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Law and Governance in the 21st Century Regulatory State

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Book Review Essay

Law and Governance in the 21st Century Regulatory State

LAW AND NEW GOVERNANCE IN THE EU AND THE US. Gráinne de Búrca[†] & Joanne Scott,^{††} eds. Portland, OR: Hart Publishing, 2006. Pp. 440. \$70.00.

THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS. By Lisa Heinzerling[‡] & Mark V. Tushnet.^{‡‡} New York, NY: Oxford University Press, 2006. Pp. 872. \$99.00.

Reviewed by Jason M. Solomon^{*}

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I. Introduction

In 1996, a Democratic president, Bill Clinton, famously declared: “The era of big [g]overnment is over.”¹ The question for U.S. policymakers and legal scholars ever since has been: what *is* taking—indeed, what *should* take—the place of the “command-and-control” post-New Deal regulatory state?

Legal scholarship and pedagogy on the regulatory state are at parallel, important junctures, and two new books stand at the cutting edge. The first, *Law and New Governance in the EU and the US*,² edited by Gráinne de Búrca and Joanne Scott, is a collection of works by some of the leading scholars in the “new governance” field. New governance scholars have both described and laid the theoretical foundation for what they see as promising and innovative efforts to address public problems.³ These efforts attempt to be less hierarchical, more transparent, and more democratic than traditional top-down forms of regulation.

The second, *The Regulatory and Administrative State: Materials, Cases, Comments*,⁴ by Lisa Heinzerling and Mark Tushnet, is one of the first case-books for a class on the regulatory state and may have helped persuade Harvard’s faculty that adding such a class to the first-year curriculum was feasible as part of their recent curricular reform.⁵ Moreover, as the first in Oxford University Press’s Twenty-First Century Legal Education series,⁶ an unusual foray by the elite academic publisher into books for American legal education, the book will no doubt be influential at many elite law schools. Besides Harvard, Stanford is also undertaking significant curricular reform,

1. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996).

2. LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) [hereinafter LAW AND NEW GOVERNANCE].

3. See, e.g., Peter Cane, *Review of Executive Action*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 146 (Peter Cane & Mark Tushnet eds., 2003) (discussing administrative law); Christine Parker & John Braithwaite, *Regulation*, in THE OXFORD HANDBOOK OF LEGAL STUDIES, *supra*, at 119 (discussing regulation for the purpose of furthering “democratic experimentalism”); Michael Taggart, *The Nature and Functions of the State*, in THE OXFORD HANDBOOK OF LEGAL STUDIES, *supra*, at 101 (discussing privatization).

4. LISA HEINZERLING & MARK V. TUSHNET, THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS (2006).

5. See HLS: News: HLS Faculty Unanimously Approves First-Year Curricular Reform, http://www.law.harvard.edu/news/2006/10/06_curriculum.php (last updated Oct. 15, 2006) [hereinafter HLS Curricular Reform] (discussing Harvard Law School’s curricular reform, including the addition of a first-year course on legislation and regulation). Tushnet teaches at Harvard, where one of Clinton’s chief domestic-policy aides from the second term, Elena Kagan, is the dean. See HLS Office of the Dean: Dean Kagan Biography, <http://www.law.harvard.edu/dean/bio.php> (last updated July 19, 2006).

6. The series is edited by Larry Kramer, the dean of Stanford Law School, which is currently in the middle of curricular reform, see Tresa Baldas, *Several Schools Adjust Their Curriculums*, NAT’L L.J., Sept. 10, 2007, at S1, S1; Martha Minow, who spearheaded Harvard’s effort, see HLS Curricular Reform, *supra* note 5 (noting that Minow chaired Harvard’s curricular-reform process); and Tushnet himself. Tushnet also has a chapter in *Law and New Governance*.

though focusing more on the second and third years,⁷ and Dean Edward Rubin of Vanderbilt is leading an ambitious effort at that school.⁸

In this Review, I aim to link these two books and the developments in the legal academy for which they stand: the scholarly effort to rethink the role of the state in the twenty-first century and the curricular effort to make courses on the regulatory state a core part of legal education. I think both books are tremendously important and largely succeed on their own terms. But I argue in this Review that they share a common flaw: a lack of attention to the “adversarial legalism” that pervades American policymaking and implementation.⁹

Part II of this Review describes the emerging new governance literature, as captured in *Law and New Governance*, and suggests future directions for new governance scholarship. Part III looks at and assesses the pedagogical approach taken in *The Regulatory and Administrative State*, locating it in the context of recent curricular reforms.

Part IV critiques both books on a common ground—a lack of attention to adversarial legalism and the role of lawyers—and argues that this inadequacy threatens both the explanatory power of new governance as an overarching regulatory theory and the pedagogical potential of promising curricular reforms. I argue that a more nuanced account of how new governance schemes both arise and play out “on the ground” in the culture of adversarial legalism will help strengthen the theory’s explanatory power. Part V concludes by arguing that both the scholarly and pedagogical developments described here could benefit from greater attention to the other.

II. *Law and New Governance*

Under a traditional, command-and-control regulatory model—embodied in the post-New Deal administrative state in the United States and the harmonization efforts of the European Union—the state sets rules or standards

7. See Baldas, *supra* note 6, at S1 (quoting statements by Dean Larry Kramer that the focus of curricular reform at Stanford Law School is on the second and third years).

8. See Grace Renshaw, *A Memorable Year*, VAND. LAW., Summer 2006, at 8, 11, available at http://grenshaw.ventress.com/lawyer/memorable_year.html (discussing broad plans for curricular reform at Vanderbilt Law School). Rubin is himself a leading scholar in regulatory theory, see, e.g., EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005), and is also chairing the Association of American Law Schools’ (AALS) committee on curriculum development. E-mail from Gloria L. Groover, Human Resources Manager, Association of American Law Schools, to Rebecca Kalmus, Member, Texas Law Review (Nov. 20, 2007) (on file with the Texas Law Review). Vanderbilt recently adopted a required four-credit Regulatory State course in the first year as part of this curriculum-reform effort. See VANDERBILT LAW SCHOOL’S CURRICULAR REFORM INITIATIVE, available at <http://www.aals.org/documents/curriculum/documents/VanderbiltCurricularReform.pdf>.

9. I borrow this phrase from ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001), where he describes adversarial legalism as a “method of policymaking and dispute resolution” characterized by formal legal contestation and litigant activism. *Id.* at 9. Kagan sees adversarial legalism as “a mode of governance, embedded in the political culture and political structure of the United States.” *Id.* at 5.

through the legislature or agencies delegated power by the legislature, and private actors must comply with those rules. The state enforces those rules through inspection and other means, sometimes with the help of private attorneys general.

But the command-and-control model has come under attack in the last few decades on a number of fronts. Primary among them is the inefficiency and stickiness of the rulemaking process.¹⁰ In a world of uncertainty, legislatures and agencies are unable to predict what the best rules will be down the road, and the mechanisms for monitoring and adjusting the rules in light of experience are severely lacking.¹¹ As Michael Dorf, one of the leading new governance scholars, puts it, “[I]n the conditions of modern life, people increasingly find that their problem is not so much an inability to persuade those with different interests or viewpoints of what to do; their problem is that no one has a complete solution to what collectively ails them.”¹² There is also considerable evidence that compliance levels are disappointingly low.¹³ Finally, scarce state resources mean that agencies are unable to sufficiently help private actors comply, to enforce the law, or to monitor and update rules in light of experience.

New governance, then, arises out of this critique of the command-and-control model. Under the rubric of democratic experimentalism, scholars drawing on a pragmatist tradition have presented compelling case studies of new modes of regulation that incorporate robust public participation, benchmarking, and information sharing to solve public problems.¹⁴ Administrative law scholars are observing that the traditional model of the administrative state—where regulatory agencies with expertise issue rules that regulated entities must follow—is giving way to a mode of “collaborative governance,” where agencies and industry representatives work together to define and revise standards.¹⁵ Together, these scholarly

10. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 3 (1997) (“Regulation is currently under attack from all quarters as inefficient, ineffective, and undemocratic.”).

11. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 278, 278–79 (1998) (stating that “the increasing volatility and complexity of social and economic circumstances” has made it more difficult for agencies and Congress to establish uniform rules).

12. Michael C. Dorf, *After Bureaucracy*, 71 U. CHI. L. REV. 1245, 1269 (2004).

13. See Freeman, *supra* note 10, at 3 (“[T]hat implementation [of regulation] is inconsistent[] and that enforcement is at best sporadic are by now uncontroversial claims.”); *id.* at 14–17 (continuing the discussion of enforcement problems).

14. See Dorf & Sabel, *supra* note 11, at 323–36 (detailing new methods of regulating, such as family support services in several states, community policing in Chicago, and military procurement in the U.S. Navy).

15. See Freeman, *supra* note 10, at 33, 33–34 (noting that a process where regulated entities negotiate the substance of a rule with the regulating agency is “increasingly common in both environmental and health and safety regulation”).

strands make up the field of new governance, a series of efforts to reconceive the relationship between the state and those it governs.¹⁶

Like many new paradigms, new governance defines itself in large part oppositionally. The kinds of regulation encompassed in the term *new governance* tend to be less prescriptive, less top-down, and more focused on learning through monitoring than compliance with fixed rules. As one scholar put it, new governance mechanisms share emphasis on regulation through “centrally coordinated local problem solving.”¹⁷ Both in defining the problem to be addressed and devising solutions, new governance forms emphasize provisionality and revisability in light of experience.¹⁸ The public agency acts to help local actors learn from one another about best practices and ensures transparency and public participation in problem solving. In such regimes, public and private actors interact in increasingly complex and collaborative ways to address problems of public policy.

Law and New Governance is an important collection of essays on new approaches to governance in the United States and the European Union. The result of a conference at Cambridge University, the essays in this collection pursue three parallel lines of inquiry. First, the essays are “practical and empirical”—that is, they provide case studies that describe and evaluate ongoing experiments in new governance in the United States and the European Union.¹⁹ Second, the essays explore the relationship between law and new governance, with some exploring the “gap” between the two domains, others positing that new governance is “transformative” of law, and others pointing to a “hybrid” approach that might prove enduring. Third, the essays look at the relationship between new governance and constitutionalism. In the European Union context, the authors are largely asking whether new governance mechanisms can help provide a *raison d’être* for the European Union, while in the United States, the new governance scholars largely pose the model as a possible answer to the question of what the role of the state is now that the “era of big [g]overnment is over.” I discuss each of these lines of inquiry below.

A. *A Mosaic of Experimentation*

The regulatory experiments examined in these case studies differ in their origins. Most of the U.S. examples are what we might call bootstrapping, bottom-up examples of reform, originating either within

16. For an interesting theoretical account of the emergence of new governance, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

17. Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 323, 323.

18. Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 1, 3.

19. *Id.* at 1.

administrative agencies or from particular institutional actors. In the European Union, however, new governance efforts have been more deliberate and top-down as the EU Commission has funded and otherwise promoted research on such efforts.²⁰ The principal new governance method in the European Union, known as the Open Method of Coordination, involves “the setting of guidelines or objectives at EU level with the elaboration of Member State action plans or strategy reports in an iterative process intended to bring about greater coordination and mutual learning in these policy fields.”²¹ Drawing on the international-relations literature, some authors discuss this as a form of “soft law.”²²

The EU experience with new governance started with employment policy, which Claire Kilpatrick looks at in her essay. She sees EU employment governance as widespread, but only because of its “limited newness.”²³ That is, she looks beyond the key new governance innovation in this area—the Open Method of Coordination—and examines its linkages to other key aspects of EU employment governance, like legislation, spending on employment initiatives, and the establishment of fundamental rights.²⁴ De Búrca’s own contribution takes the example of an area governed clearly by a human rights model—EU race-discrimination law—and shows how the EU Council and Parliament in 2000 adopted a directive to “implement[] the principle of equal treatment”²⁵ and left it to states to do so in a new governance fashion: through “monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.”²⁶ For de Búrca, this shows the promise of a hybrid model.²⁷

Health care is addressed from both the EU and U.S. perspectives. Tamera Hervey traces new governance methods that arose from private litigation in the European Union, explaining how a classic “hard-law” process led to soft-law new governance. In responding to the litigation, EU actors developed mechanisms for funding data collection, investments in technology, and exchanges of best practices on providing health-care

20. *Id.* at 2.

21. Grainne de Búrca, *The Constitutional Challenge of New Governance in the European Union*, 28 EUR. L. REV. 814, 824, 823–24 (2003).

22. See, e.g., David M. Trubek, Patrick Cottrell & Mark Nance, “Soft Law,” “Hard Law” and EU Integration, in LAW AND NEW GOVERNANCE, *supra* note 2, at 65, 65 (noting that the nonbinding governance relations of new governance are often referred to as soft law).

23. Claire Kilpatrick, *New EU Employment Governance and Constitutionalism*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 121, 121.

24. See *id.* at 144–45 (discussing other key aspects of EU employment governance).

25. Grainne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 97, 99 (quoting Council Directive 2000/43, tit., 2000 O.J. (L 180) 22, 22 (EC)).

26. *Id.* at 101 (quoting Council Directive 2000/43, *supra* note 25, art. 11, at 25).

27. See *id.* at 119, 118–20 (observing that the European Union’s race-discrimination regime has evolved to combine a traditional “legal rights-based instrument at its core” with a framework that embodies aspects of a new governance approach).

services.²⁸ The new governance practices emerging in the United States around health care, according to Louise Trubek's account, focus on some of the same issues, with the traditional rules in the Health Insurance Portability and Accountability Act (HIPAA) of 1996²⁹ leading to the creation of a series of public and private collaboratives for implementing technology in health care while protecting data privacy.³⁰

Environmental regulation, too, has new governance aspects on both sides of the Atlantic. In the European Union, environmental assessment has a long history and, recently, a distinct experimentalist bent, according to the account by Joanne Scott and Jane Holder. The practice of reason giving and information pooling can lead to a "feedback loop" that, combined with robust public participation, can produce better outcomes.³¹ Similarly, an EU directive for protecting water quality has a distinct new governance feel, with sharing of best practices and benchmarking across member states.³² Bradley Karkkainen's account looks optimistically at two kinds of legal rules in the United States: regulatory-penalty defaults that allow parties to contract around the hard-law requirements and destabilization rights arising from citizen suits that can induce public agencies to adopt collaborative new governance approaches.³³

Occupational health and safety in the United States, the locus for some of the harshest critiques of command-and-control regulation, is the subject of Orly Lobel's account of experimentation. In recent years, the Occupational Safety and Health Administration (OSHA) has developed a variety of "cooperative programmes" that exempt firms with exemplary safety records from inspections, provide training to firms in targeted industries, and foster sharing of best practices among firms, trade associations, and unions.³⁴ Though there is some evidence that these programs have had success in reducing accident rates, one of the most promising of such programs—a Clinton-era effort to target dangerous workplaces—was struck down after the U.S. Chamber of Commerce successfully challenged it as subject to formal-

28. Tamara K. Hervey, *The European Union and the Governance of Health Care*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 179, 188–91.

29. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1996.

30. Louise G. Trubek, *New Governance Practices in US Health Care*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 245, 253–54.

31. See Joanne Scott & Jane Holder, *Law and New Environmental Governance in the European Union*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 211, 223, 223–24 ("[T]he emergence of European-level sustainability (or impact) assessment offers an example of a feedback loop in law and policy making.").

32. *Id.* at 227.

33. Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 293, 295–96.

34. Orly Lobel, *Governing Occupational Safety in the United States*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 269, 278–80.

rulemaking requirements under the Administrative Procedure Act (APA).³⁵ Lobel's account, then, combines optimism with disappointment. She concludes that a "myriad of legal barriers" must be removed for these new governance efforts to be successful.³⁶

Susan Sturm's essay on efforts to help women advance in science and engineering careers in higher education is perhaps the most cautious and domain specific of these case studies and, in part as a result, among the most compelling. Sturm demonstrates how the National Science Foundation acted as a "problem-solving intermediary" to work with university faculty, department chairs, lawyers, and other stakeholders to break down gender bias at the University of Michigan.³⁷ She illustrates the mechanisms that enabled people to genuinely collaborate and solve problems, and begins to explore the preconditions for success in other domains.³⁸

Looking across these case studies, new governance seems less a structural or institutional description and more a description of a particular epistemic approach toward the task of governance. It draws on John Dewey's pragmatist notion of learning by doing,³⁹ and with its emphasis on benchmarking and rolling best practices, draws from the "lean production" model of business organization.⁴⁰

The case studies are offered in both a descriptive and normative spirit. New forms of governance *are* emerging, according to these authors, and for improved public-policy outcomes, the more new governance, the better. Together, the essays form a mosaic that is largely, if not unequivocally, bright.

B. Are Law and New Governance Compatible?

If, however, new governance regimes are not a set of rules passed by democratic institutions that must be followed by others, are they really law? As Charles Sabel and William Simon, two of the leading new governance theorists, articulate the concern, doubts emerge as to whether new governance forms can still be "law in the sense of holding officials accountable for their acts and assuring that citizens are otherwise secure in

35. *Id.* at 279.

36. *Id.* at 287, 287–88.

37. Sturm, *supra* note 17, at 326, 337–59.

38. *Id.* at 323–25.

39. See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE, *supra* note 2, at 37, 37 & n.2 (referring to John Dewey's conception of democratic government as support for using the term *pragmatist* to describe mainstream jurisprudence).

40. See *id.* at 37–38 (arguing that the lean production model contradicts basic premises of mainstream legal theory).

the enjoyment of their rights.”⁴¹ Most of these authors take on this question in one form or another and arrive at different answers.

For a few of the authors, there is a *gap* between law and new governance that may be insurmountable. On one version of this thesis, law is simply blind to new governance schemes, as evidenced most distinctly by the failure of the EU Constitution to mention such forms of regulation.⁴² In another, more dangerous account for new governance proponents, law actively resists or obstructs attempts at new governance. An example is Lobel’s account of how the courts struck down an innovative occupational-health-and-safety program because it did not comply with formal rulemaking requirements.⁴³

For most of the authors, though, law and new governance can interact in fruitful ways. Gráinne de Búrca’s contribution tells a successful hybrid story of how judicially enforceable rights of nondiscrimination are furthered by spreading best practices to promote equality.⁴⁴ Scott and Holder’s discussion of the water-framework directive in the European Union is another example of this sort of hybrid: binding laws coupled with new governance implementation regimes.⁴⁵ Louise Trubek explains how medical malpractice litigation in the United States can lead to new governance mechanisms that improve the quality of care.⁴⁶ For these authors, law and new governance can peaceably coexist.

For Sabel and Simon, *transformation* of law by new governance is inevitable and desirable. They remind readers of the “enduring insight of nineteenth-century social theory that great innovations only arise in conditions that undermine their antecedents.”⁴⁷ New forms of governance are emerging because of the limits of law, and further undermining of law ought to be embraced.

New governance also presents, directly and indirectly, a critique of and (for some) an intentional challenge to the rights-based model of legal liberalism. For progressives seeking to strengthen norms like antidiscrimination, the road to success is not by “claiming rights,” as in a traditional regulatory model, but by “solving problems,” as in new governance.⁴⁸ Simon uses the heuristic device of Toyota’s lean production

41. Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in *LAW AND NEW GOVERNANCE*, *supra* note 2, at 395, 395.

42. See de Búrca & Scott, *supra* note 18, at 11 (“The formal constitutional framework of the EU . . . seems largely blind to the spreading practices of new governance.”).

43. See Lobel, *supra* note 34, at 279–80.

44. See de Búrca, *supra* note 25, at 97.

45. See de Búrca & Scott, *supra* note 18, at 8.

46. Trubek, *supra* note 30, at 257.

47. Sabel & Simon, *supra* note 41, at 396.

48. See William H. Simon, *Solving Problems Vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (criticizing traditional legal liberalism and favoring the problem-solving pragmatist vision).

model, calling new governance Toyota jurisprudence.⁴⁹ Under this model, stakeholders (like Toyota's workers and managers) collaborate to reduce pollution, minimize workplace injuries, raise the academic achievement of the disadvantaged, and achieve other normatively attractive goals.⁵⁰

For defenders of conventional notions of law, a primary objection to this approach, though, is that of "legitimacy" or "accountability." Sabel and Simon describe the concern this way:

The deep worry here is that the explicit provisionality of new governance framework laws obligates those who "follow" the legal rules to re-write them in the act of applying them; that this revision is at the discretion of those who do the revising; and that this inevitable exercise of discretion is incompatible with the kinds of accountability on which citizens of a democracy rightly insist in the elaboration of administrative rules and constitutional rights.⁵¹

But the very notion of accountability as a meaningful concept has been undermined, as Sabel and Simon point out. Under the traditional, hierarchical notion of principal-agent accountability, the principal—a democratically elected legislature—hands down rules, and the administrative agent implements those rules,⁵² disciplined if she goes astray by an independent judiciary tasked with enforcing accountability as a "matter of pedigree."⁵³ If this account was ever realistic, it is no longer. The legislature is simply not able to lay down rules with enough specificity so as to eliminate discretion. In such a regime, the new governance theorists argue, a more "dynamic accountability," where agents are forced to transparently justify their decisions and are evaluated by peers making similar decisions, better fulfills the desideratum of a government that is responsive to its citizens.⁵⁴

The new governance scholars welcome the challenge that new governance poses to law. Many see the concept of law as no longer useful in analyzing the modern regulatory state, and they are not alone. As another prominent U.S. scholar of regulatory theory recently put it, perhaps we ought to "bracket the concept of law" altogether, "suspend[ing] its claim to describe some aspect of our society in a useful or convincing way" and deploy

49. Simon, *supra* note 39, at 37.

50. Simon, *supra* note 48, at 181–86.

51. Sabel & Simon, *supra* note 41, at 397–98.

52. In administrative law scholarship, this idea was traditionally referred to as the "transmission belt" model. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470, 470–71 (2003). In a more recent model of the administrative state, the president is the democratically elected principal directing the agencies. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

53. Sabel & Simon, *supra* note 41, at 398; see also RUBIN, *supra* note 8, at 144–45 (similarly describing the idea of legitimacy as medieval, with its origins in determining the status of the king's heir in a hereditary monarchy).

54. Sabel & Simon, *supra* note 41, at 400, 400–01.

the alternative concept of “policy and implementation” in understanding today’s administrative state.⁵⁵

C. *Can New Governance Achieve Constitutional Status?*

Though some new governance scholars are content to explore its domain-specific applications, its most ambitious proponents see it as *the answer* to big questions of constitutional scale.⁵⁶ In Europe, scholars see it as the answer to the question: what is the European Union *for* exactly?⁵⁷ In the United States, the question might be: what is the future of liberal constitutional theory?⁵⁸ Or put differently, what is a progressive vision of the role of the state now that our most recent Democratic president has declared the “era of big [g]overnment” over?⁵⁹

But in both places, the questions remain largely the same: is new governance as a mode of regulation more of a domain-specific model, or is it small-*c* constitutional? What are the conditions for its success? What are the obstacles to its scalability? Is it compatible with existing notions of constitutionalism?

The authors differ on the extent to which new governance mechanisms are already a fundamental part of EU constitutionalism. Some note with disappointment that the principal EU new governance mechanism—the Open Method of Coordination—was deliberately left out of the EU Constitution and constitutional treaties, ostensibly an indicator that it will never play a major role.⁶⁰ Sabel and Simon, however, seem to treat new governance as already fundamental, seeing the new governance mechanism of peer review as “ubiquitous” in many areas of EU governance, “incipient” in others, and

55. RUBIN, *supra* note 8, at 203.

56. The authors are using the term *constitutional* in the British sense, not the American version hinging on a written constitution. The use here is more akin to the way Mark Tushnet defines a “constitutional order” as a “reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions.” MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 1 (2003).

57. See Neil Walker, *EU Constitutionalism and New Governance*, in *LAW AND NEW GOVERNANCE*, *supra* note 2, at 15, 15 (explaining that the relationships between constitutionalism and new governance reveal something about the peculiar regulatory dynamic of the European Union).

58. See, e.g., Mark Tushnet, *A New Constitutionalism for Liberals?*, 28 N.Y.U. REV. L. & SOC. CHANGE 357, 357 (2003) (“[T]he idea of an experimentalist constitutionalism . . . would seem to offer an extremely promising course for liberal constitutional theory.”); see also William N. Eskridge, Jr. & John Ferejohn, *Super-statutes: The New American Constitutionalism*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 320, 321 (Richard W. Bauman & Tsvi Kahana eds., 2006) (arguing for a “new American constitutionalism,” where important changes in public norms and constitutional principles are developed incrementally in legislatures and agencies rather than in courts).

59. See TUSHNET, *supra* note 56, at 171–72, (“[D]emocratic experimentalism remains the most promising candidate for a theory of government activity in the new constitutional order.”).

60. See, e.g., de Búrca & Scott, *supra* note 18, at 11 (noting that EU constitutional texts are conspicuously devoid of the many European new governance initiatives).

“now routinely used” to address new problems and devise new approaches to old ones.⁶¹ In other work, Sabel has argued that the “deliberative polyarchy” at the core of new governance schemes may well be the *raison d’être* of the European Union.⁶² New governance may have more currency in the European Union simply because the very purpose of the European Union is still up for grabs in a way that it is not in the United States.

In the United States, the constitutional issue is perhaps more difficult. Even before the issue of scalability is faced, there is the challenge of compatibility. Can new governance, with its “flagrant disrespect” for the distinction between lawmaking and enforcement or implementation be consistent with a constitutional order that relies on separation of powers?⁶³ The new governance theorists essentially take the position that strict separation of powers is a myth, as evidenced by the frequent need for dialogue among the branches of government.⁶⁴

A related objection, particularly from those defending legal liberalism, is the perceived need to maintain a robust role for courts in protecting rights. In his essay, Tushnet thinks that liberals cannot have it both ways, holding onto judicial protection of “fundamental” rights but encouraging innovative, nonjudicial methods of enforcement for new rights or values.⁶⁵ The answer that new governance theorists provide is peer review: the use of benchmarking institutions to horizontally (unlike the vertical, judicial-review model) engage “elements of civil society” in interpreting and protecting fundamental values.⁶⁶

Even if new governance is compatible with constitutionalism, can it reach constitutional scale? In fact, we currently have an ongoing experiment on that very question: the principal domestic policy innovation of the current Republican Administration, No Child Left Behind (NCLB). NCLB passed in 2001 with overwhelming bipartisan support and is currently up for reauthorization.⁶⁷ New governance scholars greeted NCLB, and the state-

61. Sabel & Simon, *supra* note 41, at 402.

62. Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* 345, 362–73 (Jonathan Zeitlin & David M. Trubek eds., 2003).

63. See Sabel & Simon, *supra* note 41, at 398 (“[N]ew governance seems radically unsettling because of its flagrant disrespect for the distinction between enactment (or law making) and enforcement (or law application) on which principal–agent accountability depends.”).

64. See *id.* at 410–11 (discussing the periodic dialogue between different branches of the U.S. government).

65. See, e.g., Mark Tushnet, *Governance and American Political Development, in LAW AND NEW GOVERNANCE, supra* note 2, at 381, 393 (“[L]iberals simply cannot both (1) be skeptical about the importance of the courts in a new constitutional order and still insist, as the interest-group constituencies of the older order require (2) that the heart of those constituencies’ policy agendas be protected by the courts against erosion.”).

66. Sabel & Simon, *supra* note 41, at 400, 407.

67. Maria Glod, *Congress is Urged to Enhance “No Child” Law*, WASH. POST, Jan. 8, 2008, at A3.

level reforms in Texas and Kentucky on which it was based,⁶⁸ with great excitement.⁶⁹ The law appears to act at the national level much like the European Union's Open Method of Coordination operates at the supranational level: setting goals but leaving it to the states to come up with plans for achieving the goals.⁷⁰

Though it constituted an unprecedented federal level of involvement in state and local education policy, states and local school districts were granted autonomy to devise their own plans for achieving progress, and even for defining the standards themselves.⁷¹ In return, the federal government required accountability measures including data to ensure that students, disaggregated by race and income, were making "adequate yearly progress."⁷² Public participation was guaranteed by provisions requiring the federal Department of Education to include parent representatives on a committee that would review the implementing regulations⁷³ and other provisions giving parents the right to get information from their school districts about the qualifications of their children's teachers.⁷⁴

If NCLB is successful, it would be strong evidence that large-scale new governance regulation could work in the United States and might have broad political support as the basis for any new "constitutional order" in the United States.⁷⁵

The jury is still out on the success of NCLB. On the positive side—indeed, this may make anything else mere quibbles—there is substantial evidence that the math and reading scores of disadvantaged students have gone up since the passage of the law.⁷⁶ On the other side of the ledger,

68. See generally James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 231–66 (2003) (discussing education reforms in Texas and Kentucky).

69. See James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1706 (2003) (praising No Child Left Behind because it "encourages the development of just the kind of locally, experientially, and consensually generated standards whose absence in the past has discouraged courts from carrying through with their initial commitments to desegregated, educationally effective schools"); Liebman & Sabel, *supra* note 68, at 304 (observing that the school-reform movement "commands attention as an innovative response by civil society and the courts to the remaking of the schools").

70. See Liebman & Sabel, *supra* note 69, at 1721–24 (discussing the standards set for state education by No Child Left Behind).

71. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111(b)(1)(A), 115 Stat. 1425, 1444 (codified as amended at 20 U.S.C. § 6311 (Supp. V 2005)).

72. *Id.* § 1111(b)(2)(C), 115 Stat. at 1446.

73. See *id.* § 1111(e)(1)(B), 115 Stat. at 1456.

74. *Id.* § 1111(h)(6)(A), 115 Stat. at 1461.

75. See TUSHNET, *supra* note 56, at 1 (defining "constitutional order" as "a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions").

76. See CTR. ON EDUC. POLICY, ANSWERING THE QUESTION THAT MATTERS MOST: HAS STUDENT ACHIEVEMENT INCREASED SINCE NO CHILD LEFT BEHIND? 51–60 (2007) (describing a narrowing of the gap between students from historically lower performing subgroups and those from historically higher performing subgroups, while average test scores increased overall). The

teachers report increased time “teach[ing] to the test,” which may crowd out other important educational goals.⁷⁷ Scholars and policymakers have raised the question of whether the benefits of the law outweigh the unintended consequences of NCLB, including encouraging states to lower academic standards, pushing poor and minority students out of schools, and creating an environment that discourages strong teachers from taking jobs in schools with high numbers of disadvantaged students.⁷⁸

Is this a successful regulatory model both for educational policy and other domains? Again, the jury is still out. For new governance scholars, the model’s strength is its ability to learn from experience and update both the goals of the regulatory scheme and the means in light of experience. In the NCLB context, states can both learn from their own experience and the experience of other states through the benchmarking coordinated at the federal level. But when one talks about experimenting at a local level in light of uncertainty about how best to proceed, one thinks of the familiar idea of states as “laboratories of democracy.”

So how exactly is this different? Indeed, one of Louise Trubek’s main examples of new governance in U.S. health care, the federal State Children’s Health Insurance Program (SCHIP), sounds like plain old federalism, providing money to insure more children but allowing states to come up with programs for how to do it.⁷⁹ In his essay on “new environmental governance,” Bradley Karkkainen describes the Clean Air Act as a “cooperative federalism” scheme where the federal Environmental Protection Agency (EPA) establishes standards and leaves it to the states to develop “State Implementation Plans” to regulate emissions, and monitor and enforce compliance.⁸⁰ If the EPA deems the state plan inadequate, a “Federal Implementation Plan” serves as a backstop, and Karkkainen points to this arrangement as an innovative “regulatory penalty default” scheme.⁸¹ But it is not clear how distinctive these regulatory schemes are from many others in our system of federalism.

Even if it is different, is the new governance, NCLB model really better? One leading scholar of education policy, Harvard’s Richard Elmore, thinks not, pointing out that before NCLB, states were experimenting with various kinds of performance-based accountability, but NCLB “narrows the domain of experimentation drastically and hence limits the amount we can

causal link to passage of the law, however, is far from clear. *See id.* at 4 (“We cannot say to what extent test scores have gone up *because* of NCLB . . .”).

77. COMM’N ON NO CHILD LEFT BEHIND, ASPEN INST., BEYOND NCLB 19 (2007); *see id.* (relating claims that the high-stakes nature of an annual-testing procedure has driven teachers to emphasize rote instruction of the subjects being tested over creative learning techniques).

78. *See, e.g.,* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 934 (2004).

79. *See* Trubek, *supra* note 30, at 259–61.

80. Karkkainen, *supra* note 33, at 308.

81. *Id.* at 309.

know.”⁸² Annual testing is one way to measure performance, but it is not the only way and may not be the best way. Under NCLB, it is the mandatory way.⁸³

From a different direction, scholars have criticized NCLB for its mix of federal involvement with flexibility left to the states—precisely the recipe prescribed by new governance advocates. As James Ryan puts it, perhaps the federal government “should get off the federalism fence.”⁸⁴ Either the political and institutional dynamics are such that the states can be trusted to establish and enforce strong academic standards or they cannot. And if they cannot, then perhaps the federal government ought to just prescribe national standards, as was supported by the first President Bush and by President Clinton.⁸⁵ To be sure, perhaps political reality would stand in the way of such standards—but that is not the new governance proponents’ argument. Their argument is that providing states flexibility is *better* as a policy matter because of the uncertainty about ends and means.⁸⁶

D. *The Future of New Governance Scholarship*

Going forward, the new governance scholarship would do well to focus more on the conditions for success, as the best of the essays in this volume do. Susan Sturm’s work on gender equity, for example, highlights the role of problem-solving intermediaries like the National Science Foundation, which are trusted by all parties and build up institutional knowledge by learning from experience.⁸⁷ One question this raises is whether administrative agencies themselves can be such problem-solving intermediaries.

Another question is whether the threat of either litigation or more top-down regulation is necessary to induce the regulated entities to engage in collaborative efforts. Hervey’s chapter on health care in the European Union, for example, traces how a new governance scheme arose out of private litigation⁸⁸—a context that is explored in other work by Susan Sturm on employment discrimination. Sturm shows how Home Depot settled class actions in the United States alleging a pattern and practice of discrimination

82. Richard F. Elmore, *Details, Details, Details*, 28 N.Y.U. REV. L. & SOC. CHANGE 315, 318 (2003).

83. See 20 U.S.C. § 6311(b)(3) (2000 & Supp. V 2005) (setting forth requirements that each state implement academic assessments for students in mathematics, reading or language arts, and science).

84. Ryan, *supra* note 78, at 987.

85. See *id.* at 988 (noting that both the first President Bush and President Clinton advocated national standards).

86. See Liebman & Sabel, *supra* note 69, at 1715, 1712–15 (arguing that providing states with a framework within which they are free to question and experiment with means ultimately triggers a “race to the top in educational performance” and facilitates redress for those schools and populations that do not benefit initially from that race to improve).

87. See Sturm, *supra* note 17, at 337, 337–39 (describing the National Science Foundation’s role as a problem-solving intermediary).

88. Hervey, *supra* note 28, at 180–81.

in part by implementing problem-solving mechanisms into the corporate culture.⁸⁹ It may well be that the success of new governance depends in part on the old, hoary topic of the law of remedies.

New governance scholarship would also benefit from attention to the differences in culture and governmental structure across countries. Though in this volume the authors specified that their task was not “deliberately comparative,”⁹⁰ future work should also focus on the differences between the European Union and the United States and discuss why new governance schemes might work better in one and not the other.

Greater attention to the conditions for success, and the context in which new governance schemes arise, will lead to more careful definition of the regulatory *problem*. Recall Michael Dorf’s definition: “[I]n the conditions of modern life, people increasingly find that their problem is not so much an inability to persuade those with different interests or viewpoints of what to do; their problem is that no one has a complete solution to what collectively ails them.”⁹¹ On this account, developed in this book by Simon’s account of Toyota jurisprudence, constant questioning and collaboration lead to better solutions.⁹² But the problem with Simon’s analogy is that on the Toyota production floor, all the problem solvers are on the same team. When teachers’ unions, parents, and school districts are collaborating, the interests may not be quite as harmonious.

Perhaps the most fruitful question going forward is how to capture other kinds of regulatory methods. Think about *new governance regulation* as an umbrella term covering a kind of interaction between the state, regulated entities, and other stakeholders that has a number of desiderata—public participation, data provision, transparency, benchmarking, sharing of best practices, fora for deliberation on ends and means, and autonomy and flexibility for those subject to regulation.

The question for new governance proponents and policymakers is how best to maximize the number of areas of regulation that contain these features. To do so, we need to look more broadly and deeply at the political economy of policymaking and implementation. In order to scale up, new governance scholars and practitioners need to follow more of their own advice about breaking down, or analyzing across, the traditional boundaries of policymaking and implementation.

89. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 512, 510–12 (2001) (“The solution was to achieve accountability through technology, information systems, and systematizing discretion, rather than through rules.”). But see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 516–17 (2003) (arguing that this kind of “negotiated governance” model, that of a compliance regime internal to organizations, has led to lawyer-driven inefficiencies).

90. De Búrca & Scott, *supra* note 18, at 1.

91. Dorf, *supra* note 12, at 1269.

92. See Simon, *supra* note 39, at 48–50.

The new governance experiments to date in the United States fall largely into two categories: (1) areas where centralized regulation is well established but controversial among those regulated and (2) attempts to solve intractable social problems. As to the former, environmental and occupational-health-and-safety regulation are the two most prominent examples. In these areas, businesses subject to regulation have substantial complaints about the burdens of existing command-and-control regulation. As they have had increased success in the public and other domains in pushing for deregulation, policymakers and others have searched for a middle ground.⁹³

The second category, what I refer to as intractable social problems, is made up of problems that primarily concern individuals not well represented in the political arena but that frequently garner public attention. These include drug abuse,⁹⁴ education for the disadvantaged,⁹⁵ and even gender bias in higher education.⁹⁶

But these two categories leave out vast swaths of economic and other activity that are, or might be, subject to some kind of regulation. Consider the category of activities that are centered in one industry or a handful of industries, but cause harm to the public, by looking at two examples of recent vintage: data privacy and childhood obesity.

In data privacy, a series of well-publicized gaffes and identity thefts from data brokers, like ChoicePoint, led to litigation, calls for regulation at the state and federal levels, and other measures.⁹⁷ With childhood obesity, it was a report by the Institute of Medicine, a congressional advisory body, that put the issue on the public agenda and led advocacy and public-health groups

93. See Freeman, *supra* note 10, at 97–98 (acknowledging that health-and-safety and environmental regulation may be particularly promising areas for collaboration because “the regulated industries in these sectors have accepted the inevitability of regulation and are willing to discuss implementation”).

94. See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000) (discussing drug courts as a novel form of governance).

95. See Liebman & Sabel, *supra* note 69, at 1737–41 (noting that Kentucky education-governance reforms created frameworks for grassroots organizations focused on identifying the causes of achievement gaps among disadvantaged groups); Liebman & Sabel, *supra* note 68, at 238 (noting that Texas education accountability reforms had the goal of closing “the achievement gap between property-rich and property-poor districts” (quoting *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 728–29 (Tex. 1995))).

96. See, e.g., Sturm, *supra* note 17, at 325 (“Recently, a different public approach to the problem has emerged to address women’s marginalisation and under-participation in universities, particularly in the sciences.”).

97. See Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140, 154–58 (2006) (describing data security breaches and the ensuing state and federal legislative responses).

to call for regulation of the food and beverage industry concerning sales and marketing to children.⁹⁸

In both these circumstances, there was little to no regulation of the relevant industry before the issue became one of public concern (no regulation of data brokers on information privacy⁹⁹ and no regulation of the food and beverage industry on sales and marketing to children¹⁰⁰). And the problem here is not, contra the democratic experimentalists, that the relevant stakeholders agree on the ultimate goal but are having trouble figuring out how best to get there. The problem here is a fundamental conflict between the interests of the companies that want to maximize profits and the public that bears the burden of the externalities of these profit-making enterprises. The issue for the public is how best to balance these interests and by what means.

In both these circumstances—data privacy and childhood obesity—the industries responded to the threat of litigation and government regulation with a tactic I call preemptive self-regulation. In order to forestall the drive toward government regulation, the industries simply announced and began to implement regulation themselves.¹⁰¹

For scholars and policymakers seeking an alternative to command-and-control regulation, chastened by experience, and recognizing the limits of administrative agencies, this might seem like a good outcome. Indeed, much of the new governance and related literature relies in part on a strategy of relying on the regulated entities to do more themselves in light of government agencies' inherent limits.¹⁰² Even for some progressives, self-regulation holds promise.¹⁰³

98. For an overview (though not an unbiased one), see Michele Simon, *Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health*, 39 LOY. L.A. L. REV. 169 (2006) and Michele Simon, *Food Marketing to Children and the Law: An Introduction*, 39 LOY. L.A. L. REV. 1 (2006).

99. See Brian Deagon, *High-Profile Online Data Thefts Irk Pols*, INVESTOR'S BUS. DAILY, Aug. 22, 2005, at A4 (describing a number of bills under consideration introduced in response to data security breaches and predicting closer regulation of data brokers).

100. See Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79 (tracing the development and demise of several plans to regulate the marketing of food to children).

101. See Ellen J. Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 LOY. L.A. L. REV. 93 (describing the inception of and various changes to the Children's Advertising Review Unit as a self-regulating tool for the advertising industry); Tom Zeller Jr., *Investigators Fear Curbs on Personal Data*, INT'L HERALD TRIB., Mar. 22, 2005, at IR (relating the decision made by the Federal Trade Commission to permit a working group made up of database companies to establish self-regulating guidelines in lieu of federal regulation).

102. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–56 (2000) (describing the pervasive role of private entities in regulation, service provision, policy design, and implementation); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2037–40 (2005) (discussing the role of private-governance scholarship in developing a more robust view of the role of private entities in regulation); Symposium, *New Forms*

But new governance scholars ought to have a story for policymakers and a strategy for how to turn these attempts at preemptive self-regulation into the kind of new governance schemes that will produce positive policy outcomes on the underlying issues. For data privacy, an industry group might be tasked with coordinating and publicizing best practices on how companies can protect data privacy. For childhood obesity, the Institute of Medicine could produce periodic company-by-company reports on the marketing of soda and high-sugar foods to kids. In a world of regulatory pluralism, where different modes of regulation are best in different contexts, trying to maximize the number of desirable features (transparency, benchmarking, etc.) of any regime may be the best that a regulatory theory can do.

III. *The Regulatory and Administrative State*

A. *Public Law in Legal Education*

Since the rise of the administrative state in the United States, legal education has struggled to incorporate “public law” courses into its curriculum. The first courses to appear were administrative law courses, dealing with the process by which agencies do rulemaking, judicial review, and other related topics. Shortly thereafter, legislation courses grew, introducing students to the legislative process and how to read and interpret statutes.¹⁰⁴ After World War II, two professors at Harvard, Henry Hart and Albert Sacks, developed what grew to be legendary materials called *The Legal Process*.¹⁰⁵ These materials introduced students to the different ways that society can deal with public problems, including regulation through administrative agencies.

The administrative law and legislation courses have remained staples of the upper-level curriculum, and though the “Legal Process” was taught in dozens of law schools in the 1960s, 1970s, and 1980s, it is now taught in only a handful. In the meantime, many law schools have moved toward requiring some kind of public law course as part of the first-year curriculum.¹⁰⁶ Though some schools did this through an administrative law or legislation course, others, such as Columbia and Georgetown, developed a “regulatory

of Governance: Ceding Public Power to Private Actors, 49 UCLA L. REV. 1687 (2002) (reviewing broadly the various ways in which private actors have entered the public sphere).

103. See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005) (viewing the rise in self-regulation as an opportunity to improve employee rights through the use of independent monitors).

104. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at lxix–lxx (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

105. See HART & SACKS, *supra* note 104.

106. Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. (forthcoming 2008) (manuscript at 3 n.9, on file with author).

state” course that focused in large part on questions of institutional or regulatory design.¹⁰⁷ With Harvard’s recent adoption of a Legislation and Regulation course into the required first-year curriculum and Vanderbilt’s dean and a leading regulatory-state scholar, Edward Rubin, leading curricular-reform efforts both at his own school and through the AALS, the issue has come to the fore again.¹⁰⁸

B. Heinzerling and Tushnet’s Approach

1. *The Book’s Strategy.*—Into the mix step Harvard’s Mark Tushnet and Georgetown’s Lisa Heinzerling with their new book, *The Regulatory and Administrative State*. This is a new casebook designed to fill the void in the market—where demand may also grow if other schools follow Harvard’s lead and require such a course—for materials to teach an introductory course in public law. On the question of whether such a course should be required, Tushnet and Heinzerling are clear in the Preface: “Lawyers in the twenty-first century need course materials of this sort. They are deeply involved in public law and the regulatory state, and need the skills—including the ability to read and understand statutes—associated with the modern regulatory state.”¹⁰⁹ At this stage, the question of whether law students need the “skills . . . associated with the modern regulatory state” is not controversial. The issue is whether or not this book provides them.

The book takes as its theme the regulation of risks to human life and health. In exploring how the law regulates these areas, the book considers recurring issues of institutional choice, statutory interpretation, and market and regulatory failure. And it is quite different from a standard administrative law or legislation book.

The book proceeds in four parts. First, it considers the basic justifications for regulation in circumstances where the individual parties contract. Second, it explores the contours of common law regulation of risks to human life and health through both criminal and tort law. Third, the book takes up the emergence of the modern regulatory state as a response to the perceived failure of common law regulation of risk. In doing so, it offers an introduction to statutory interpretation, administrative law, and public-choice theory. Finally, the book closes with a section on “new perspectives” on the regulatory and administrative state in the twenty-first century, exploring

107. Tushnet taught the course at Georgetown for many years before his recent move to Harvard, and *The Regulatory and Administrative State* book is an outgrowth of the materials he used to teach that course. In turn, such a course was the descendant of the Law in Society course that the Wisconsin legal historian Willard Hurst developed in the 1930s and 1940s with Wisconsin’s then-dean Lloyd Garrison. See Eskridge & Frickey, *supra* note 104, at lxx–lxxiii.

108. See *supra* notes 5–8 and accompanying text.

109. HEINZERLING & TUSHNET, *supra* note 4, at x.

some of the same issues explored in greater depth in *Law and New Governance*.¹¹⁰

The book starts in Chapter 1 with the limits of private ordering—more precisely, the problem of “justifying regulation when parties have a contract with each other”¹¹¹—by introducing occupational health risks, and the traditional constitutional and common law legal response that such risks were accounted for in the contract between employer and employee.¹¹² Then in Chapter 2, the authors present an economic perspective suggesting both that legal rules should provide appropriate incentives for future conduct and that occupational health risks should be factored into the “wage premium” in the contract between employer and employee.¹¹³ Chapter 3 introduces “alternative perspectives” that might bear on the regulation of workplace health and safety, specifically the ideas that certain aspects of personhood ought to be “inalienable” in the marketplace, that unequal bargaining power might mean that the acceptance of risk in the workplace is not truly voluntary, and that distributive and paternalistic considerations can trump “freedom of contract.”¹¹⁴

In Part II, the authors explore the doctrinal and institutional limits of the common law. Having already explored some of the limits of contract law in regulating risk, Chapter 4 looks at criminal and tort law. This is perhaps the most interesting chapter in the book and has moments of pedagogical brilliance. The authors start with the statutory definitions of murder in California and Pennsylvania and then reproduce a 1973 memo by a General Motors engineer that became well known in auto-accident litigation for its cost-benefit analysis of designing safer gas tanks.¹¹⁵ Through the “comments and questions,” the authors show how the necessary criminal intent for murder does not quite fit the paradigm of businesses doing cost-benefit analyses about product design.¹¹⁶ Moreover, in the notes, the authors put the students in the position of lawyers advising their clients and ask what possible courses of action they would counsel.¹¹⁷ Then the authors turn to the limits of tort law in regulating risk, looking at a toxic-tort case in New Jersey and an attempt to use statistical evidence to prove causation in an auto-accident case.¹¹⁸ These cases nicely illustrate the limits of courts’ capacity to determine and compensate for exposure to risk.

110. Although the authors call it a casebook, excerpts from cases are equaled if not outnumbered by excerpts from scholarly articles.

111. HEINZERLING & TUSHNET, *supra* note 4, at x.

112. *See id.* at 3–36.

113. *See id.* at 37–52.

114. *See id.* at 53–108.

115. *See id.* at 111–13.

116. *See id.* at 113–14.

117. *See id.*

118. *See id.* at 128–55.

Chapter 5, "Institutional Strengths and Limits,"¹¹⁹ then turns squarely to a theme that will recur throughout the rest of the book—that of comparative institutional analysis, or institutional competence. The authors present excerpts from two law-review articles that nicely introduce many of the considerations relevant to deciding among courts (adjudicating under tort or criminal law), administrative agencies (promulgating rules under a statutory framework), and the market in terms of which best regulates risk.¹²⁰ They also excerpt materials on the sociology of claiming legal rights,¹²¹ explaining that the "naming, blaming, claiming" of how disputes do or do not enter the legal system affects how any particular scheme of risk regulation will work, and is a welcome "law in action" addition to thinking about comparative institutional analysis.¹²²

In guiding students' reflections on such matters, the authors put the students, implicitly, in the role of policymakers, asking questions like "what is the best institution to use in responding to" work-related carpal tunnel syndrome, climate change, and other issues?¹²³ As I explain further below, this perspective of the policymaker, or what the authors refer to later in the book as the disinterested social scientist,¹²⁴ is the primary perspective from which the authors approach these materials.

More promising, in my view, are the too-rare instances where students are asked to think about the role of lawyers. In this chapter, for example, students are asked to think about how lawyers affect the process by which individuals complain about workplace sexual harassment or secondhand smoke—even here, though, the students are asked to play social scientists thinking about the role of lawyers, not thinking *as lawyers* themselves.¹²⁵

As Tushnet's former Wisconsin colleague, the late Willard Hurst, did in his Law in Society course designed in the late 1930s,¹²⁶ the authors in Chapter 6 use the tale of workers' compensation to show how a statutory framework for regulating risk emerged from dissatisfaction on all sides with the common law.¹²⁷ They provide excerpts from articles exploring the concept of "moral hazard" used by economists to indicate a possible downside for workers' compensation schemes—workers, knowing that they will be compensated for injury, do not have sufficient incentive to take care to

119. *Id.* at 205.

120. *See id.* at 205–31.

121. *Id.* at 231–45.

122. *Id.* at 231–39 (excerpting William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC'Y REV. 631 (1980–1981)).

123. *Id.* at 231.

124. *Id.* at 683.

125. *See id.* at 239–40.

126. Eskridge & Frickey, *supra* note 104, at lxxi.

127. *See id.* at 275–95.

prevent such injuries.¹²⁸ And they also include articles to point out some of the limits of workers' compensation, particularly in the area of occupational disease.¹²⁹

Part III, "The Modern Regulatory State,"¹³⁰ is the core of the book, introducing students to statutory interpretation, the basics of administrative law, and some modern features of contemporary regulation including cost-benefit analysis and information provision. The authors provide a solid introduction to the key administrative law topics of rulemaking, judicial review, standard setting, and nondelegation, primarily through the principal Supreme Court cases and a few circuit opinions applying those cases.¹³¹ To be sure, future lawyers in a regulatory practice would have to take the full administrative law course, but others could be confident that they have a decent foundation. And the authors present interesting materials on regulatory design: cost-benefit analysis; some of the ways that regulatory efforts fail; and how providing information can be a market-based solution to regulating risk, but one that also has its limits, as psychological research presented here indicates.¹³²

But the materials on statutory interpretation are inadequate, covering only one chapter and arguably not even that. This is a serious flaw. The materials on statutory interpretation consist of excerpts from a few classic articles—by Karl Llewellyn, Frank Easterbrook, and Stephen Breyer—to provide an excellent introduction to the overall approach in interpreting statutes.¹³³ These articles are followed by two cases: one, the classic *Holy Trinity*¹³⁴ case, demonstrates the conflict between statutory purpose and text; the second, a Seventh Circuit opinion interpreting the Sentencing Guidelines,¹³⁵ features interesting, dueling opinions from Judges Posner and Easterbrook.¹³⁶ After that, the authors go right to *Chevron*,¹³⁷ the classic Supreme Court case about judicial deference to agency interpretation of statutes, and a more recent case on that topic, *Brown and Williamson*.¹³⁸

The canons of statutory interpretation barely appear. Other than a table from the Llewellyn excerpt listing the statutory canons and the responses to

128. See HEINZERLING & TUSHNET, *supra* note 4, at 295–306.

129. See *id.* at 306–15.

130. *Id.* at 317.

131. See *id.* at 415–60, 613–82.

132. See *id.* at 461–611.

133. See *id.* at 319–49.

134. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

135. *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990), *aff'd sub nom. Chapman v. United States*, 500 U.S. 453 (1991).

136. See HEINZERLING & TUSHNET, *supra* note 4, at 350–77 (excerpting *Holy Trinity* and *Marshall*).

137. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

138. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); see HEINZERLING & TUSHNET, *supra* note 4, at 378–412 (providing text and discussion of *Chevron* and *Brown & Williamson*).

each,¹³⁹ there is no exploration of how those canons are used. Perhaps the authors are fully persuaded by the idea that Llewellyn introduced in his classic article that “there are two opposing canons on almost every point.”¹⁴⁰ As a result, the authors ask in comments and questions section: “Given the availability of competing canons of interpretation, what use are they?”¹⁴¹ But Llewellyn also said unambiguously about the canons: “Every lawyer must be familiar with them all: they are still needed tools of argument.”¹⁴² Either the authors disagree, or they have unwisely chosen to put the canons beyond the scope of the book.

At the close of Part III, the authors take a welcome turn from the perspective of a “disinterested social scientist” to the perspective of “politicians.”¹⁴³ In Chapter 13, they introduce public-choice theory, the microeconomic approach that looks at the self-interested incentives that politicians have in making regulatory choices.¹⁴⁴ Politicians want to run for reelection, they need to raise money for such a campaign, and their choices are shaped by these realities.¹⁴⁵ Besides the excerpts from public-choice theory, the authors include an interesting excerpt from the Harvard political theorist Jane Mansbridge questioning the premises of public-choice theory with its focus on self-interestedness, its acceptance of adversary democracy, and the absence of “deliberation” from this view of public life.¹⁴⁶ No doubt the new governance scholars would agree with these objections to public-choice theory. But all must face the question of how exactly to get past the reality of “adversary democracy” and toward the aspiration of greater deliberation in public life, a theme I will return to below.

In ending Part III’s tour of the modern regulatory state, the authors present a view of “[s]etting [r]egulatory [p]riorities” by looking at worker safety.¹⁴⁷ An article by the sociologist Andrew Szasz provides an excellent look at the context surrounding passage of the Occupational Safety and Health Act, including the mine disaster and the resulting publicity and hearings that pushed through passage of the law.¹⁴⁸ The article also recounts the strategic options facing industry on implementation—how closely to work

139. HEINZERLING & TUSHNET, *supra* note 4, at 325–27 (excerpting Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950)).

140. *Id.* at 324 (quoting Llewellyn, *supra* note 139, at 401).

141. *Id.* at 327.

142. *Id.* (quoting Llewellyn, *supra* note 139, at 401).

143. *Id.* at 683.

144. *See id.* at 683–705.

145. *See id.* at 683.

146. *See id.* at 721, 716–22 (excerpting and quoting Jane Mansbridge, *Self-interest in Political Life*, 18 POL. THEORY 132 (1990)).

147. *Id.* at 723, 723–50.

148. *See id.* at 723–35 (excerpting Andrew Szasz, *Industrial Resistance to Occupational Safety and Health Legislation: 1971–1981*, 32 SOC. PROBS. 103 (1984)).

with the new agency, OSHA, and how much to try to undermine the law.¹⁴⁹ The section would benefit from asking students to reflect upon how they would approach these options as lawyers representing businesses, but the basic approach of looking at the context in which regulatory schemes arise and are implemented is not only valuable here but is also one from which the *Law and New Governance* volume could benefit.

Heinzerling and Tushnet close the book with a two-chapter part called "The Regulatory and Administrative State in the Twenty-First Century: New Perspectives."¹⁵⁰ The part consists of a chapter on comparative perspectives on the problem of regulating risk, focusing primarily on studies of environmental regulation in Great Britain and Japan.¹⁵¹ And the final chapter, "Proposals for Reform," has a significant emphasis on the new-governance-style mechanisms described in de Búrca and Scott's collection.¹⁵²

2. *Success on Its Own Terms?*—This book is ambitious. On the theory that students will learn more by "seeing the subjects in a unified course," Heinzerling and Tushnet designed the book as an introduction to "the reasons for regulation, the ways in which regulation can go awry, the choice of legal institutions for regulation, the choice of regulatory instruments, and the theory and practice of statutory interpretation."¹⁵³ But in attempting to do so much, the authors risk accomplishing relatively little. The authors believe that today's lawyers need to have "*both* an understanding of statutory interpretation *and* an understanding of the reasons for regulation."¹⁵⁴

But it is not clear why exactly they need the latter. To be sure, when Willard Hurst first designed such a course at Wisconsin in the 1940s, the place of the administrative state itself was much more tenuous.¹⁵⁵ In that context, a course that spent some time demonstrating the limits of the common law or the need for scientific expertise as part of the Executive Branch might have made sense. But today, the administrative state is an inescapable part of our legal system. No one is suggesting that it is unnecessary in our complex modern society.

And so, with choices to make about what precisely law students *need* in perhaps the only course they will take on the regulatory state, I am not sure that a few chapters carefully, and even compellingly, teasing out the very reason for its existence is the best use of scarce resources. In focusing so heavily on the reasons for regulation and the choice of regulatory

149. *Id.* at 728–35.

150. *Id.* at 751.

151. *See id.* at 753–91.

152. *See id.* at 793, 793–822.

153. *Id.* at ix.

154. *Id.* at x.

155. *See* Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 L. & HIST. REV. 1, 34 (2000) (noting Hurst's concern that the complex problems facing modernity required a new "use [of] law in all its forms to address the needs of society").

instruments, the authors have designed a book ideal for a third-year elective in law school or a required course at a public-policy school, but less than ideal for a required course in law school.¹⁵⁶

To be sure, a few unnecessary chapters might not be the worst sin committed by casebook authors, or a particularly uncommon one. And Heinzerling and Tushnet have designed the book intentionally for professors who want to use this book's basic "spine" for a course that focuses on substantive issues other than those of risk regulation that constitute the "ribs" of this particular book and course.¹⁵⁷

But the focus on the reasons for regulation means that the spine itself is not strong enough. Of the five topics that Heinzerling and Tushnet aim to cover in the book—"rationales for regulation, choices among institutions, choices of regulatory instruments, regulatory failures, and statutory interpretation"¹⁵⁸—the last one is the most important for lawyers to learn and learn well, but it is the weakest in the book. After all, many lawyers will not have the kind of practice that involves proceedings before the Federal Communications Commission, for example, but all will have to deal with statutes, even in practices that are purely transactional or heavily focused on private law or commercial litigation.

What is needed is more of an approach that focuses on training future lawyers to make arguments about how to interpret statutes. Put simply, depending on the client and the situation, a lawyer will have to argue either that a client or his conduct is or is not covered by a statutory provision—and future lawyers need to be trained to make these kinds of arguments the same way they are trained to make doctrinal arguments. To make matters worse, most legislation courses do not focus on teaching this skill either. The leading textbook for legislation courses, for example, authored by prominent scholars on statutory interpretation,¹⁵⁹ underemphasizes the goal of providing future lawyers a "toolkit" of statutory arguments to use on behalf of clients.¹⁶⁰

156. For a thoughtful discussion of this "second-generation" question of what a required public law course ought to cover, including a similar critique of the Tushnet and Heinzerling approach, see Leib, *supra* note 106 (manuscript at 18–19). See also William N. Eskridge, Jr., *The Three Ages of Legislation Pedagogy*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 3, 7–9 (2003) for a discussion of several different approaches.

157. HEINZERLING & TUSHNET, *supra* note 4, at ix–x.

158. *Id.* at ix.

159. WILLIAM M. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001).

160. A better approach, which emphasizes the craft of making statutory arguments, while containing enough theory to ground the students in why exactly they are making these kinds of arguments, is contained in an excellent new book, LINDA D. JELLUM & DAVID CHARLES HRICK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* (2006).

C. *The Lost Pedagogical Legacy of Hart and Sacks*

For generations, students at Harvard Law School and elsewhere learned about the contours of the regulatory state through Hart and Sacks's *The Legal Process*.¹⁶¹ In the wake of criticism from the "crits" on the left and public-choice economists on the right, the approach embodied in *The Legal Process* has been largely discredited in the academy.¹⁶² Unfortunately, its discrediting as a scholarly approach has led to the loss of the pedagogical approach embodied in the materials as well. Here, I argue that a book like Heinzerling and Tushnet's would benefit from reclaiming this lost pedagogical legacy.

Where Heinzerling and Tushnet begin the book with the problem of justifying regulation when parties have a contract with each other,¹⁶³ Hart and Sacks begin with a much more mundane, and literally messy, problem: the problem of spoiled cantaloupes.¹⁶⁴ In this problem, famous to generations of Legal Process students at Harvard and elsewhere, students are put into the position of counseling a man who received a shipment of spoiled cantaloupes and asked to consider: What are the client's options?¹⁶⁵ And Hart and Sacks provide the relevant regulatory and other background to allow for thoughtful discussion and consideration of those options. Though more mundane, this problem is more pedagogically useful because it places students in the role of lawyers. And this placing students into "role" has been emphasized by scholars of legal education, most recently in the Carnegie Foundation's *Educating Lawyers*.¹⁶⁶

So when Heinzerling and Tushnet discuss questions of institutional competence, they ask which institution is "best" for regulating different kinds of risk, with *best* being defined by a disinterested social scientist or policymaker.¹⁶⁷ But as the authors indicate in their public-choice chapter, no policymakers are disinterested, at least not the ones who want to be reelected.¹⁶⁸ And certainly no lawyers are. This is a flaw that both books share—the new governance scholars devote a fair amount of attention to undermining the traditional principal–agent relationship where legislators hand down rules for agencies to interpret, but they ignore entirely another critical principal–agent relationship, that of clients and lawyers. In other

161. HART & SACKS, *supra* note 104.

162. See Eskridge & Frickey, *supra* note 104, at li, cxix–cxx (citing general critiques from law professors arguing that the theory embodied in *The Legal Process* rested upon an inadequate theory of democracy and a flawed theory of adjudication).

163. HEINZERLING & TUSHNET, *supra* note 4, at 1.

164. HART & SACKS, *supra* note 104, at 10–12.

165. *Id.* at 11–12.

166. See WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22 (2007).

167. See, e.g., HEINZERLING & TUSHNET, *supra* note 4, at 231 (asking which institution, given a particular framework, is best to use in responding to a variety of social issues).

168. See *id.* at 683 ("[T]he premise [of public-choice theory] is that the kind of self-interested behavior one sees in markets can also be seen in the political realm.").

words, lawyers are heavily involved in shaping these institutional choices on behalf of clients. And future lawyers ought to engage in guided reflection on how they might go about doing so.

Rather than asking what is the “best” institution to deal with work-related carpal tunnel syndrome, for example, one might more fruitfully ask: What if you were a lawyer for a union and started to receive a number of complaints from employees about such injuries? Would you bring a product-liability lawsuit against the maker of the machine causing such injuries? Would you bring it to the attention of OSHA even though there was no specific standard covering such injuries? Would you support the development of a federal ergonomics standard that mandates rest breaks at specified intervals for certain jobs, for example, or support simply mandating employers to come up with a plan for minimizing such injuries? Would you try to get measures to help prevent such injuries into the next collective-bargaining agreement?

In order to have informed reflections on such issues, of course, students would need to be provided with background on all these possibilities.¹⁶⁹ Such an exercise starts to look a lot like the one Hart and Sacks led generations of students through in the case of the spoiled cantaloupes. Indeed, a key pedagogical innovation of Hart and Sacks’s materials was their use of the “problem method” as a vehicle for introducing students to the issues of public and private ordering at the heart of the materials.¹⁷⁰ As Hart once put it in a letter:

[K]nowledge consists, not in doctrine, not in propositional statements stored away in the brain; but in the capacity to solve problems as they are actually presented in life; the capacity to see all the implications . . . of the action to be taken; the capacity to bring to bear in the taking of decisions the maximum of the available experience of mankind.¹⁷¹

Students should take a course on the regulatory state, but on *lawyering*, not policymaking. Such a course might ask students to play the role of the lawyer for a teachers’ union, school district, or state or federal department of education; provide them with the statute and the accompanying regulations; and ask them to make arguments supporting their client’s position. Such a

169. This kind of approach, akin to the business-school case method, is proposed by two professors who spent considerable time thinking about legal education as part of Harvard’s recent curricular-reform effort. See Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 604, 603–05 (2007) (“[W]e are members of a committee that is presently recommending to our faculty a set of curricular revisions that include[s] the creation of problem-solving materials of this sort . . .”).

170. See Eskridge & Frickey, *supra* note 104, at lxxv (discussing a precursor to Hart and Sacks’s materials).

171. *Id.* at lxxvi (quoting an October 15, 1941 letter from Henry M. Hart, Jr. to John H. Williams, who was then Dean of the Graduate School of Public Administration at Harvard University).

course might ask students to consider how they might propose changing the law—as advocates for a particular client—in the context of, for example, the current reauthorization debate on NCLB.

To be sure, the line between lawyering and policymaking is not always so clear, and indeed, students should be trained in both evaluating the effects of and advocating for particular policies. But the perspective ought to be that of a lawyer with a client, not that of a disinterested regulator or social scientist.

Note that this is a different critique than the familiar one that legal education is not practical enough. Heinzerling and Tushnet are trying to be quite practical, aiming to provide with these materials what students need: “the skills—including the ability to read and understand statutes—associated with the modern regulatory state.”¹⁷² But they do not deliver the goods.

In closing the book with a chapter on new governance mechanisms, Heinzerling and Tushnet ask a series of questions aimed at new governance’s potential: “Can you identify the political conditions that make such uses possible? What are the political constraints on, and possibilities for, adopting reconstitutive regulation more broadly?”¹⁷³ And after an excerpt on “reflexive environmental law,” the authors ask whether such a system would “soften the system of adversarial legalism.”¹⁷⁴ They ask the right questions. I begin to address them below in Part IV.

IV. Adversarial Legalism and Lawyers

A. *Accounting for Adversarial Legalism*

What will the American regulatory state look like in twenty years? To a certain extent, both books are making wagers on that answer. In this section, I argue that how each book deals with that question has an impact on the other and could help shape the very answer itself. The argument goes like this: a key and largely unexplored variable in the scalability of new governance in the United States is our culture of adversarial legalism, to use Robert Kagan’s term.¹⁷⁵ In not grappling with that issue, the new governance literature currently falls short.

But our adversarial legal culture is not fixed, and one explanatory factor here is how we train tomorrow’s lawyers. Here, Heinzerling and Tushnet miss an opportunity. To be sure, they do not ask students to play the role of warrior litigators, but nor do they ask them to play the role of problem-solving collaborators.¹⁷⁶ In failing to do so, they fail to maximize the

172. HEINZERLING & TUSHNET, *supra* note 4, at x.

173. *Id.* at 822.

174. *Id.* at 804.

175. KAGAN, *supra* note 9, at 3.

176. See generally Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. &

chances that tomorrow's lawyers will act to change the adversarial legal culture in which they operate.

The political scientist Robert Kagan has had significant influence on the way we think about law in the United States with his research on adversarial legalism, which he views as a distinctively American phenomenon consisting of "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation."¹⁷⁷ Kagan separates adversarial legalism into two principal components: "formal legal contestation"—that is, the frequent invocation of legal rights, duties, and procedural requirements in the course of policymaking and policy implementation—and "litigant activism"—a style of lawyering where the disputing parties dominate the assertion of claims and legal arguments, the gathering of evidence, and the selection of witnesses, unlike the model in Europe where the judge or administrative official plays a larger role in shaping the proceeding.¹⁷⁸

Kagan's work relies heavily on cross-national studies that demonstrate that regulation in the United States is more adversarial and legalistic than that of other industrialized democracies, notably those of Europe and Japan.¹⁷⁹ Though some scholars have questioned Kagan's normative assumptions (e.g., Is adversarial legalism necessarily bad?),¹⁸⁰ his basic descriptive point remains largely unchallenged. For our purposes, then, Kagan's work raises a serious challenge to new governance scholarship, with its vision of collaboration and inclusive participation. The question is: Why do new governance scholars think that interests accustomed to battling over policy will put down their swords, share information, and collaborate?

Put differently, how can new governance schemes overcome the adversarial legal culture in the United States? Perhaps the reason why new governance is much more widespread in the European Union, and may remain that way, is because of this lack of adversarial legal culture. But this variable is largely unexplored in the new governance literature thus far.

In his classic book on the topic, *Adversarial Legalism: The American Way of Law*, Kagan concludes by questioning whether the United States can move beyond adversarial legalism.¹⁸¹ He posits that in order to do so, Americans need to be willing to accept giving administrative officials more discretion, and accord their decisions more finality, without the opportunity for legal challenge.¹⁸² This is consistent with the European model, but Kagan

POL'Y 119 (1997) (discussing a paradigm shift from a "gladiator" model of lawyering to a "problem-solver" model of lawyering).

177. *Id.*

178. *Id.* at 9.

179. *Id.* at 53.

180. See, e.g., Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189 (2003) (reviewing KAGAN, *supra* note 9).

181. KAGAN, *supra* note 9, at 242–52.

182. *Id.* at 239–41; see also Freeman, *supra* note 10, at 96 (arguing that greater deference to agency discretion may be required at a minimum under the model of collaborative governance).

is skeptical that Americans will go for it.¹⁸³ Indeed, the experience in administrative law of the last few decades with “negotiated rulemaking,” which might be described as new governance, offers weak support for the possibility of getting beyond adversarial legalism. As Cary Coglianese and other scholars have shown, the rules have been challenged nearly as much under negotiated rulemaking as with traditional rulemaking.¹⁸⁴ Strangely, the new governance scholars appear to ignore this literature.

In order for new governance to succeed, perhaps it will be necessary to amend the Administrative Procedure Act to limit judicial review considerably.¹⁸⁵ Will lawyers accept this? Regulated entities? Citizens? Should they?¹⁸⁶

Indeed, the adversarial legal culture may carry over to new governance schemes. To take one example, Kagan cites the Education for All Handicapped Children Act¹⁸⁷ as an example of a law that relies on due process rights and private lawsuits for enforcement, as opposed to an administrative-enforcement mechanism that would not rely on the courts.¹⁸⁸ Anecdotal evidence suggests that the same lawyers who challenged the schools on special-education issues have also started bringing legal challenges under NCLB.¹⁸⁹ Moreover, parents and their lawyers are starting to use the NCLB “right” to transfer students out of low-performing schools to challenge school rezoning decisions.¹⁹⁰ This is not to say that these developments are necessarily bad, just that the shift from a rights-based, court-centric model to a problem-solving, collaborative one seems tentative at best.

183. KAGAN, *supra* note 9, at 242–43.

184. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1308, 1308–10 (1997) (“In the aggregate, negotiated rulemaking has not generated any substantial difference in the way that legal challenges get resolved.”).

185. Kagan appears to think so. See Robert A. Kagan, *Political and Legal Obstacles to Collaborative Ecosystem Planning*, 24 ECOLOGY L.Q. 871, 875, 874–75 (1997) (arguing that increasing use of collaborative ecosystem planning would be “aided immensely” by changes in statutes allowing parties to have access to the courts to challenge such plans); see also Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1053 (2000) (arguing that negotiated rulemaking has been frustrated by the adversarial legalism that the APA’s allowance for judicial review promotes).

186. For an argument that they all should, see Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1314–26 (1999), which argues that judicial review of administrative rulemaking allows interested parties to use litigation to change rules to their own benefit.

187. Pub. L. No. 94-142, § 1401, 89 Stat. 773, 775 (1975) (codified as amended at 20 U.S.C. § 1400 (Supp. V 2005)).

188. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism?: A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 18 (1994).

189. See Interview with Beth F. Morris, Attorney, Harben & Hartley, in Gainesville, Ga. (Aug. 31, 2007) (phone interview conducted by author).

190. See Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1 (describing the efforts of black Tuscaloosa parents to prevent students from being transferred to lower performing schools).

Alternatively, maybe it does not matter to the success of the new governance project if affected parties still have the opportunity to challenge regulations once formulated. But this would seem an odd conclusion since continued opportunity for challenge would reduce the incentive to actually participate and collaborate in the policymaking process. If the claim, then, is that the collaborative process itself will lead to less adversarial positioning for strategic advantage, that requires some empirical support, particularly in light of the evidence to the contrary with respect to negotiated rulemaking.¹⁹¹

Lawyers will also need to be reassured that it is in their economic interest to support (or at least not oppose) new governance. That is, if lawyers for the U.S. Chamber of Commerce, for example, cannot make money challenging agency regulations, they need to believe that they will be able to make as much money participating in shaping the regulations and revising them in light of experience, or else lawyers' self-interest may help prop up the status quo.

The scholars in *Law and New Governance* largely position themselves as social engineers—technocrats deciding the optimal government programs. But if the new governance scholars are going to succeed in understanding the circumstances in which such schemes will work, they must take greater account of how the schemes arise and are implemented. Specifically, they must account for the United States' culture of adversarial legalism, where interests represented by lawyers clash, and lawyers use and attempt to shape the law to serve their clients' interests. For better or worse, these lawyers are generally not trying to work with others to reach the "best" social outcome—whether it be lower drug use, higher test scores in schools, or safer workplaces. Rather, they are trying to advance their clients' interests in particular contexts.

The Regulatory and Administrative State generally takes the same technocratic perspective, that of a "disinterested social scientist, attempting to determine what choices among institutions would best serve the public interest."¹⁹² Focusing on the general topic of risk regulation, the book asks the questions: When is government regulation necessary and desirable, and what form can and should regulation take? These are important and interesting topics, but a lack of attention to adversarial legalism means that this book falls short.

Tushnet and Heinzerling's failure to attend more closely to the role of lawyers and adversarial legalism is not just a pedagogical failure, then, it is a scholarly one as well. If the relative success of the regulatory instruments depends in part on the role that lawyers play and the degree to which adversarial legalism can "gum up the works," so to speak, then comparative

191. Tushnet speculates that the theory here is to "undermine the existing interest-group structure" and then "reconstitute it in a different form" that will be less obstructionist to change and new forms of governance. Tushnet, *supra* note 65, at 391.

192. HEINZERLING & TUSHNET, *supra* note 4, at 683.

institutional analysis that fails to look at these issues is incomplete and inaccurate.

The example of NCLB helps illustrate this common weakness. With its accountability measures, the law was an example for the new governance scholars of the promise of democratic experimentalism (if properly implemented).¹⁹³ But only by examining how such a law has and could play out “on the ground” can one begin to understand the circumstances under which such a model of regulation can work and, where it fails, how it can be improved. And the way it will be implemented is not by everyone holding hands and working together for the public interest. It is through a complex pushing and pulling, with lawyers for teachers’ unions, school districts, and government agencies battling over what constitutes compliance with the law. Only by examining this new governance innovation in the context of this adversarial legal system can it be properly evaluated.

Or return to the account of preemptive self-regulation on issues like data privacy and childhood obesity. Without a strategy whereby new governance encompasses such areas, it is difficult to see how it would become an overarching regulatory theory. Such areas are governed by a third kind of adversarial legalism that Anthony Sebok recently highlighted: institutional interests locked in permanent battle over the degree and kind of regulation in a particular domain.¹⁹⁴ He used it to describe the battle between the insurance industry and doctors, on the one hand, and trial lawyers and Naderites, on the other, over the tort system.¹⁹⁵ But the same could apply to the teachers’ unions, parents, and school districts in education policy, or other interests in any number of domains.

In his contribution to *Law and New Governance*, Tushnet frames the issue nicely: “What are the political circumstances under which some innovations become significant in shaping large-scale policy?”¹⁹⁶ He answers the question by looking to the “large-scale structures of national governance,” what he calls the “functional constitution.”¹⁹⁷ But as he has pointed out in other work, the political circumstances are not fixed: indeed, conservative constitutionalists had success by connecting with groups that had political interests in their success, such as business interests.¹⁹⁸ Only by identifying such interests, and working with them to build political support for experimentalist strategies, can new governance achieve a broader scale.

193. Liebman and Sabel describe how NCLB “is informed by an innovative system of publicly monitored decentralization of school governance,” known as the “New Accountability,” see Liebman & Sabel, *supra* note 69, at 1708, in which “ends are revised in light of means and vice versa,” *id.* at 1713.

194. See Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEXAS L. REV. 1465 (2007) (book review).

195. *Id.* at 1474–75, 1506.

196. Tushnet, *supra* note 65, at 381.

197. *Id.*

198. Tushnet, *supra* note 58, at 360.

B. Training Lawyers

If new governance is as transformative as its most ardent proponents think, de Búrca and Scott posit, this will demand a “re-conceptualisation of our understanding of law and of the role of lawyers.”¹⁹⁹ Already, the new governance scholars have certainly made the case that such regulation is now part of the “modern regulator’s toolkit.”²⁰⁰ But the twenty-first-century regulatory state in Heinzerling and Tushnet still looks a lot like the twentieth-century version in Hart and Sacks.

Rather than introduce new governance methods at the end of the book in an “alternatives” section, Heinzerling and Tushnet in future editions might highlight such methods in Part III, when they talk about different regulatory instruments. Perhaps if lawyers are trained in new governance as a mode of regulation, they might be more inclined to propose such methods on behalf of clients or government agencies.

Moreover, the causal arrow may run in both directions—that is, just as new governance may lead us to rethink the role of lawyers and therefore how we train them, a shift in how we train lawyers may help create an environment where new governance is more likely to succeed.

Kagan provocatively asks in the title of one article: “Do Lawyers Cause Adversarial Legalism?”²⁰¹ And he provides the tentative answer of (essentially): To a certain extent, yes.²⁰² If that is the case and how we train lawyers is part of what leads to adversarial legalism, as Kagan argues, then we may need to rethink legal education if we want to increase new governance.²⁰³ To be sure, changing the way we train lawyers is simply one piece of the puzzle, and perhaps a minor one relative to decentralized government, distrust of government power, and other factors. But it is a factor.

The good news is that there are signs of change in legal education, consistent with the direction I describe here. Stanford, for example, is offering courses in the second and third year that have students work collabo-

199. De Búrca & Scott, *supra* note 18, at 9; *see also* Dorf & Sabel, *supra* note 94, at 860–65 (arguing that experimentalism may lead to a reconception of the very notion of what it means to be a professional such as a lawyer); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 928–29 (2003) (observing that Hart and Sacks’s approach hinted at a new model of legal professionalism where lawyers’ principal skill is the “ability to collaborate across disciplinary boundaries to solve problems”).

200. HEINZERLING & TUSHNET, *supra* note 4, at 547.

201. Kagan, *supra* note 188, tit.

202. *See id.* at 2 (“[W]hile adversarial legalism stems *primarily* from enduring features of American political culture and governmental structure, the legal profession itself does play a significant *independent* role in promoting and perpetuating adversarial legal contestation as a prominent feature of governance.”).

203. *See id.* at 24–27; *see also* Sturm, *supra* note 176, at 128 (“Legal education plays a pivotal role in socializing lawyers to the primacy of the gladiator model [of lawyering].”).

ratively in interdisciplinary groups.²⁰⁴ Harvard's new Problems and Theories class also appears to be a step in this direction.²⁰⁵ Law firms are indicating they want graduates to have more problem-solving skills, and this may impact law-school curricula.²⁰⁶

The theme of the Association of American Law Schools' 2008 Annual Meeting was "Reassessing Our Roles as Scholars and Educators in Light of Change," and the description of the main plenary session, "Rethinking Legal Education for the 21st Century," begins:

There is a growing sense among legal educators that it is time to rethink legal education. Dissatisfaction with the Langdellian model, now over a century old, has combined with enthusiasm about new approaches to both content and pedagogy to produce a potential turning point in the way we educate our students. A number of law schools have announced major initiatives in the past few years, and others are planning to do so.²⁰⁷

The bad news is there have been related calls for change of legal education before, with a limited degree of success. Institutional and individual inertia, resources, and other factors have played a role then as they do now in limiting change.

What would such a change look like? As the former general counsel of General Electric recently put it, there ought be more emphasis in law school on "creating, rather than critiquing."²⁰⁸ Students might be asked to write a strategy memo for a multinational corporation seeking to do business in China but worried about how to deal with the risks of corruption,²⁰⁹ or an options memo for a data broker or search engine facing parallel challenges to privacy concerns through litigation, state and federal regulatory bodies, and on the public-relations front.²¹⁰ Should the company implement an internal system of self-regulation, an industry-wide one, or neither? Or should the company press for federal standards and try to preempt state law?²¹¹

204. See Baldas, *supra* note 6, at S1; Press Release, Stanford Law Sch., A "3D" JD: Stanford Law School Announces New Model for Legal Education (Nov. 28, 2006), *available at* <http://www.law.stanford.edu/news/pr/47/> (describing such simulation courses as part of the curricular-reform effort).

205. See *infra* note 216.

206. See Baldas, *supra* note 6, at S5 (recounting responses to Northwestern University School of Law focus groups asking managing partners what competencies students need to be successful lawyers: project-manager and leadership skills, teamwork skills, and understanding legal strategy).

207. Association of American Law Schools, Reassessing Our Roles as Scholars and Educators in Light of Change, <http://www.aals.org/am2008/friday/index.html#plenary>.

208. Ben W. Heineman, Jr., *Law and Leadership*, 56 J. LEGAL EDUC. 596, 608 (2007).

209. Heineman describes this as one of his challenges at General Electric. See *id.*

210. See Ludington, *supra* note 97, at 154-58, 173 (describing three private-sector security breaches and the ensuing state and federal legislative responses, and proposing a new tort for misuse of personal information in order to protect privacy interests).

211. This appears to be the strategy of several industries today. See Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 16, 2007, at A1.

Some of the new governance scholars have explored the meaning of “lawyering for a new democracy” in the context of public-interest lawyering,²¹² but it need not be confined to that context. Besides the examples above, one can think of countless others. For example, from my own experience working at a major research university, I recall lawyers working with scientists and administrators to come up with a system for approving and monitoring stem-cell research experiments, and ensuring that federal-government money was not used for such research.²¹³ Students could be asked to work in teams to come up with creative solutions to similar problems. After all, lawyers and their clients are not mere passive recipients of regulatory output from government; they help shape regulatory regimes in fundamental ways.

In future editions, Heinzerling and Tushnet can do more along these lines. So when the authors discuss cost-benefit analysis in Chapter 9, they might include a scenario where students represent a company or trade association preparing to submit materials to an agency undertaking cost-benefit analysis of a particular regulation. And students could be asked how exactly they would make the case.

Similarly, in discussing the ways that regulation can fail in the same chapter, students as lawyers representing clients might be asked how strongly they would oppose or push for a particular regulation. If they are representing a regulated entity, for example, but the enforcement mechanism is weak or not likely to work, perhaps they ought to spend their political capital elsewhere. On the flip side, students might think about whether there are scenarios where requesting more regulation might benefit their clients, as Mattel is currently doing in asking for more regulation of imported toys, or as Google is in asking for privacy standards so that they do not have to do more than their competitors.²¹⁴

Such an approach would approximate more the “case method” in business schools, placing students in real-world situations and asking them to think through options for dealing with the situation at hand.²¹⁵ It would not

212. See Symposium, *Lawyering for a New Democracy*, 2002 WIS. L. REV. 271; see also Sturm, *supra* note 176, at 129 (“[The] image and practice of lawyer as gladiator is not descriptive of the range of roles that many lawyers play or of how many lawyers work . . .”).

213. See Alvin Powell, *Vigilant Eyes Oversee Stem Cell Research*, HARV. U. GAZETTE, Apr. 22, 2004, at S7, S7, available at <http://www.news.harvard.edu/gazette/2004/04.22/99-Stem-Ethics.html> (describing the board of scientists and ethicists that oversaw Harvard’s efforts).

214. See, e.g., Lipton & Harris, *supra* note 211, at A13 (“American toymakers recently asked the federal government to allow the Consumer Product Safety Commission to require premarket safety testing of all toys.”); *Google Lobbies for Privacy Standards*, ATLANTA J.-CONST., Sept. 15, 2007, at C2 (reporting that Google has urged countries to adopt a set of uniform privacy rules).

215. See Heineman, *supra* note 208, at 608 (arguing that law schools should develop “complex, interdisciplinary case studies” like those in business and public policy schools “to illuminate the multiple dimensions of issues and processes”); Rakoff & Minow, *supra* note 169, 603–05 (comparing the use of case studies at business schools and law schools); Robert J. Rhee, *Follow the*

involve reading cases in the sense of appellate opinions except as background for understanding the legal landscape; walking through those “cases” would not be a focus in class as it is in most law-school classes.²¹⁶

V. Conclusion

The fate of the project at the heart of each book is inextricably linked to the other. For the new governance scholars, the success of new governance as an overarching regulatory theory depends, at least in the United States, on the next generation of lawyers having the skills and inclination to overcome the culture of adversarial legalism that pervades policy implementation today. That is, in determining the success of new governance as a model for the twenty-first-century regulatory state, the training and receptivity of lawyers may well be an explanatory variable.

By the same token, for public law curricular reformers like Tushnet and Heinzerling, their book only succeeds if it provides adequate tools to the next generation of lawyers to be effective in the twenty-first-century regulatory state. To be sure, there is an as yet unanswerable question here: What will the U.S. regulatory state look like in twenty years? But I suspect that the new governance scholars may be more right about the future than Tushnet thinks and that the materials and skills in *The Regulatory and Administrative State* are therefore inadequate preparation for the twenty-first-century regulatory state.

The students who are trained by *The Regulatory and Administrative State* will understand what it means to challenge agency-issued regulations in the courts under the APA,²¹⁷ but not how to work with a school district to develop a plan to meet the goals of the NCLB law²¹⁸ or a hospital developing a system to protect information privacy under the Health Insurance Portability and Accountability Act (HIPAA).²¹⁹ Yet the latter tasks are likely to be more common than APA challenges for lawyers in 2020, and probably even today.

M.B.A. Model, NAT'L L.J., May 28, 2007, at 22, 22 (arguing that law schools should incorporate the business-school case method into the “structural fabric of the curriculum”).

216. In their curricular reform, Harvard separated the idea of putting lawyers in “role” and asking them to work as problem solvers by creating a separate course, given in between the regular semesters, called Problems and Theories. HLS Curricular Reform, *supra* note 5. This may well have been the result of a compromise among Harvard’s faculty, *see* Rakoff & Minow, *supra* note 169, at 604 (indicating such exercises should “become prominent features of our required first-year curriculum”), but pedagogically the same approach ought to be used in regulatory-state courses.

217. *See* HEINZERLING & TUSHNET, *supra* note 4, at 416–17 (excerpting Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975), which details the theoretical underpinnings of the role of agencies in the APA).

218. *See* Simon, *supra* note 39, at 56–57 (discussing implementation of the No Child Left Behind Act).

219. *See* Trubek, *supra* note 30, at 252–55 (discussing the development and potential revision of HIPAA).

At the same time, the new governance scholars could benefit from the kind of comparative institutional analysis that Heinzerling and Tushnet teach their students. For example, is the NCLB method of allowing states the flexibility to define standards for students really likely to lead to higher student achievement than if the federal government set the standards itself? If so, why? This kind of comparative analysis is frequently absent from the inevitability narrative advanced by some of the new governance scholars.

As we move more or less toward a new constitutional order in the United States, we must understand the kinds of regulatory mechanisms that are likely to be effective and train tomorrow's lawyers to represent their clients effectively within such a regulatory framework. Together, these two books are a promising start.