Desautels-Stein, "The Market as a Legal Concept," *Buffalo Law Review* 60 (2012), p. 385; Justin Desautels-Stein, "Liberal Legalism and the Two State Action Doctrines," *NYU Journal of Law and Liberty* 5 (forthcoming 2012).
8. Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 1975).
9. *Ibid.*
10. For discussion, see Pierre Schlag, "Formalism and Realism in Ruins (Mapping the Logics of Collapse)," *Iowa Law Review* 95 (2010), p. 195.
11. Kennedy, "Rise and Fall."
12. Desautels-Stein, "Market," pp. 396—421.
13. John Locke, *Second Treatise of Government* (Hackett, 1980).
14. Chapter Five presents Locke's analysis of property rights.
15. Kennedy, "Three Globalizations," p. 37.
16. *Ibid.*, pp. 37—59.

17. For an interesting counter-narrative, see Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2009).
18. Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908), p. 605.
19. Desautels-Stein, "Market," pp. 421—442.
20. Kennedy, "Three Globalizations," p. 57.
21. Desautels-Stein, "Market," pp. 421—442.
22. *Ibid.*
23. 334 U.S. 1 (1948).
24. Friedrich Hayek, *Law, Legislation, and Liberty, Volume 2: The Mirage of Social Justice* (University of Chicago Press, 1976).
25. 334 U.S. at 13.
26. *Ibid.*, pp. 14.
27. Kennedy, "Three Globalizations," pp. 25—36.
28. John Henry Schlegel, *American Legal Realism and Empirical Social Science* (University of North Carolina Press, 2011).
29. *Ibid.*
30. Laswell, a scholar of political science, psychology, communications, and law, worked directly in Dewey's shadow while at the University of Chicago in the 1920s.
31. Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," *American Journal of International Law* 53 (1959), p. 19.
32. *Ibid.*, p. 19.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*, pp. 20—21.
36. *Ibid.*, p. 21.
37. *Ibid.*, pp. 22—23.
38. *Ibid.*, p. 24.
39. Kennedy, "Three Globalizations," pp. 63-73.
40. 552 U.S. 491 (2008).
41. *Ibid.*, pp. 502.
42. *Ibid.*
43. *Ibid.*, pp. 503.
44. *Ibid.*, pp. 504.
45. *Ibid.*, pp. 513-514.
46. My thinking about ideology follows Barbara Fields, "Slavery, Race, and Ideology in the United States of America," *New Left Review* 1 (1990), p. 95.
47. *Ibid.*, pp. 549.
48. *Ibid.*, pp. 550.
49. *Ibid.*, pp. 516.
50. Desautels-Stein, "Eclectics."
51. *Ibid.*, pp. 566—586.
52. *Ibid.*
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*

56. I'm referring here to the well-known Nike slogan.
57. "The question we ask today is not whether our government is too big or too small, but whether it works." <http://www.newyorker.com/online/blogs/tny/2009/01/our-better-history.html#ixzz1hNSqU1QB>
58. In his study of American pragmatism *The Metaphysical Club*, Louis Menand quotes George Santayana as being "so extremely natural that there was no knowing what his nature was, or what to expect next." Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (Farrar, Straus and Giroux, 2001), p. 77.
59. In this article, we are only concerned with "eclectic pragmatism" and "experimental pragmatism." Another, increasingly popular style of legal pragmatism is "economic pragmatism," distinct from both neoclassical and behavioral law and economics.
60. Desautels-Stein, "Eclectics," pp. 595—611.
61. For the purposes of this discussion, I am limiting the coverage here to Charles F. Sabel and William H. Simon, "Minimalism and Experimentalism in the Administrative State," *Georgetown Law Journal* 100 (2011), p. 53, and William H. Simon, "Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism," *William & Mary Law Review* 46 (2004), p. 127.
62. "Experimental Pragmatism" seems like a label that is perfectly consistent with Sabel and Simon's usage here. My suspicion is that their main complaint would be that the label is redundant since all pragmatism is experimentalist. My response there would simply be to the abundance of work done by self-identified pragmatists that so clearly does not embody the kind of experimentalism they are espousing. This may very well boil down into what is "really" pragmatism and what is not, re-playing the same debates that emerged after Peirce, Dewey, and James claimed that the term was being misused. My intention here is most certainly not to claim that Sunstein is actually and truly a pragmatist. It is rather that scholars like Sunstein self-identify with the term, and have enough in common with a rough and vernacular sense of pragmatism to justify calling them pragmatists as such. What is necessary, however, in the process of diluting the name "pragmatism" is to make sure that we carefully distinguish its strains, since they at least claim to be different creatures.
63. For example, Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008).
64. Sabel & Simon, "Minimalism," pp. 78.
65. *Ibid.*, pp. 56.
66. *Ibid.*, pp. 69.
67. *Ibid.*, pp. 69.
68. *Ibid.*, pp. 89.
69. *Ibid.*, pp. 55—56.
70. *Ibid.*, pp. 62.
71. *Ibid.*, pp. 62—63.
72. *Ibid.*, pp. 64—65.
73. *Ibid.*, pp. 66—69.
74. *Ibid.*, pp. 78.
75. *Ibid.*, pp. 56.
76. For example, Howard Erlanger et. al., "Is it Time for a New Legal Realism?" *Wisconsin Law Review* 2005 (2005), p. 335.
77. Simon, "Solving Problems."
78. *Ibid.*, pp. 146.
79. *Ibid.*
80. *Ibid.*, pp. 173.