

## ARTICLES

### The Market as a Legal Concept

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## INTRODUCTION

Writing thirty-three years ago in the pages of this journal, Duncan Kennedy made the troubling claim that the entire landscape of American Legal Thought was in the shadow of a “fundamental contradiction.”<sup>1</sup> This contradiction was an aspect of the political philosophy associated with thinkers like Thomas Hobbes, John Locke, Immanuel Kant, Jeremy Bentham, John Stuart Mill, and John Rawls,<sup>2</sup> and it involved the basic problem of relating individual freedom to a coercive sovereign.<sup>3</sup> Liberalism, as that famous philosophy came to be called, had its origins in an epic battle against an ancient theory of justice and social organization, wherein the new believers asserted a kind of autonomy and subjectivity rooted in an idea about individualism.<sup>4</sup> The foundational liberal move, however, was to argue that this new individualism, and the freedom and equality that would come with it, could only be realized when men were willing to renounce their natural freedoms in exchange for a regulated and ordered life under a

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1. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 213 (1979). Five years later, in a piece co-authored with Peter Gabel, Kennedy renounced the fundamental contradiction: “First of all, I renounce the fundamental contradiction. I recant it, and I also recant the whole idea of individualism and altruism, and the idea of legal consciousness . . . . I really see the fundamental contradiction these days as a lifeless slogan . . . .” Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16 (1984). Almost thirty years later, my own view is that Kennedy has now renounced that renunciation.

2. For two “modern classics” in the spirit of the “fundamental contradiction” and addressing many of these authors, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 52-54 (1989); ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 118 (1975).

3. Kennedy, *supra* note 1, at 213.

4. See, e.g., PIERRE MANENT, AN INTELLECTUAL HISTORY OF LIBERALISM 115-16 (Rebecca Balinski trans., Princeton Univ. Press 1994) (1987).

collective and coercive power.<sup>5</sup> Consequently, here was the fundamental contradiction: in order to experience a life of meaningful freedom, we have to give up our “natural” freedom to a supreme authority of law.<sup>6</sup>

Kennedy claimed that all law in the western tradition was dominated by liberalism, and that every legal problem was in a way a kind of liberal problem.<sup>7</sup> Referring to the liberal contest between individual freedom and state control, Kennedy stated:

[I]t is not only an aspect, but the very *essence* of every [legal] problem. There simply are no legal issues that do not involve directly the problem of the legitimate content of collective coercion, since there is by definition no legal problem until someone has at least imagined that he might invoke the force of the state.<sup>8</sup>

That is, in Kennedy’s view, all law was liberal, and to suggest that some law could exist outside of this tradition, at least in the developed North Atlantic capitalist states, was to suggest a sort of discourse that we might not even recognize as operating in the language of law.

Over the last thirty or forty years, “totalizing” claims about the legal system have come in and out of fashion.<sup>9</sup>

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5. See Kennedy, *supra* note 1, at 211-12. Classic liberal political theorists have offered varying reasons for how and why freedom would be realized in this way. Hobbes, for example, believed that in the natural condition of mankind, human beings possessed an ultimate right of self-preservation subject to no higher authority. THOMAS HOBBS, LEVIATHAN 66 (Dutton 1965) (1651). That is, every individual was free to determine for himself just what was necessary for his own survival, and that such determinations were not moral in any meaningful sense. The problem, as is well known, was that Hobbes saw this all-powerful natural right as the source of social strife, pushing men into a constant state of war and fear. *Id.* at 67. In order to be truly and actually free, Hobbes argued for a renunciation of that basic natural right of self-preservation in exchange for the order guaranteed by a political sovereign, i.e., the Leviathan. *Id.* at 89-90.

6. See Kennedy, *supra* note 1, at 211-12.

7. *Id.* at 213.

8. *Id.*

9. Jacques Derrida is representative:

Thus it has always been thought that the center [of a totalizing structure], which is by definition unique, constituted that very thing within a structure which while governing the structure, escapes

Critical legal studies bloomed, only to struggle against the onset of rival forms of critical thought,<sup>10</sup> and then apparently shrink in the bright lights of a burgeoning law and economics movement,<sup>11</sup> not to mention the ascendance of a new and mighty form of legal consciousness: legal pragmatism.<sup>12</sup> Today, a full generation later, Kennedy's

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structurality. This is why classical thought concerning structure could say that the center is, paradoxically, *within* the structure and *outside* it. The center is at the center of the totality, and yet, since the center does not belong to the totality (is not part of the totality), the totality *has its center elsewhere*. The center is not the center.

JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278, 279 (Alan Bass, trans., Univ. of Chicago Press 1978) (1967).

10. Two examples would include developments within critical legal studies itself, casting skepticism on the notion of the fundamental contradiction, and later, critical race theory. For a sample of the literature on critical race theory, see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995) (explaining developments, early and late, in critical race theory); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985 (2007) (discussing the role of race in subordination and the history of colorblindness in law); Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 330 (2006) ("[C]ritical race theory . . . rises, in part, as a challenge to the emergence of colorblind ideology in law . . . ."); Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 *IOWA L. REV.* 1497 (2009) (looking back at twenty years of critical race theory developments).

11. For discussion of the possible fates of critical legal studies, see Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 *LAW & SOC. INQUIRY* 779, 782 (1992) (reviewing MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987)) ("My argument here is that this question—not the supposed failure of [critical legal studies] to answer it, but the assumptions and structures of thought that are embedded in an revealed by *the question itself*—has been a principle cause of a systematic misreading and mischaracterization of [CLS] work by mainstream legal scholars."); John Henry Schlegel, *CLS Wasn't Killed By a Question*, 58 *ALA. L. REV.* 967, 968 (2007) (arguing that critical legal studies drifted out of fashion in legal scholarship).

12. For discussions of legal pragmatism, see BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 35-43 (1997) (advancing the positive and negative uses of pragmatism in legal theory); Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 *MICH. ST. L. REV.* 565; Catherine Pierce Wells, *Pragmatism, Feminism, and the Problem of Bad Coherence*, 93 *MICH. L.*

hypothesis seems ripe for renewal. The incredible claims launched out of law schools in the 1970s about the connective tissue linking up what were apparently disparate fields of law has never been refuted, and at the same time, the harvest borne of this insight has never been reaped. As we face the onset of yet another wave of what some economists have called a “Perfect Fiscal Storm,”<sup>13</sup> the time for doubts should be behind us—the time for reaping is now.

And so, we can ask, time for what exactly? As a preliminary matter, I don’t mean to suggest that we relaunch the particular idea about understanding all law as a totalizing structure. It seems more fruitful to understand Kennedy’s early idea more in terms of *style* and less in terms of structure. This means that we should understand the fundamental contradiction and its implications merely as symptomatic of a very precise kind of liberal legalism, and not as an attribute of *all possible law*. This distinction between a focus on legal style, and law itself, is crucial if we are to keep hold of the idea that the particular versions of market economy we have witnessed over the last half-millennium are only really just that—*versions* of a market economy, and not market economy *itself*. A market economy is fundamentally indeterminate, meaning, it may take any number of alternative institutional formations, and the dominant styles of liberalism have so far only provided us with a limited set of those formations. Thus, to restate: we should understand the analysis of the fundamental contradiction as an aspect of liberal legalism and only as one way of doing law, a way of doing law *as we have known it*, and not necessarily as an aspect of what it must always be, or what it might become.

Next, the argument here in the context of markets, and in a counter-part argument on the subject of race,<sup>14</sup> is that we should train our focus on the idea of *legal concepts*. That is, if we seek fundamental market reform, if we seek basic advances in the battle against racial subordination, the

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REV. 1645 (1995) (reviewing MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993)).

13. L. Randall Wray, *The Perfect Fiscal Storm*, 46 CHALLENGE, Jan.-Feb. 2003, at 55, 55.

14. See Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1 (2012).

strategy presented here suggests that we focus tactically on markets and races as legal ideas first, and social, political, or economic ideas later. There are two arguments for taking on what appears to be such a juridico-centric task, and these arguments share a common purpose:

Among the most powerful obstacles in the way of imagining alternative institutional variations of market society is the false distinction between free competition and the regulatory state. This distinction stifles our imaginative powers because the very notion that naturally free markets actually exist blinds us from the market's socially and politically contingent legal structure. The transformation of market society requires an attention to the legal rules that form that society, and more particularly, an attention to those background and foreground rules that both constitute and regulate markets. Our attention to legal concepts must be historicized so that we are constantly on guard from making the mistake of believing that anything about those rules is natural or necessary. In doing so, we protect ourselves from the common mistake of confusing the abstract conception of the market with a particular and contingent set of market institutions.

The two arguments in support of this insight are these. First is the idea that market reform is substantially blocked by social contexts—natural forces in the world that exist independently of our policy decisions. This view of the relation between social context and responsive regulation tells us that there is only so much we can do, and that we simply have to do the best we can with the cards we are dealt. Competitive markets exist naturally, and our only recourse is to either manage as expertly as we can, or let them regulate themselves and hope for the best. This perspective on the nature of social change can be challenged, however, when we recall that “social context,” or “competitive markets” are not naturally occurring at all. In fact, what we often think of as a naturally evolving context, say in the case of lending practices or unemployment rates or whatever, are always historically contingent choices made by real people in real time. These are choices with consequences about how wealth and resources are distributed in society, and there is simply nothing natural about it. Remembering that the market is a legal concept, and not a natural entity, assists us when we hope to challenge settled expectations about what is and what is not

possible. This might be termed a *critical* argument in favor of viewing the market as a legal concept.<sup>15</sup>

A second argument similarly seeks to denaturalize thinking about the market through a focus on the notion that markets are literally sets of legal rules. Just as it is helpful to shift popular discourse away from an obsession over “state regulation” of a “free market,” it is also helpful to shift legal discourse away from an idea that markets exists independently of laws, and that laws simply respond to naturally competitive markets out there in the world. Competitive markets are legal constructs, both constituted and managed by legal rules, top to bottom. Consequently, it’s just plain wrong to think of the legal system as only responding to the market—the legal system creates the market just as well. Once we remember that legal concepts like markets are just sets of rules, jurists are empowered to manipulate the rules as they like, running the arguments through whatever modes of legal reasoning seem to suit the situation, be they formalist, functionalist, or pragmatist. In other words, the choice to see the market as a legal concept empowers the jurist to experiment with the form and substance of that concept in a way that is impossible to do when it is assumed that the market has an existence outside of the legal system. This might be termed a *structural* argument in favor of viewing the market as a legal concept.<sup>16</sup>

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15. This argument draws on the sorts of ideas found in BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011); David Kennedy, Address, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5 (2005); John Henry Schlegel, Essay, *On the Many Flavors of Capitalism, or Reflections on Schumpeter’s Ghost*, 56 BUFF. L. REV. 965, 971 (2008) (“That markets require rule systems means that there is no such thing as a (rule-)free market. A claim that one prefers the ‘free market’ to a potential regulatory regime is only shorthand for avoiding the task of explaining why one particular rule system is preferable to another, for all markets, and thus all capitalist economies, are constructed.”).

16. This argument draws on ideas found in DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* (1998) [hereinafter UNGER, *DEMOCRACY REALIZED*]; ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS* (2007) [hereinafter UNGER, *FREE TRADE REIMAGINED*]; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); Karl E. Klare, *Judicial Deradicalization of the*

Taken together, an insistence on thinking critically about the ideological and historically contingent politics of “free markets,” and an insistence on thinking structurally about the sorts of rules that both constitute and regulate “free markets,” recommends a baseline for institutional imagination.<sup>17</sup> It is for this reason that this Article brings focus to the idea that markets are legal concepts—that our descent into what the *New York Times* has called “a cataclysmic financial meltdown”<sup>18</sup> might be accompanied by a new round of critical and structural analysis of market reform.

In the discussion that follows, I suggest that in the vocabulary of liberal legalism, all legal concepts have two aspects. The first aspect involves an association with a particular liberal style, and the second aspect involves an identification as a certain type of rule.<sup>19</sup> As for liberalism,

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*Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

17. This approach is very much in the spirit of “critical history,” as illustrated in the work of Thomas McCarthy. A “history of the present,” in contrast to conventional intellectual histories, seeks to change our self-conceptions through destabilization of our settled convictions. As McCarthy has explained:

Critical histories make evident that the political values from which political liberalism seeks to construct a political conception of justice have always been and still are deeply intricately with matters of power, desire, and interest, and that they are essentially contestable. More generally, such histories make us aware that the quite distinct, often conflicting ideas, principles, values, and norms that have variously been taken to express the demands of justice cannot adequately be comprehended, assessed, or rethought without understanding how elements of the contexts and situations in which they have been propounded have invariably entered into them.

THOMAS MCCARTHY, *RACE, EMPIRE, AND THE IDEA OF HUMAN DEVELOPMENT* 38 (2009). For a similar methodology in a different context, see FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (Marjory Mattingly Urquidi trans., Univ. of California Press 1979) (1971).

18. *Credit Crisis—Bailout Plan (TARP)*, N.Y. TIMES, TIMES TOPICS (Dec. 7, 2010), [http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit\\_crisis/bailout\\_plan/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/bailout_plan/index.html).

19. In this context, the distinction between rules and standards is irrelevant. The point is not to say that a concept has to be particularly determinate or not, or more “substantive” or “procedural”—in fact, this is the sort of dialogue we’d expect if we were in the company of Hart’s work on rules of recognition and the like. The idea here is more *aesthetic*—the point is to establish a baseline for



there appear to be four major styles of painting a relation between market and state, or between free competition and state regulation. These styles are classic,<sup>20</sup> modern,<sup>21</sup> neoliberal,<sup>22</sup> and pragmatist. As for rules, there are two ideal types: background and foreground. Background rules are constitutive of the legal concept, meaning, without those basic foundational rules, the concept would not exist. Foreground rules are those rules that are meant to respond to the play of the background rules. They are regulatory in nature, and not constitutive of the concept. Each liberal style has its own particular approach to the relation between background and foreground rules. Classic liberalism and neoliberalism share a strong emphasis on background rules and find few reasons for foreground rules at all. Modern liberalism has a strong emphasis on foreground rules, but still retains a commitment to the idea of background rules. Pragmatist liberalism is like all of

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thinking about legal concepts from the point of view of the arguer, and not from some supposedly neutral and universal statement about the concept itself. This Article takes notice of but does not move deeply into the literature on constitutive and regulative rules. For example, the market's background rules of property and contract may very well be "constitutive" in the sense used by writers like John Ruggie. Following John Searle, Ruggie explains that regulative rules are rules that take as a given the existence of some prior activity and seek to control that activity. JOHN GERARD RUGGIE, *CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION* 22 (1998). Traffic rules are examples of regulative rules insofar as the decision to force drivers on to the right side of the road has little to do with the existence of the prior and predicate activity of driving. *Id.* In contrast, the rules of chess are constitutive in that we cannot know the game of chess—there is no antecedent activity—without first knowing the rules of the game. *Id.* As Ruggie says: "[C]onstitutive rules define the set of practices that make up any particular consciously organized social activity—that is to say, they specify *what counts* as that activity." *Id.* In this light, property and contract rules do appear to be constitutive in Ruggie's sense, since we cannot know the nature of liberalism's market game without property and contract rules. In contrast, antitrust laws cannot be constitutive, since they do, as a matter of definition, respond to an antecedent activity, namely, the competitive market. For discussion of constitutive and regulative rules, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995); Christopher Cherry, *Regulative Rules and Constitutive Rules*, 23 *PHIL. Q.* 301 (1973); John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

20. See *infra* Part I.A.2.

21. See *infra* Part I.B.

22. See *infra* Part I.C.

these styles in that it remains committed to the basic problem of the market-state dyad, but is unlike the rest in that it has lost any faith in an a priori assemblage of background and foreground rules.

What will become apparent in the discussion that follows is that a choice to emphasize background rules is a choice that inevitably conjures up the illusion of free markets. 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. 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. The problem, however, is precisely that these are illusions: the choice between free markets and interventionist states 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.

Part I sets out to describe the classic, modern, and neoliberal styles of relating “market” to “state.”<sup>23</sup> It does so by taking snapshots in time of representative authors and locating them in some historical context. The classic liberal style is represented by John Locke, the modern liberal style is represented by Henry Carter Adams and Frank Knight, and the neoliberal style is represented by Friedrich Hayek. In each case, the purpose is to show how these authors created a way of dealing with the liberal “fundamental contradiction” between individual freedom and state control through the elaboration of background and foreground rules. I leave pragmatist liberalism for another day.

Part II presents yet another style of approaching the market-state question, but from a sort of meta-perspective. While liberals are busy painting a picture of what they think they see in the world, the critical style elaborated

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23. These terms are in quotes here to emphasize the point that I do not mean to suggest that market or state can or should be understood in trans-historical, trans-cultural terms. The focus is on the idea of generating a style of market and state (which necessarily admits that there may be quite a lot of different styles), not a definition of them. For a classic work in social history, which is not the style implicated here, see E.P. THOMSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (Vintage Books 1966).

here paints a picture about liberals painting pictures.<sup>24</sup> It argues that the distinction between the classic liberal emphasis on free markets and the modern liberal emphasis on the regulatory state—the distinction between competition and control—is illusory. The entrenched relation between arguments for and against more and less regulation is important to understand in the work of outlining liberal programs or styles or sensibilities of political economy.<sup>25</sup> As abstract technique or style, there is a real difference between the classic liberal focus on free competition and the modern liberal focus on expert control. The critical point here, however, is that this difference is not the difference we usually take it to be: so-called “free markets” are deeply regulated, and so the alleged distinctions between more and less regulatory approaches are largely false. The *real* difference between the legal styles of competition and control lies in the choice between background and foreground rules. Classic liberal and neoliberal preferences for free markets are merely

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24. Just as I have not attempted to provide a comprehensive history of economic liberalism in Part I, Part II does not outline a unified theory of critique or an intellectual history of Marxism, the Frankfurt School, American Legal Realism, Structuralism, or anything else. For examples of such reviews, see AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993); DAVID HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS (1980); 1 THE HISTORY OF MARXISM: MARXISM IN MARX'S DAY (Eric J. Hobsbawm ed., Indiana University Press 1982); MARTIN JAY, THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 1923-1950 (1973); EDITH KURZWEIL, THE AGE OF STRUCTURALISM: LEVI-STRAUSS TO FOUCAULT (1980); ROLF WIGGERSHAUS, THE FRANKFURT SCHOOL (Michael Robertson trans., The MIT Press 1994) (1980); David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1985); Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13 (David Kairys ed., rev. ed. 1990). For recent work on how the writings of critics like Max Horkheimer, Theodor Adorno, Herbert Marcuse, Jacques Derrida, and Michel Foucault, among others, journeyed to the United States, see FRANÇOIS CUSSET, FRENCH THEORY: HOW FOUCAULT, DERRIDA, DELEUZE & CO. TRANSFORMED THE INTELLECTUAL LIFE OF THE UNITED STATES (Jeff Fort trans., Univ. of Minn. Press 2008) (2003) and THOMAS WHEATLAND, THE FRANKFURT SCHOOL IN EXILE (2009).

25. There are obviously a number of streams of critical work that could be emphasized here, most notably one in line with the writings of Michel Foucault. See MITCHELL DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY 133-154 (2d ed. 2010) (analyzing Foucault's relationship with liberalism).

preferences for more background rules—not for no rules.<sup>26</sup> What’s more, background and foreground rules don’t mean what they are sometimes taken to mean in the liberal literature. The rules of property and contract, for example, don’t have any naturally specified content—these are legal concepts that can be re-arranged in multiple ways, and in each of those ways there are different distributive results. To make reference to the importance of background rules of property and contract, in the abstract, is quite literally to make reference to nothing concrete at all. This critical style is rather idiosyncratically arranged through a discussion of sample texts from Karl Marx, Robert Hale, Morris Cohen, and Duncan Kennedy.

## I. LIBERAL LEGALISM: THREE STYLES

### A. *The Classic Liberal Style: The Law of Competition*

If our subject is the relation between market and state, the style of relating them that was born in seventeenth century England, and went on to rule the world, is associated with the set of ideas known as classic liberalism.<sup>27</sup> In the discussion that follows, John Locke will

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26. Throughout this Article I mostly refer to property and contract as the essential rules for both the classic and modern liberal conceptions of market society. My failure to focus on tort should not be registered as a disagreement. My decision to leave tort law out of the story is primarily a function of my choice to use Locke’s *Second Treatise* as the revelatory text for classic liberalism. See *infra* Part I.A.2. For critical discussions of tort law, see Richard L. Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 16, at 326; Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789 (1930); Morton J. Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 16, at 360; Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

27. Classic liberalism is a topic that has generated a tremendous amount of scholarship. A sample of works includes KOSKENNIEMI, *supra* note 2; ALISDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (Univ. of Notre Dame Press 1981); MANENT, *supra* note 4; SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY* (2000); CAROLE PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION: A CRITIQUE OF LIBERAL THEORY* (1985); RAZEEN SALLY, *CLASSICAL LIBERALISM AND INTERNATIONAL ECONOMIC ORDER: STUDIES IN THEORY AND INTELLECTUAL*

serve as a chief example of how to produce such a style or sensibility. I will not argue that Locke is either the only or the best representative of the classic liberal tradition; simply that he is an effective one.<sup>28</sup> The key characteristics of the presentation will be these: First, there is a separation between a pre-political economic sphere of activity, sanctioned by both the natural law of reason as well as Christian Revelation, and an artificial, political society the task of which is to guarantee the transformation of certain natural rights into protected positive rights.<sup>29</sup> Second, the manner in which political society is to generate the guarantee is through a constitutional government, sanctifying the natural rights of private property and freedom of contract.<sup>30</sup> Government should not interfere with the spontaneous play of the market, and must erect strong constitutional structures preventing political officials from tampering. Because these natural freedoms actually depend on that constitutional structure, Locke sets up a separation between the economic and political, market and government, natural and artificial, private and public—a separation that contains the essence of the classic liberal style.

Before heading directly to Locke, the discussion will begin with some of the context in which Locke was writing, a time when the feudal style of political economy was in the midst of collapse and in which England was witnessing a Civil War and a Revolution as a testament to that transformation.<sup>31</sup> It is important to emphasize that a

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HISTORY (1998); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998); UNGER, *supra* note 2.

28. For discussion of Locke, see C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE (1962); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953).

29. See *infra* notes 101-48 and accompanying text.

30. See *infra* notes 150-56 and accompanying text.

31. Between 1603 and 1641, England experienced a stretch of peace enabling a space for the gentry to split over religious and economic questions. Christopher Hill, *A Bourgeois Revolution?*, in THREE BRITISH REVOLUTIONS: 1641, 1688, 1776, at 109, 113 (J.G.A. Pocock ed., 1980). The fracture of the gentry, along with a Scottish War that proved the inability of King Charles I to rely on the gentry for financial support, the King's insistence on perceptibly Catholic preferences in a largely Protestant majority, and entrenchment of a tyrannical style of rule, all made visible the formidable cracks in the Stuart Monarchy. See *id.* at 113-14. In 1649, King Charles I lost his head, which in

summary of the feudal landscape is not intended to generate a sense of nostalgia for a golden age of communal love. The burden of human misery in this period has been well-chronicled,<sup>32</sup> and no analysis of the economic context in which classic liberalism was born should serve a desire to wind back the clock. What a recollection of feudal economy can do, however, is place the beginnings of economic

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many ways was a good thing for the market: feudal tenures were abolished and the manorial estate formally became “private ownership.” *See id.* at 116. Similarly, the peasantry’s only real weapon against enclosure—the infamous star chamber—was eliminated. BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* 17 (1966). The defeat of the King made room for rule by a “committee of landlords.” *Id.* at 19. “Both the capitalist principle and that of parliamentary democracy are directly antithetical to the ones they superseded and in large measure overcame during the Civil War: divinely supported authority in politics, and production for use rather than for individual profit in economics.” *Id.* at 20. As for the Revolution of 1688, it is, in Hobsbawm’s opinion, the “turning point” from the dominant hand of the feudal order to a less visible one. E.J. Hobsbawm, *The Crisis of the Seventeenth Century*, in *CRISIS IN EUROPE: 1560-1660*, at 5, 27 (Trevor Aston ed., 1965). This is sensible for several reasons, including the notion that the Revolution completed what the Civil War had left unfinished. After a failed attempt to establish an English Republic, the Stuart Monarchy was restored in 1660 in the person of King Charles II, who was then succeeded by King James II in 1685.

James proved to invoke the Catholic and traditionalist provocations of his dead Stuart relatives, and England geared up for a final verdict. Lawrence Stone, *The Results of the English Revolutions of the Seventeenth Century*, in *THREE BRITISH REVOLUTIONS, 1641, 1688, 1776*, *supra*, at 23, 58. To do so, a handful of English subjects appealed to William of Orange, grandson of Charles I, husband to Mary (James II’s daughter), and a staunch Protestant. Robert Beddard, *Introduction: The Protestant Succession* to *THE REVOLUTIONS OF 1688: THE ANDREW BROWNING LECTURES*, 1988, at 1, 1-2 (Robert Beddard ed., 1991). The claim of the English was that King James II had reverted to the feudal approach to property and liberty, invading their individual rights, and they had no avenues for constraining the King as Parliament had been dissolved. *See id.* at 1. Thus, in November 1688, William arrived with an accompaniment of 15,000 men, ready to dispose of the Catholic Problem once and for all. *Id.* When it was over, this so-called “bloodless” revolution saw William take the throne, the entrenchment of a Protestant England, the establishment of England’s constitutional monarchy, the passage of the English Bill of Rights, and the creation of the Bank of England. *See* STEVEN C.A. PINKUS, *1688: THE FIRST MODERN REVOLUTION* (2009). England was ready for John Locke.

32. *See, e.g.*, ROBERT L. HEILBRONER & WILLIAM MILBERG, *THE MAKING OF ECONOMIC SOCIETY* 25 (12th ed. 2008) (“The relation between lord and serf was often, even usually, exploitative in the extreme.”).

liberalism in sharp relief, reminding us that many of the ideas that have been taken to be “natural” were in fact forged by men in a scene of blood and hunger.

1. *The Passing of English Feudalism*. By the 1600s, Europeans were living in the murderous wake of Martin Luther’s famous Halloween post on the doors of Wittenburg Church,<sup>33</sup> the impact of John Calvin,<sup>34</sup> and the prior century’s massive acceleration of power in the Habsburg attempt to shut down the Reformation.<sup>35</sup> Religious war was the face of the 1600s, probably the most famous of which was the one commonly known as the Thirty Years War fought between the Habsburgs, French, Swedes, and numerous German principalities,<sup>36</sup> and ending with the immortalized Peace of Westphalia in 1648.<sup>37</sup> In tandem with this religious upheaval was the emergence of Enlightened Rationalism,<sup>38</sup> conventionally heaped on the shoulders of

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33. DIARMAID MACCULLOCH, *REFORMATION: EUROPE’S HOUSE DIVIDED, 1490-1700*, at 123 (2003).

34. *Id.* at 237-70 (describing Calvin’s model for the reformed church and noting the challenges it engendered).

35. *Id.* at 270-80 (“It was remarkable that general warfare had been postponed for so long in the wake of Luther’s 1517 protest and the gradual separation of various monarchs, cities and princes from Roman obedience.”). For discussions of the Habsburg campaign in the context of military history, see PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 75-143 (2002); PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000*, at 31-72 (1987).

36. See STÉPHANE BEAULAC, *THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTEL AND THE MYTH OF WESTPHALIA* 75-83 (2004) (describing the power dynamics that set the stage for the Thirty Years’ War).

37. See Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT’L L. 20, 21, 24 (1948) (providing a classic treatment of the Thirty Years War).

38. See JACQUES BARZUN, *FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE* (2000) (providing a history of the Enlightenment). For a fascinating account of the struggle between rationalism and historicism, see Paulo Barrozo, *The Great Alliance: Reason, History, and Will in Modern Law* (Feb. 2012) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author). For general histories, see MACINTYRE, *supra* note 27 (detailing the emergence of enlightened rationalism in the context of religious upheaval); BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* (1945) (providing general histories of Western philosophy).

Descartes,<sup>39</sup> Hobbes,<sup>40</sup> Newton,<sup>41</sup> or Locke.<sup>42</sup> This was the spirit of an independent and individualistic search for empirical truth, and the crowning of Man's true power over Nature—the power of Reason.<sup>43</sup> Together, the effects of the Reformation and the Renaissance set the stage for the wild social climate of the 1600s.<sup>44</sup>

In terms of material life,<sup>45</sup> seventeenth century England sat in a curious position, not yet at the very beginnings of market society, and also not yet into the revolutionary

39. RENÉ DESCARTES, *Discourse on the Method*, in DESCARTES: SELECTED PHILOSOPHICAL WRITINGS 20 (John Cottingham et al. trans., Cambridge Univ. Press 1988) (1637).

40. HOBBS, *supra* note 5.

41. ISAAC NEWTON, *PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA* (Alexandre Koyré & I. Bernard Cohen eds., Harvard Univ. Press 1972) (1687).

42. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1960) (1689).

43. See MAX HORKHEIMER, *ECLIPSE OF REASON* (1947) (providing a critique of the role of reason in man's perceived supremacy over nature); PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998) (same).

44. Gross, *supra* note 37, at 28 (describing the Restoration and the Renaissance as “centrifugal forces” acting to undermine established authority); Jenny Wormald, *Introduction* to *THE SEVENTEENTH CENTURY* 1, 1 (Jenny Wormald ed., 2008) (“Of course, history never stands still. But in [the seventeenth century] it moved at bewildering and sometimes kaleidoscopic speed.”). The seventeenth century is conventionally understood as a rather short and chaotic period ranging from the ascension of the Scottish King James I to the English throne in 1603, and ending in 1688 with the Glorious Revolution. *Id.* Conversely, the eighteenth century is viewed as a “long century,” beginning in 1688 and ending with the termination of the Napoleonic Wars in 1815. *Id.* The nineteenth century is another “long” one, ending after WWI. For a wonderful discussion of the long nineteenth century, see E.J. HOBBSAWM, *THE AGE OF REVOLUTION: EUROPE 1789-1848* (1962) [hereinafter HOBBSAWM, *AGE OF REVOLUTION*]; ERIC HOBBSAWM, *THE AGE OF CAPITAL, 1848-1875* (Vintage Books 1996) [hereinafter HOBBSAWM, *AGE OF CAPITAL*]; ERIC HOBBSAWM, *THE AGE OF EMPIRE, 1875-1914* (1987) [hereinafter HOBBSAWM, *AGE OF EMPIRE*].

45. Here I follow Fernand Braudel's emphasis on the distinction between material and structural aspects of capitalist history. Braudel likens this distinction to the several floors of a house, where the ground floor (“material life”) represents the elementary aspects of day-to-day subsistence. FERNAND BRAUDEL, *2 CIVILIZATION AND CAPITALISM: THE WHEELS OF COMMERCE* 21 (Siân Reynolds trans., Collins 1982) (1979); see also FERNAND BRAUDEL, *CAPITALISM AND MATERIAL LIFE: 1400-1800*, at ix (Miriam Kochan trans., Weidenfeld and Nicholson 1973) (1967) (referring to material life as the “ground floor . . . of history”).



moments of the eighteenth century.<sup>46</sup> As is well known, the market society that was soon to emerge was preceded by a style of feudal economics of a very different sort.<sup>47</sup> Feudal society failed to realize several of the key components that would come to establish the full-fledged market society, including the desire for mass production for profit; a pervasive division of labor among a laboring and owning class; a massive shift away from agricultural life and towards industry; a dramatic rise in the extent of local exchange; a condemnation of the role of intermediaries in the supply chain as necessarily exploitative; the creation of wage-based work; the emergence of a market system independent of social relationships; a transformation in the ethics of competition; a transformation of land, labor, and money into commodities offered for sale on the market; and the creation of a central political authority capable of heralding such a transformation.<sup>48</sup> Though these elements were hardly in place in the 1600s, Eric Hobsbawm has suggested that it was in this period that we find the turning point:

Once the first crack appeared [in the feudal economic system], the whole unstable structure was bound to totter. It did totter, and in the subsequent period of economic crisis and social upheaval the decisive shift from capitalist enterprise adapted to a generally feudal framework to capitalist enterprise transforming the world in its own pattern, took place. The Revolution in England was thus the most dramatic incident in the crisis, and its turning point.<sup>49</sup>

Let us bring focus then, on some of the key aspects of what Karl Polanyi famously called the “great transformation” from a society-driven market (the feudal style) to a market-driven society (the classic liberal style).<sup>50</sup>

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46. Hobsbawm, *supra* note 31, at 14-15.

47. *Id.* at 15.

48. *Id.*

49. *Id.* at 27.

50. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 72-74 (Beacon Press 2001). Polanyi explained that a market society “implies a self-regulating system of markets; in slightly more technical terms, it is an economy directed by market prices and nothing but market prices.” *Id.* at 45. This market society requires “[a]ll transactions [to be] turned into money transactions . . . .” *Id.* at 44. “The transformation to this

Feudal economics was based on the relationship between two primary centers of activity: the manorial estate and the guild system.<sup>51</sup> The manorial estate was the living space of the lord, often constructed in the form of a castle, as well as the abutting land.<sup>52</sup> The lord was the master of all the very many individuals that worked on the estate, and by “master” it is meant that he performed the duties of “protector, judge, police chief, and administrator . . . .”<sup>53</sup> The lord was due an amount of goods and services from the serfs and freemen that lived and worked on the estate, and in return, the lord was obligated to provide his people with a baseline amount of food reserves in times of difficulty, as well as physical protection.<sup>54</sup> Very little, if any, of these exchanges took the form of cash payments or had anything to do with profit, production, or a labor force.<sup>55</sup> It was rather more like a system in which social relationships and their attendant responsibilities were judged by an objective normative scheme and determined by individual status.<sup>56</sup>

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system . . . is so complete that it resembles more the metamorphosis of the caterpillar than any alteration that can be expressed in terms of continuous growth and development.” *Id.* And yet, Polanyi’s purpose was to show:

[T]he entirely unprecedented nature of such a venture in the history of the race . . . .

. . . In spite of the chorus of academic incantations so persistent in the nineteenth century, gain and profit made on exchange never before played an important part in human economy. Though the institution of the market was fairly common since the later Stone Age, its role was no more than incidental to economic life.

*Id.* at 45.

51. HEILBRONER & MILBERG, *supra* note 32, at 24-28; *see also* R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM: A HISTORICAL STUDY 189-210 (1926) (discussing the transition from feudalism to capitalism).

52. HEILBRONER & MILBERG, *supra* note 32, at 24.

53. *Id.*

54. *Id.* at 24-25.

55. *Id.* at 26.

56. As Henry Maine famously argues regarding the transition from status to contract:

There are few general propositions concerning the age to which we belong which seem at first sight likely to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract. . . . Not many of us are so

Separate from the manor and situated in the town were the guilds—hierarchical organizations of craftspeople with the purpose of producing all the wares not generated by the manor itself.<sup>57</sup> Just like the economic life of the manor, the guild operated as a social mechanism, strictly regulated by a set of rules establishing a hierarchy of masters, journeymen, and apprentices.<sup>58</sup> These rules were hardly restricted to the terms of the trade—they governed the guild member’s duties as a member of society, ranging from his charitable responsibilities to his style of dress.<sup>59</sup> Most importantly for present purposes, the guilds did not understand themselves to be businesses for profit.<sup>60</sup> In fact, the creation of wealth in feudal times was widely regarded as sinful.<sup>61</sup>

In the social network of the manorial estate, guilds, and the occasional fair, three characteristics were prominent. One was that land was not understood to be an item for sale.<sup>62</sup> Serfs did not rent their land from the master, freemen could not sell their plots if they so wished, and lords were barred from moving their servants off the land.<sup>63</sup> The peasantry lived in strips and plots of land “scattered

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unobservant as not to perceive that in innumerable cases where old law fixed a man’s social position irreversibly at his birth, modern law allows him to create it for himself by convention . . . .

HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 295 (1870).

57. HEILBRONER & MILBERG, *supra* note 32, at 27.

58. POLANYI, *supra* note 50, at 73.

59. HEILBRONER & MILBERG, *supra* note 32, at 28.

60. *Id.*

61. TAWNEY, *supra* note 51, at 35 (“It is right for man to seek such wealth as is necessary for a livelihood in his station. To seek more is not enterprise, but avarice, and avarice is a deadly sin.”); *see also* MAX WEBER, *THE PROTESTANT WORK ETHIC AND THE “SPIRIT” OF CAPITALISM AND OTHER WRITINGS* 106 (Peter Baehr & Gordon C. Wells eds. & trans., Penguin Books 2002) (1905) (“Wealth as such is a serious danger, its temptations never cease, and the striving for it is not only pointless in the face of the overwhelming importance of the kingdom of God, but is also morally questionable. Calvin, far from seeing the wealth of the clergy as a hindrance to their effectiveness, saw it as giving them a thoroughly desirable increase in their prestige, and permitted them to invest their wealth for profit, although without giving offense.”).

62. HEILBRONER & MILBERG, *supra* note 32, at 24.

63. *Id.*

helter-skelter amid those of his fellows in unfenced or open fields.”<sup>64</sup> Instead, land was understood as a commons, bestowed by God for all to enjoy.<sup>65</sup> Land was not alienable, was not subject to possession, and so not marketable.<sup>66</sup> Second, labor did not function in feudal society in any way reminiscent of what was to come. Instead of a labor market in which workers sold their productive functions for a wage, the relations of master, journeyman, and apprentice were all regulated by the guild system.<sup>67</sup> Individuals had no opportunity to compete with one another, offering a particular service for a lesser wage.<sup>68</sup> These questions were *social* questions, not to be left to the dangerous discretion of individual caprice.<sup>69</sup> Laborers were therefore barred from putting themselves on the market.<sup>70</sup> Third, as has been noted, feudal society was not a cash system.<sup>71</sup> In fact, the idea that currency could become a commodity itself, and used for gain through the generation of interest, was generally condemned.<sup>72</sup> As would become clear, prohibiting the use of money as a commodity played a critical role in suppressing an expansionist market.<sup>73</sup> As a result of these characteristics, Polanyi famously suggested that in pre-liberal society, the market was “embedded” in a dense web

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64. MOORE, *supra* note 31, at 12.

65. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 12 (Paul Negri & Tom Crawford eds., Dover Publications 2002) (1689) (quoting Psalms to show that God initially gave the land to mankind in common).

66. See MOORE, *supra* note 31, at 8 (“They began to treat land more and more as something that could be bought and sold, used and abused, in a word like modern capitalist private property.”).

67. HEILBRONER & MILFORD, *supra* note 32, at 28.

68. See *id.* at 24-28 (explaining that serfs were tied to the land and required to provide labor in exchange for security, and that even manufacturers labored for wages fixed by the guild).

69. POLANYI, *supra* note 50, at 74.

70. *Id.* at 73.

71. HEILBRONER & MILFORD, *supra* note 32, at 26.

72. See TAWNEY, *supra* note 51, at 39-41 (describing the medieval Church’s condemnation of usury).

73. HEILBRONER & MILFORD, *supra* note 32, at 30-31 (describing the condemnation of usury in a static economic system in which economic expansion was not a priority).

of social practices, traditions, and custom.<sup>74</sup> It had no power of its own to shape social values, as it was never more than an adjunct, and it is in this sense that we can understand the feudal style of political economy as a thoroughly integrated image of politico-economic society.

This is the reverse of the market-driven society (or “market society”). As the feudal style went out of favor, land, labor, and money shifted into what Polanyi called “fictitious commodities.”<sup>75</sup> Polanyi noted further that “all production is for sale on the market and that all incomes derive from such sales.”<sup>76</sup> This means that there is an assumption that members of the market society act in such a way as to increase profits through self-interest, and buy and sell goods at prices generated through competition on the market. In addition to markets in goods, however, land, labor, and money also go on the market and produce prices known respectively as rent, wage, and interest.<sup>77</sup> The idea that all human relationships can become commodities, produced for sale and consumption, generates a very clear idea about the relationship between market and society: the market has been dis-embedded, and is hardly any longer playing the part of adjunct.<sup>78</sup> Another way of saying the

74. POLANYI, *supra* note 50, at 73.

75. *Id.* at 71.

76. *Id.* at 72.

77. *See id.* at 75 (discussing labor, land, and money as “essential elements of industry”).

78. *See* Fred Block, *Introduction* to KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME*, *supra* note 50, at xviii, xxiv (“Polanyi does say that the classical economists wanted to create a society in which the economy had been effectively disembedded, and they encouraged politicians to pursue this objective. Yet he also insists that they *did not* and *could not* achieve this goal.”). For contemporary uses of Polanyi’s concept of embeddedness, see Jens Beckert, *The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology* (Max Planck Institute for the Study of Societies Discussion Paper 07/1, 2007) (“I argue that it is not the embeddedness of economic action as such that should constitute the vantage point of economic sociology, but rather . . . coordination problems that actors face in economic exchange. It is only by starting from these coordination problems that the *necessity* of embedding economic action becomes theoretically comprehensible.”). There is a difference between believing that all human relationships can be commodified, and the empirical question as to whether all human relationships are commodified. Clearly, some relationships are protected

same thing is that the market is now self-regulated. Neither the manor nor the guild is anymore in a position to control the dynamics of economic exchange; no longer does custom and tradition define the color and shape of the market. The market defines itself, and in so doing, *pretends* to establish what was not there before: a separation of an economic from a political sphere.<sup>79</sup>

A notable example of this process was the phenomenon of man-eating sheep.<sup>80</sup> Beginning as early as the 1200s, but not taking full flight until the eighteenth and nineteenth centuries, was a shift in attitude towards the land reflected in what was known as the enclosure movement.<sup>81</sup> As mentioned above, the feudal perspective on the land was that it was inherently political and social in purpose and obligation, meaning that the first and best question about how to use a piece of land was with regard to how it could contribute to the health of society.<sup>82</sup> The idea that the land could be turned into an income-yielding investment and subjected to private ownership was bizarre.<sup>83</sup> And yet, this feudal idea did change, and the process of enclosing the commons that comprised the manorial strip-system was one of the basic triggers of that change.<sup>84</sup>

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by taboos, like the selling of children, though this might be a bad example, since the sale of children actually does happen.

79. See RUGGIE, *supra* note 19.

80. MOORE, *supra* note 31, at 12. Thomas More described the early stages of enclosures in *Utopia*: “[Y]our sheep that were wont to be so meek and tame and so small eaters, now, as I hear say, be become so great devourers and so wild, that they eat up and swallow down the very men themselves. They consume, destroy, and devour whole fields, houses, and cities.” THOMAS MORE, *UTOPIA* 101 (David Harris Sacks ed., Ralph Robynson trans., Bedford/St. Martin’s 1999) (1516).

81. HEILBRONER & MILFORD, *supra* note 32, at 47; *see also* POLANYI, *supra* note 50, at 36-44 (describing the enclosure movement as upsetting the social order and “breaking down ancient law and custom”); TAWNEY, *supra* note 51, at 140 (“Against the landlord who enclosed commons, converted arable to pasture, and rack-rented his tenants, local resentment, unless supported by the Government, was powerless.”).

82. MOORE, *supra* note 31, at 8.

83. POLANYI, *supra* note 50, at 72-73.

84. *See* Joan Thirsk, *The Common Fields*, 29 PAST & PRESENT, Dec. 1964, at 3 (describing the process of enclosing the commons).

By the time of the sixteenth century and beyond, lords and nobles began resorting to new legal mechanisms in order to bypass customary law and deprive peasants of their rights to cultivate the common land so that the space could be used as arable fields for sheep grazing.<sup>85</sup> The decision to make more room for pasture was stimulated by the fact that the English wool industry was a lucrative business, and the lords and their farmers realized that they could maximize their gains by expanding the available pastures for their flocks.<sup>86</sup> This expansion necessitated an enclosed space, where the lord's animals grazed on the land that had once been common to the peasantry and the source of their daily bread.<sup>87</sup> Before and during this period, the enclosure process pushed off the farm something close to nine-tenths of the estate's tenants.<sup>88</sup> Polanyi, in his typically colorful language, described the process as a catastrophe which ripped the old order asunder, placing in its stead a society of mutilated relationships.<sup>89</sup> The sheep may not have been literally devouring the commoners, but it appeared that they might as well have been.

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85. MOORE, *supra* note 31, at 9.

86. HEILBRONER & MILFORD, *supra* note 32, at 47; *see also* MOORE, *supra* note 31, at 10-11 (describing yeoman farmers as economically ambitious capitalists who were motivated to take every possible opportunity to increase profits).

87. HEILBRONER & MILFORD, *supra* note 32, at 47.

88. *Id.* at 48; *see also* MOORE, *supra* note 31, at 21 (“[T]he enclosures were the final blow that destroyed the whole structure of the English peasant society embodied in the traditional village.”).

89. As Polanyi describes the enclosure movement:

Enclosures have appropriately been called a revolution of the rich against the poor. The lords and nobles were upsetting the social order, breaking down ancient law and custom, sometimes by means of violence, often by pressure and intimidation. They were literally robbing the poor of their share in the common, tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs and their heirs'. The fabric of society was being disrupted; desolate villages and the ruins of human dwellings testified to the fierceness with which the revolution raged, endangering the defences of the country, wasting its towns, decimating its population, turning its overburdened soil into dust, harassing its people and turning them from decent husbandmen into a mob of beggars and thieves.

POLANYI, *supra* note 50, at 37.

The enclosure movement, which spanned several hundred years,<sup>90</sup> was beginning to have several noticeable effects. One was the creation of an entirely new class: the “wandering poor.”<sup>91</sup> Pushed off their traditional lands, these starving peasants would transform into a key ingredient of a market society, that of a labor force willing to sell their productive powers for a wage.<sup>92</sup> Another effect was the transformation of land understood as a social device into private property.<sup>93</sup> Along with the emergence of wage-labor and private property, the operative mechanism that would unite the individuals of the nascent market society was the contract device.<sup>94</sup> But the effect that was surely more noticeable to the yeoman and upper gentry doing the enclosing was the great supply in the yield of the land.<sup>95</sup> Whatever the social dimensions of the transformation, no one could deny that in terms of maximizing profits, the enclosure movement was a tremendous advance.<sup>96</sup>

2. *John Locke’s “Very Natural Doctrine.”* Bertrand Russell has described John Locke as the “apostle of the Revolution of 1688, the most moderate and the most successful of all revolutions.”<sup>97</sup> Eric Hobsbawm has in turn described the Revolution as the pivotal moment when the feudal system gave way to the English market society.<sup>98</sup>

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90. HEILBRONER & MILFORD, *supra* note 32, at 47.

91. *Id.* at 48.

92. *Id.*; see also HOBBSAWM, AGE OF REVOLUTION, *supra* note 44, at 149-52 (“[T]he great mass of the rural population had in some way to be transformed, at least in part, into freely mobile wage-workers for the growing non-agricultural sector of the economy.”).

93. HEILBRONER & MILFORD, *supra* note 32, at 47.

94. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 207 (1987) (describing formal contracting as a means of uniting self-interested individuals in “carefully circumscribed” interactions); Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 53-59 (2011) (describing contracts as embedded in social context).

95. POLANYI, *supra* note 50, at 36 (“[T]he yield of the land manifestly increased . . .”).

96. *Id.*; see also HEILBRONER & MILFORD, *supra* note 32, at 47-48 (noting the increase in land productivity as a result of enclosure, but describing the economic growth it brought about as “ruthless” in its effect on the labor force).

97. RUSSELL, *supra* note 38, at 604.

98. Hobsbawm, *supra* note 31, at 27.



Locke, as a consequence, was the “most fortunate of all philosophers. He completed his work in theoretical philosophy just at the moment when the government of his country fell into the hands of men who shared his political opinions.”<sup>99</sup>

The following discussion will review the “apostle’s” very familiar arguments in his *Second Treatise*, and the symmetry between Locke’s theory of property, contract, and money and the emergence of a market society. It will serve as chief representative of the market-state dyad in the classic liberal style, masking the political struggles that paved the way for the competitive market by cloaking them in an aura of natural timelessness.<sup>100</sup>

Locke establishes a strong dichotomy between a pre-political, natural society in which men freely and equally engage in commercial relations, and a totally separate political society in which men will sadly, if necessarily, give up their total powers and enter the artificial realm of government and positive law. I will review each side of the dichotomy in turn, as well as Locke’s rationale for the need to create a political society at all.

Let’s begin with the natural society. Locke starts off with an analysis of the “state all men are naturally in, and

99. RUSSELL, *supra* note 38, at 605.

100. Notably, Locke’s strategy is to reverse the narrative that has been told here. For Locke, the natural market society antedated the political society of England, and in ancient times there existed a natural law of private property. See LOCKE, *supra* note 65, at 2. It is only in his present day, the late 1600s, that Locke regrettably identifies contemporary practice:

’Tis true, in land that is common in England, or any other country where there is plenty of people under government, who have money and commerce, no one can enclose or appropriate any part without the consent of all his fellow-commoners: because this is left common by compact, *i.e.*, by the law of the land, which is not to be violated. . . . [W]hereas in the beginning and first peopling of the great common of the world it was quite otherwise. The law man was under was rather for appropriating.

*Id.* at 15. For a discussion of Locke’s philosophy in the context of emerging capitalism, see NEAL WOOD, JOHN LOCKE AND AGRARIAN CAPITALISM 31-48 (1984) (“[A]nything written by Locke between 1668 and 1692 on the nature of society, the economy, and agriculture must be read, interpreted, and evaluated—if our understanding of his thought is not to be distorted—within the overarching context of those economic ideas.”).

that is a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.”<sup>101</sup> As a consequence of this natural freedom, all men naturally have an equal right to the exercise of that freedom.<sup>102</sup> These free and equal men are found in the state of nature so long as they live together “according to reason, without a common superior on earth with authority to judge between them . . . .”<sup>103</sup> If they have no common superior, but disregard Reason, Locke tells us that men have left the state of nature and have entered the state of war.<sup>104</sup>

It is the Rule of Reason which therefore serves as the measure of Natural Law. It is Reason which commands Natural Man not to destroy himself, nor to (unless justice so demands) “harm another in his life, health, liberty, or possessions.”<sup>105</sup> The only compulsion to constrain oneself, and the only available form of enforcement, however, exists in the reasoned heart of man himself.<sup>106</sup> As the sole judge of what constitutes “harm,” every man has the right to enforce the law of nature and punish its offenders in a reasonable manner.<sup>107</sup> Additionally, all men have a right to compensation for harm done to them—punishment for wrong-doing is insufficient.<sup>108</sup> These two rights of punishment and compensation function independently, in that while any man may punish an offense of the natural law, only the injured man can demand compensation.<sup>109</sup> This flows from the injured man’s primal right of self-preservation.<sup>110</sup>

Locke’s Natural Man should not be confused for Neanderthal Man. Natural Man is capable of complex

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101. LOCKE, *supra* note 65, at 2.

102. *Id.*

103. *Id.* at 9.

104. *Id.*

105. *Id.* at 3.

106. *Id.* at 3-4.

107. *Id.*

108. *Id.* at 5.

109. *Id.*

110. *Id.*

commercial transactions,<sup>111</sup> beginning with the right to formalize the manifestations of his independent will in contracts.<sup>112</sup> This is a natural right, Locke explains, because “promises and bargains for truck . . . truth and keeping of faith belong to men as men, and not as members of society.”<sup>113</sup> Crucially, Natural Man also possesses the right of ownership, first and foremost to his own physical body.<sup>114</sup> In making the argument out for private ownership, Locke sets himself up against both the feudal and Christian ideas of common ownership.<sup>115</sup> While Natural Man was given the land in common with other Natural Men, Locke explains that men were given land (in the beginning) so as to use it “to the best advantage of life and convenience.”<sup>116</sup> Or, as Locke says a few pages on, God did not actually provide the commons for the use of all men: “He gave it to the use of the industrious and rational (and labour was to be his title to it), not to the fancy or the covetousness of the quarrelsome and contentious.”<sup>117</sup> This qualification sets up the rest of the picture.

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111. *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.”).

112. See MACPHERSON, *supra* note 28, at 210 (discussing Locke’s idea of contract, including the idea that contracts “owe their validity to man’s natural reason”).

113. LOCKE, *supra* note 65, at 7.

114. *Id.* at 12-13. Interestingly, Locke repeatedly referred to the idea of individual right of all against all in the state of nature as a very strange doctrine, *id.* at 6, but never suggested anything at all odd about the radical notion of being able to “own” one’s body.

115. *Id.* at 12. With regard to the idea of private ownership, Locke continues to dominate the field in terms of his influence on contemporary scholarship. For recent discussions, see Symposium, *Property and Obligation*, 94 CORNELL L. REV. 743 (2009); Symposium, *Ownership and Justice*, 27 SOC. PHIL. & POL’Y 1 (2010).

116. LOCKE, *supra* note 65, at 12.

117. *Id.* at 15.

“The fruit or venison which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, *must be his*, and so his, *i.e.*, a part of him, that another can no longer have any right to it . . . .”<sup>118</sup> The fact that something nourishes Natural Man does not make it his property, however. In order to transform something into a property, Natural Man must appropriate it—that is, he must pour his labor into the thing.<sup>119</sup> There are therefore two “unquestionable” postulates at work: men own their bodies, and they own the labor produced from their bodies.<sup>120</sup> By the force of a kind of transitive property, when Natural Man mixes his labor with a piece of land, that land is inevitably fenced in, and properly his own.<sup>121</sup> But just as soon as Locke sets down this fairly straight-forward idea, he famously adds a complicating layer. It is not simply that Natural Man may take ownership of the field which he has tilled, or the orchard he has cultivated. There is also an employment relationship immanent in the mechanism, for as Locke states, “the grass my horse has bit, the turfs *my servant* has cut, and the ore I have dug in any place where I have a right to them in common with others, become *my property* without the assignation or consent of anybody.”<sup>122</sup> The question pushing the next stage in the argument is therefore how Natural Man has somehow obtained the labor power of his servant, a power which just moments before Locke had explained to be the inherent and natural belonging of all men.<sup>123</sup>

Locke tells us that while Natural Man has not yet become political, he has developed an impressive catalogue of economic practices.<sup>124</sup> In the ancient version of Natural Man, he was constrained by the natural law in that he was only able to enclose so much land that he could fruitfully

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118. *Id.* at 12 (emphasis added).

119. *Id.* at 12-13.

120. *Id.*

121. *Id.*

122. *Id.* at 13 (emphasis added).

123. See MACPHERSON, *supra* note 28, at 214-20.

124. See, e.g., LOCKE, *supra* note 65, at 21-22 (“[H]e also bartered away plums that would have rotted in a week, for nuts that would last . . . a whole year . . . . [H]e would give his nuts for a piece of metal, pleased with its colour . . . . And thus came in the use of money . . . .”).

use, and that he could not use so much that would keep other men from having the same opportunities.<sup>125</sup> But Natural Man smartened up, and avoided these problems with the discovery that the improvement of the land could never diminish the goods available to mankind—it only increased them.<sup>126</sup> Here, as Locke suggested, one needed to understand that a single acre of enclosed land benefited the whole of mankind by ten to a hundred times as that of a hundred acres in common possession.<sup>127</sup> Thus, greed could not actually bar the hoarding of land, so long as that land was being put to use.<sup>128</sup>

As for the problem of spoilage, the emergence of the market was the solution.<sup>129</sup> Natural Man could hoard as many goods, or enclose as much land as he could, so long as he was able to fruitfully make use of those possessions, or, and here was the new development, he could trade those possessions for cash.<sup>130</sup> In the presence of money, spoilage was no longer a threat, and so the impetus for growth and gain could proceed against the sole remaining curb in the natural law: improve your lot so long as you do no harm to the life and liberty of others.<sup>131</sup> But this curb turns out to be out of place since the rights of appropriation and improvement did not only have nature's imprimatur, they bore the kiss of revelation as well.<sup>132</sup> As Pierre Manent put

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125. *Id.* at 14.

126. *Id.* at 17.

127. *Id.*

128. See MACPHERSON, *supra* note 28, 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.”).

129. See LOCKE, *supra* note 65, at 22 (“And thus came in the use of money—some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.”).

130. See *id.*

131. See *id.* at 17-22 (explaining how the market allows for the transfer of the fruits of the increased productivity that results from the individual appropriation of formerly common property).

132. *Id.* at 16 (“God, by commanding to subdue, gave authority so far to appropriate.”).

it, in Locke's system "[j]ustice is *always already realized*, as long as property is guaranteed and protected."<sup>133</sup> Locke's picture of the possessive individual is therefore one which, in the end, is acquisitively boundless.

The upshot is that Natural Man exists in a Natural Market, where he and his fellows equally own their persons, and as a result the labor of their persons. Mixed with that labor, Natural Man acquires possessions, and after having consented to a common coin, is able to contract for the purchase and sale of more possessions. This brings us back to Natural Man's servant, and the lawn he was busy mowing. In this market system, how did Natural Man come to own the product of his servant's labor? Clearly, given Locke's philosophical rejection of the feudal concept of status and hierarchy, the answer cannot have been that the master owned the labor of his servant, as a function of that ancient relationship.<sup>134</sup> Instead, we must assume that the servant has entered into a modern wage relationship with the master, selling his labor in exchange for a cash value.<sup>135</sup> Indeed, this seems to be precisely what Locke had in mind when he elaborated the notion that property gains its particular value from the labor that had gone into it.<sup>136</sup> Labor, for Locke, was about value before it was about rights.

Locke was clear that the Natural Market was not a state of war,<sup>137</sup> which forces the question of why it was

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133. MANENT, *supra* note 4, at 46.

134. See LOCKE, *supra* note 65, at 38 ("[A] freeman makes himself a servant to another by selling him for a certain time the service he undertakes to do in exchange for wages he is to receive; and . . . gives the master but a temporary power over him . . .").

135. *Id.*; see also MACPHERSON, *supra* note 28, at 213-16 ("We have seen that [Locke] did attribute to the state of nature a commercial economy, developed to the point when large estates (of thousands of acres) are privately appropriated for the production of commodities for profitable sale. Such an economy could scarcely have been understood by Locke except as implying production by wage-labour.").

136. See MANENT, *supra* note 4, at 43 ("Locke insists on this point: it is human labor, and not nature, that gives things their *value*.").

137. See PATEMAN, *supra* note 27, at 64 ("[T]he Lockean natural condition has many 'inconveniences'. . . . However, such 'inconveniences' must not be confused with the state of war.").

necessary to establish a political society at all.<sup>138</sup> After all, Locke's version of the state of nature is much more attractive than Hobbes', which actually did describe a state of war in which men always had a hand on the sword.<sup>139</sup> Ultimately for Locke, the distinction ends up collapsing, and his picture of the state of nature inevitably turns bleak: in a society of free and equal men with no common authority among them, every man will be judge, jury, and executioner in his own case.<sup>140</sup> But men can never be impartial about their own interests, and so everybody's right to enjoy their possessions will always be threatened.<sup>141</sup> In this light, the Natural Market is actually a place where man lives a life "full of fears" and laments the fact that his property is "very unsafe, very unsecure."<sup>142</sup> Thus we have Locke's "great and chief end"<sup>143</sup> for establishing a government and political society: "[T]he preservation of the property of all the members of that society as far as is possible."<sup>144</sup> Indeed, Locke goes further, for it is not simply that government has the protection of property as its key purpose, but that political society cannot even *exist* "without having in itself the power to preserve the property, and in order thereunto, punish the offenses of all those of that society . . . ."<sup>145</sup>

The force of this shift should not be lost. For Locke, and the classic liberal style, there is a strong notion of a natural freedom that consists almost entirely of a right to private

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138. *See id.* at 69 ("To understand why . . . government is needed, reference has to be made to the conjectural history of the state of nature . . . . It is only at a certain stage of socio-economic development that a *political* society . . . become[s] necessary . . . .").

139. HOBBS, *supra* note 5, at 111-12 (explaining that laws are useless unless executed by men with "a Sword in the hands").

140. LOCKE, *supra* note 65, at 38-39.

141. *See id.* at 57 ("[I]n the state of nature he [is] . . . constantly exposed to the invasion of others."); *see also id.* at 40 ("The end of civil society [is] to avoid and remedy those inconveniences of the state of nature which necessarily follow from every man's being judge in his own case . . . .").

142. *Id.* at 57.

143. *Id.*

144. *Id.* at 39.

145. *Id.*

ownership.<sup>146</sup> But before the creation of political society, this freedom is constantly under siege.<sup>147</sup> Therefore, in order to establish a “real” and meaningful freedom, Locke establishes property as a political and positive right in addition to a natural right. This may at first seem odd, given Locke’s insistence that property is a natural, and not a political, freedom. But he also insists, and more conclusively, that politics is in fact a pre-requisite for the true enjoyment of a market society. Thus, while political society takes the market as a pre-condition, and is substantively obliged by those private principles, those principles in turn require the existence of government.<sup>148</sup> As C.B. Macpherson explained:

The wholesale transfer of individual rights was necessary to get sufficient collective force for the protection of property. . . . In these circumstances individualism must be, and could safely be, left to the collective supremacy of the state.

The notion that individualism and “collectivism” are the opposite ends of a scale along which states . . . can be arranged, regardless of the stage of social development in which they appear, is superficial and misleading. *Locke’s individualism, that of an emerging capitalist society, does not exclude but on the contrary demands the supremacy of the state over the individual.*<sup>149</sup>

Locke believed that government had three basic duties. First, it must establish a positive law that will protect property allocations and apply equally to all members of political society, the members of government included.<sup>150</sup>

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146. See MACPHERSON, *supra* note 28, at 198 (explaining that there is some confusion as to whether, in Locke’s usage, “property” meant “goods” or meant “life and liberty and estates,” because Locke used both meanings repeatedly).

147. See LOCKE, *supra* note 65, at 57.

148. See POLANYI, *supra* note 50, at 44 (explaining that the market, in order to become a full-fledged system, *must* shape all of society). *But see* Karl Marx, *Estranged Labor* (1844), reprinted in ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 106, 106 (Dirk J. Struik, ed., Martin Milligan trans., 1971) (“Political economy starts with the fact of private property, but it does not explain it to us.”).

149. MACPHERSON, *supra* note 28, at 256 (emphasis added).

150. LOCKE, *supra* note 65, at 57; *see also* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 75 (1976) (describing the legal system, in classic liberal style, as a necessary wall protecting the market from politics).



Second, government must establish an impartial judiciary that will rise above the passions of particular controversies.<sup>151</sup> Third, it must enforce the law.<sup>152</sup> Beyond these baseline responsibilities, the government, or the state, or political society, had no warrant for interfering in the workings of the market system<sup>153</sup>—a system enabled by property and contract rights, and propelled by the invention of money.<sup>154</sup> Or, another way of putting it is that when it comes to the question of why the state should ever intervene in the matters of the market, there is always a single answer: the maintenance and enforcement of natural law principles.<sup>155</sup> This is Locke's fundamental rationale for *constitutional* government: the provision of limitations on the power of the legislature to harm individual rights in a way that was notoriously absent in Hobbes' description of sovereign power.<sup>156</sup>

The resulting legal scheme of the classic liberal style is very straight-forward. At the center of human freedom lie the right of private property and the capacity to independently and equally buy and sell goods and services. In order to properly realize these rights in property and contract, the state is required to promulgate these rights,

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151. LOCKE, *supra* note 65, at 57-58.

152. *Id.* at 58.

153. *Id.* at 59.

154. See JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 39 (2000) (“[T]ogether [the law of property and contract] form the foundation of a private law-based system of commerce . . . . Through contract the objects of property become capital.”).

155. The decision to enter political society does not create new rights on the part of government, other than those already mentioned (i.e., ascertainable and enforceable laws adjudicated by an impartial judiciary). See MACPHERSON, *supra* note 28, at 218. All rights possessed by the new government are the rights transferred by Natural Man, which were definitely natural rights predicated on private ownership. See *id.* at 256-58. Consequently, the state has no warrant to override the naturally conceived right to property. See *id.* at 218.

156. See *id.* at 256-57 (“Hobbes’s denial of traditional natural law, and his failure to provide guarantees for property as against a self-perpetuating sovereign did not recommend his views to those who thought property the central social fact.”). Though Locke did not have in mind any particular form of government as superior to another, it is clear that whatever its form, the government would need to be limited by a set of principles establishing a private sphere of rights enjoyment. See *id.* at 257.

and protect them not only against private transgressors, but from the government itself.

Before moving on to modern liberalism, it's worth pausing over the question of whether Locke's mercantilism makes him a poor choice as a representative of the classic liberal style of relating the growth of markets to the state.<sup>157</sup> Mercantilists like Locke believed in the importance of stockpiling as much bullion as possible, since a stocked war chest was understood at the time as an indicator of a strong state.<sup>158</sup> But mercantilists were against free trade, and generally favored the use of stiff protections for domestic industry, particularly manufacturing industries.<sup>159</sup> In reaction to French mercantilism in particular, Francois Quesney and the physiocrats emerged as an apparent corrective in favor of free trade and full competition,<sup>160</sup> though the physiocrats too still played favorites in their thinking about how to generate growth. Though the policy of *laissez-faire* is generally associated with this round of eighteenth century economics, conventional thinking about "classical economics" really begins with Adam Smith.<sup>161</sup>

Smith's well-known argument in support of the rather scandalous idea that the national interest could best be

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157. For a discussion of mercantilism, see Lars G. Magnusson, *Mercantalism*, in A COMPANION TO THE HISTORY OF ECONOMIC THOUGHT 46, 46-59 (Warren J. Samuels et al. eds., 2003).

158. Locke's most explicit discussions of economics are in LOCKE, *supra* note 111.

159. See STEVEN G. MEDEMA, THE HESITANT HAND: TAMING SELF-INTEREST IN THE HISTORY OF ECONOMIC IDEAS 11-13 (2009).

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

161. As Heilbroner has suggested:

To be sure, Smith did not "discover" the market; others had preceded him in pointing out how the interaction of self-interest and competition brought about the provision of society. But Smith was the first to understand the full philosophy of action which such a conception demanded, the first to formulate the entire scheme in a wide and systematic fashion. He was the man who made England, and then the whole Western World, understand just how the market kept society together and the first to build an edifice of social order on the understanding he achieved.

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

served through the promotion of individual interests would go to work as the essential organizing idea in every phase of economic thinking that would follow, from utilitarianism to (the first) institutional economics to the neoclassical marginal revolution, to Keynesianism and beyond.<sup>162</sup> At bottom, the idea—an idea that today animates the curricula of elementary economics courses around the country—was that free competition was the best method for allocating goods and services, at the right prices and in the right amounts, to those market actors that valued them the most.<sup>163</sup> A competitive system would achieve socially optimal results, it was said, if individual actors were able to pursue their own needs as they understood them. It was through the law of competition, Smith and his followers taught, that we might attain the most morally desirable and economically prosperous form of social organization.<sup>164</sup>

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162. To be sure, I do not mean to imply here that nothing has changed in the years since Smith's idea of the invisible hand gained popular acceptance. Obviously, much has changed, quite dramatically. As is well-known, the idea that the promotion of individual self-interest could, all alone, guarantee social well-being, was an idea that certainly did fall out of favor by the middle of the twentieth century. However, my point here is that the idea about free competition itself as a central organizing principle of society never really went out of favor. As we will see, modern liberals came to see the concept of free competition as ultimately desirable, but that it required much more management than had been previously believed. Modern liberals did not believe, as was put forward from some on the left, that the very concept of free competition itself was fundamentally problematic—that the basic background rules themselves were somehow complicit in the problem of social inequality. Another way of making this point is to revert to the more familiar language of microeconomics and macroeconomics. The macro perspective of economists like Harrod, Domar, or Keynes didn't do away with the basic assumptions of the neoclassical marginalists. It was rather that the marginalists didn't seem to see how conditions of uncertainty and equilibria might prove much more socially problematic than had been otherwise understood. For a discussion of the possibility of seeing Keynesian economics as doing much more than this, however, see UNGER, *DEMOCRACY REALIZED*, *supra* note 16.

163. This can be seen in the most basic models of demand and supply. *See, e.g.*, JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 107-09 (2009).

164. Adam Smith's vision of an invisible hand guiding social progress through the self-interested pursuit of individual preference is among the most famous of all images in the classic liberal repertoire. Smith first introduced the idea in *The Theory of Moral Sentiments*:

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The produce of the soil maintains at all times nearly that number of inhabitants which it is capable of maintaining. The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species. When Providence divided the earth among a few lordly masters, it neither forgot nor abandoned those who seemed to have been left out in the partition. These last too enjoy their share of all that it produces. In what constitutes the real happiness of human life, they are in no respect inferior to those who would seem so much above them.

ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 215-16 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759) (footnote omitted). It is probably more well-known for its placement in *The Wealth of Nations*:

By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it.

2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 29-30 (Edwin Cannan ed., Arlington House 1966) (1776). For an overview of Smith's work, see HEILBRONER, *supra* note 161, at 38-43 (describing Smith's concern with the market mechanism that ties society together); *THE HISTORY OF ECONOMIC THOUGHT: A READER* (Steven G. Medema & Warren J. Samuels eds., 2003). The image of the invisible hand is also one of the most famously criticized in the political economy literature. 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) (arguing that unregulated economic freedom is a necessary condition for political freedom). For a modern critique, see Joseph Stiglitz, *Guided by an Invisible Hand*, *NEW STATESMAN*, Oct. 20, 2008, at 18 ("[F]or over a quarter of a century, we have known that Smith's

Thus, it might seem that Smith or Ricardo or Mill or some other classical economist might serve as a better illustration of the classic liberal style than would a mercantilist like Locke. The reason Locke works so well, however, lies in Locke's own formulation of the law of competition. In *The Second Treatise*, Locke isn't talking about supply, demand, equilibria, or the marginal utility of anything at all, and of course he couldn't be since much of this kind of thinking hadn't been thought up yet. So he couldn't have been talking about *those* sorts of "laws." But Locke *was* talking precisely about the legal requisites for making markets happen, and Locke adamantly believed that these legal requisites included the background rules of property rights and freedom of contract. These laws, for Locke, comprised what I am here calling the "law of competition." The chief end of government, Locke instructed, was the protection of property and person, and that protection would be afforded through the rule of law. To be sure, many of the classical economists also recognized the importance of law as a background requisite of market growth.<sup>165</sup> To the extent these admissions are far more peripheral in such works, however, and that law so clearly serves as a constitutive engine for Locke, we should feel comfortable in labeling Locke as a powerful representative of the classic liberal style.

#### B. *The Modern Liberal Style: The Law of Control*

The 1870s was a period of intense shifting in the world of political economy, then beginning its transition to "economics," leaving the "political" behind. The new economic work, which would come to be called neoclassical and associated with the concept of marginal utility, understood itself to be much less interested in questions about national economic growth and more focused on what were perceived as the more technical questions about the behavior of individuals and firms in the markets. As a consequence, microeconomics saw itself as gaining a kind of intellectual purity and shedding those controversial questions that proved so vulnerable in the work of Marxist

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conclusions do not hold when there is imperfect information—and all markets, especially financial markets, are characterised by information imperfections.”).

165. MEDEMA *supra* note 159, at 160-61.

economics.<sup>166</sup> Around the same time, another field of economic thinking was in the offing, referred to by Herbert Hovenkamp as “the first great law and economics movement.”<sup>167</sup> Where neoclassical thinkers had gone “pure,” institutional economists were trained on the political aspects of capitalism, and often on what were being treated as “the legal foundations of capitalism.” To be clear, however, the emergence of marginalism and institutional economics did not represent a chastening of the classic liberal image of market and state. On the contrary, by 1870 classic liberalism had crystallized into a controlling ethos for modern society. In Hobsbawm’s words:

Never has there been a more overwhelming consensus among economists or indeed among intelligent politicians and administrators about the recipe for economic growth: economic liberalism. The remaining institutional barriers to the free movement of the factors of production, to free enterprise and to anything which could conceivably hamper its profitable operation, fell before a world-wide onslaught.<sup>168</sup>

Consequently, we can see this period as one in which the classic liberal style was in full flower, but also being subjected to, on the one hand, the rationalizing work of neoclassical economics, and on the other, to criticism from non-Marxist progressives working under the banner of institutional economics (and later, legal realism).

In contrast to all three of these images (classic liberalism à la Locke, neoclassical economics, and institutional economics), a new view on the role of the state in the market was emerging.<sup>169</sup> This alternative had a

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166. See Peter Groenewegen, *English Marginalism: Jevons, Marshall, and Pigou*, in A COMPANION TO THE HISTORY OF ECONOMIC THOUGHT, *supra* note 157, at 246, 246-261. For an interesting discussion of the emergence of law and economics in this context, see Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163, 181 (1983).

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

168. HOBBSAWM, AGE OF CAPITAL, *supra* note 44, at 35-36.

169. See generally SIDNEY FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE (6th prt. 1978); ARTHUR SCHLESINGER, JR., THE CRISIS OF THE OLD ORDER, THE COMING OF THE NEW DEAL, THE POLITICS OF UPHEAVAL (1959); JACOB VINER, ESSAYS ON THE INTELLECTUAL HISTORY OF ECONOMICS (Douglass A. Irvin ed., 1991) (discussing the history and emergence of laissez-faire). The concept of

powerful focus on the concept of competition, but a very different one than the one we have seen in Locke's work.<sup>170</sup> As a result of massive transformations in social consciousness, a steady consensus developed about the widening gap between the rich and poor, and between big business and the local entrepreneur.<sup>171</sup> This was the age of the great Robber Baron, the Carnegies, the Rockefellers—an age in which people were increasingly inclined to see government take a more active role in controlling the excess of avarice and the “curse of bigness.”<sup>172</sup> Opinions were

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laissez-faire has generated an enormous amount of legal scholarship. Some recent and popular work includes DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS* 13 (2008); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293, 293-331 (1985); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 *N.C. L. REV.* 1 (1991); Stephen A. Siegel, *Understanding the Lochner Era: Lessons From the Controversy Over Railroad and Utility Rate Regulation*, 70 *VA. L. REV.* 187, 187-88 (1984); Cass R. Sunstein, *Lochner's Legacy*, 87 *COLUM. L. REV.* 873, 873-919 (1987).

170. For treatments of the classical idea of competition, see Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 *IOWA L. REV.* 1019, 1021 (1989) (“In both classical law and classical economics, “competition” . . . was a belief about the role of individual self-determination in directing the allocation of resources; it was a theory about the limits of state power to give privileges to one person or class at the expense of others.”); John T. Nockleby, *Two Theories of Competition in The Early 19th Century Labor Cases*, 38 *AM. J. LEGAL HIST.* 452, 454 (1994) (“19th century American common law courts structured ‘appropriate’ or permissible competitive behaviors by employing common law tort and property doctrines such as interference with contractual relations, trademarks and tradenames, interference with trade or ‘antitrust’, and conspiracy.”); Rudolph J. Peritz, *The “Rule of Reason” in Antitrust Law: Property Logic in Restraint of Competition*, 40 *HASTINGS L.J.* 285, 293 (1989) (“In our terms, the primary strategy of Sherman and others was to limit market power and thereby to prevent monopoly pricing; their ultimate goal was to enhance the consumer’s well-being.”); George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 *J. POL. ECON.* 1, 1 (1957) (“‘Competition’ entered economics from common discourse, and for long it connoted only the independent rivalry of two or more persons.”).

171. See generally *THE CRY FOR JUSTICE: AN ANTHOLOGY OF THE LITERATURE OF SOCIAL PROTEST* (Upton Sinclair ed., 1963).

172. 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.”).

steadily shifting towards the view that government needed to intervene in the market, wresting the promise of “good” competition away from those forces proving the competitive sphere to be so ruinous.<sup>173</sup>

In the classic liberal style, the dominant conception of justice was believed to be naturally embodied in the market itself, and its historically located predicates of property, contract, and constitutionally limited government. The modern liberal style, in contrast, had a different view of justice, one that was to be characterized by a “fair” distribution of resources among the classes, races, and sexes. Individual rights other than the economically-oriented ones would come to hold pride of place, and the constitution would increasingly be seen as a vacant treatise when it came to whether the United States was legally committed to a particular economic creed. It is difficult, however, to identify the modern liberal style simply by reversing what we know of classic liberalism. Indeed, the modern style does not imagine the state to be somehow superior to the market, that public officials are more moral than private entrepreneurs, that large corporations are necessarily malignant, or that competition is not a source of innovative production. Instead, the rigid distinctions of the classic style have merely been relaxed, not abolished, and where it was once believed that justice was carried simply through the combination of self-interested efforts in the marketplace, the modern style counters with a purposive jurisprudence.<sup>174</sup> In this style, it does not really matter

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173. *See id.* at 109 (“[W]e have learned that unless there be regulation of competition, its excesses will lead to the destruction of competition, and monopoly will take its place.”).

174. By the time the modern liberal style had achieved a commanding role in the courts, it was assimilated by the courts through the ascent of the legal process school. According to David Kennedy and William Fisher, “[b]y 1940, the realist revolt against nineteenth-century orthodoxy was complete.” *Introduction* to Lon L. Fuller, *Consideration and Form*, in *THE CANON OF AMERICAN LEGAL THOUGHT* 209, 209 (David Kennedy & William W. Fisher III eds., 2006). “Lon Fuller’s 1941 article ‘Consideration and Form’ mark[ed] the turn both to routinize—and de-radicalize—Legal Realism, knitting it into a new mainstream way of thinking about law.” *Id.* at 210. This new way of thinking eventually came under the heading of “legal process,” which had a view of law as purposive, problem-oriented, and as a “policy instrument *with a particular institutional structure*.” *Introduction* to Henry M. Hart, Jr., and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, in *THE CANON OF AMERICAN LEGAL THOUGHT*, *supra*, at 243, 245. The legal order’s distributional



where the line is drawn between the state and market, public and private, so long as there is an increase in social welfare. But it is here that we meet the modern style's second claim. Though it doesn't matter where the line between the public and private is drawn, this style is nevertheless strongly committed to the line itself.<sup>175</sup> That is, while this style is modern, it is also "liberal" in that it retains the initial commitment to a separation of political and economic spheres, where the ultimate purpose of political society is to first protect individual rights, and only then to work for the social good.

The paradigmatic example of the manner in which government would come to constrain competition was the establishment of a federal antitrust law in 1890.<sup>176</sup> With this law and the body of jurisprudence it would spawn, the state would explicitly work to control the competitive

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dimensions were believed to be less important than the procedures which could settle disputes, and high priority was placed on the identification of particular institutional competences to deal with specific problems. *See id.* "The role of law in the broadest sense is to set, monitor, and enforce the procedural arrangements determining who does what." *Id.* For further discussion of legal process, see Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993) (tracing the evolution of process thinking); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988) (providing the intellectual context of the 1950s to explain the emergence of the "process theory").

175. Roberto Unger has explained how, over the course of nineteenth and twentieth centuries, Anglo-American private law merged with particular market institutions in order to form what was perceived as "the natural and necessary form of the market economy and, by extension, as the indispensable support of the market economy, the pure framework of coordination among market agents." ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 24 (1996). Unger goes on to recount how this view:

[R]epresent[ed] the movement of economic history as a convergence, through discovery, trial, and error, toward the institutional practices and legal rules that are indeed required by a market economy. The property regime is the quintessence of this evolutionary achievement. Political interventions into this institutional order deserve skeptical resistance because they are likely to be costly, self-defeating, and subversive of freedom.

*Id.*

176. *See* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)).

marketplace, isolating "good" competition from the "bad."<sup>177</sup> To be completely clear here, I should emphasize that I am not suggesting that antitrust law was "paradigmatic" because it was the most effective or exacting kind of jurisprudence meant to counteract what many perceived to be the problems with the laissez-faire system. If it was the most effective or comprehensive attempt we would be after, it might make more sense to study the rate-regulation movement of the late nineteenth century, or other more invasive elements of the New Deal program. However, insofar as the point here is to build a proper image of the modern liberal style, what we are after is a set of ideas that construes itself as dealing with the *consequences* of laissez-faire, *and not its roots*.

This point may at first seem too subtle, but there is a striking difference between the two kinds of approaches. The first approach, which I label "modern liberal," refrains until the end from any critical analysis of those legal rules which are constitutive of the classic liberal style, and focuses entirely on the consequences of that style. Thus, the modern liberal style confronts symptoms with no worry about causes. The second approach, which might be labeled "progressive," is actually concerned with the deeper and more fundamental causes of social inequality. This might mean an attack on the classic liberal conception of contract and property rights themselves. The modern liberal style does not do this, nor does antitrust law. Antitrust law, even at its most ambitious, simply *responds*. It never attempts to re-create.

1. *The Ascent of Trusts and Antitrust*. In the last decades of the nineteenth century, the classic liberal style of relating the spontaneous self-regulated market to an artificial, hands-off government was beginning to go out of fashion.<sup>178</sup> To be sure, classic liberalism was still the controlling image, and would be so until the 1940s. But it is in the 1870s that historians have noticed the development of counter-trends, much having to do on the one hand with the substantial depression of trade in the period from the 1870s to the 1890s,<sup>179</sup> and on the other the effects of the

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177. See *infra* notes 210-16 and accompanying text.

178. See YERGIN & STANISLAW, *supra* note 169, at 16.

179. See HOBBSAWM, *AGE OF EMPIRE*, *supra* note 44, at 34-46; see also W.W. ROSTOW, *THEORISTS OF ECONOMIC GROWTH FROM DAVID HUME TO THE PRESENT*

infrastructure put in place by the revolution in communication and transportation technologies.<sup>180</sup> Together, these developments were at least in part responsible for a new phase in market society where economic concentration joined with business rationalization<sup>181</sup>—what came to be known as monopoly or managerial capitalism.<sup>182</sup> Though many were uncertain about the portents of this economic transition, Europeans and Americans were apiece with regard to a common sentiment: they didn't like it.<sup>183</sup>

The advent of the combined corporate enterprise, which evolved into that legal device called a trust,<sup>184</sup> had several implications for the traditional image of the market pattern: combinations or trusts would advance at the expense of an abstract idea of perfect competition, big business mergers would advance at the expense of small business owners,<sup>185</sup> and the business entity would gain rights of a measure

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153-160 (1990) (“The declining price trend from 1873 to the mid-1890s was the occasion for extended analysis by virtually all the major pre-1914 and interwar monetary theorists, including Cassel, Fisher, Giffen, Keynes, Layton, Marshall, Pierson, Wells, and Wicksell.”).

180. See Hovenkamp, *supra* note 167, at 997-1000.

181. HOBBSAWM, AGE OF EMPIRE, *supra* note 44, at 43; see ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 79-80 (1977).

182. For a legal perspective on the shift from classic liberalism to managerial capitalism, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960, at 80-90 (1992). For a seminal account from a heterodox economic perspective, see PAUL A. BARAN AND PAUL M. SWEEZY, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER 218-48 (1966).

183. “Those who do not like the actual tendencies of the [classic] system as they appear to work out when it is tried—and that is virtually everybody—attack the scientific analysis.” FRANK HYNEMAN KNIGHT, *The Ethics of Competition*, in THE ETHICS OF COMPETITION AND OTHER ESSAYS 41, 48 (Transaction Publishers 1997) (1935).

184. For descriptions of the nineteenth century trust, see HORWITZ, *supra* note 183, at 73-79; Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75, 79-87 (1990) (“Although trust arrangements were individually negotiated and each was different, every late nineteenth century acquisition was organized around one of three legal models: (1) the stock-transfer trust model; (2) the asset-transfer combination; (3) the holding company.”).

185. HOBBSAWM, AGE OF EMPIRE, *supra* note 44, at 44.

comparable to that of the private individual.<sup>186</sup> Further, as Alfred Chandler has explained, it is here that we see market actors willing to forego Adam Smith's picture of the invisible hand and its allocation of resources in favor of the "visible hand" in the new science of business management.<sup>187</sup> Although the "market remained the generator of demand for goods and services . . . modern business enterprise took over the functions of coordinating flows of goods through existing processes of production and distribution, and of allocating funds and personnel for future production and distribution."<sup>188</sup> These changes, along with the tendency towards the new form of trusts and syndicates popping up in the United States and Germany, led Chandler to conclude that the new economic man, in his acquisition of certain fundamental responsibilities previously allotted to the natural market, had simultaneously acquired vast amounts of power.<sup>189</sup>

In the United States, concerns about economic concentration accelerated in the 1880s and 1890s as the public became more aware and more skeptical of big trusts like Standard Oil, American Cotton Oil, National Linseed Oil, National Lead, and the Whiskey and Sugar trusts.<sup>190</sup> The issue bubbling to the surface related to a central thread in the classic style: were the concentration of capital, the emergence of trusts, and the withering away of the small businessman the natural and inevitable consequences of Liberalism, or were these simply pathological and aberrational developments, due more to cheating than to problems with the background rules themselves?<sup>191</sup>

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186. HORWITZ, *supra* note 182, at 74-76. For a controversial and recent articulation of this idea, see *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899-903 (2010).

187. CHANDLER, *supra* note 181, at 1; *see also* DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 122 (1991).

188. CHANDLER, *supra* note 181, at 1.

189. *See id.* at 1, 323-32.

190. HORWITZ, *supra* note 182, at 80-81.

191. This question represents in a way one of the fundamental dividing lines between classic and modern liberals. It is also the defining question for antitrust law. For histories of the Sherman Act and its debates, see BRAITHWAITE & DRAHOS, *supra* note 154, at 175; ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 56-66 (1978) (discussing the legislative intent behind

The stakes were obviously high. If someone was persuaded by the former idea, he faced two choices. On the one hand, a market society based on private property, freedom of contract, and a common currency apparently did not lead to an ideal of full and free competition. In such a case, the idea would then be to simply let go of your emotional attachment to the competitive society, and embrace the natural evolution of big business. On the other hand, if you felt that the trusts were a natural and inevitable development, you might very well side with Marx and consider the whole enterprise to be an unfortunate but inevitable step on the way to something better.<sup>192</sup>

But then there was also the latter view: trusts were not natural at all, and were actually the byproducts of cheating in the market. On this view, an entrepreneur who used his savvy, honed his skills, and played the game fairly, would never find himself in a position where his prices were not the product of a fair and efficient form of production and distribution. Liberalism did not need to be jettisoned, nor did trusts *necessarily* need to be understood as unhealthy.

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the Sherman Act, and concluding that the law should be interpreted in terms of consumer welfare); TONY FREYER, *ANTITRUST AND GLOBAL CAPITALISM, 1930-2004* (2006); RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992*, at 9-26 (1996) (discussing the debates of the fiftieth Congress regarding the Sherman Act, including debates on differing views of free competition and freedom of contract); Eleanor M. Fox, *The Sherman Antitrust Act and the World—Let Freedom Ring*, 59 *ANTITRUST L.J.* 109 (1990) (summarizing views of prominent early twentieth century Supreme Court Justices on antitrust); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *YALE L.J.* 1017, 1026-28 (1988) [hereinafter Hovenkamp, *Regulatory Conflict*] (noting diversity of legislative motive underlying the Sherman Antitrust Act); Herbert Hovenkamp, Essay, *The Antitrust Movement and the Rise of Industrial Organization*, 68 *TEX. L. REV.* 105, 122-27 (1989) [hereinafter Hovenkamp, *The Antitrust Movement*] (noting contemporary economists' belief that the Sherman Act would impede corporate efficiency); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 *OHIO ST. L.J.* 257, 288-300 (1989) (describing congressional debates surrounding passage of the Sherman Act); Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 *B.U. L. Rev.* 1, 34-46 (1999) (discussing the relationship between antitrust legislation and liberty of contract); William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 *EMORY L.J.* 1, 15-18 (1995) (depicting the Supreme Court's antitrust decisions as relying on the role of markets and government).

192. See *infra* Part II.

On this view, the answer was to simply eliminate *unreasonable* restraints of trade.

In either case, the notion of a self-regulated sphere of economic activity was certainly becoming less popular,<sup>193</sup> as suggested in the very influential work of the economist Henry Carter Adams.<sup>194</sup> Writing in 1887, Adams published his aptly-titled *Relation of the State to Industrial Action*, an essay attacking the “evils” of free competition.<sup>195</sup> Adams began by situating himself as part of a new crowd, a crowd that in large measure defined itself by who was to be excluded: Herbert Spencer and his unfashionable friends.<sup>196</sup>

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193. See PERITZ, *supra* note 191, at 17 (“[N]o one denied the importance of government intervention.”).

194. Henry Carter Adams is usually described as a member of the school of Institutional Economics. Joseph Dorfman, *The Background of Institutional Economics*, in INSTITUTIONAL ECONOMICS: VEBLEN, COMMONS, AND MITCHELL RECONSIDERED 1, 30 (1963). As a group of left-leaning economists, scholars like Adams, Thorstein Veblen, John Commons, Richard Ely, Walton Hamilton, Gardiner Means, and Robert Hale found themselves in opposition both to laissez-faire economists and those associated with the burgeoning welfare school of neoclassical economists. See HORWITZ, *supra* note 183, at 195. For a description of the institutionalists in the context of “law and economics,” see Hovenkamp, *supra* note 167, at 997-1000; Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499, 521-29 (2011). For a less charitable, though entertaining view on the relationship between the institutionalists and the Chicago School, see Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, in THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 53, 58-65 (Francesco Parisi & Charles K. Rowley eds., 2005). Despite Adams’ affiliation with a “critical” tradition, I use him here in an exposition of the modern liberal style since his critique of laissez-faire is a critique that moderns had accepted as well.

195. Henry Carter Adams, *Relation of the State to Industrial Action*, 1 PUB. AM. ECON. ASS’N 7, 34 (1887). Importantly, however, for those deploying the interventionist style, it is the idea of a secondary, or derivative form of competition, that is under attack, and not the legal predicates upon which it depends. 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 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.” *Id.* at 35. It is for this reason and others that I do not call Adams a “modern liberal,” but only use part of his essay to reflect what would become a popular attack on the classic style.

196. *Id.* at 11.

Laissez-faire, Adams explained, had turned out to be a lot of nonsense, and as a result there was a “growing clamor for more government.”<sup>197</sup> And why was it nonsense? Laissez-faire involved a syllogism, which, upon reflection, suffered from a non-sequitur. Its first premise was that all human interests were the same.<sup>198</sup> Its second premise was that each man knows his own interest, and left to himself, will follow it.<sup>199</sup> The conclusion was that the best form of social relation will always emerge from the unregulated play of the market.<sup>200</sup> Adams believed that the kinds of interest at work in the first premise (the fundamental or ultimate interests of man) are of a categorically different kind than the interests at work in the second premise (the short-term interest which might guide a person to sacrifice a supposedly higher interest for a desire for some immediate satisfaction).<sup>201</sup> The upshot was that the classic liberal style would doggedly produce a society in which short-term advantage always trumped hopes for deeper, social goods. For Adams, and apparently everybody else, the logic of this disparity was on vivid display.

The way forward, however, was not simply to modify the old style by shifting the rhetoric from one of a “principled” view of the self-regulated market towards a “rebuttable presumption” that the state should keep its hands off. What was needed instead, Adams explained, was to seek out laws which would simultaneously “maintain the beneficent results of competitive action while guarding society from the evil consequences of unrestrained competition.”<sup>202</sup> There should not be a presumption working for or against state intervention in the market. The presumption, instead, should focus on the health of the social organism, regardless of the relation between the economic and political spheres, and a realistic understanding of what market competition empirically

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197. *Id.* at 12.

198. *Id.* at 17.

199. *Id.*

200. *Id.* at 20.

201. *Id.* at 20-21.

202. *Id.* at 35.

entailed.<sup>203</sup> Ultimately, the age in which the state was viewed with a severe case of myopic disdain had come to an end: “The advocates of non-interference have treated government as the old physicians were accustomed to treat their patients. Was a man hot he was bled; was he cold he was bled; was he faint he was bled, was he flushed he was bled; until fortunately for him he passed beyond the reach of leach and lance. This has been, figuratively speaking, the form of treatment adopted by the people of the United States for their local governments, and it has worked its natural result of feebleness and disintegration.”<sup>204</sup>

Three years later, the Sherman Antitrust Act was adopted.<sup>205</sup> Much of Adams’ discussion with regard to the new manner of conceiving competition (no longer understood as Revelation but deployed with an eye towards its positive and negative effects) found its way into the Senate debates.<sup>206</sup> Although the initial bill was focused on the notion of competition, what emerged was instead a bit of language familiar to the common law.<sup>207</sup> The first bill sought to eliminate “all arrangements, contracts, agreements,

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203. *Id.* Adams did not believe, however, that social health should be left to a vulgar consequentialism. Sharing Hayek’s hostility towards the ad hoc use of a “rule of reason,” see FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72-79 (1944), Adams believed that the evils of unrestrained competition must be addressed in a principled manner. To do so, a progressive program must (1) battle the tendency for the worst of the human spirit to dominate the marketplace, which tends to place itself as the model of entrepreneurial success; (2) elaborate a full theory of the benefits of monopolized industry in order to balance out the dominant model of the competitive society; (3) counteract the corruptive influence of the notion that government action is innately corrupt and ineffective. Adams, *supra* note 195, at 38.

204. *Id.* at 65-66.

205. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890).

206. See PERITZ, *supra* note 191, at 13-26. Peritz explains how these two views of trusts shaped the debates on the Senate floor over whether the Antitrust Act should be focused on competition, or restraints of trade. *Id.* at 14-20. William Page has set out a slightly different dyadic structure for understanding the debates. For Page, the real contest was between laissez-faire and collectivism (a contest that ended in compromise), which stands in contrast to the contest Peritz has suggested—a fight between two camps, both of which understood themselves to be at odds with both laissez-faire and collectivism. William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 23 (1991).

207. See PERITZ, *supra* note 191, at 13-26.



trusts, or combinations . . . made with a view, or which tend to prevent full and free competition . . . or which tend to advance the cost to the consumer . . . .”<sup>208</sup> What emerged as the law instead was a prohibition on restraints of trade and monopolies.<sup>209</sup>

As Rudolph Peritz has suggested, the decision to use the common law language instead of the wording focused on “full and free competition” had serious implications.<sup>210</sup> For the sponsors of the original bill, what was eating away at society was the deranged phenomenon of the trust.<sup>211</sup> It was pathological and a threat to the classic liberal style of imagining a natural market.<sup>212</sup> The “ought” to be derived from the “is” was therefore a frontal assault on those elements hindering free competition—competition understood as a principled and absolute good.<sup>213</sup> But for the

208. *Id.* at 13 (quoting H.R. DOC. NO. 124 (1888)).

209. The critical text of the Sherman Antitrust Act is famously brief:

§1: Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (2006).

§2: Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

210. See PERITZ, *supra* note 191, at 13-26.

211. *Id.* at 14-15.

212. *Id.* at 21-22.

213. *Id.* at 13-26.

victors in the Senate debate, it wasn't at all clear that competition was *always* good, and so the existence of certain conglomerates might not necessarily present evidence of a pathology as much as a natural evolution.<sup>214</sup> Of course, that evolution required more state intervention than the market had needed in the past, thus necessitating the new law.<sup>215</sup> The result was a resort to the common law, and the implied belief that, for the most part, the traditional mechanisms for upholding and maintaining the market were still working.<sup>216</sup>

The twists in the Sherman Act's birth story force us to ask whether the new statute was really more of a piece with classic or modern liberalism. On the one hand, the Senate's resort to the common law suggested a final refusal to believe the market had really and truly gone astray.<sup>217</sup> Surely, new means of enforcement were needed, and courts would be empowered with them under the Sherman Act, but as to whether the laissez-faire system was intrinsically corrosive, the Senate declined to take such a strong view.<sup>218</sup> On the other hand, despite the Senate's reticence, the first years of antitrust jurisprudence were marked with a "literal" quality foreign to the common law, in which courts took very seriously the Sherman Act's prohibition on all unreasonable restraints of trade.<sup>219</sup> Thus, while the

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214. See PERITZ, *supra* note 192, at 24-25. The notion of evolution plays an interesting role in all of these debates. On the one hand, German historicism was influential on progressive scholarship. See Hovenkamp, *The Antitrust Movement*, *supra* note 191, at 109-18. On the other, a more Darwinian argument animates neoclassical ideas about the common law, most notably in F.A. Hayek's understanding of the Rule of Law. See generally F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 228 (1960) ("A free system can adapt itself to almost any set of data, almost any general prohibition or regulation, so long as the adjusting mechanism itself is kept functioning."). A conservative historicism is also on display in liberal philosophy, as with David Hume, Edmund Burke, and Michael Oakeshott. For a discussion, see Barrozo, *supra* note 38.

215. See PERITZ, *supra* note 191, at 24.

216. See *id.* at 21. Of course, the remedies found in the statute were radical, and totally alien to the common law. See *id.* at 25-26.

217. See *id.* at 20-26.

218. See *id.*

219. See Peritz, *supra* note 170, at 313.

language was old, the interpretation was new, and more in line with the popular distaste for the new trusts.<sup>220</sup>

2. “*The Ethics of Competition.*” As lawyers and judges struggled in the following decades to come up with a concept of competition that made sense out of the Sherman Act,<sup>221</sup> economists were similarly at work dealing with the prospects of “market failure.”<sup>222</sup> As W.W. Rostow has described the beginnings of a shift occurring around 1870 from classical to welfare economics, the central moves would eventually involve a “shift from a focus on growth to social reform and welfare; a new emphasis on the refinement of analysis; a heightened concern with the optimum allocation of resources, in terms of marginal analysis; and the emergence of economics throughout the Atlantic world as an academic profession.”<sup>223</sup> Among the new economists was Frank Knight,<sup>224</sup> who in time would become known as

220. After 1911, this progressive or populist streak in antitrust jurisprudence took a classical turn in the famous *Standard Oil* decision. *See id.* at 329-36 (discussing the debates between the “literalists” and the “Rule of Reason” faction).

221. For discussion of the early years of antitrust jurisprudence, before the “Rule of Reason” came down in *Standard Oil*, see James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1981*, 135 U. PA. L. REV. 495, 541-53 (1987) (discussing the vagueness of Supreme Court decisions in early antitrust jurisprudence) and Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 269-78 (presenting a “counter-history” of the evolution of antitrust law consisting of “a correspondence of struggles between factions holding two radically opposed views of competition policy”).

222. For treatments of the relation between changes in legal thought and the change from classical to neoclassical economics, see MEDEMA, *supra* note 159, at 26-53; Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 407-09 (1988); Kennedy, *supra* note 26, at 596-614.

223. ROSTOW, *supra* note 179, at 153.

224. *See* RAZEEN SALLY, CLASSICAL LIBERALISM AND INTERNATIONAL ORDER 67-80 (1998) (discussing Frank Knight’s political economy). I do not mean to make any claims that Frank Knight, or Henry Carter Adams for that matter, “was” a modern liberal. My claim is rather that when certain of their texts are examined for a critique of laissez-faire, we see a central tenet of the modern liberal style. Some might still be surprised by my use of Knight as an illustration of the style of political economy known for its acceptance of social planning, and even more, some might be revolted by my juxtaposition of Knight with Adams. To be fair, it is true that Knight is “a lodestar” in the neoliberal constellation, having mentored such stars as Milton Friedman, George Stigler, Aaron Director, and Hayek. *Id.* at 67. At the same time, Adams is a poster-child for leftist

among the founders of the price theoretic tradition associated with the "Chicago School."<sup>225</sup>

Although Knight is widely known as a strong supporter of the market, and is sometimes called a "classic liberal,"<sup>226</sup> in 1935 Knight grappled with contemporary views regarding the costs of free competition in his *The Ethics of Competition*.<sup>227</sup> As so many writers of this period tended to do, Knight framed the essay by noticing "the contrast between the enticing plausibility of the case for the 'obvious and simple system of natural liberty,' and the notoriously disappointing character of the results which it has tended to bring about in practice."<sup>228</sup> These "intolerable" results brought on at an accelerating pace a new way of thinking about government "interference" in the market, an acceleration that for Knight was completely understandable, though not necessarily welcome.<sup>229</sup> As Knight would demonstrate, the idea of "competition" was deeply flawed, but he remained agnostic as to whether there was any better alternative.<sup>230</sup> The way forward lay in the murky problem of finding "the right proportions between individualism and socialism."<sup>231</sup>

As a point of departure, Knight explained that the classic view of competition was premised on the idea that:

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economists, and was a member of that most hated group of Institutionalists, sworn enemies of Chicagoans everywhere. See *supra* note 176 and accompanying text. Nevertheless, the use of Adams and Knight (neither of which could be labeled as a modern liberal when understood in the broader context of their work) in piecing together what I am calling the modern liberal style is helpful in making the case that welfarism was not necessarily tied to any particular view of partisan politics.

225. SALLY, *supra* note 224, at 67.

226. *Id.* at 68.

227. KNIGHT, *supra* note 183, at 41-75. Despite his complaints, Knight was no social planner, and an ardent opponent of the New Deal. See FRANK HYNEMAN KNIGHT, *Economic Theory and Nationalism*, in THE ETHICS OF COMPETITION AND OTHER ESSAYS, *supra* note 183, at 277, 293-94 (referring to the New Deal as a form of "socialism" whose supporters were "comfortably vague" as to how to enact their goals).

228. KNIGHT, *supra* note 183, at 47.

229. *Id.* at 48.

230. *Id.* at 44.

231. *Id.* at 58.

[A] freely competitive organization of society tends to place every productive resource in that position in the productive system where it can make the greatest possible addition to the total social dividend as measured in price terms, and tends to reward every participant in production by giving it the increase in the social dividend which its co-operation makes possible.<sup>232</sup>

Knight did not believe that this view was inaccurate, and suggested that those who criticized it were confusing economic arguments with ethical ones.<sup>233</sup> We might not like the tendencies of the competitive market, Knight suggested, but this implicates an ethical ideal, and not an analysis of the competitive mechanism itself.<sup>234</sup>

Nevertheless, Knight was sympathetic to an ethical outlook, and first outlined a series of objections with respect to how the ideal of free competition failed to match up to material life.<sup>235</sup> Among these was the argument that whereas the competitive system assumes a society of “freely contracting individuals,” the practical unit in production and consumption was the family.<sup>236</sup> Families, not individuals, were the basic building blocks of society, and individuals without social relationships, or somehow defined as something other than the cultural products that they really are, could not be understood as real individuals at all.<sup>237</sup>

Another argument concerned the notion of fictitious commodities, though Knight didn’t put it in those words. It was “universally recognized that effective competition calls for” the placing of all goods and services “into exchange,” and yet it was clear that this assumption barely fit the facts of real social life<sup>238</sup>—a life in which labor and land could

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232. *Id.* at 48. If we accept Hovenkamp’s view of competition, Knight is likely reading into Adam Smith an idea about competition which really didn’t emerge until neoclassical economics took hold. See Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1025-29 (1988).

233. KNIGHT, *supra* note 183, at 48.

234. *Id.*

235. *Id.* at 49.

236. *Id.*

237. *Id.*

238. *Id.* at 50.

never be actually believed to have been produced for sale. Knight also criticized the assumption that members of competitive society are rational, have perfect knowledge, understand what it is that they purchase, or why they even make the purchases that they do.<sup>239</sup> The classic image of competition similarly failed to capture the wide-ranging tasks of government with regard to the regulation of currency and credit.<sup>240</sup> The bottom line was that while the theoretical tendencies of the competitive system might be persuasive, its practical and fundamental limitations cause the system to fall “enormously” short of “our highest ideals.”<sup>241</sup>

Knight then moved towards a bigger picture question: given these discrepancies between the image of the freely competitive society and the reality of our own, why do we keep on competing?<sup>242</sup> What does the competitive system have going for it?<sup>243</sup> As for the first question, Knight wondered whether the idea of “business as game” might make the concept of economic competition more comprehensible. His conclusion was that it did not.<sup>244</sup> For one thing, players need incentives to play, and for a small number of “captains of industry,” the game was certainly quite enticing.<sup>245</sup> But for most of the people living in a social order where all values have been reduced to a measure of money, the compulsion to play can be agony: the “propertyless and ill-paid masses” protest not only the specter of endless impoverishment, but also “the terms of what they feel to be an unfair contest in which being defeated by the stacking of the cards against them is perhaps as important to their feelings as the physical significance of the stakes which they lose.”<sup>246</sup>

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239. *Id.* at 50-51.

240. *See id.* at 53.

241. *Id.* at 57.

242. *See id.* at 58-66.

243. *Id.*

244. *See id.* at 64-66.

245. *Id.* at 61.

246. *Id.* at 60.

Thinking about business as a game also highlighted the disjuncture between efficiency and equality.<sup>247</sup> The competitive mechanism, for example, allocates resources to those who use them most efficiently, not to those who might have the greatest need for those resources.<sup>248</sup> This is akin to giving the fastest runner the shortest track—a consequence of perfect economic sense, but one in basic conflict with the idea that the slower runner should have been given a head start.<sup>249</sup> What this makes for is actually a really lousy game:

[The outcome of the business game] is a very inaccurate test of real ability, for the terms on which different individuals enter the contest are too unequal. The luck element moreover is so large—far larger than fairly successful participants in the game will ever admit—that capacity and effort may count for nothing. And this luck element works cumulatively, as in gambling games generally.<sup>250</sup>

Another problem is that:

[D]ifferences in the capacity to play the business game are inordinately great from one person to another. But as the game is organized, the weak contestants are thrown into competition with the strong in one grand mêlée; there is no classification of the participants or distribution of handicaps such as is always recognized to be necessary to sportsmanship where unevenly matched contestants are to meet.<sup>251</sup>

But it gets worse. In the real world, there actually are handicaps, but they affect the wrong players, providing “advantage to the strong rather than the weak. We must believe that business ability is to some extent hereditary, and social institutions add to inherited personal superiority the advantages of superior training preferred conditions of entrance into the game, and even an advance distribution of the prize money.”<sup>252</sup>

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247. *See id.* at 61.

248. *Id.* at 61-62.

249. *Id.* at 62.

250. *Id.* at 64.

251. *Id.*

252. *Id.* at 64-65.

Alright, so as far as good sport goes, big business is a lousy competition.<sup>253</sup> But, asks Knight, is there anything morally redeemable about playing the game?<sup>254</sup> What competitive society seems to have going for it is that, in terms of the 100 meter dash, an efficiency norm will establish that the fastest person runs the race with the best training and with the best resources. Competition will ensure that the fastest time is put in the record books. The knack for “getting things done,” however, doesn’t lead to an obvious answer as to whether having the fastest time recorded was the most morally desirable result.<sup>255</sup> Indeed, Knight emphasizes, it is at least plausible that it would be more socially desirable for more people to be less hungry, than for society to have produced an incredibly fast runner.<sup>256</sup> Of course, the answer to this question turns on the value set we choose to favor, and for Knight, highlighting this fact was the whole point.<sup>257</sup>

Four years after Knight published *The Ethics of Competition*, the case against laissez-faire deepened. On October 29, 1929, the stock market took its famous crash, and within a few weeks the American economy had hemorrhaged \$30 billion.<sup>258</sup> In the few years that followed, national gross domestic product fell by half, one out of four people was out of work, nine million savings accounts went up in smoke, and workers were regularly forced to graze or steal if they were to survive.<sup>259</sup> The causes of the crash and the depression that followed, such as the massive stock speculation and shocking distributional allocations of the prior decade,<sup>260</sup> are not as relevant for us as is the response

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253. *See id.* at 61-65.

254. *See id.* at 66-75.

255. *Id.* at 74.

256. *See id.* at 66-75.

257. *See id.* at 68-69.

258. HEILBRONER & MILBERG, *supra* note 32, at 100.

259. *Id.* at 100-01.

260. *Id.* at 101, 105-06; *see also* ERIC HOBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991*, at 100 (1994) (“[A]s mass demand could not keep pace with the rapidly increasing productivity of the industrial system in the heyday of Henry Ford, the result was over-production and speculation. This, in turn, triggered the collapse.”). *See generally* W.W. ROSTROW, *Explanations of*



that followed. According to Robert Heilbroner and William Milberg, that response, so important to the identity of the modern liberal style, laid the foundation for “a new pattern of government relationship to the private economy, a pattern that was to spell a major change in the organization of American capitalism . . . . [A] change marked by an unprecedented enlargement of the range and reach of governmental powers within the market system.”<sup>261</sup> It is therefore fair to say that the opposition to classic liberalism, which began to crawl out from the periphery, had made its way into the very center of the mainstream by the 1930s and ‘40s.<sup>262</sup> The new, “middle” way between classic liberalism and socialism had been found at last, and its hero would be John Maynard Keynes.<sup>263</sup>

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*the Great Depression, in BRITISH ECONOMY OF THE NINETEENTH CENTURY* 145 (1948).

261. HEILBRONER & MILBERG, *supra* note 32, at 111.

262. See PERITZ, *supra* note 191, at 111-15.

263. In mapping out the grand styles of classic and modern approaches to political economy, one might easily expect an exposition of John Maynard Keynes’ *General Theory of Employment, Interest, and Money*. There can be no doubt that this text, along with Keynes’ other writings, had an immense influence on postwar economic policy around the world. For Keynes, as for so many of the theorists of the first half of the twentieth century, modern life demanded a new, middle way between individualism and socialism, a way that would secure full employment of national resources, provide equitable distribution of incomes, and planned governmental intervention in the market. See, e.g., DONALD MARKWELL, JOHN MAYNARD KEYNES AND INTERNATIONAL RELATIONS 140-209 (2006) (discussing Keynes’ evolution in thought toward a “middle way” economic theory). This middle way was what Keynes called “New Liberalism.” *Id.* I have forgone the use of Keynes as an express demonstration of the modern liberal style, however, in hopes of dislodging any particular presumptions about “Keynesianism” from the non-partisan approach I have attempted to elucidate here. As mentioned above, finding pieces of modern Liberalism in key texts from the right (Knight) and the left (Adams) seemed like a more useful way of establishing the artistic relationship between the classic and modern views. For similar efforts to construct “a middle way” out of apparently contradictory positions, see David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 9-13.

C. *The Neoliberal Style: The Law of Competition Revisited*

The neoliberal vision of the market<sup>264</sup> did not arrive in 1980, fully formed.<sup>265</sup> Since at least 1944 and the publication of Friedrich Hayek's *The Road to Serfdom*,<sup>266</sup> classic liberals had been hard at work, planning an intervention against the New Deal. Writing at the end of World War II, Hayek gloomily observed the ascendance of Keynesianism, knowing that it was simply the precursor to totalitarianism.<sup>267</sup> Having witnessed the transformation of the German Weimar Republic into a fascist state,<sup>268</sup> the slide from welfarism and social planning towards corporatism and horror was no mere abstraction. As a result, Hayek launched a campaign he hoped would force instead a return to "the abandoned road."<sup>269</sup> This was the road of

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264. See JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT*, at xvii (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.").

265. See *id.* at 203-34.

266. HAYEK, *supra* note 203. Hayek's influence has been tremendous. See BRUCE CALDWELL, *HAYEK'S CHALLENGE: AN INTELLECTUAL BIOGRAPHY OF F.A. HAYEK* (2004). One illustration of his continuing impact is New York University Law School's decision to establish a journal inspired by his work. See *Introduction*, 1 N.Y.U. J.L. & LIBERTY 1 (2005) ("This journal's name was inspired by Hayek's *Law, Legislation & Liberty*, so it is fitting that the inaugural issue should explore Hayek's influence on legal scholarship."). Among the most well-known legal scholars working in the Hayekian tradition is Richard Epstein. See, e.g., RICHARD A. EPSTEIN, *Introduction to SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 1, 1-12 (2003) ("My version of classical liberalism sees a large place for the operation of voluntary markets under legal protection. Yet at the same time, it is clear that markets do not operate in a void, but . . . also depend on a social infrastructure that often only the state can create."). For a recent discussion of Hayek, and the possibility of a Hayekian connection to new and experimental forms of regulation, see Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357.

267. See HAYEK, *supra* note 203, at 56-57 (differentiating collectivism from liberalism in that it "refuses to recognize autonomous spheres" and is "totalitarian in the true sense of this new word").

268. See *id.* at 3, 68.

269. *Id.* at 10-23.

“individualism”: “the respect for the individual man qua man, that is, the recognition of his own views and tastes as supreme in his own sphere, however narrowly that may be circumscribed, and the belief that it is desirable that men should develop their own individual gifts and bents.”<sup>270</sup> The shift from the feudal order, described above, to a liberal world in which men could equally and freely determine their life-stories, Hayek explained, had not been so much of a political revolution as it had been an economic one.<sup>271</sup> But this economic revolution had not been planned; to the contrary, over several centuries it was gradually understood that it was in the natural and spontaneous interactions of men that a complex economic order had been established.<sup>272</sup> Hayek did not mean to convey, however, that the spontaneous organization of economic activity would lash society to an evolutionary historicism, or a “wooden” *laissez-faire*.<sup>273</sup> The key to economic progress was the liberation of individual energies and the resulting spark of competitive innovation, but while this did mean that society should resort as little as possible to coercive measures, it did not mean that liberal society had no need for political guarantees and direction.<sup>274</sup> Liberalism required, as Locke and others had said before, a government that would deliberately create an economic system in which competition would function as beneficially as possible.<sup>275</sup> Much of *The Road to Serfdom* was dedicated to splitting the difference between what such a state should look like, and the unfortunate condition into which modern liberalism had lapsed.

Splitting the difference required parsing the meaning of “social planning.” Planning, in the general sense, was both unavoidable and necessary.<sup>276</sup> In fact, “good” planning could

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270. *Id.* at 14.

271. *Id.*

272. *See id.* at 15.

273. *Id.* at 17.

274. *Id.*

275. *Id.*

276. *See id.* at 34 (“Planning’ owes its popularity largely to the fact that everybody desires, of course, that we should handle our common problems as rationally as possible and that, in so doing, we should use as much foresight as we can command.”).

get pretty extensive, running the gamut of whatever state action might be necessary to ensure the free reign of competition as the sole source of social organization.<sup>277</sup> “In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.”<sup>278</sup> One might wonder whether Hayek is hopelessly confused here: how can “competition” function as the sole source of social organization when he has already admitted that it is the fundamental task of government to engage in “a wide and unquestioned field”<sup>279</sup> of social planning, namely, the idea of planned competition? Hayek was ready for this response: Competition and planning are mutually exclusive modes of social organization.<sup>280</sup> When we talk of “planning for competition”<sup>281</sup> this sharp distinction remains intact, since the politics of the plan are never allowed to interfere with the competitive principle once it has been established.<sup>282</sup> Planning in this sense never becomes anything more than the creation of *means*, or rules of permission.<sup>283</sup> When social planning enters the territory of shared ends, Hayek instructs, it has gone off the mark.<sup>284</sup>

Hayek suggests that this important distinction becomes clear when the problem of the economic planner is carefully examined.<sup>285</sup> In contrast to the military general who is tasked with a precise and defined mission, and who is warranted to use whatever means are at hand to accomplish that mission, the economic planner is always faced with a set of choices.<sup>286</sup> These choices are inevitably distributive—they will affect the gains and losses experienced by particular groups in society. There is no convincing reason,

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277. *Id.* at 39.

278. *Id.*

279. *Id.*

280. *Id.* at 42.

281. *Id.*

282. *Id.*

283. *Id.* at 60.

284. *Id.*

285. *See id.* at 64.

286. *Id.* at 64-65.

however, why this man, whatever his partisan leanings might be, should be able to make distributive decisions for a society when the free reign of competition can do it so much more efficiently, and justly to boot.<sup>287</sup> Or rather, when the distribution of gains and losses is left to the market, there are no choices at all, and to the extent it is possible to eliminate rules that are biased in favor of certain groups, all such kinds of coercive restrictions should be abandoned.<sup>288</sup> Thus, the beauty of the market is that it takes distributive justice out of human hands, leaving it instead for a benevolently invisible one.<sup>289</sup>

This style invokes, yet again, an image of a separation between a public sphere, the purpose of which is to constitute and maintain the free and natural operation of the private sphere, governed by the singular principle of competition. Problems set in, Hayek explained, when competition and planning are mingled and mixed up, and this is precisely what was happening in the modern welfare state.<sup>290</sup> In contrast to the good type of “planning for competition,” predicated on a sharp distinction between the market and politics, welfarism involves “planning *against* competition,” and the attendant image of a porous dividing line between state and market.<sup>291</sup> This attitude towards an unlimited sphere of state action, so long as it fortifies competition, implies a much more sophisticated approach to law and politics than was available in the classic liberal style. Importantly, Hayek underlines the idea that the needs of a competitive society will evolve, thus necessitating new innovations in governance strategy.<sup>292</sup> This innovation cannot come from a planned intervention, however. Instead, there is a single way in which planning for competition can take place, and that is in the hands of judges.

It is here that Hayek offers a related distinction necessary to the neoliberal style, and that is between the

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287. *Id.* at 64.

288. *Id.* at 65.

289. *Id.*

290. *Id.* at 61.

291. *Id.* at 42.

292. *Id.* at 43.

“Rule of Law”<sup>293</sup> and arbitrary and distributive legislation. The Rule of Law, which some might intuit to be of pivotal importance in its regulation of private intercourse, means for Hayek “that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”<sup>294</sup> The market actor benefits from this restraint insofar he is able to freely go about his business, without worry that the powers of government will arbitrarily frustrate his aims.<sup>295</sup> The key here is that the Rule of Law never aims at securing the ends of any particular groups; it is only an instrument, enabling people to pursue their own preferences.<sup>296</sup> Beyond this, the Rule of Law is also beneficial in that we cannot know (even if we wanted to) what sorts of effects the Rule of Law might have on the distributions of gains and losses in society. “In fact, that we do *not* know their concrete effect, that we do *not* know what particular ends these rules will further, or which particular people they will assist,” is one of the judiciary’s greatest recommendations over the legislature.<sup>297</sup>

Legislative planning, in contrast to the formal, neutral, and ultimately moral nature of judicial decision-making, is centralized and distributive, artificial, incapable of digesting masses of market signals in order to produce efficient policies, and inevitably held hostage to special interest groups.<sup>298</sup> Legislation is also destructive; the formal, neutral posture of the Rule of Law “is in conflict, and in fact incompatible, with any activity of the government

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293. *Id.* at 72. I carry on with Hayek’s own tendency to use capital letters in designating what he meant by the Rule of Law. For broader discussions on the idea of the rule of law, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 253 (David M. Trubek & Alvaro Santos eds., 2006). A classic statement is Joseph Raz, *The Rule of Law and Its Virtue*, 93 *LAW Q. REV.* 195 (1977).

294. HAYEK, *supra* note 203, at 72.

295. *Id.* at 73.

296. *Id.*

297. *Id.* at 75.

298. *Id.* at 48.

deliberately aiming at material or substantive equality of different people, and that any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law.”<sup>299</sup>

In Hayek’s trilogy of the late 1970s, *Law, Legislation and Liberty*, he provided a more detailed account for how the Rule of Law was meant to function, and a better description of its vehicle in the courts and the common law. But before moving there, it is instructive in an account of the neoliberal style to visit Ronald Coase’s *The Problem of Social Cost*,<sup>300</sup> published sixteen years after *The Road to Serfdom*. As mentioned above, at the time of Hayek’s writing in the mid-1940s, he was certainly in the minority. In 1960, the modern variant of liberalism was still in firm control, but the growth of the neoliberal critique was mounting to such a degree that at this time “cracks were beginning to appear in the foundation.”<sup>301</sup> As Steven Medema has argued, it was with Coase’s challenge that, to use another metaphor, the tide had begun to turn.<sup>302</sup>

For Hayek, one of the (wrong) arguments for the inevitability of the interventionist state had been the shift to monopoly capitalism towards the end of the nineteenth century. Hayek believed that the real problem, largely undiagnosed, was the aggravated incidence of state interventions in the first place, having meddled too much in the market over the establishment of trusts and monopolies.<sup>303</sup> Coase faced up against a related but different argument for the necessity of state intervention in the

299. *Id.* at 79.

300. R.H. COASE, *The Problem of Social Cost*, reprinted in LAW, ECONOMICS, AND PHILOSOPHY: A CRITICAL INTRODUCTION WITH APPLICATIONS TO THE LAW OF TORTS 13, 13-40 (Mark Kuperburg & Charles Beitz eds., 1983). Coase is traditionally credited with starting the law and economics movement of the late twentieth century. Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499, 499 (2011).

301. MEDEMA, *supra* note 159, at 102.

302. *Id.*

303. See *infra* notes 334-70 and accompanying text (discussing Hayek). In this way, Hayek was performing a role diagnosed by Polanyi, wherein classic liberals tended to blame the depression of the 1870s, rising unemployment, and widening disparities between the rich and the poor, on state intervention, and not on laissez-faire. Polanyi believed these arguments to be total nonsense. See POLANYI, *supra* note 50, at 141-157.

problem of externalities. Traditionally, welfare economists identified certain costs associated with market transactions that were never paid for by the transacting players.<sup>304</sup> This was a problem since it was possible that firms might be systematically generating greater social costs than benefits, shielded from the burden of making social compensations to the third parties ostensibly bearing the burden of these externalities.<sup>305</sup> Because these social costs end up being shouldered by third parties, government action was necessary to correct for these failures to internalize the costs of particular transactions, usually through some kind of tax or penalty.<sup>306</sup> What came to be known as Coase's theorem set out to debunk this traditional response: in a competitive market unobstructed by transaction costs and supplied with perfect information, state action will never be necessary to ensure the efficient allocation of resources.<sup>307</sup> (Like Hayek, "state action" in this case is a synonym for arbitrary legislation; enforcement of the Rule of Law as articulated in common law courts is not seen as "state action," and is instead used as a logical and factual predicate for Coase's theorem).<sup>308</sup>

As for the argument, Coase brought in the now famous example of the rancher and farmer. Conventionally, Coase explained, government has reacted to the interaction of rancher and farmer—where the rancher inevitably bumps a cost onto his neighboring farmer through the damage brought on by his grazing cattle—by imposing a fine on the rancher.<sup>309</sup> This is because the farmer has been harmed, and the rancher should be restrained, through tort liability, or a tax, or whatever.<sup>310</sup> Coase countered in a Hohfeldian manner

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304. See COASE, *supra* note 300, at 13. Coase opens with a reference to Pigou as the standard response of economists to the problem of externalities. See generally ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932).

305. COASE, *supra* note 300, at 13. As Coase states in the first sentence of the essay: "This paper is concerned with those actions of business firms which have harmful effects on others." *Id.*

306. MEDEMA, *supra* note 159, at 102.

307. See *infra* notes 309-17 and accompanying text.

308. For general discussion of the idea of state action in the context of neoliberalism, see Justin Desautels-Stein, *Liberal Legalism and the Two State Action Doctrines*, 6 N.Y.U. J.L. & LIB. (forthcoming 2012).

309. COASE, *supra* note 300, at 13-14.

310. *Id.* at 14.



that what must be realized is that a decision to restrain the rancher is just as much a harm as was the harm initially done to the farmer.<sup>311</sup> The question is inescapably *relational*.

The important social question is therefore not how best to constrain the rancher, since this simply assumes that the farmer has some inherent priority in the dispute, but rather which of the harms is the least efficient in the allocation of productive resources.<sup>312</sup> “The nature of the choice is clear: meat or crops. What answer should be given is, of course, not clear unless we know the value of what is obtained as well as the value of what is sacrificed to obtain it.”<sup>313</sup> Coase went on to suggest that a government official is unlikely to know the answer to this question, or at the most generous, he certainly won’t know as well as the rancher and the farmer.<sup>314</sup> For example, if it’s worth the rancher’s while, he will pay off the farmer (against the background of tort liability), or bargain with the farmer in hopes of finding a mutually agreeable deal (against the background of property and contract law).<sup>315</sup> In addition to these background rules, Coase’s image of the efficient deal also assumes that the farmer and rancher are rational, self-interested, have access to all the available information, and are negotiating in a condition of perfect competition.<sup>316</sup> Under these assumptions, public distributions of legal entitlements at best have no effect on and at worst obstruct what the market will achieve all by itself, pressuring the rearrangement of legal rights (i.e., Rule of Law) wherever they turn out to maximize the value of production.<sup>317</sup>

Throughout the essay, Coase asked how this idea plays out when the “very unrealistic” assumptions are relaxed, including when the problem of transaction costs is introduced.<sup>318</sup> This raises the problem of how best to mimic the market, and who should do the mimicking. It’s possible

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311. *Id.*

312. *Id.* at 14.

313. *Id.*

314. *Id.* at 30.

315. *Id.* at 16-17.

316. *Id.* at 14-18.

317. *See id.* at 27.

318. *Id.*

that certain arrangements of legal rights may better compensate for these market deficiencies, or that those costs might be better handled by large firms or even by social planning.<sup>319</sup> Another option is not to do anything at all, since the total social costs of government intervention may in many (most?) cases create new costs that weren't there in the first place.<sup>320</sup> The bottom line: in the presence of transactions costs and imperfect competition, an economic evaluation of particular legal arrangements will be necessary to determine when and where social planning might be necessary.<sup>321</sup> Most importantly, this type of pragmatic analysis should dispense with the default position that government intervention is the proper response to market failure, not only because government itself is often the cause for that failure, but also because "there is a real danger that extensive Government intervention in the economic system may lead to the protection of those responsible for harmful effects being carried too far."<sup>322</sup>

In 1964, Coase joined the faculty of the University of Chicago, many of whom only a few years before had been highly skeptical of Coase's challenge to welfare economics.<sup>323</sup> By the 1960s, these former students of Frank Knight were Coasian converts, and the "Chicago School" was afoot.<sup>324</sup> In tandem with this academic reaction against modern liberalism, an international economic crisis began to surface in the late 1960s.<sup>325</sup> The social program that had been in place since the New Deal appeared to be breaking down: unemployment and inflation were accelerating at a systemic pace; tax revenues were falling while expenditures were rising; the Bretton Woods system of fixed exchange rates was falling apart (and was abandoned in 1971); OPEC hammered the developed world with an oil embargo.<sup>326</sup> All in

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319. *See id.* at 28-29.

320. *Id.* at 30.

321. *See id.* at 30-31.

322. *Id.* at 40.

323. MEDEMA, *supra* note 159, at 102, 104.

324. For a discussion of Coase's contributions to the development of the Chicago School, see *id.* at 164-69.

325. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 12 (2005).

326. *Id.*

all, the global economy appeared to be seeking the answers already being worked out in Chicago.

By the last years of the 1970s, everything seemed in place to inaugurate the neoliberal style.<sup>327</sup> In 1979, Margaret Thatcher was elected Prime Minister in Great Britain, and brought with her an economic blitzkrieg which involved:

[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 . . . .<sup>328</sup>

For Thatcher and her adherents, there was “no such thing as society, only individual men and women.”<sup>329</sup> In that same year, Paul Volcker, chairman of the U.S. Federal Reserve Bank, reversed the long-standing New Deal commitment to full employment in favor of a full-frontal attack on inflation, launching what later came to be known as the “Volcker Shock.”<sup>330</sup> 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.<sup>331</sup> 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.<sup>332</sup> As David Harvey has described it, this exploding new style of political economy proposed that:

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327. See generally DEEPAK LAL, REVIVING THE INVISIBLE HAND: THE CASE FOR CLASSICAL LIBERALISM IN THE TWENTY-FIRST CENTURY 62-90 (2006); ANDREW LANG, WORLD TRADE AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER 52-57 (2011); YERGIN & STANISLAW, *supra* note 169.

328. HARVEY, *supra* note 325, at 22-23.

329. *Id.* at 23.

330. *Id.* at 23-24.

331. *Id.* at 24-25.

332. *Id.* at 29.

[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 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.”<sup>333</sup>

Much as John Locke found himself writing at just the right moment in the wake of the Glorious Revolution,<sup>334</sup> Hayek published the third volume of *Law, Legislation and Liberty* in 1979.<sup>335</sup> Hayek began this ambitious work by identifying what he called “three fundamental insights.”<sup>336</sup> The first is that there is a right and a wrong way of constructing our institutional arrangements. The right way is to establish those institutions which enable a “self-generating or spontaneous order.”<sup>337</sup> The wrong way is to model society after an “organization.” The way we know the right from the wrong way is by the type of laws which prevail in them, respectively. The second insight was that hopes for “social justice” only make sense in an organization; they have no coherence in a spontaneous society.<sup>338</sup> The third was that the predominant style of modern liberalism tends towards totalitarianism.<sup>339</sup> The discussion here will only focus on the first of these points.

Somewhat like Locke, Hayek begins his argument on behalf of spontaneity by suggesting that the rules of classic

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333. *Id.* at 2.

334. *See supra* note 99 and accompanying text.

335. F.A. HAYEK, 3 *LAW, LEGISLATION AND LIBERTY* (1979). It is unnecessary to go into great detail with regard to all three books, but a presentation of Hayek’s richer account of the Rule of Law and its relation to the problem of monopolies will be helpful as the discussion moves into the next sections of the Article.

336. F.A. HAYEK, 1 *LAW, LEGISLATION AND LIBERTY* 2 (1973).

337. *Id.* at 2.

338. *Id.* at 2.

339. *Id.*

liberalism are natural, but natural in a special way. For Hayek, human beings are born with a cultural heritage consisting of certain rules of just conduct.<sup>340</sup> These rules are not laws in the sense that they have been authored by a sovereign and backed with sanction.<sup>341</sup> To the contrary, these rules of conduct have evolved because they were successful—they were victorious over other rules or customs because they made for better lives.<sup>342</sup> It would be a mistake to believe, however, that the adherents of these customs ever consciously promulgated them, or may have even been able to articulate them. Customs were instead manifested in the regularity of practice: “The important point is that every man growing up in a given culture will find in himself rules, or may discover that he acts in accordance with rules—and will similarly recognize the actions of others as conforming or not conforming to various rules.”<sup>343</sup> What follows from this spontaneous and organic conception of rules is the idea that they cannot be attributed to any conscious, deliberate, human design.<sup>344</sup> These rules of conduct are therefore, by definition, pre-political, just as in the same way that the growth of organic compounds or the arrangement of magnetic fields are wholly natural.<sup>345</sup>

Hayek argued against a presumption in favor of government control over free competition, since the market presents with “an order of such a degree of complexity . . . as we could never master intellectually, or deliberately arrange . . .”<sup>346</sup> All that political society can hope to do, and indeed, what it must do, is play the night watchman.<sup>347</sup> The night watchman, guarding the factory from intruders and guaranteeing the basic operations of the facility, has nothing to say about the nature of goods that the factory tends to produce, how quickly it produces, or anything of the

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340. *Id.* at 18.

341. *Id.*

342. *Id.*

343. *Id.* at 19.

344. *Id.* at 28.

345. *See id.* at 39-40.

346. *Id.* at 41.

347. *See id.* at 47 (describing the function of the night watchman in terms of “a maintenance squad of a factory”).

like.<sup>348</sup> Those questions are left instead to those that operate the factory, and those that buy its products.<sup>349</sup>

Though the state plays a small role, Hayek reminds us that the role of law, through the Rule of Law, is huge. The difference here is between those rules that belong to organized government—legislation—and those rules of conduct imminent in the market.<sup>350</sup> As Hayek explains, legislation is necessarily distributive, while the Rule of Law is “independent of purpose,” blindly and equally applicable to all.<sup>351</sup> Real freedom, as a result, is conditioned on a choice of the Rule of Law over legislation, where the Rule of Law is understood as permissive and enabling, and legislation is prohibitive and coercive. While it is hopefully clear by now, Hayek helpfully concludes that everything he has discussed with regard to the rules of conduct operating in the spontaneous order, and the willy-nilly legislative caprice of governmental organization, tracks exactly the distinction between private and public law, respectively.<sup>352</sup> In a similar vein, Hayek also explained that in the context of constitutional law, its fame had been misconceived.<sup>353</sup> Its job, and nothing grander, is simply to “secure the maintenance of *the law*,”<sup>354</sup> by which he means the Rule of Law, funneled through the courts.

Hayek believed that property and contract were essentially the heart of the Rule of the Law and the market system. Taking us back to an unspecified time in history, perhaps the moment of the man-eating-sheep,<sup>355</sup> Hayek argued that the “decisive step” which made peaceful

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348. *See id.* (“[The maintenance squad’s purpose is] not to produce any particular services or products to be consumed by the citizens, but rather to see that the mechanism which regulates the production of those goods and services is kept in working order.”).

349. *Id.*

350. *Id.* at 72-74.

351. *Id.* at 49-50.

352. *Id.* at 132 (“[W]e shall henceforth regard the distinction between private and public law as being equivalent to the distinction between rules of just conduct and rules of organization . . .”).

353. *See id.* at 134.

354. *Id.*

355. *See supra* notes 80-89 and accompanying text.

cooperation possible was the discovery of the bargain.<sup>356</sup> But the ability to consistently determine what belonged to who, and how one could trade one thing for another, depended on the development of property and contract rules.<sup>357</sup> If this never were to happen, ideas like “ownership” and “bargain” would never have had any real meaning.<sup>358</sup> For Hayek, these new rules of conduct were the mechanisms of co-existence, were definitively non-coercive, and had as their central function the creation of a society in which people with different outlooks on life, with different values for different products, could live together in peace.<sup>359</sup> What was required was a law that told no man what he ought to do, but could “tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him.”<sup>360</sup> Though Hayek imagined the private law as non-coercive and pre-political in a very strong sense, he nevertheless did, like Locke before him, believe that the market brought with it more than a sustainable peace (essential as that was), but a just society as well.<sup>361</sup> It was not that either of them thought that the moral content of property and contract would generate any particular constellation of social outcomes, but rather that it was the *process* of the private law that was just:

In this respect what has been correctly said of John Locke’s view on the justice of competition, namely, that “it is the way in which competition is carried on, not its result, that counts,” is generally true of the liberal conception of justice, and of what justice can achieve in a spontaneous order.<sup>362</sup>

Hayek wants us to believe that the Rule of Law that he describes, and the manipulation of those rules of just conduct by the common law courts, do not in any fashion

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356. F.A. HAYEK, 2 *LAW, LEGISLATION AND LIBERTY* 109 (1976)

357. *Id.* (“All that was required to bring this about was that rules be recognized which determined what belonged to each, and how such property could be transferred by consent.”).

358. *See id.* at 35 (“Such states as ‘ownership’ have no significance except through the rules of conduct which refer to them . . .”).

359. *Id.* at 110.

360. *Id.* at 37.

361. *Id.* at 38.

362. *Id.*

constitute “planning” or “intervention.”<sup>363</sup> Just as the clockmaker, in setting out the twelve numbers on the face of a clock, or regularly oiling and winding it, is not “interfering” with the clock’s chief functions, so it is that the common law judge, in elaborating and developing the ground rules of market competition, does not “interfere” with competition, either.<sup>364</sup>

But what of the law of competition, that hallmark response of the welfare style to the apparently grim fact of gigantic trusts and managerial capitalism? Does antitrust law belong to the beautiful Rule of Law or the grotesque sphere of legislation? Clearly, if you are a fan of the Hayekian style, you will hope for the former over the latter. Hayek’s discussion of the problem is reminiscent of the Senate debates of the 1890s, inasmuch as he begins by suggesting that a monopolist cannot be identified as a systemic defect so long as he is simply playing the competitive game really, really well. In fact, it must be admitted that in these cases the monopolist or oligopolist is likely rendering better services than anyone else.<sup>365</sup> If this point regarding the potential efficiencies associated with monopolies is not conceded, it would inevitably lead to a critique of the ground rules themselves, which no liberal style of political economy can countenance. On the other hand, if the monopolist has gained his position by disabling his competitors in the market, such that they are unable to play at all, this is an instance of pathology.<sup>366</sup>

Hayek’s answer is not difficult to predict: to the extent the monopolist’s competitors are empowered as watchdogs, as reined in by the common law judge, this will constitute a check that could be consistent with the Rule of Law. To the extent that government itself makes an effort to distinguish the good monopolies and cartels from the bad, it will almost always fail.<sup>367</sup> The only conceivable way for a planned intervention to have any success in mimicking the Rule of

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363. *See id.* at 128-29 (defining “interference” as aiming to bring about a particular result, as opposed to allowing a mechanism to proceed along its natural course).

364. *Id.*

365. HAYEK, *supra* note 335, at 73-74.

366. *Id.* at 73.

367. *Id.* at 85-86.



Law would be to deprive the antitrust enforcer of any discretion whatsoever—and enact a general pronouncement banning all agreements in restraint of trade.<sup>368</sup> However this plays out, Hayek concludes, there is decisively more to gain from less government involvement in the issue of monopolization than in its participation, particularly since it is government planning itself which has so often been the very cause of inefficient and undesirable monopolies in the first place.<sup>369</sup> Finally, when we think of monopolization, and the conventional governmental response, Hayek argued that the target has almost entirely been misconceived. The problem was not really ever the combination of a few big firms; it was the ascendance of the union.<sup>370</sup>

## II. A CRITIQUE OF LIBERAL LEGALISM

The prior discussion has outlined three liberal visions of a relation between “market” and “state.” Classic liberalism and neoliberalism shared a great deal in common, as illustrated in a sample of texts from John Locke, Ronald Coase, and Friedrich Hayek. In these styles, a strong distinction between civil society and the state is posited, where individuals freely exercise natural rights that are meant to be serviced through the operation of the state. As a consequence, the state’s purpose is to work as the handmaiden of the market, enabling the operation of free competition as the organizing concept for all of society. In contrast is the modern liberal style, illustrated here in the work of Henry Carter Adams and Frank Knight. For these writers and so many others, the distinction between civil society and the state is retained, but the precise line defining the boundary becomes far less important. In modern liberalism, the state is not merely in service of the market, existing merely as its enabler. Here, the state is tasked with control, reigning in the persistent problem of market failure and its attendant effects. Thus, the modern liberal style takes a far more aggressive and enlarged view of law. In contrast to the classic liberal and neoliberal emphasis on the Rule of Law, quietly operating in the background, the modern liberal style deploys an armada of

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368. HAYEK, *supra* note 356, at 86.

369. *Id.* at 88.

370. *Id.* at 89.

foreground rules in its attempt to regulate, manage, and constrain free markets. As we have seen, antitrust law is a good example of such a foreground rule, precisely because it situates itself as merely responding (in the foreground) to a pre-existing world of markets. Antitrust law, and the modern liberal style more generally, never intends to actually displace or transform the background rules (i.e. property, contract, etc.) themselves.

In this Part, the discussion turns to critiques of liberal legalism.<sup>371</sup> The style of critique that I will here emphasize has two elements. The first is a critique of the constitutive nature of background legal rules in both the classic and modern liberal images of political economy. As we have seen, this is the idea that property and contract are the ground rules of the economic game.<sup>372</sup> In opposition to the likes of Hayek, the view explored below suggests that it is a mistake to believe these background rules to be neutral with respect to distributive gains and losses, natural with respect to a fictitious distinction between a natural civil society and an artificial political society, or necessary with respect to an inevitable historical progression. A related idea here is that it is a mistake to think that a presumption in favor of the enforcement of property and contract rights, in the abstract, is a presumption with any meaning. In other words, the “background rules of the market” are only understandable once we have a particular form of liberalism offering a particular form of property and contract. For liberal legalists to argue for strong property and contract rights, without specifying *which* property and contract rights to which they are referring, they make the mistake not only of confusing one single vision of the market with

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371. As is well known, a sustained critique of classic liberalism was deployed from the political left before it became a mainstream talking point around the turn of the twentieth century. As far back as Karl Marx, market society was already being targeted as a masquerade. Unlike the liberal legal styles, however, these critical approaches have never gained entrance in the field of popular political trends. No doubt, the Left has had its effects, and not simply in the socialist revolutions of the nineteenth century or the communist revolutions of the twentieth. It is now a commonplace that the “social-democratic compromise” that took place after World War II among the western industrialized nations, referred to here as “modern liberalism,” struck a balance between the discredited ideas of the classics and the very real policy proposals hurtling from the left.

372. See *supra* note 26 and accompanying text.

the idea of a true and actual market. They also make the mistake of being unintelligible.

The second component of the critique to be canvassed here is a rejection of the standard dichotomy we have repeatedly seen between civil society and the state, free competition and social planning, the private and the public. It is mistake, as the modern liberal view would have it, to believe that the market is an independent sphere that is either allowed to regulate itself, or is at other times subject to the heavy hand of planned interventionism. The market has never regulated itself, can never regulate itself, nor can we accurately understand government as sometimes intervening more or less intrusively. The reason is that the “market” is not an “itself”—it is a set of choices, made by human beings, and human beings continue to choose how they want the background rules of the market to function. The question for critics is therefore not whether more or less coercion is better or worse—coercion is inescapable. The idea that coercion and control are relegated to a singular domain of sovereign authority while freedom and competition are sovereign in the market is an illusion. The real question is instead: what types of policy do we want, and which social actors do we want making the relevant decisions? To talk of more or less of the state is simply to confuse the issue that really matters.

In the survey that follows, and in which these two elements of a critique of liberal legalism are brought together, the discussion turns to some works from Karl Marx, Morris Cohen, Robert Hale, and Duncan Kennedy.

#### A. *A Critique of the Market/State Distinction*

In his early essay *On the Jewish Question*,<sup>373</sup> Karl Marx analyzed the classic liberal style’s insistence on a separation of political society from natural society, and what this separation really meant in terms of liberalism’s own deepest aspirations for human freedom. His conclusion was that the liberal method undermined its supposed objective: where Locke argued that the move to political society was the key to human freedom because it placed the sacred rights of life

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

and property under the watchful eye of a common authority,<sup>374</sup> Marx argued that this move, while indisputably progressive, achieved a degree of political freedom at the expense of a true form of human emancipation. Here's how the argument works.

According to Marx, the liberal image of market society involves a dichotomous human existence in which Locke's conception of the "Natural Man" partially exists in political society (where he is a *citizen* with rights and duties owed to others), and partially exists in a non-political civil society (where he is a *human* with desires and needs, using other people as means to satisfy those desires and needs).<sup>375</sup> In political life, the citizen is a communal being, and free from the hindrance of religious and other self-identified forms of difference which inevitably atomize people and emasculate social relationships.<sup>376</sup> Curiously, it is only in this artificial political world that Natural Man enjoys a common humanity in the understanding that he is a vital part of a social organism.<sup>377</sup>

In private life, Natural Man is empowered with a set of rights that by their definition exclude and separate him from everyone else. It is in this sphere that he is truly himself, in touch with the real and natural spirit of his being, isolated, alone, and enterprising. Natural Man is free, in the sense that he can do anything he likes, but only so long as he doesn't impinge on the same freedom enjoyed by his neighbors.<sup>378</sup> Natural Man therefore inhabits in his private life an enclosed space in which he is sovereign—this is the liberty of the "isolated monad, withdrawn into

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374. See *supra* Part I.A.2.

375. See MARX, *supra* note 373, at 224-25.

376. *Id.* at 225 ("In the political community [man] regards himself as a communal being . . ." (emphasis omitted)). Herbert Marcuse put it this way: "They were really emancipated. The 'natural' and personal dependencies of the feudal order had been abolished. . . . The primary conditions of capitalism were herewith at hand: free wage labor and private property in the means of commodity production." HERBERT MARCUSE, REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY 305-06 (2d ed. 1954). The production of commodities, he goes on to say, begins with the labor contract, "ostensibly the realization of freedom, equality, and justice." *Id.* at 306.

377. MARX, *supra* note 373, at 225 (emphasizing that, in civil, as opposed to political society, man is a private being).

378. *Id.* at 235.

himself.”<sup>379</sup> It is a right of separation, a right of restricted space, practically enabled and realized through the law of private property.<sup>380</sup> This highly individualized and self-interested conception of the private, pre-political world has the effect of turning one’s friends and neighbors into the barriers to one’s own freedom, instead of seeing other people, and social relationships, as the means for becoming truly free, for realizing the *true* nature of human freedom. Even worse, the sphere in which human beings take on the tendencies of a community—political life—is understood to merely serve the emaciated existence of civil society. Society barely hangs together at all: “The only bond between men is natural necessity, need and private interest, the maintenance of their property and egoistic persons.”<sup>381</sup>

Marx rooted this liberal division of man from man in what Partha Chatterjee has called “the narrative of capital.”<sup>382</sup> That narrative, with which we are now familiar, identified the establishment of a distinct and separate realm of politics as the destruction of the medieval world, a world we have seen to have been integrated in the sense that it was largely free from distinctions between private and public, natural and political.<sup>383</sup> Feudal society was “directly political,” meaning that constructs like land, family, and work were recognized vehicles of governance, as opposed to the more familiar sense of them being the objects of control.<sup>384</sup> The effect was to convert the particular relation man would have between him and the state into a general relation between man and man. Because land, family, and work were already politicized, the mechanics of the state and the actual government were kept at a distance.<sup>385</sup> What Liberalism did was to banish that political dimension from land, family, and work, and concentrate it in the sphere of government.<sup>386</sup> According to Marx:

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379. *Id.*

380. *Id.* at 235-36.

381. *Id.* at 237.

382. PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS* 234-39 (1993).

383. *See id.* at 239.

384. *Id.* at 238.

385. *Id.*

386. *Id.* at 239. Georg Lukács perceptibly echoes Locke’s idea that political society cannot even be properly called government unless it protects property

[Liberalism] shattered civil society into its constituent elements—on the one hand *individuals* and on the other the *material* and *spiritual elements* constituting the vital content and civil situation of these individuals. It released the political spirit, which had been broken, fragmented, and lost, as it were, in the various cul-de-sacs of feudal society. It gathered up this scattered spirit, liberated it from its entanglement with civil life, and turned it into the sphere of the community, the *general* concern of the people ideally independent of these *particular* elements of civil life.<sup>387</sup>

Thus, the shift Marx is describing here represented a change from a condition where man's relation to the land on which he lived and worked, to his guild members, to his wife and children were always already politicized, into a very different condition in which these relations were suddenly naturalized. The content of the political, and its interest in the distribution of wealth and resources, had gone elsewhere.

The creation of political society was therefore attended by a simultaneous and second creation: Locke's Natural Man.<sup>388</sup> Natural Man is the new recipient of "natural rights," rights that will subsequently come to be the object of protection by the new political society. But as we have seen, the human being is also a political man, though this is an abstract, artificial, and juridical person, in contrast to the immediate, concrete, organic person in civil society. For Marx, the way forward inevitably would necessitate an elimination of this alienation of the self, and ultimately call forth a total, human freedom undisturbed by liberalism's

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rights in his analysis of the classic liberal relation between market and state. For Lukács, the market was dependent on a government that made itself in the market's image: "The capitalist process of rationalisation based on private economic calculation requires that every manifestation of life shall exhibit this very interaction between details which are subject to laws and a totality ruled by chance. It presupposes a society so structured." LUKÁCS, *supra* note 164, at 102. These laws which are to mirror the dynamics of market calculation, however, cannot take on a truly rational form in that they must be barred from ever micro-managing the decisions of particular market actors: "But such a 'law' would have to be the 'unconscious' product of the activity of the different commodity owners acting independently of one another, i.e. a law of mutually interacting 'coincidences' rather than one of truly rational organisation." *Id.*

387. MARX, *supra* note 373, at 239.

388. See *supra* Part I.A.2.

political/natural distinction—a call that would collapse the apparent difference between *citizen* and *human*.<sup>389</sup>

But Marx's way forward is not what we're after here.

### B. *A Critique of Property and Contract*

Though the discussion has so far described only a very small, and in some circles controversial,<sup>390</sup> portion of Marx's work, there is nothing in his immense oeuvre that enables his critique to reach the idea that law plays a constitutive role in the construction of the liberal distinction between market and state. Marx is fundamental in offering a critique of the idea that civil society could somehow be understood as genuinely apolitical; the notion of a natural man and a natural society, separated from a political, distributivist society was upon inspection an incredible sham, an astounding parlor trick, resulting in the estranged separation of man from himself. What Marx failed to reach, however, was the nature in which legal background rules forged the façade.<sup>391</sup> It was to this point that writers in the late nineteenth and early twentieth century turned in their elaboration of the critical style.<sup>392</sup> In setting this out, I will

389. See MARX, *supra* note 373, at 241.

390. There is a long-standing debate among Marxists as to whether Marx's early writings are in combat with his more mature works. See, e.g., LOUIS ALTHUSSER, 'On the Young Marx,' in FOR MARX 49, 52 (Ben Brewster trans., 1969) (1965) ("[W]e must admit that *Capital* (and 'mature Marxism' in general) is either an expression of the Young Marx's philosophy, or its betrayal." (emphasis omitted)); see also G.A. COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENCE (Princeton Univ. Press expanded ed. 2001) (providing a separate debate within Marxism regarding the coherence of the dialectical method).

391. See DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault!*, in SEXY DRESSING ETC. 83, 90 (1993) (distinguishing Marxism from the liberal model in that liberalism focuses on the background of legal rules). To be sure, Marx was very aware of the role of property law in its fundamental relation to liberal political economy. His view of the law, however, failed to understand its constitutive nature, and focused instead on law as superstructural. See, e.g., COHEN, *supra* note 390, at 216-40.

392. For two of the well-known works from the school of Institutional Economics that attempted to elaborate on the background rules, see JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) and RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914). For discussion of both works, see Hovenkamp, *supra* note 167, at 1021-31.

focus on three articles written in the 1920s and 1930s by Robert Hale, lawyer and economist at Columbia University, and Morris Cohen, philosopher and Professor at the City College of New York.<sup>393</sup>

In *Property and Sovereignty*, Cohen wrote:

Certain things have to be done in a community and the question whether they should be left to private enterprise dominated by profit motive or to the government dominated by political considerations, is not a question of man versus the state, but simply a question of which organization and motive can best do the work. Both private and government enterprise are initiated and carried through by individual human beings.<sup>394</sup>

Similarly, in his *Coercion and Distribution in a Supposedly Non-Coercive State*, Hale argued that the modern welfare critique of laissez-faire had been misguided.<sup>395</sup> Anticipating Polanyi, it was not simply that the self-regulated market needed to be checked—the self-regulated market *had never been*. In the real world, the actual function of laissez-faire was shot through with coercive restrictions on individual freedom, restrictions “out of conformity with any formula of ‘equal opportunity,’ or of ‘preserving the equal rights of others.’”<sup>396</sup> In any modern society, such restrictions were unavoidable, and the only question was when and how to

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393. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) [hereinafter Cohen, *Contract*]; Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) [hereinafter Cohen, *Property*]; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) [hereinafter Hale, *Coercion*]. For further discussion of Hale and Cohen, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421 (1990); Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1973); and Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988). Some of Hale's other particularly well-known writings include ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

394. Cohen, *Property*, *supra* note 393, at 27.

395. Hale, *Coercion*, *supra* note 393, at 470.

396. *Id.*



coerce whom, and where to direct the distribution of income and resources.<sup>397</sup>

A similarly foundational critique aimed at the liberal distinction between rules of permission versus rules of prohibition. Marx saw the beginnings of this critique:

Political economy starts with the fact of private property, but it does not explain it to us. It expresses in general, abstract formulas the *material* process through which private property actually passes, and these formulas it then takes for *laws*. It does not *comprehend* these laws, i.e., it does not demonstrate how they arise from the very nature of private property.<sup>398</sup>

Where Marx left this insight inchoate, Hale and Cohen developed it, showing how rules popularly believed to simply enable free action were deeply prohibitive—the very idea of permission, they explained, depended on a prior idea of coercion.<sup>399</sup>

These conclusions might be seen as the endpoint in this Part: private enterprise and government enterprise are equal in the sense that they each have organizational capacities predicated on a substantial, though different, degree of sovereign and coercive power. But how was it that the private side could be seen as sovereign and coercive?

397. *Id.*

398. Karl Marx, *Estranged Labor* (1844), reprinted in *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844*, at 106, 106 (Dirk J. Struik ed., Martin Milligan trans., 1964).

399. Duncan Kennedy put it this way:

In the liberal model, law plays a major role in the form of “the rule of law,” a defining element in the liberal conception of a good society. But the content of the background of legal rules is seen to flow either as a matter of logic from regime-defining first principles (rights of bodily security, private property, freedom of contract) or from the will of the people, or from both together in some complex combination. The distributive issue is present, but understood as a matter of legislative intervention (for example, progressive taxation, labor legislation) to achieve distributive objectives by superimposition on an essentially apolitical private law background. . . .

A basic reason for the invisibility of the distributional consequences of law is that we don’t think of ground rules of permission as ground rules at all, by contrast with rules of prohibition.

KENNEDY, *supra* note 391, at 90.

The answer was to be found in a sociology of property and contract law.

To begin, Cohen suggested, it is essential to move beyond the old picture of property as a relation between man and the products of his labor.<sup>400</sup> It will be recalled that in the classic style, man was imagined to first have ownership over his body, then ownership over those things with which he mixed his labor.<sup>401</sup> After the invention of money and an allowance for freedom of contract, man's capacity for private property—ownership of things—was virtually limitless. In a move that would have pleased Coase, Cohen argued that this simply didn't make any sense, since a "property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals."<sup>402</sup>

At its basic essence, the right to private property is a right of exclusion.<sup>403</sup> The law does not grant any actual connection between a man and his land, food, car, or money. What it does instead is grant that man the power to wield the force of governmental power against any other people that may try to use that land, food, etc.<sup>404</sup> If he wants to use that thing, he must gain the "owner's" consent, and if he

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400. Cohen, *Property*, *supra* note 393, at 11-12.

401. *See supra* Part I.A.2.

402. Cohen, *Property*, *supra* note 393, at 12. The argument that rights could not be understood as relations between people and things, but only as between rights and correlative duties, is typically attributed to Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Also affiliated with legal realism, Hohfeld's signal contribution was to organize all of legal reasoning around a set of eight legal correlatives: rights/duties, privileges/no-right, power/liability, and immunity/disability. *Id.* at 30. The impact of the scheme was to smash the idea of a unitary, abstracted idea of rights, including property rights. After Hohfeld, the question of what was meant by a property right would necessarily require a relational answer that described the constellation of rights, duties, powers, and privileges enjoyed by a particular person at a particular moment. For a discussion of Hohfeld's relational approach to rights, see *Wesley Hohfeld*, in THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 174, at 45, 45-54; Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986-1050.

403. Cohen, *Property*, *supra* note 393, at 12.

404. *Id.*

gets it, use of those objects will be allowed. But whatever the decision of the owner, what the law is actually doing is forcing a barrier between the two individuals, and making the consent of one the requisite for use by the other. The necessity of consent begins to reveal its sovereign aspects when the fact of scarcity is introduced: there isn't enough land and food freely available for all members of society, and so it quickly becomes clear that if one man is to survive, he must find shelter, food, and the like. In the context of the private property regime, however, this man cannot simply use any shelter or food that he might find—he will have to gain consent from some landlord, grocer, whomever, who is willing to let the man share in their property. To do that, the man will need money.<sup>405</sup> If he doesn't have money, he will die as a result of the law enabling the landlord and grocer to exclude the man indefinitely. Not wanting to die, most people will therefore be forced to sell their labor in exchange for a common currency, and as a result, be able to bargain with the landlord and the grocer. It is in this sense that Cohen characterized the law of property as “sovereign power compelling service and obedience.”<sup>406</sup>

Hale offered a similar route into the coercive properties of property law. He began by setting up the classic image of a non-interventionist government on the one side, and the freely competitive society on the other.<sup>407</sup> In this picture, just what was government doing when it “protects a property right?”<sup>408</sup> In one sense, it is creating a relationship between the owner and government in which the government has no presumptive power to interfere with the owner's use of the thing.<sup>409</sup> This seems non-interventionist. When the relation between the owner and the non-owner is considered, however, the flavor shifts dramatically from one of abstention to active governmental coercion.

To further the illustration from above, Hale explains that the non-owner, the man looking for food and shelter, faces a situation more drastic than simply one of being forced to not be lazy. Say that the man who owns no

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405. *Id.*

406. *Id.*

407. Hale, *Coercion*, *supra* note 393, at 470-71.

408. *Id.* at 471.

409. *See id.*

property—the non-owner—does not want to labor for a particular employer. He will face two alternatives: no wages, or work for some other employer.<sup>410</sup> Because of the law of property, all alternative employers are able to forcibly threaten the non-owner with withholding any wages, unless he becomes willing to labor for that employer.<sup>411</sup> This threat to withhold money will usually be enough to compel the non-owner to work—a motivation to labor that can be understood exclusively as an attempt to ward off threats of withholding. Now, if most people will be coerced into work as a result of the property law,<sup>412</sup> what of those who refuse? The (landless) non-owner still has to eat, even if he remains free of private coercion, but in order to eat, he will have to convince other members of the community to share with him, since property law forecloses his ability to consume anything he might find.<sup>413</sup> Owners may, at their discretion, waive their power and share their food with the non-owner, but there will always be “every likelihood that the owners will be unanimous in refusing, if he has no money.”<sup>414</sup> So unless he can produce his own food, which is doubtful since he owns no land, the non-owner will starve unless he gives in to the pressure to labor for wages.<sup>415</sup> In addition to a workforce, property law also guarantees a stream of revenue.<sup>416</sup> As the entrepreneur develops products with the assistance of the non-owner, consumers who would like to enjoy those products have to gain the producer’s consent.<sup>417</sup> They are strictly prohibited from consuming the products without it.<sup>418</sup> Consumers may wish to avoid payment by going without those products, just as they may wish to avoid governmental taxes by leaving the country.<sup>419</sup> In either case, the consumer will be

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410. *See id.* at 472.

411. *Id.* at 473.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

compelled to pay if he wishes to avoid the threat of punishment (i.e., going without consumer goods, or paying a fine or going to prison).<sup>420</sup>

The upshot, Hale tells us, is that large employers are secured a labor-force, with little if any alternatives for survival, by and through the coercive nature of property law, as it have been conceived in the classic liberal style.<sup>421</sup> Similarly, producers are guaranteed revenue by the same set of coercive arrangements.<sup>422</sup> Thus, the distribution of incomes throughout the sphere of wage-labor, and the allocation of goods and services more generally, is entirely dependent on “the relative strength of [each person’s] power of coercion, offensive and defensive.”<sup>423</sup>

If non-owners and consumers are systemically subject to the coercive power of owners and producers, there may be some question as to whether “freedom” is a meaningful concept. After all, the classic liberal style is very concerned with establishing freedoms in the private sphere through the mechanism of minimalist governmental control. If coercion is rampant, classic liberalism seems to have failed. What turns the argument around is some precision with regard to what we mean by freedom. Hale suggests that if it were decided to take control away from a factory owner (through a re-alignment of the property and contract regime) and vest it instead in some other set of people, like a group of public officials, or a union, this cannot be properly understood to be making the functional existence of the factory any more officially coercive than it had been when it was in the control of the owner.<sup>424</sup> The same coercive dimensions will continue, but such a transfer would simply shift the power of exclusive restrictions to a different set of people.<sup>425</sup> It is true, Hale explains, that one arrangement over another might provide varying degrees of individual

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420. *See id.*

421. *Id.*

422. *Id.*

423. *Id.* at 477.

424. *Id.* at 478.

425. *Id.*

initiative—but individual initiative is hardly the same thing as “freedom from governmental constraint.”<sup>426</sup>

The former is the political idea that a person will be able to realize their will, regardless of what prerequisites may be in order. The latter is a natural idea that freedom will always be maximized when government limits its coercive powers in the private sphere. But the latter type of freedom is not a meaningful kind of freedom at all, since it is impossible to reduce coercive restrictions.<sup>427</sup> Thus, if we really want to know what sort of institutional arrangement most effectively secures the capacity for free individual initiative, the only measure of such a thing is in the economic results of that particular factory.<sup>428</sup> In this way, Hale concluded, it is impossible to say in the abstract whether communism is any more free than capitalism.<sup>429</sup>

In addition to property law, Hale and Cohen also aimed to underline the neglected shades of contract law in the classic image. The connection between contract and property, as passively suggested in no less a context than Locke’s *Second Treatise*, seemed clear enough.<sup>430</sup> After all, if the future of economic development turned on the capacity to exclude, buy, and sell, market actors would of necessity engage in the bargaining process, otherwise known as freedom of contract.<sup>431</sup> But just as with property law,

426. *Id.* at 478.

427. Cohen, *Contract*, *supra* note 393, at 560.

428. *See* Hale, *Coercion*, *supra* note 393, at 478.

429. *Id.*

430. *See supra* notes 111-17 and accompanying text (describing Locke’s conception of contract and property).

431. Joseph Singer has identified three principles of the “free contract system”:

First, you cannot be forced to contract against your will. This principle implied defenses against contractual liability when there was a defect in free will, such as fraud, duress, or incapacity, and rules about what constitutes free agreement, including rules of offer and acceptance and consideration as evidence of intent to be legally bound. Second, you are free to contract if you wish to do so. This principle implied rules specifying what conduct creates a binding obligation, and rules concerning what constitutes a breach of that obligation and the consequences of a breach. Third, if you do contract, your agreement will be enforced in accordance with its terms. The state refuses to regulate the substantive terms of private relations.

contract law turned out to be hardly free in the non-interventionist meaning of the term, and was riddled through with coercive restrictions and distributive consequences.

Cohen's *The Basis of Contract* brought focus to Henry Maine's famous thesis that liberal society had brought with it a transformation where people no longer related to one another by way of their respective status (i.e., master, servant, father, son), but instead through a system where individual rights and duties were determined by the voluntary agreements of the parties to the contract.<sup>432</sup> Below the surface is a familiar picture: there is only one form of morally acceptable obligation that may be placed on the individual, namely, that obligation to which he has consented. Other forms of coercive restriction should be avoided at all costs, and to the extent government interferes in the market, it is obstructing the individual's free will. Freedom of contract, as a result, has deep roots in classic liberalism, in tandem with the fundamental quality of private property.

Cohen then asked, in what sense is bargaining actually free? Do contracts realize this notion of voluntary agreement and consent? To begin, all contracts specialists know of those categories which by definition have little if anything to do with voluntary agreement.<sup>433</sup> When a man buys a train ticket, or buys a bag of peanuts from a vendor, we presume tacit consent on the part of the buyer that he has agreed to pay whatever price the seller has decided to assign. But though a court will deem the transaction a

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Singer, *supra* note 409, at 479. Duncan Kennedy has defined "the will theory of contract liability" in the following way:

The will theory of contract liability states that all the rules of law that compose the law of contracts can be developed from the single proposition that the law of contract protects the wills of the contracting parties. Thus we can define the law of capacity (duress and infancy, for example) to protect will, likewise the law of fraud, of damages, of offer and acceptance, of breach, of excuses, of contract interpretation, and so forth.

Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 115 (2000).

432. Cohen, *Contract*, *supra* note 393, at 553 (citing HENRY MAINE, ANCIENT LAW 100 (Dutton 1972) (1861)).

433. *Id.* at 568.

contract, no one believes that the man getting on the train or eating peanuts has actually bargained his way into a deal that suited his will.<sup>434</sup> Beyond this obvious issue, Cohen pointed to employment as a more serious example of the same phenomenon. When creating the labor contract, no worker bargains with the large employer in any meaningful sense.<sup>435</sup> He can agree to the terms of work, or go down the rabbit's hole described above, and the larger the employer, the deeper the stakes:

The greater economic power of the employer exercises a compulsion as real *in fact* as any now recognized by law as duress. The extreme form of such duress, the highwayman's pistol, still leaves us with the freedom to accept the terms offered or else take the consequences. But such choice is surely the very opposite of what men value as freedom.<sup>436</sup>

In such circumstances, we may meaningfully ask whether the old law of master and servant has been superseded.<sup>437</sup>

Given such considerations, Cohen moved for an alternative view of contract law. As opposed to searching the meaning of contract for an articulation of voluntary agreement—a distillation of free will—a better view was to see contract as an agreement between parties that would distribute gains and losses in an anticipated future situation.<sup>438</sup> If Morris sells Robert 100 widgets for \$10, Morris expects to lose a hundred of his widgets, and gain ten dollars. Expectations are not always realized, however, and the widgets may turn out to be less than what Robert expected, or God may act, or Morris may have all of his widgets stolen. In this sense, contract law may be understood as that set of rules that will determine who will win and lose when unexpected situations arise.<sup>439</sup> “One can therefore say that the court's adjudication supplements the original contract as a method of distributing gains and losses.”<sup>440</sup>

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434. *Id.* at 568-69.

435. *Id.* at 569.

436. *Id.*

437. *Id.*

438. *Id.* at 583.

439. *Id.* at 584.

440. *Id.*



To be sure, Cohen recognized that one function of contract law was to ensure the enforceability and predictability of promises. But instead of this being the core of contract law, Cohen believed it to be simply a limiting principle.<sup>441</sup> The core is a distributivist mechanism, aimed at answering who should lose when Morris' widgets were stolen, or were lost in transit, or were somehow other than what Robert had expected. The crucial point for Cohen was that the distributivist element in contract law was thickly obscured by its pretensions as a vehicle for free will, and that as a result, the political questions of who should gain and who should lose (a definitively political question about the justness of distribution) are never scrutinized. Further, it was hardly the case that these distributions of gains and losses were simply the products of individual agency:

It is an error then to speak of the law of contracts as if it merely allows people to do things. The absence of criminal prohibition will do that much. The law of contract plays a more positive rôle in social life, and this is seen when the organized force of the state is brought into play to compel the loser of a suit to pay or to do something.<sup>442</sup>

Given this, there seemed little credible way of distinguishing contract law from any other form of coercive, public law:

The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. . . .

From this point of view the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.<sup>443</sup>

Generally speaking, Cohen argued, public law rules regulate the scope of official state power, as in the context of constitutional law.<sup>444</sup> In this domain, the legislature enacts laws at its discretion, and the judiciary enacts laws that

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441. *Id.* at 584-85.

442. *Id.*

443. *Id.* at 586.

444. *Id.*

purport to set the limits of that discretion.<sup>445</sup> When the judiciary so acts, it promulgates what is often called private law—the law of corporations, leases, contract, insurance, and so on.<sup>446</sup> But the public and private law is hardly as different as it might appear, for just as the constitution provides the legislature with ample room to fill gaps and serve social needs, so does the law of contract provide individual persons with ample room to fill gaps and serve needs.<sup>447</sup> When private parties contract with each other, formalizing their rights and duties with respect to one another, these contracts become “the law of the land, just as much as do treaties between our nation and others, compacts between states, contracts between a state . . . and a private corporation,” and so on.<sup>448</sup> Similarly, just as an agreement between a state actor and a private actor will compose a part of the legal order in which all participate, so does an agreement between, say, a trade union and a single employee, or a corporate charter, represent a legal threshold through which all those wishing to enter the industry will be forced to pass.<sup>449</sup>

If we cannot meaningfully distinguish the public law from the private (since in either case, sovereign power will be conferred on some party to the transaction, be it the legislature or John Smith), Cohen concluded, we must confront the question of whether and when we as a society want sovereign power funneled through the transactions of publically unaccountable market actors:

To put no restrictions on the freedom of contract would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will ‘voluntarily’ enter under economic pressure—a pressure that is largely conditioned by the law of property. Regulations, therefore, involving some restrictions on the freedom to contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways.<sup>450</sup>

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445. *Id.*

446. *Id.*

447. *Id.* at 586-87.

448. *Id.* at 587.

449. *Id.*

450. *Id.*

Summing up, Cohen wrote: “Real or positive freedom depends upon opportunities supplied by institutions that involve legal regulation. Our legislative forces may be narrowly partisan and the rules may be poor ones. But this can be remedied not by the abrogation of all rules but by the institution of better ones.”<sup>451</sup>

### C. *A Critique of Legal Consciousness*

The writings of critics like Robert Hale and Morris Cohen went out of style as American society moved through and after the New Deal. They were overwhelmed by the programmatic apparatus that emerged after World War II and the modern liberal style of the welfare state.<sup>452</sup> As the 1950s wore on, these critiques were largely understood to have been absorbed—lessons learned, it had been time to move on—thus triggering the occasional label of the “post-realist” generation of legal process scholarship.<sup>453</sup> In the 1960s and 1970s, however, this dominant approach was gradually joined by a two-pronged resurrection. On the one hand was a revival of classic liberal pictures about the efficacy of the free market.<sup>454</sup> On the other, American legal academia experienced the emergence of a second wave of critique focused on those background rules constituting the classic and modern images of the market-state relation.<sup>455</sup> Duncan Kennedy is emblematic.<sup>456</sup>

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451. *Id.* at 591.

452. THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 174, at 210.

453. *Id.*

454. *See supra* Part I.C.

455. There is a large critical literature on the political economy of the last third of the twentieth century. A few examples include: RICHARD S. MARKOVITS, TRUTH OR ECONOMICS: ON THE DEFINITION, PREDICTION, AND RELEVANCE OF ECONOMIC PRODUCTIVITY (2008); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); UNGER, *supra* note 175; STEVEN K. VOGEL, FREER MARKETS, MORE RULES: REGULATORY REFORM IN ADVANCED INDUSTRIAL COUNTRIES (1996); Richard Abel, *Torts*, in THE POLITICS OF LAW, *supra* note 9, at 326; C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFFAIRS 3 (1975); Morton J. Horwitz, *The Doctrine of Objective Causation*, in THE POLITICS OF LAW, *supra* note 9, at 360; Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special*

In *The Role of Law in Economic Thought*, Kennedy rehearsed some of Hale and Cohen's points, but elaborated it them in a new way: *the economics of both laissez faire, as well as the welfare school, both depended in a constitutive way on the work of a relatively autonomous "legal consciousness."*<sup>457</sup> Kennedy began with the classical problem

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*Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599 (1991); Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661 (1989).

456. Many of Kennedy's works were seminal in the Critical Legal Studies Movement, including: Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687 (1976) ("My purpose is to examine the relationship between . . . the 'erosion of the rigid rules of the late nineteenth century theory of contractual obligation' and the 'socialization of our theory of contract[.]'" (emphasis omitted)); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985) [hereinafter Kennedy, *The Role of Law in Economic Thought*] (discussing, in four essays, how nineteenth century economic thought "managed to maintain the illusion of coherence"); Kennedy, *supra* note 1, at 209 ("Introduc[ing] the reader to a method for understanding the political significance of legal thinking, a method that might be called structuralist or phenomenological, or neo-Marxist, or all three together."). Many will no doubt expect Duncan Kennedy's work to be most obviously connected with what came to be known as "the indeterminacy thesis." See, e.g., Kennedy, *supra* note 1, at 362 n.56. While indeterminacy and contradiction are certainly relevant to the critical image I am constructing, insofar as critics showed how ideas like liberty, property, and contract suffered from an abuse of deductive reasoning at the hands of the classics, the focus here is on the public-private distinction and its association with political economy.

457. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 993. Duncan Kennedy has described relative autonomy, or "circular causation," as a situation where "a small change in one factor initiates a small change in another factor, which 'feeds back' or reinforces the first change. This initiates a second change in the second factor, another reaction back, and so forth, until the system restabilizes at a new level that is much further from the starting point than would seem plausible if we looked at the first small change in isolation." KENNEDY, *supra* note 391, at 92. The debate on the autonomy of legal systems, as I have suggested in the movement from Marx to Hale to Kennedy, has a long pedigree. After Marx, a serious effort to understand the social nature of law was attempted by Max Weber, who believed that a unique quality of classic liberalism was its ability to develop a legal mode of thought that was autonomous from other forms of social thought. MAX WEBER, 2 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 641-44 (Guenther Roth & Claus Wittich eds., 1968). The autonomy of the legal system served economic needs, since autonomy brought with it a sense of predictability. *Id.* at 655. Legal

of how to show, on the one hand, that government was compatible with natural freedom (what Locke had set out to do), and on the other hand, that they needed to identify certain principles that would be able to reliably distinguish “good government” from the bad.<sup>458</sup> In this vein, classic economists needed an argument about the inherent justness of property and contract, so that the attendant distributions of wealth could consequently be justified.<sup>459</sup> The fact was, however, that writers in the classic style never produced any legal theory at all, and were content instead to label property and contract as “sacred” and “natural” as a matter of definition.<sup>460</sup> Whatever these terms might mean in practice, that meaning would be deduced through the power of natural reason.<sup>461</sup> This idea, as we have seen, was opened up by writers like Hale and Cohen, who attacked the idea that there was anything neutral or natural about those terms, but that instead they were highly political and coercive.<sup>462</sup> As Kennedy reinforced: “It is therefore simply nonsensical to claim that property and contract *in the abstract* define a regime that is free and just. Before we can even begin to assess such a statement, we have to know *what* property and *what* contract.”<sup>463</sup> Writers in the classic style failed to ask these questions, paving the way for those who would.

Kennedy suggested that a fundamental reason why this failure was obscured was the emergence of a dominant subsystem<sup>464</sup> within late nineteenth century legal

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autonomy also served political needs, as Locke had also argued: in order for government to be legitimate, executive and judicial authority needed to exist independently of individual caprice. *Id.* at 652-53.

458. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 949.

459. *Id.* at 949-50.

460. *Id.* at 950.

461. *See id.*

462. *See supra* Part II.B.

463. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 952.

464. Borrowing from Structuralist works like Claude Levi-Strauss’ *The Savage Mind* and Jean Piaget’s *Play, Dreams, and Imitation in Childhood*, Kennedy explained that his idea of “subsystem” utilized “a small set of conceptual building blocks, along with a small set of typical arguments about as to how the concepts should be applied, to produce results that seem to the jurists involved to have a high level of coherence across within and across legal fields.” DUNCAN

consciousness.<sup>465</sup> Calling the subsystem “classical legal thought,” Kennedy argued that the classic liberal tendency to assume the naturalness of property and contract was made possible through the judicial embrace of a Lockean theory of property, along with an idea that the value of a product was a function of the labor that had gone into it.<sup>466</sup> Simultaneously, classical jurists developed the notion of freedom of contract,<sup>467</sup> to which we have seen Morris Cohen’s response.<sup>468</sup> In both cases, classical legal thought worked out a sharp distinction between public and private law, and the image of government power as belonging to the former and

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KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT*, at xiv-xv (Beard Books 2006).

465. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 952. Orly Lobel has explained that there are two contemporaneous tracks in the use of the term “legal consciousness.” Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 n.1 (2007). The first is the one being used here, as developed by Duncan Kennedy. *Id.* In the other, “sociolegal researchers have drawn on empirical data to explore the evaluation of legality made by ordinary citizens in everyday life.” *Id.*; *see also* PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 45-49 (1998) (discussing different forms of legal consciousness); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 62 (1990) (describing legal consciousness as arising from one’s life experiences); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC’Y REV. 1055, 1058-59 (2000) (describing the study of legal consciousness as a means of exploring the ways people do and do not think about the law). As Lobel states:

Legal consciousness research in this second stream is described as the examination of:

the role of law (broadly conceived) and its role in constructing understandings, affecting actions, and shaping various aspects of social life. It centers on the study of individuals’ experiences with law and legal norms, decisions about legal compliance, and a detailed exploration of the subtle ways in which law affects the everyday lives of individuals to articulate the various understandings of law/legality that people have and use to construct their understanding of their world.

Lobel, *supra*, at 937 n.1 (quoting Nielsen, *supra*, at 1059).

466. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 953.

467. *Id.*

468. *See supra* notes 395-97 and accompanying text.

never the latter.<sup>469</sup> In terms of how this belief system assisted classical economists by providing a working theory:

The classical legal thinkers provided crucial support for the labor theory of value by showing that the idea of respect for the labor of others could, all by itself, generate through the process of legal reasoning a vast, detailed code of particular rules about what . . . constituted an actionable injury to property. They provided crucial support for the theory of free exchange by showing that the abstract notion of freedom could generate, also by the strictly rational processes of the law, an equally complex code of rules of contract, agency, corporations, and so forth.<sup>470</sup>

The deductive aspect of classical legal thought was essential to arguing that ongoing state efforts in support of property and contract institutions were natural and not coercive.<sup>471</sup> If as a starting point it was believed that property and contract were sacred, and that it was possible to derive from those starting points entire systems of common law rules, then those elaborated systems could partake of that same sacred quality.<sup>472</sup> Conversely, if state action could not be reeled back towards a will theory and tacit consent, a court would be on solid ground in proclaiming state action to be coercive, and more importantly, necessarily reducing incentives to labor, and then wealth.<sup>473</sup>

Tying a nice ribbon on it, classical legal thought imagined constitutional law as the enforcing mechanism. On the one hand, sovereign powers would come explicitly into the hands of an individual claimant when he bore an action against an organ of the state interfering with his will. On the other, as Cohen and Hale argued, sovereign powers also came into the hands of an individual any time another private party interfered with his will, though in these cases the power of the state would be channeled through property, contract, and tort law.<sup>474</sup> It was constitutional interpretation

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469. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 953-54.

470. *Id.* at 955.

471. *Id.* at 956.

472. *Id.*

473. *Id.* at 956-57.

474. *See supra* Part II.B.

that managed this dual track, along with what Kennedy called the “capstone of the classical edifice.”<sup>475</sup>

In his characterization of a “legal consciousness” which supported the classic liberal style of viewing law as an important, though entirely passive component of political economy,<sup>476</sup> Kennedy provided a more comprehensive style of critique than was available in the writings of Hale and Cohen. Whereas these earlier writers showed how the liberal versions of property and contract law had distributive consequences, they never offered an account that attempted to analyze the structure of the law in a way that would suggest that these coercive restrictions were attributable to something deeper than the mere sway of political power.<sup>477</sup> In *The Rise and Fall of Classical Legal Thought*, Kennedy explained that his use of “consciousness” was an attempt to pry from the hands of modern liberal historiographers the idea that “conservative politics” had been the real and only source of laissez-faire jurisprudence.<sup>478</sup> This view ignored the possibility that it was the structure of legal argument itself, with “a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest.”<sup>479</sup> Or, as David Trubek put it, a critique of legal consciousness provides the corrective to the cynical error which understands “legal order as merely a mask behind which the rich and powerful hide their continued domination and exploitation of the poor and powerless.”<sup>480</sup> These social forces were undeniably important, to be sure, but any attempt to understand the constitutive role of law in economic thought would fail if it ignored the mediating

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475. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 957-58.

476. *Id.* at 957.

477. See Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 204 (2009) (“[T]he legal realists generally tried to crack legal formalism at certain weak points rather than theorizing it from some overarching standpoint.”).

478. KENNEDY, *supra* note 464, at 1-2.

479. *Id.* at 2.

480. David M. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529, 544 (1977).



effects of legal consciousness.<sup>481</sup> Nevertheless, Kennedy needed to thread the needle, admitting that though legal consciousness must be autonomous, that autonomy could never be anything more than relative.<sup>482</sup> At the end of the day, “[l]egal institutions and ideas have a dynamic, or dialectical, or constitutive relationship to economic activity.”<sup>483</sup>

In addition the notion of classical legal thought as a form of legal consciousness, a second advance was the adaptation of the critique to neoclassical microeconomics, and the argument that while modern economists had distanced themselves from a great number of classic positions, they remained tied to a similar image of background legal rules.<sup>484</sup> In particular, Kennedy saw this shared misunderstanding in two ways. First, the neoclassical notion of perfect competition, predicated on free exchange, indulges in the same old idea that there is one specific set of legal arrangements corresponding to an idea of “freedom” in the marketplace.<sup>485</sup> This assumption, again, ignores the indeterminacy of property and contract. But the persistence of this assumption generates the second misunderstanding, also of a piece with its classic ancestor. The assumption that a determinate legal background exists, and that this background, as distilled through the common law, represents the efficient allocation of resources in the free market, presents us again with the dichotomy between the sphere of private enterprise and the opposing sphere of

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481. KENNEDY, *supra* note 464, at 2. The idea of mediation has been an important element in explaining how it is that most jurists tend to be at ease in the face of repeated contradiction and incoherence. Roberto Unger has explained that the dominant form of legal analysis:

[W]orks by putting a good face—indeed the best possible face—on as much of law as it can, and therefore also on the institutional arrangements that take in law their detailed and distinctive form. It must restrict anomaly, for what cannot be reconciled with the schemes of policy and principle must eventually be rejected as mistaken.

UNGER, *supra* note 175, at 40.

482. KENNEDY, *supra* note 464, at 4.

483. *Id.* at 2; see also Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 293, at 19, 19.

484. Kennedy, *The Role of Law in Economic Thought*, *supra* note 456, at 960.

485. *Id.* at 964-65.

government regulation.<sup>486</sup> Unlike the classical economists, those performing in the modern liberal style will refrain from saying where, as a matter of principle, the appropriate line between the market and the state should lie. But as Kennedy explains: “The apologetic effect comes from the framing of the issue, rather than through the kind of claim to ethical closure that was typical of the Classics. Yet the effect may be *more* powerful for having shed its too obviously contestable pretensions.”<sup>487</sup>

Summing up this little tour of some of critical theory’s biggest hits, the discussion began with Marx’s classic critique of the liberal distinction between a naturalized civil society and an artificial political society. While admitting the progressive nature of this distinction, Marx argued that the result was a deeply constrained and dehumanizing way to think about human freedom. In the liberal conception, Marx explained, we are told that we are free only when we are alone, and told we are a part of a community only when it really doesn’t matter. To be truly free, to be truly human, Marx concluded, we need to recognize that our humanity is only realizable through community, and not in opposition to it. What legal realism brought, here in the context of some of Hale and Cohen’s work, was a close look at the role of law in the construction of the naturalized civil society that Marx was criticizing. As Hale, Cohen, and others made clear, the liberal distinction between market freedom and government control was an illusion. Looking carefully at property and contract regimes operating in the early decades of twentieth century American legal thought, these writers showed how property and contract—the legal foundations of liberal markets—were coercive and distributive, and not neutral and “free.” Pushing the critique further, the discussion moved to Duncan Kennedy and the work of the critical legal studies movement. Not only was the distinction between market and state dehumanizing (Marx) and illusory (Cohen and Hale), it was also structured by a form of legal consciousness. As a consequence, the attack on liberal legalism would require more than an acquaintance with the “politics of law”—it would also need to master the “law of politics.”

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486. *Id.* at 963.

487. *Id.* at 964.

## CONCLUSION

This Article has presented snapshot illustrations of the dominant images of political economy in liberal political theory. Central to each of these images is an idea about human freedom made possible in a competitive marketplace, offset against an idea about governmental control and political power. As we have seen in the work of John Locke, human beings are natural rights-bearers, and the purpose of the state is to protect and promote those rights. Freedom is understood here as the very absence of coercion. Similarly, Friedrich Hayek taught that individualism is the highest of all goods, and that its greatest enemy is the interventionist state and its tendency to control the competitive process. Even for those liberals less worried about the road to fascism, whether they were Henry Carter Adams, Frank Knight, or John Maynard Keynes, the star of freedom was still viewed through the lens of control. These liberals simply believed freedom to work differently than the other liberals (whether old or new)—and not that freedom *was* coerced, or that competition could only be realized *through* control.

Of course, the liberal vision of a natural society carved away from political society has been a subject of criticism since the beginnings of classical social theory. By the time Duncan Kennedy made his assertion about liberalism's fundamental contradiction in the 1970s, it wasn't startling because it was new. It was startling because it was total. Was the contradiction really everywhere in such a structure? Is that really the way knowledge and power were deployed throughout the legal system? As it inched towards becoming a cliché, the notion that all law was in the shadow of a liberal contradiction diminished.

A generation later, this basic insight should be revisited not only for its analytical grace but also for its practical power. Consider the state of the game in the second decade of the twenty-first century. A few years out from the recession of 2008, and with the possibility of a "double-dip" still very real, there's no end to the back and forth missives between modern liberals and classic/neoliberals. What seems guaranteed is that the conversation will continue to be framed in terms of naturally occurring competitive markets, and the greater or lesser degree to which the state should intervene in those markets. The discourse is interminable, and for good reason.

As Bernard Harcourt has recently argued, and as laid out in the work of Marx, Cohen, Hale, and Kennedy, free markets are illusions.<sup>488</sup> At least in the context of liberal theory, the concept of free competition is a concept requiring an extensive amount of background and foreground rules. Without these rules, the concept just couldn't exist. As a consequence, it is literally illusory to think that we are dealing with a choice between a pre-political space that is off-limits, and a coercive political state. Social life is both constituted and managed through law, at least in the world of liberalism. Hence the contradiction: liberal freedom *is* liberal control.

But here's where the pay-off comes in, a pay-off yet to be cashed. There's no need to see this contradiction—the illusion of the free market—as an unavoidable and total social condition. Instead, we can see liberal legalism as merely a set of styles, techniques, or approaches to the canvass of social life.<sup>489</sup> The critique of liberal legalism

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488. HARCOURT, *supra* note 15, at 44 (“The categories of ‘free market’ and ‘regulated,’ it turns out, hinder rather than help. They are, in effect, illusory and distort rather than advance our knowledge.”).

489. In this context, some writers have looked for help in Immanuel Kant's theory of aesthetic judgments. See IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* (Paul Guyer ed., Paul Guyer & Eric Matthews trans., 2000) (1790). There is a sizable literature on Kant's theory of aesthetic judgments. See, e.g., THE CAMBRIDGE COMPANION TO KANT (Paul Guyer ed., 1992); HANNAH ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* (Ronald Beiner ed., 1982). For Kant, there are two ways to think about the universal judgments we make about the goodness of any given thing. First is the “objectively universal” judgment, which is valid for all human beings due to the rightness of a particular concept. KANT, *supra*, at 100. This kind of judgment is therefore *logical*. In opposition to this form of reflection is what Kant called the “subjectively universal” judgment. *Id.* This sort of judgment is not based on the objective validity of a concept, but is instead generated by the subjective perception of an object. See *id.* The universality of this second kind of judgment therefore emerges out of our subjective perceptions, as opposed to being connected up with an objectively valid first principle. Say that I look at a painting, and as I try to understand it and imagine it, I either determine that it is “good” or not. This determination of the painting's worth, according to Kant, is just as different from (1) saying that a meal is “good” as it is from (2) saying that it is “good” to tell the truth. A determination that a painting is good lies somewhere between these two—if I say that a meal is good, I am not likely to be claiming that it will be perceived as good for all people, and if I say that it is good to tell the truth, I *am* likely to be claiming that this is good for all people. That is, the former judgment is *entirely* subjective (the meal is good, *to me*), and the latter judgment is *entirely* objective because it is based on the universal validity of a logical concept. For Kant, the

assists us in the effort to get some distance from the idea that there must be two basic models of market society in the world—to see the difference between the style with which we approach the canvass, and the canvass itself. After having seen that markets are indeterminate, it also enables us in the exercise of our weakened powers of institutional imagination. It is in the service of Roberto Unger’s plea that we come to understand the versions of market society we have seen in the past two centuries as only illustrations, and not as the actual exhaustion of what market societies might ever become, that this critique should be revitalized today.<sup>490</sup>

As a way of getting a feel for this, imagine for a moment that you are an attorney in Washington, D.C., and after lunch decide to take a quick stroll through the National Gallery of Art. Passing along, you notice Grant Wood’s 1936 oil painting *Haying*, and are struck by its curious portrayal of a farm.<sup>491</sup> Quite obviously managed by human hands, the farmer is away, as if plucked by aliens. Later, after a meeting at the Federal Trade Commission, you take measure of Michael Lantz’s 1942 sculpture, *Man Controlling Trade*, which you’ve passed a dozen times before.<sup>492</sup> Like the painting, this work also depicts a human connection with nature, though in a very different setting, with very different effects. Here, man is powerful and aggressive, locked in struggle, though in comparison with the might of the horse, likely to lose. This image also strikes

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aesthetic judgment about a painting sits in the middle of these totally subjective and objective forms of judgment. It is subjective, for sure, but the judgment also aspires to universalism. Why? “When we call something beautiful, the pleasure that we feel *is expected of everyone else* in the judgment of taste as necessary . . .” *Id.* at 103 (emphasis added). Or in other words, while we know that we cannot be objectively right in our view that this is a good painting, we want it to be accepted universally because we suspect that everybody should likely have the same cognitive process that we do. But we also know that they do not, and so Kant called aesthetic judgments “subjectively universal.”

490. See, e.g., UNGER, *FREE TRADE REIMAGINED*, *supra* note 16, at 16.

491. Grant Wood, *Haying* (1936) (National Gallery of Art). For an image of *Haying*, see HAY IN ART, <http://www.hayinart.com/images/2304.jpg> (last visited Mar. 3, 2012).

492. Michael Lantz, *Man Controlling Trade* (1942) (Smithsonian American Art Institution). For an image of *Man Controlling Trade*, see *The Federal Trade Commission Headquarters*, FED. TRADE COMM’N, [http://www.ftc.gov/ftc/hq\\_building.shtm](http://www.ftc.gov/ftc/hq_building.shtm) (last visited Mar. 3, 2012).

you as beautiful, though in a far more visceral way than with Wood's eerie presentation of the farmer-less farm. On your way home from work, you walk up Fourteenth Street, pass the *The Black Cat*, and notice *My Bloody Valentine's* famous "wall of sound" blaring out of the venue's speakers.<sup>493</sup> You've heard it before, but at this moment, you're struck by the incredibly loud warp of the guitars, and the oddly "unified" confluence of all the dissonance. Walking through the door of your home, you wonder what it might have been like if you had been a painter or musician, instead of the legal technician you apparently became. Perhaps you tell yourself that your work is your art, and perhaps you're convinced.

But probably not. We tend to think that there is something objective about law that art can bypass or maybe even avoid entirely. As many working lawyers understand, however, this ostensible objectivity doesn't actually turn out to be very reliable or determinate. If objectivity doesn't separate law from art, perhaps the difference turns instead on the apparently incomparable sorts of stakes involved in legal disputes and artistic disagreements? This distinction, after all, can hardly be contested. With this in mind, we should ask again: should the fact that legal disputes and artistic disagreements yield very different kinds of consequences keep us from analogizing legal styles from styles of art?<sup>494</sup> Maybe, but consider the impression of the following parallels.

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493. MY BLOODY VALENTINE, *LOVELESS* (Creation Records 1989).

494. Pierre Schlag has described the sometimes perilous decision to view law in aesthetic terms in the following way:

Many thinkers view aesthetic judgments as subjective and ungrounded, impervious to rational argument. Meanwhile, law is written "in a field of pain and death." To suggest then that law is an aesthetic enterprise can easily seem cavalier, ethically obtuse, even cruel. We are confronted with the disturbing possibility that law paints its order of pain and death on human beings with no more ethical warrant or rational grounding than an artist who applies paint to canvas.

I do not dispute—in fact, I would affirm—these ethical concerns and moral judgments here. But the notion of aesthetics I wish to invoke is neither confined to the realm of art nor preoccupied with questions of beauty.

Wood's suggestive portrayal of the farmer-less farm feels familiar. In *Haying*, nature is in the foreground—indeed, the natural world is what this painting appears to be completely about. And yet, the strange forms of hay, the jug, the wheelbarrow, the farmhouse itself, all clue us in to the fact that in order for this farm to succeed, and to understand the nature of the farm as it really is, we must know the work of the human hand. Man is clearly in this painting, and yet he is nowhere. Perhaps we can say this is an image in the classic liberal style.

In *Man Controlling Trade*, the impressive struggle of a highly “interventionist” wrangler attempts to wrestle into control a wild animal. It is in no way clear from the image whether the man will succeed in his effort to tame the horse, or even that he doing it in the right way. We don't

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Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050 (2002) (footnotes omitted). As for the idea that art has its own political stakes, the idea is an old one:

There are two ‘positions on objectivity’ which are constantly at war with one another, even when intellectual life falsely presents them as at peace. A work of art that is committed strips the magic from a work of art that is content to be a fetish, an idle pastime for those who would like to sleep through the deluge that threatens them, in an apoliticism that is in fact deeply political. For the committed, such works are a distraction from the battle of real interests, in which no one is any longer exempt from the conflict between the two great blocs. The possibility of intellectual life itself depends on this conflict to such an extent that only blind illusion can insist on rights that may be shattered tomorrow. For autonomous works of art, however, such considerations, and the conception of art which underlies them, are themselves the spiritual catastrophe of which the committed keep warning. Once the life of the mind renounces the duty and liberty of its own pure objectification, it has abdicated. Thereafter, works of art merely assimilate themselves to the brute existence against which they protest, in forms so ephemeral . . . that from their first day they belong to the seminars in which they inevitably end. The menacing thrust of the antithesis is a reminder of how precarious the position of art is today.

Theodor Adorno, *Commitment*, in AESTHETIC AND POLITICS 177, 177-78 (Ronald Taylor trans., 2002); see also ROLAND BARTHES, *The Photographic Message*, in IMAGE-MUSIC-TEXT 15, 19-20 (Stephen Heath trans., 1977) (1977) (“[W]hen one wants to be ‘neutral’, ‘objective’, one strives to copy reality meticulously, as though the analogical were a factor of resistance against the investment of values (such at least is the definition of aesthetic ‘realism’); how then can the photography be at once ‘objective’ and ‘invested’, natural and cultural?”).

even know for sure that he shouldn't just let the animal alone. What we do know, however, is that man's relationship with his opponent is present, active, and alive. Unlike in Wood's painting, where we can see solitary man's passive footprint while the farmer himself is secreted away, in this sculpture we find a strong and capable human being, representing a willful society, exercising control over the world. This image, quite intentionally, is in the modern liberal style.

As for a musical rendering of the critical style, *My Bloody Valentine's* "wall of sound" seems as good as anything. Unlike the two prior works dealing with man and nature, here there is a conspicuous lack of anything meant to reflect the "natural" world. In its place is a pulsing force of fuzz and static—the technical connection between guitar strings and amplifiers. Further, this image is almost dedifferentiated,<sup>495</sup> as the sounds have become so entangled through the distortion that whatever independent sources may have at once existed, they now come through as something resembling an integrated roar. Also analogically useful is the similar way in which *My Bloody Valentine* and some types of critique relate to taste: it would seem that for many, it's something that you just find appealing, or you don't.

So how does any of this help in advancing the kinds of stale conversations we see re-played in the course of our

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495. Pierre Schlag has moved the critical style in a direction which is in a kind of combative dialogue with the work of Hale, Cohen, and Kennedy: though the early move to show how law constituted the market was surely correct, it was misleading in that it failed to realize that the market just as equally made the law. Even after we grant the complexity of a "relatively autonomous" legal consciousness, Schlag argues that its purported distinctions between law and economics simply cannot stand in light of what he calls the dedifferentiation problem. Schlag's analysis of the dedifferentiation problem does take account of Luhmann, but only in a footnote:

The great thinker of differentiation in social systems is Niklas Luhmann. Oddly, however, his thinking has limited relevance here. The reason is simple: Luhmann writes from a perspective that assumes the cogency of differentiation in *his own* thinking. He presumes the perspicuousness and relevance of his own differentiations. And accordingly, he *bypasses* the intellectual problem raised here.

Pierre Schlag, *The Dedifferentiation Problem*, 42 *CONT. PHILOS. REV.* 35, 37 n.7 (2009).



public life? How might the art analogy open the way to a reinvigorated institutional imagination?

One possible answer may lie in the condition of contemporary legal analysis. In some versions of the story, prior generations of jurists experienced stretches of time in which particular approaches to legal reasoning were dominated by certain sets of ideas and practices. At one moment, there was believed to be a consensus not only about formalist techniques for resolving legal questions, but also about larger background questions regarding the natural and necessary content of the private law in conjunction with an artificial and synthetic public law apparatus. Whether or not these beliefs were consistently played out at the time is one matter—but the fact of a perceived consensus is another, a consensus about these ideas being *right*. A later generation experienced the degradation of these ideas, and the ascension of functionalist techniques for resolving legal questions, and a widely held belief that the private law was appropriately subject to public manipulation. At this time, these ideas were believed to be *right*.

Today, there seems little evidence that there might be consensus about the right kinds of legal techniques, or about the right kind of balance between the public and the private. Even more, the enormous influence of American pragmatism appears to have produced a situation in which it is unusual for even so-called “conservatives” and “liberals” to consistently favor any given approach. The typical stand is instead to pick and choose, eclectically serving as classic at one moment, modern at another, formalist in one instance, functional in the next. The eclectic pragmatist can even deploy the critical style if she finds that it will be pragmatic to do so.<sup>496</sup>

The upshot is a condition in which there is a widespread lack of faith regarding the intrinsic truth of any given style of legal analysis—only a faith that there is something valuable about pragmatism. In this terrain, the old and repetitive conversations about more or less government feel especially unhelpful. Most of us know, nowadays, that in a conversation about the value of the free market, it is entirely acceptable to emphasize the problem of market

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496. Desautels-Stein, *supra* note 12, at 590-94.

failure at one moment and government failure at the next. Context is what matters, not ideology.

In a way, what the coming of pragmatism has done is shed light on the idea that thinking about law as art is perhaps ineluctable. That is, it is not that we might have something to gain by choosing to borrow a new vocabulary, but that law and art have always been intertwined—there's no choosing about it, just whether we want to keep pretending or not. But whether we like our pragmatism light or heavy—by disclosing the fact of our collective loss of faith in any single perspective on the market-state antagonism (i.e., the “light” version), or by suggesting that law *was already* art (i.e., the “heavy” version)—why not take the next step? Why not view liberal legalism as an aesthetic approach to political economy? Why not open the conversation up to the notion that “free markets” are and have always been legal concepts? Why not now?