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**THE RENEW DEAL: THE FALL OF  
REGULATION AND THE RISE OF GOVERNANCE  
IN CONTEMPORARY LEGAL THOUGHT**

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## Article

# The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought

Orly Lobel<sup>†</sup>

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The legal field is at a critical moment of renewal and reinvention for the twenty-first century. In an analytical tour de force, contemporary legal thought is promoting a shift from the traditional New Deal regulatory era to a “Renew Deal” governance paradigm. Different schools of thought within legal academia are breaking from conventional models of regulation, administration, and adjudication, and introducing a new regime for a new century. Pointing to the false dilemma between centralized regulation and deregulatory devolution, there is a growing consensus in legal scholarship that innovative approaches to law, lawmaking, and lawyering are possible and necessary. At the same time, a myriad of policy initiatives in different fields are employing new regulatory approaches in legal practice that reflect this theoretical vision. Administrative agencies at the federal and state levels are increasingly promoting outreach programs and issuing nonbinding guidelines in lieu of their traditional top-down rule promulgation, implementation, and enforcement activities. New legislation in areas such as eco-management and information technology provides opportunities for private parties to opt out of the conventional legal regime and manage their environment through collaborative and dynamic planning. Courts and administrators increasingly rely on voluntary compliance as a defense against liability

in employment discrimination cases. In all of these contexts, government harnesses the power of new technologies, market innovation, and civic engagement to enable different stakeholders to contribute to the project of governance.

This Article introduces the emerging vision as a paradigm shift from a regulatory to a governance model, signifying a collective intellectual and programmatic project for a new legal regime. The new governance model connotes a de-centering of legal scholarship, challenging the traditional focus on formal regulation as the dominant locus of change. The model enables practices that dislocate traditional state-produced regulation from its privileged place, while at the same time maintaining the cohesion and large-scale goals of an integrated legal system. It thereby provokes a long-awaited synthesis of thought within legal academia, addressing the pervasiveness of both regulatory and market failures. Ingeniously integrating insights from law and economics and critical legal scholarship, it further promises a renewed dialogue between those who champion centralized top-down regulation and those who advocate devolution, deregulation, and privatization. The Article maintains that a key strength of the new governance model is its explicit suggestion that economic efficiency and democratic legitimacy can be mutually reinforcing.

Over a half-century ago, the New Deal signified a paradigm shift in the American polity. Under the mandate of relief, recovery, and reform, the modern regulatory administrative state was created. In the context of world war and economic depression, law was conceptualized as national, top-down, and sanctioned. The New Deal regulatory model sought to consolidate formerly dispersed powers into the newly founded expert regulatory agencies and to direct economic and social activities at the national level. At the beginning of the twenty-first century, against the backdrop of global competition, changing patterns in market organization, and a declining commitment to direct government intervention, contemporary legal thought and practice are pointing to the emergence of a new paradigm—*governance*—that ties together recent developments in the political economy with advances in legal and democratic theory. Governance signifies the range of activities, functions, and exercise of control by both public and private actors in the promotion of social, political, and economic ends. The new governance model supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative

model, in which government, industry, and society share responsibility for achieving policy goals. The adoption of governance-based policies redefines state-society interactions and encourages multiple stakeholders to share traditional roles of governance. Highlighting the increasing significance of norm-generating nongovernmental actors, the model promotes a movement downward and outward, transferring responsibilities to states, localities, and the private sector—including private businesses and nonprofit organizations. Lawmaking shifts from a top-down, command-and-control framework to a reflexive approach, which is process oriented and tailored to local circumstances. At the same time, by linking together geographically and materially dispersed law reform efforts, the model provides innovative ways to coordinate local efforts and to prevent the isolation of problems. Scaling up, facilitating innovation, standardizing good practices, and encouraging the replication of success stories from local or private levels become central goals of government. Legal orchestration is achieved through interpenetration of policy boundaries, new public/private partnerships, and next-generation policy strategies such as negotiated rulemaking, audited self-regulation, performance-based rules, decentralized and dynamic problem solving, disclosure regimes, and coordinated information collection.

This Article integrates the insights of recent legal approaches into a single framework called the Renew Deal school. The Article both asserts the emergence of a new model and critically explores the interaction among its various elements. It unpacks the widespread claims of newness in legal theory, as well as in practice, asking why legal projects are seeking to be innovative and to what they are responding. At the same time, it offers a comprehensive map for understanding the uncharted terrain of renewal projects collectively, addressing contingencies and internal tensions among the possible meanings and interpretations of the emerging model. Prominent scholarly works at the microlevel of doctrinal areas, the macrolevel of constitutional and administrative law, and the metalevel of jurisprudence all advocate the necessity and the possibility of renewal through a new governance model. The new paradigm is instigating change in a wide spectrum of policy issues and fields, ranging from employment and environmental protection; to welfare, family, health, and education laws; to policing and criminal justice administration; to state takings, torts and consumer protection; to transportation, information technology,

privacy, and corporate shareholder protections. This Article demonstrates how the governance model emerges from a myriad of recent scholarly theories including “reflexive law,”<sup>1</sup> “soft law,”<sup>2</sup> “collaborative governance,”<sup>3</sup> “democratic experimentalism,”<sup>4</sup> “responsive regulation,”<sup>5</sup> “outsourcing regulation,”<sup>6</sup> “re-constitutive law,”<sup>7</sup> “post-regulatory law,”<sup>8</sup> “revitalizing regulation,”<sup>9</sup> “regulatory pluralism,”<sup>10</sup> “decentering regulation,”<sup>11</sup> “meta-regulation,”<sup>12</sup> “contractarian law,”<sup>13</sup> “communicative gov-

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1. ALBERTO FEBBRAJO & GUNTHER TEUBNER, *STATE, LAW AND ECONOMY AS AUTOPOIETIC SYSTEMS: REGULATION AND AUTONOMY IN A NEW PERSPECTIVE* (1992); REFLEXIVE LABOUR LAW: STUDIES IN INDUSTRIAL RELATIONS AND EMPLOYMENT REGULATION (Ralf Rogowski & Ton Wilthagen eds., 1994) [hereinafter REFLEXIVE LABOUR LAW].

2. See, e.g., David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, EUR. L.J. (forthcoming 2004); KERSTIN JACOBSSON, *INNOVATIONS IN EU GOVERNANCE: THE CASE OF EMPLOYMENT POLICY CO-ORDINATION* (Stockholm Center for Organizational Research, Working Paper No. 2001:12, 2001), at <http://www.score.su.se/pdfs/2001-12.pdf>.

3. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

4. ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* (1998); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) [hereinafter *A Constitution of Democratic Experimentalism*]; Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimentalist Government*, 53 VAND. L. REV. 831 (2000) [hereinafter *Drug Treatment Courts and Experimentalist Government*].

5. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2002).

6. DARA O’ROURKE, *Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring*, 31 POL’Y STUD. J. 1 (2003).

7. Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986).

8. Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 299 (Gunther Teubner ed., 1986); David Trubek & Louise Trubek, *Post-Regulatory Law & Lawyering* (Wisconsin Law School Course 940-015) (unpublished syllabus and bibliography, on file with author).

9. Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278, 1280 (1993).

10. Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 LAW & POL’Y 49 (1999).

11. Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World*, 54 CURRENT LEGAL PROBS. 103 (2001).

12. Bronwen Morgan, *Regulating the Regulators: Meta-Regulation As a Strategy for Reinventing Government in Australia*, 1 PUB. MGMT. 50 (1999).

ernance,”<sup>14</sup> “negotiated governance,”<sup>15</sup> “destabilization rights,”<sup>16</sup> “cooperative implementation,”<sup>17</sup> “interactive compliance,”<sup>18</sup> “public laboratories,”<sup>19</sup> “deepened democracy and empowered participatory governance,”<sup>20</sup> “pragmatic lawyering,”<sup>21</sup> “nonrival partnership,”<sup>22</sup> and “a daring legal system.”<sup>23</sup> It argues that these subsets of ideas should be understood together as generating a powerful vision within legal thought about the need for renewal through a shift to the governance paradigm. The theoretically-integrated model serves to better inform policymakers in prescribe and normatively evaluate policies, legal function, and democratic ideals.

The Article begins by introducing the myriad of claims for renewal within legal thought and practice. Part I discusses the emergence of the twenty-first-century Renew Deal vision against the backdrop of the twentieth-century New Deal. Rather than merely a transition from one set of rules to the next, it describes the connection between renewal and permanent innovation as the key to understanding the new governance model. While the concept of regulation carries with it the

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13. David A. Dana, *The New “Contractarian” Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35.

14. Jan Kooiman, *Findings, Speculations and Recommendations, in MODERN GOVERNANCE: NEW GOVERNMENT—SOCIETY INTERACTIONS* 249 (Jan Kooiman ed., 1993).

15. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

16. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

17. Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535 (1996).

18. CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE: RESOLVING THE REGULATION-DEREGULATION DICHOTOMY (Jay A. Sigler & Joseph E. Murphy eds., 1991); JAY A. SIGLER & JOSEPH E. MURPHY, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION* (1988).

19. 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 (2003).

20. DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003).

21. William H. Simon, *Solving Problems v. Claiming Rights: The Pragmatist Challenge to Legal Liberalism* (unpublished manuscript, on file with author).

22. MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002).

23. *Id.*

baggage of boundaries and predetermined solutions, the contemporary concept of governance is open, dynamic, and diverse with a built-in temporal dimension. Part II traces the various rationales and motivations that drive the theoretical and practical efforts for a Renew Deal. It argues that the contemporary moment of renewal is simultaneously motivated by both external push factors of the new political economy and internal developments within legal thought concerning the inherent limitations of traditional regulatory theory. The analysis reveals the coexistence of parallel modes of reasoning, internal and external to legal thought, including crisis and opportunity; action and reaction; regression, progression, and cyclic; transition and permanence; replacement and complementarity; and authentic law and outside-of-the-law constructs. Drawing on these internal and external dynamics for reform, Part II further demonstrates how the governance model is linked to sectoral isomorphism among the public sector, the market, and the nonprofit, or “civil society,” third sector. It argues that the market and civil society are at once the platform and the analogy for triggering isomorphic changes in the organization of public governance.

Part III provides a comprehensive roadmap of the dimensions and organizing principles of the governance model. These features consist of increased participation of nonstate actors, stakeholder collaboration, diversity and competition, decentralization and subsidiarity, integration of policy domains, flexibility and noncoerciveness, adaptability and dynamic learning, and legal orchestration among proliferated norm-generating entities. The challenge is to understand these dimensions of the new legal model as operating together, along with the contingencies and internal debates over meaning and bricolage that inevitably arise in an emerging school of thought. The new policy tools and mechanisms that are integral to the governance principles are evaluated and considered within the efforts to improve democratic practices. Part IV critically documents the practical application of governance principles in the following three areas: employment law, environmental law, and digital technology laws. First, new workplace policies—including occupational safety and health administration, employment discrimination, and vocational training programs—provide important insights into the ways the legal regime is confronting the new political economy and constructing innovative policies to produce socially responsible

market practices. The recent enactment of the Workforce Investment Act (WIA), as well as newly adopted programs of the federal Occupational Health and Safety Agency (OSHA) and the Equal Employment Opportunity Commission (EEOC), provide practical testing grounds to examine large-scale shifts from regulation to governance. In environmental law, a second leading area of governance, scholars and activists are developing the concept of civic environmentalism, which confronts the failures of traditional regulatory schemes and promotes participatory and decentralized arrangements to better conserve the ecosystem and natural resources. In particular, Part IV.B examines the 2000 revised federal guidelines for Habitat Conservation Planning (HCP) under the Endangered Species Act (ESA). The new policy encourages private stakeholders to engage in participatory governance as an alternative to top-down regulation. Finally, in a third principal governance domain, information technology law, the ever-expanding domain of the Internet provides a momentous illustration of the implementation of governance principles in a new technological infrastructure. Regulatory agencies have begun harnessing the power of digital technologies to meet the informational and organizational demands of rulemaking and to expand civic involvement in policymaking, for example, through the enactment and implementation of the 2002 E-Government Act. At the same time, private industry and nongovernmental organizations are using information technology to expand their public activities and agendas, fostering new forms of norm-generating institutions. The concept of cyberdemocracy and its regulatory challenges are considered in relation to current legal debates about digital regulation and design.

While the struggle among regulatory, market, and governance approaches persists, the new governance paradigm enables a synthesis of thought within legal academia. Part V argues that the governance model is purposely and ingeniously designed as a model of theoretical and practical hybridization, drawing together elements from rival schools of thought. In practice, it addresses the pervasiveness of both regulatory and market failures. In legal theory, hybridization involves the integration of insights from both law and economics and critical legal scholarship, and the rejection of the oppositional stance that these schools have previously taken. In turn, the integrative project enables the realignment of commitments between advocates of centralized regulation and advocates of deregula-

tory privatization. Most importantly, the Renew Deal illuminates the ways in which, under certain conditions, economic efficiency and democratic legitimacy can be mutually reinforcing.

This Article concludes with a discussion of the central normative canons that are evoked by the nascent governance regime. Building on both the theoretical and programmatic analyses of the emerging paradigm, Part VI introduces several sets of critical challenges to the new conceptual framework. First, it considers situations of compatibility—as opposed to interchangeability—between the traditional regulatory model and the new governance model. Second, it describes tensions that arise between the emphasis on direct engagement, as well as the notion of pluralized authority, championed by the new model and the ongoing need for an expert representative government in the new polity. Third, the issue of power in a collaborative participatory legal regime is explicitly explored. A central strength of the governance model is its appeal to both progressive social reform agendas that support bottom-up democratic empowerment and exponents of projects of privatization and devolution. It is precisely for this reason, however, that the Renew Deal must confront difficult choices and further develop its underlying values, enhancing the particular circumstances in which governance succeeds. In the concluding section, the Article relates principles of the governance model to our complex understanding of democracy, arguing for ongoing substantive normative evaluation, even as we advance to the more pluralized and process-oriented governance model.

#### I. THE SPIRIT OF RENEWAL IN CONTEMPORARY LEGAL THOUGHT

In describing the emergence of a new legal regime, the claim to novelty is inexorably ambitious and problematic. Undoubtedly, there are politics of innovation in academia, as in other communities of knowledge. A claim of newness often carries with it several exciting promises, including progress, originality, optimism, and the introduction of cutting-edge ideas. Newness as politics can also serve as a strategy for forgetting differences and moving beyond past disagreements; it is a way to conceal preassigned identities and enter into an ongoing discourse that previously seemed gridlocked by the ideas of familiar, but mutually exclusive, incumbents. This Article is motivated by the need for an articulation and evaluation of contemporary legal thought, which ubiquitously declares itself

at a stage of renewal.

In his remarkable book, *The Structure of Scientific Revolutions*, Thomas Kuhn describes a paradigm as a “set of recurrent and quasi-standard illustrations of various theories in their conceptual, observational, and instrumental applications.”<sup>24</sup> A paradigm draws a picture of the world, including the constellation of beliefs, values, and techniques shared by the members of a community.<sup>25</sup> A new paradigm emerges through a revolution, a noncumulative developmental episode in which an older paradigm is understood to be replaced in whole or part by one that is new and incompatible.<sup>26</sup> A revolution takes place when the existing paradigm ceases to function adequately in the exploration of an aspect of nature and thought. While new paradigms may replace older ones, continuous links to earlier models invariably exist.<sup>27</sup>

Over six decades ago, the New Deal brought a paradigm shift to American society. The establishment of the New Deal by President Franklin Roosevelt is widely understood as one of the most significant events in American politics of the twentieth century. As Bruce Ackerman has described, “[a] half-century ago, our legal system was reeling under one of the greatest shocks in its history. Although America had experienced many depressions before, it had never confided political power to a leadership so evidently willing to respond by questioning the legitimacy of laissez faire itself.”<sup>28</sup> Responding to the burdens and risks of the Depression and two world wars, the New Deal instigated the creation of the modern regulatory and administrative state. The New Deal paradigm invoked three Rs—relief, recovery, and reform, but it was the legal developments that united all three under the umbrella of the big “R” of regulation. In a short period of time, a sweeping set of

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24. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43 (1962).

25. See JOHN A. VASQUEZ, *THE POWER OF POWER POLITICS: FROM CLASSICAL REALISM TO NEOTRADITIONALISM* 22–23 (1998) (defining paradigm as the fundamental assumptions scholars make about the world they are studying).

26. KUHN, *supra* note 24, at 110.

27. Labeling is of the essence, as it shapes and informs the imaginative spectrum. New governance approaches have received a variety of names. Some contribute more than others to the very elements the model seeks to promote. Terms such as “post-regulatory” or “soft law” can, in my view, be problematic, as they begin with a position of either/or and accept an inferior position of law vis-à-vis the regulatory model.

28. BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 6 (1984).

new regulations, regulatory agencies, and federal and state programs were created.<sup>29</sup>

As we enter the twenty-first century, commentators from across the political spectrum are signaling a second revolutionary paradigm shift—the Renew Deal. As with the New Deal, the Renew Deal vision of governance aims to tie developments in technology, globalization, communications, economic organization, and privatization, as well as the collapse of states and ideologies, the unification of regimes like the European Union, and the rise of nonstate and stateless actors in both peace and war together with developments in legal and democratic theory, including the decline of unified theories and the dissatisfaction with oppositional and fragmented schools. At this moment, a window has opened that engages the attention and energy of diverse thinkers in the legal world.<sup>30</sup>

In the emerging Renew Deal, the claims of a new legal regime are self-descriptive. Commentators from a wide range of

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29. See generally WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940 (1963) (describing the social and political events of Franklin D. Roosevelt’s first two terms).

30. See *infra* Part II. Whether the shift to the Renew Deal is directly correlated with actual developments in the world or internally integrated by a myriad of legal scholars who are using similar terms and concepts and are inspiring and being inspired by others, is secondary to the actual emergence of a vision. Before the New Deal, pragmatism was understood to be the knot that pulled different strands of intellectual thought together—the emergence of cultural pluralism, the fascination with pure science and the logic of scientific inquiry, the development of probability theory as a means for coping with randomness and uncertainty and the spread of historicist approaches to study culture, the rapid assimilation of Darwinian theory of evolution, and the suspicion of institutional authority. See, e.g., MICHAL ALBERSTEIN, PRAGMATISM AND THE LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION 13–14 (2002) (suggesting that pragmatism should be understood as a rupture and a foundational moment in American thought); CLASSICAL AMERICAN PRAGMATISM: ITS CONTEMPORARY VITALITY (Sandra B. Rosenthal et al., eds., 1999) (showcasing the intellectual contributions of prominent contemporary pragmatist scholars); THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (Morris Dickstein ed., 1998) (profiling the major currents in modern American pragmatic thought); CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM (1989) (chronicling the history of American pragmatism from Ralph Waldo Emerson to Richard Rorty and the challenge of postmodernity). See generally Louis Menand, *Introduction to Pragmatism*, in PRAGMATISM: A READER at xxvi (Louis Menand ed., 1997). In the succeeding decades after the New Deal, the “space race” of the 1960s and 1970s further fostered expectation about the capacities of top-down reform and optimism about technology as an all-encompassing response to social need. See WALTER A. MCDUGALL, THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE (1985).

legal fields agree that there is a contemporary “broad consensus in favor of the need for *some kind of change* in the current regulatory system.”<sup>31</sup> As one author describes, “[n]ot since the New Deal has the direction of the administrative state been subject to such contestation. The language of regulatory reinvention is ubiquitous.”<sup>32</sup>

Proclaiming a new post-New Deal paradigm has also been ubiquitous in the political arena. During his presidency, President Clinton stated that the New Deal “helped to restore our

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31. Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441 (1999).

32. Freeman, *supra* note 3, at 3; see also BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995) (discussing the shifts and developments in regulatory analysis and the federal bureaucracy during the Reagan years); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); Nicholas W. Allard, *Reinventing Rate Regulation*, 46 FED. COMM. L.J. 63 (1993) (analyzing the efficacy of the Cable Television Consumer Protection and Competition Act of 1992); Peter F. Drucker, *Really Reinventing Government*, ATLANTIC MONTHLY, Feb. 1995, at 49 (arguing that the need for reform is so severe that slashing bureaucracies is inadequate, and suggesting that reforms in the private sector be adopted in the public sector); Symposium, *Getting Beyond Cynicism: New Theories of the Regulatory State*, 87 CORNELL L. REV. 267, 279 (2002) (inquiring into the idea “that public choice theory need not involve either the strong motivational assumption of self-interest or the reductionary premise of perfect information and rationality”); Steven J. Groseclose, *Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA’s Clean Air Act Rulemaking Progress Projections*, 53 MD. L. REV. 521 (1994) (recounting the shortcomings of the EPA’s Regulatory Agenda and offering suggestions for improvement); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996) (scrutinizing efforts by the executive and legislative branches to reform the administrative state); Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 UCLA L. REV. 1687 (2002) (exploring the needs of the contemporary administrative state); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995) (evaluating Executive Order 12866 and its place in the Clinton administration’s plan to reinvent government); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001) (examining the trend towards an “elaborate system of *third-party government* in which crucial elements of public authority are shared with a host of non-governmental or other governmental actors”); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002) (investigating the attempts to overhaul the administrative state in the European Union); Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575 (arguing that public interest lawyers must change their tactics to remain relevant in a world where the center of government is shifting back to the states).

Nation to prosperity and defined the relationship between our people and their Government for half a century. . . . That approach worked in its time. But we today, we face a very different time and very different conditions.”<sup>33</sup> Like his Republican counterparts, President Clinton repeatedly asserted that “[t]he era of big [g]overnment is over.”<sup>34</sup> At a bill-signing ceremony, he declared that it was time for power to shift from the federal to the state and local levels:

We are recognizing that the pendulum has swung too far, and that we have to rely on the initiative, the creativity, the determination and the decision making of people at the State and local level to carry much of the load for America as we move into the 21st century.<sup>35</sup>

Yet, the Renew Deal shift is not simply a swing back from a point to which “the pendulum has swung too far.” A remarkable aspect of the contemporary calls for a new paradigm is the way the concept of change and renewal continues to inform the new vision even as it replaces elements of the older model. The connection between renewal and permanent innovation is therefore key to understanding the Renew Deal governance model. The promise is not merely a shift from one regime to another, from one set of legal doctrines to another, or from one method of regulation to another; but rather an entirely new regime that will have the built-in ability to innovate and constantly renew itself. Newness itself becomes the essential substance of the emerging paradigm. The idea of dynamic innovation is intrinsic to the theory. The organizing principles of the governance model are designed to allow the new paradigm to evolve organically. Its leading features, such as dynamic learning, process orientation, iteration, innovation, and adaptability, all constitute a time dimension within the model. The goal of this newness in legal thought is to imagine the ar-

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33. President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 24, 1995), in 31 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 97, 97 (1995).

34. President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), in 32 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 90, 90 (1996); see also Steven G. Calabresi, “*The Era of Big Government Is Over*,” 50 STAN. L. REV. 1015 (1998) (reviewing ALAN BRINKLEY ET AL., *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* (1997)).

35. President William J. Clinton, Remarks on Signing the Unfunded Mandate Reform Act of 1995 (Mar. 22, 1995), in 31 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 453, 455 (1995), quoted in Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1278 (1997).

chitecture of a legal system that is most likely to support constant improvement: The overriding task in the design of arrangements conducive to practical progress is therefore always to imagine and establish the arrangements for cooperation, in the small and in the large, that are least likely to prevent permanent innovation.<sup>36</sup>

## II. THE PUSH AND PULL FOR RENEWAL

### A. THE COMPETING LOGICS OF THE RENEW DEAL: CLOSING THE GAP OR LEADING THE WAY

What motivates the drive for a new governance model? Several sets of competing logics run through the vision of renewal. The primary set of logics juxtaposes external and internal reaction. While the dominant narrative of reaction relies on external triggers created by new realities of the political economy, a competing account emphasizes the internal push for new approaches to sociolegal theory. Externally, law reacts to change in the circumstances of the outside world. These circumstances include globalization, privatization, technology, increased market competition, economic recession, and alternating modes of production. At the same time, it is internally motivated by the inadequacies of existing theories, stagnation in the current state of legal discourse, and the need to progress beyond conceptual binaries—including left/right, critical/constructive, expressive/scientific, formal/informal, and regulated/unregulated—that have misinformed previous schools of thought.<sup>37</sup>

A related set of logics provokes the images of both progression and regression in the shift from a regulatory to a governance model. While many descriptions invoke the rhetoric of pro-

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36. UNGER, *supra* note 4, at 184.

37. The duality of political economy developments and theoretical conceptualization comes through explicitly in introductory notes on reflexive law:

Reflexive labour law is both a theoretical concept and a description of a certain development of modern labour law systems. As a theoretical concept it applies a particular version of general legal theory, i.e., autopoietics to labour law. As a descriptive concept it interprets and reconstructs trends in labour law . . . .

REFLEXIVE LABOUR LAW, *supra* note 1, at 7–8. This tension is similarly visible in *A Constitution of Democratic Experimentalism*, *supra* note 4. The first subtitle of Dorf and Sabel's article is "The Crisis." *Id.* at 270. Thereafter, the authors shift to the description of progress and advancements internal to legal thought. *Id.* at 270–88.

gress and growth by describing the transformation in evolutionary terms, a competing rhetoric highlights crisis and decline in existing capabilities and public commitment. While one path of reasoning reflects political disillusionment with the postwar model of the bureaucratic welfare state, the second signifies a re-legitimation of the legal process by shifting to a more advanced form of public, deliberative participation. These coexisting rationales emphasize an additional tension concerning the temporal duration of the transformation—whether the shift to governance is understood as part of a transitional period toward an unknown future or a permanent new framework that replaces the traditional regulatory paradigm. Moreover, while the Renew Deal literature often depicts the new approaches of the governance model as alternatives to conventional regulatory approaches, it simultaneously assumes their complementarity.

A final set of competing ideas that run throughout the literature involves the allocation of the new governance model within or without law's empire. While one underlying line of reasoning emphasizes the legal externality of the new model as being in sharp opposition to regulation, a competing narrative uses the rhetoric of authenticity and resurgence to suggest that the Renew Deal governance model represents a newer and truer, form of law, lawmaking, and public administration.<sup>38</sup>

Rather than deciding between competing motivators, our focus should be on the conditions, both internal and external to legal thought, that make the new vision possible. Indeed, instead of asking what is truly motivating and authentically new in the model, the key questions concern the range of developments and changes that have made the principles of the new governance model salient and feasible at the beginning of the twenty-first century.

#### B. EXTERNAL PUSH FACTORS: LAW FOLLOWS THE POLITICAL ECONOMY

The first set of rationales for the Renew Deal is reactive. The premise is that, as the world changes, patterns of law and governance must change with it. As we move into the twenty-

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38. See generally Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics* (2003) (unpublished manuscript, on file with author) (describing the tension between depictions of new reform strategies as legal and extra-legal).

first century, the economic, social, and political landscapes are constantly in motion. Consequently, legal thought and practice must transform themselves to adjust to new realities: "The world will not stand still and let us enjoy our freedoms. It will continually make itself anew, and as it does, we must consider the ever-changing predicament of liberty, and the ever new methods by which it may be augmented or curtailed."<sup>39</sup>

A remarkable number of recent legal articles therefore begin with a description of a change in the circumstances in the outside world, including increased global competition, privatization, fiscal crises; new modes of production and patterns of employment; changing ecology; and advancements in communication, science, and technology.<sup>40</sup> In reaction, law needs to continually close the gap and adapt to these circumstances: "A rapidly changing world that is moving toward a new phase of modernity requires innovative legal and policy strategies."<sup>41</sup> If the political economy has changed, legal theorists and practitioners need to rethink the traditional roles of law.

The first step therefore is to diagnose the discontinuities between the demands of the twenty-first century and the capacities of the regulatory state:

Where society demands flexibility and dynamism, the state offers bureaucracy and rules. Where society requires legal instruments that are almost self-implementing, the state builds an elaborate oversight apparatus. While societies need a legal system that induces self-reflection toward "sustainable" behavior, the state maintains a legal strategy of forcing desired behavior from outside the firm, through threats of exposure and punishment.<sup>42</sup>

This analysis reflects the idea that life has reached a new degree of complexity which renders a central control-and-command structure impossible: "[I]n a complex and rapidly changing world it is manifestly impossible to write rules that

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39. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 58 (2004).

40. See, e.g., MODERN GOVERNANCE: NEW GOVERNMENT-SOCIETY INTERACTIONS (Jan Kooiman ed., 1993) (containing a collection of essays on the new realities in Europe that demand a different conception of state/society relations); Jan Kooiman, *Governance and Governability: Using Complexity, Dynamics and Diversity*, in MODERN GOVERNANCE: NEW GOVERNMENT-SOCIETY INTERACTIONS, *supra* note 40, at 35; William F. Pedersen, *Contracting with the Regulated for Better Regulations*, 53 ADMIN. L. REV. 1067 (2001).

41. Fiorino, *supra* note 31, at 464-67, (stating "the world is changing, so law and patterns of governance must change with it").

42. *Id.* at 464.

cover the particulars of current circumstances in any sphere of activity.”<sup>43</sup> Moreover, the conditions of the new market are those of uncertainty, unpredictability, and volatility. “[P]olicy has to be flexible and revisable to cope with an increasingly complex and volatile world . . . .”<sup>44</sup> Law should recognize the new reality of “radical indeterminacy”<sup>45</sup> and the “pervasiveness of unintended consequences.”<sup>46</sup> These twenty-first century realities no longer allow for the traditional statist project, but rather require the proliferation of newly diverse sources of norms and strategies.<sup>47</sup>

New governance approaches are also needed to address the increased speed of change in the new economy. Flexibility and adaptability are key in remaining competitive in the globalized market. Scientific innovation, as well as unpredictable strains of heightened competition, require techniques which incorporate constant change and improvement.

In addition to the new levels of complexity, unpredictability, and dynamic change in society, law must also react to increasing heterogeneity. The New Deal model was created upon the assumptions of a former era, in which uniformity and stability were considerably more widespread. As described in Part IV, the typical New Deal economic enterprise was a large and relatively stable industrial company, while today the workplace

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43. *Drug Treatment Courts and Experimentalist Government*, *supra* note 4, at 837. For a discussion relating to new understandings about the complexity of ecosystems, see Annecoos Wiersema, *Extinction and Uncertainty: Reconciling Ecology and Law in International Legal Regimes for Protection of Species and Ecosystems* 3 (unpublished SJD colloquium Dec. 2003, on file with author): “While, over the past few decades, ecologists have increasingly recognized the complexity and the lack of stability in nature, lawyers seeking protection of these ecological systems have been slow to catch up.” *Id.*; see also Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231 (1995) (“Conventional regulation is continually outpaced by the increasing complexity of environmental problems.”)

44. Trubek & Trubek, *supra* note 2, at 17.

45. Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET 289, 292 (Christian Joerges & Renaud Dehousse eds., 2002).

46. *A Constitution of Democratic Experimentalism*, *supra* note 4, at 285.

47. Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT’L & COMP. L. 69, 71–72 (1998). *A Constitution of Democratic Experimentalism*, *supra* note 4, at 270 (“[O]ur national affairs are too complex, diverse, and volatile to be governed by lapidary expressions of the public will—laws of Congress, administrative rules, judicial judgments—that indicate precisely how to dispose of most of the cases to which they will eventually be applied.”)

is vastly heterogeneous, networked, and constantly changing.<sup>48</sup> Similarly, the accumulation of new scientific knowledge about the diverse and changing nature of different ecological systems requires the response of environmental policy. A significant impediment for legal reform today is the diversity of the market and the wide range of social issues and problems, which require the adoption of a wide range of organizational forms and policies. Contemporary legal scholarship recognizes that, today, no single model of social organization exists and thus a unitary conception of the regulation of diverse social fields and contexts is impossible.<sup>49</sup> There is no one-size-fits-all solution to the challenges facing the regulatory state. No standard regulations can effectively govern the multiplicity of settings in which social action operates. The nature of the new economy requires legal institutions themselves to be multiple and diverse.<sup>50</sup>

Technological advances and changes in market infrastructure have been conducive to these new demands for openness and “radicali[z]ed modernity.”<sup>51</sup> They have also added a new layer of settings to which legal thought must react. Namely, the physicality of the regulated unit has itself changed. Advances in technology and communication are increasingly facilitating self-regulation within the private market by enabling more in-

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48. See *infra* notes 236–43 and accompanying text.

49. See, e.g., *A Constitution of Democratic Experimentalism*, *supra* note 4; Fiorino, *supra* note 31.

50. In more abstract terms, these changes can be theorized as the changes in our perceptions of modernity. While the New Deal was founded on the premises of modernism, including certainty, order, rationality, universality, and objectivity, the Renew Deal is motivated by the assumptions of the “radicalization of modernity” (in some versions, postmodernism), including indeterminacy, disequilibrium, particularism, diversity, experientialism, subjectivity, and the possibility that chaos is openness. ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 50–52 (1990). See also, BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION* 21–22 (2002) (explaining the tension between regulation and emancipation in a postmodern understanding of the law).

51. Giddens characterizes radicalized modernity, or accelerated high modernity, as the unprecedented rapidity of change, the encompassing scope of change, and the increased commodification of social action. GIDDENS, *supra* note 49, at 149–50. Through time/space distinctions, social disembedding, and accepted systems of knowledge and self-monitoring, radical modernity promotes global integration and increased local and global coordination. *Id.* This is in fact opposed to the conditions described by postmodern theorists of fragmentation and disorganization. See *id.*; cf. DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1990) (describing the historical construction of the intellectual project of postmodernity but ultimately finding a renewal of Enlightenment ideals).

formation sharing and lowering the barriers of entry. For example, advances in air travel have increased competition among airlines; thereby reducing some of the need for antitrust regulation.<sup>52</sup> Similarly, the natural monopoly of microwave transmission has decreased in telecommunications.<sup>53</sup> As described in Part IV, the explosion of Internet technologies and cable broadcasting has eliminated some of the rationales for regulation of information, while creating other types of risks.<sup>54</sup> A central example is the way new cyber-communications technology has lowered the threshold for groups to act collectively, triggering the emergence of new kinds of norm-generating institutions.<sup>55</sup> Furthermore, the digital revolution has made it easy to copy, transmit, and distribute materials, as well as to connect with others through communication networks at drastically lower costs.<sup>56</sup> These physical and architectural innovations require corresponding developments in legal theory.<sup>57</sup>

Finally, recent developments in the political economy have revealed new gaps between democratic practices and prevailing constitutional theory.<sup>58</sup> Globalization, primarily the unification of nations in Europe, has brought into question the adequacy of the concept of a *demos*. Within legal theory, globalization has raised concerns about a democratic deficit.<sup>59</sup> The need for a bet-

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52. Cf. Bruce B. Wilson, *Railroads, Airlines, and the Antitrust Laws in the Post-Regulatory World: Common Concerns and Shared Lessons*, 60 ANTITRUST L.J. 711, 717–18 (1991) (asserting that railroads can learn from the airlines adoption of electronic ratemaking and electronic reservation system and the subsequent antitrust litigation).

53. PETER H. SCHUCK, *The Politics of Regulation, in THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 117, 123–24 (2000).

54. See *infra* Part IV.C.

55. HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 38–64 (1993).

56. Balkin, *supra* note 39, at 6–7.

57. For example, responding to these new digital realities, Jack Balkin argues,

“[A]s the world changes around us, as the possibilities and problems of new technologies are revealed, our conception of the free speech principle begins to change with them. Our sense of what freedom of speech is, why we value it, and how best to preserve that which we value, reframes itself in the changing milieu.”

*Id.* at 55.

58. See, e.g., *A Constitution of Democratic Experimentalism*, *supra* note 4, at 272 (describing the crisis of constitutional theory premised on a choice between the Constitution or institutional democracy as “deliberately alarmist”).

59. See, e.g., Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L.J. 451 (1999); Dan Hunter, *ICANN and the Concept of Democ-*

ter theory for the new polity bridges most directly the external and the internal drives for renewal. In the face of new realities and changing needs, these concerns have created a platform to which legal thought must react in addressing the inadequacies of existing models of regulation and lawmaking.

### C. THE INTERNAL PULL: THE DIRECTIVE OF LEGAL THOUGHT

The second set of motivations for the Renew Deal is active in nature, rather than reactive. It represents an internal pull for renewal from within legal thought. These rationales have as their starting point the inadequacy of existing approaches within the world of law. The focus is on the inherent limitations of conventional regulatory instruments, as well as the inadequacies of a legal regime based solely on market incentives. Under the traditional regulatory model, law itself has become so complex and dense that it is inevitably self-defying. The Renew Deal regulatory model, relying on substantive command-and-control legislation, has itself created the “crisis of the interventionist state.”<sup>60</sup> A more advanced and sustainable theory of law-in-society must be developed to replace the deficiencies of the existing model.

The active internal line of reasoning is evolutionary in tone and Darwinian in spirit. It includes a discourse of progression and evolution, and explores common stages through which the legal regimes of most nations progress. The future of the law in the twenty-first century lies in the mutant forms and experiments which prove to be fittest and survive the demands of tomorrow. The evolutionist pull factors are manifested most clearly in the writings on reflexive law and autopoietic systems. In his *Introduction to Autopoietic Law*, Gunther Teubner asks,

Is the practice of legal reasoning bound to end in “strange loops”, “tangled hierarchies”, and “reflexivity dilemmas”? Is the legal process nothing but a closed cycle of recurrent legal operations: “computation of computation of computation . . .”? And are the social dynamics of the legal system based upon the “paradoxes of self-reference”?<sup>61</sup>

Exemplifying the internal demand for renewal, Teubner

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*ratic Deficit*, 36 LOYOLA L.A. L. REV. 1149 (2003); Joseph S. Nye Jr., *Globalization's Democratic Deficit: How To Make International Institutions More Accountable*, 80 FOREIGN AFF. 2 (2001).

60. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 267 (1983).

61. Gunther Teubner, *Introduction to Autopoietic Law*, in AUTOPOIETIC: A NEW APPROACH TO LAW AND SOCIETY 1, 1 (Gunther Teubner ed., 1988) (citations omitted).

begins by describing the crisis in legal theory—the crisis of a split between legal theory and legal sociology. Teubner advances autopoiesis as a new approach to legal thought that can both recognize and transcend the crisis.<sup>62</sup> Teubner describes autopoiesis as a “new and promising research strategy . . . to identify circular relationships within the legal system.”<sup>63</sup> Drawing on Niklas Luhmann’s systems theory, Teubner argues that the complexity of modern life and society requires a new, next-stage approach to regulation, that of reflexive law, in which law facilitates the internal discourse and coordination of other systems. Reflexive law reforms social practices by influencing the self-referential capacities of other social institutions.<sup>64</sup> Teubner outlines an attractive paradox that surfaces in the new model. The more the legal system, as an autopoietic system, is closed (operative closeness), the more it can be radically open (cognitive openness).<sup>65</sup> The more it is autonomous, the more it can both reference and investigate social facts, political demands, social science research, and human needs.<sup>66</sup>

Renew Deal scholars, operating under broader approaches than the European reflexive law school of thought, subscribe to the evolution of modern law through three legal paradigms. Generally, there is a linear progression from: (1) a system that merely facilitates private ordering to (2) a regulatory model and then (3) from the regulatory state to a governance approach. The first stage in the evolution of modern legal systems, the background ordering and maintenance of private entitlements, consists of formal law, a minimalist set of rules within the bounds of which private actors are free to carry out their own transactions. Economies have traditionally relied on formal law as a thin regulatory framework for freedom of contract and property security. Because formal law does not correct the inadequacies and inequities of the market, however, modern legal systems universally move to a second evolutionary stage, in which they develop bodies of substantive law. In the substantive law stage, the thick regulatory state is formed.<sup>67</sup> In the

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62. *Id.*

63. *Id.* Reflexive law and autopoiesis break the taboo of circularity in legal thinking. *Id.* It is a moment of “transferring circularity from the world of ideas to that of hard facts.” *Id.*

64. *Id.*

65. *Id.* at 2.

66. *Id.*

67. While there are significant variances in the constitution of various

United States, Roosevelt's New Deal crystallized this second stage. It reflected the judgment that social subsystems are incapable of self-adjustment and need to be ordered by a centralized authority.<sup>68</sup> The regulatory stage requires the formation of a bureaucratic omnipresent government that intervenes purposively, through goal-oriented policies in such diverse areas as consumer protection, welfare, health and safety, education, and nondiscrimination.

Despite its merits, substantive law inevitably and uniformly reaches a crisis. The self-reproducing nature of all other social fields produces a regulatory trilemma. The regulatory model is fated to be either undereffective, overeffective, or distorted vis-à-vis other social fields. First, the use of substantive law is likely in most circumstances to be underinclusive and ineffective in producing meaningful changes in behavior without risking the destruction of other subsystems (undereffectiveness).<sup>69</sup> Second, substantive law may indeed turn out to be too effective and consequently destroy the internal fabric of subsystems (over-legalization or juridification of society by law).<sup>70</sup> Finally, regulation itself risks becoming colonized by the regulated subsystems. That is, it becomes too politicized, or "economized," by the centers of power of the system with which it is interacting (capture). Law needs new techniques to cir-

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substantive social regulatory regimes across developed countries, there has been a general move to regulate some form of welfare state. *See generally* GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); *WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES* (Gosta Esping-Andersen ed., 1996).

68. Stewart, *supra* note 7, at 93. In the American context, Richard Stewart describes the three stages as a shift from constitutive law, which legally recognizes and supports private ordering, defines constituents' power and entitlements, and establishes procedures for resolving disputes, to prescriptive law. *Id.* Prescriptive rules specify and dictate what conduct is required from individuals. *Id.* at 89–90.

69. Teubner, *supra* note 8, at 310–12; *see also* Arthur J. Jacobson, *Auto-poietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647 (1989); Helmut Wilke, *Three Types of Legal Structure: The Conditional, the Purposive, and the Relational Program*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 280 (Gunther Teubner ed., 1986).

70. Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW* 3, 9 (Gunther Teubner ed., 1987); *see also* DE SOUSA SANTOS, *supra* note 32, at 55 (referring to modern law's loss of its original function as a mediator between social regulation and social emancipation); Stewart, *supra* note 7, at 90 (describing prescriptive law as an inevitable, preempting choice within subsystems).

cumvent this trilemma and to engage society in a better and more productive way.

The need for a third transformation in the legal paradigm is consequently a necessary stage that every society reaches in its search for justice and order. This is achieved by implementing reflexive or reconstitutive legal strategies that restructure subsystems rather than simply prescribe substantive orders.<sup>71</sup> And indeed, through comparative observations, scholars find empirically that these are the actual progressive stages of most legal systems. For example, studying thirteen countries, Martin Jänicke and Helmut Weidner conclude that most nations progress from a strategy of dispersion of pollution (formal market-based law) to direct regulatory control (substantive regulatory law), and then progress to a more complex policy approach, which includes building cooperative relationships with the private market (reflexive, governance law).<sup>72</sup>

Straddling the internal and external motivations for a new legal paradigm are changes in the goals of legal action. Not only have the techniques of law become outmoded and the need to design second generation legal strategies become apparent, the aspirations of law and policy have themselves undergone transformation. Peter Schuck describes the old regulatory model of the New Deal as “economic or cartel regulation.” He further suggests that, since the beginning of the 1980s (and still within the regulatory model), substantive law has experienced a shift from economic to social regulation, aimed at enhancing health, safety, environmental quality, equal opportunity, and quality of life.<sup>73</sup> Social regulation, unlike economic regulation, confers on an administrative agency cross-industry jurisdiction.<sup>74</sup> Such regulation is a more complex task, requiring different types of knowledge, information, and political support. While social legislation under the regulatory model still entails compliance requirements of uniform rules, the changing fabric of legal goals moves us closer to an internal

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71. Stewart, *supra* note 7, at 90; Teubner, *supra* note 8, at 299.

72. Martin Jänicke & Helmut Weidner, *Summary: Global Environmental Policy Learning*, in NATIONAL ENVIRONMENTAL POLICIES: A COMPARATIVE STUDY OF CAPACITY-BUILDING 299, 310–12 (Martin Jänicke & Helmut Weidner eds., 1997).

73. SCHUCK, *supra* note 53, at 123. Schuck compares the rate of return on natural gas to the safety of the air to exemplify the difference in economic and social regulation. *Id.*

74. See *infra* notes 294–315 and accompanying text (discussing OSHA’s wide jurisdiction as innovative at the time of its establishment).

evolution in legal approaches. Demonstrative of such changes in policy goals has been the move in Western countries in the past decade to adopt new social policies, as nations shift from a passive bureaucratic welfare state to active approaches.<sup>75</sup> As will be further explored in the next sections, both in the United States and in Europe, social policy has changed from the maintenance of a permanent social safety net to strategies geared toward an adaptable and dynamic workforce.<sup>76</sup> Again, the political economy, along with social and legal theory, have motivated these changes in policy aspirations and the techniques for their realization.

The governance model is a natural successor to the regulatory model. It addresses the changes in both the goals and capabilities of legal regulation, and avoids the central deficiencies of substantive law. The governance stage fundamentally transforms legal control into a dynamic, reflexive, and flexible regime. Its principles promote the internal self-regulatory capacities of other social fields (or subsystems) with which it interacts. Unlike the regulatory model, it is not self-destructive, but self-sustaining.

The coexistence of external and internal logics in the moment of transformation is exemplified in this context by the influence of the new economy on legal theory. The Renew Deal governance model imports features from the organization of the market into the public sphere.<sup>77</sup> At the same time, albeit to a lesser degree, it orchestrates the importation of public values into the new private-sector economy.<sup>78</sup> A recurring theme of the new model is that state and government agencies should learn

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75. See, e.g., Charles F. Sabel & Johnathan Zeitlin, *Active Welfare, Experimental Governance, and Pragmatic Constitutionalism: The New Transformation of Europe* (unpublished draft prepared for the International Conference of the Hellenic Presidency of the European Union (May 21–22, 2003), on file with author) (discussing recent changes in social welfare policy in the EU).

76. See, e.g., Joel F. Handler, *Questions About Social Europe By an American Observer*, 18 WIS. INT'L L.J. 437 (2000); Sabel & Zeitlin, *supra* note 75; Trubek & Trubek, *supra* note 2.

77. MINOW, *supra* note 22, at 6–49 (explaining that nonprofits increasingly use the techniques of private industries to enhance their effectiveness); see also *infra* Parts III.C, III.G, III.L (discussing the influence of market organization on Renew Deal scholarship).

78. There have been recent calls for expanding this aspect within the growing body of Renew Deal literature. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1295 (2003); Martha Minow, *Public and Private Partnership: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1243 (2003).

from the practices of private organizational models and market-based management theories. The use of private firms as an analogy to other social spheres reflects the growing opinion that broad developments in the market economy trigger direct changes in law. In many contexts, the interconnections between the object of regulation (the economy) and the strategy by which it is regulated (law) motivate the push for renewal through the adoption of market practices in the public sphere. It is often more plausible, however, that legal thought is adopting a practice patterned after and correlated with the changing American market as an analogous sphere of good practices to be replicated in other spheres of life. Both possibilities link contemporary problems in the organization of the economy to innovative legal theory on regulation and governance. Thus, as scholars and reformers increasingly observe private-sector developments, regulatory agencies and public officials are facing heightened pressures to imitate the efficiencies of the private sector. For example, government is urged to become lean and flexible through the reduction of size and costs. One central way to reduce the size of the public sector is through accelerated privatization projects, reducing the size of bureaucracy primarily by contracting out public functions to private parties.<sup>79</sup>

Other institutional economic approaches are similarly influencing the principles of public management. For example, in *Reinventing Government*, David Osborne and Ted Gaebler suggest bringing Japanese business models of entrepreneurial, team-oriented management to bear on American governmental institutions.<sup>80</sup> An entrepreneurial government is one that begins with identifying its customers, determining their needs, and moving forward to identify the best practices that would meet these needs.<sup>81</sup> Under this subset of rationales, the basic assumptions of a market economy—profit motivation under competitive supply and demand conditions—are often projected onto public management ideals. As we shall further see in Part III, these developments correspond with the organizing principles of the governance model including flexibility, competition,

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79. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance* (Mar. 1, 2004) (unpublished manuscript, on file with author).

80. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992).

81. *Id.*

adaptability, and learning.<sup>82</sup>

#### D. CYCLES OF RENEWAL

A final dimension of the motivation for change is cyclical in nature. The dynamics of intellectual renewal, particularly in the field of law, which is strongly characterized by being based both in practice and in aspiration can be understood over time as rhythmic. The image evoked in President Clinton's speech, a "pendulum that has moved too far,"<sup>83</sup> expresses the idea of recurring waves. In legal practice and institutional design, as well as legal thought, there is a natural cycle of renewal, followed by ossification and entrenchment, followed in turn by another wave of renewal.

In legal practice, scholars point to recurring barriers to innovation as part of the institutional fabric of the profession. These barriers include the difficulties of modifying written texts, the formal and informal impact of precedent, the doctrine of stare decisis, and the professional adherence to status quo.<sup>84</sup> As new doctrines are developed, they increasingly become part of the system and entrenched in particular meanings and practices. Innovative processes gradually become formalized, and, eventually, there is renewed need to think outside of the regulatory tool box, and to develop newer approaches. Often this means the invention of previously informal practices. These new practices will eventually become more formalized. This cycle creates a rhythm, very much like seasonal regeneration, of calls for far-reaching innovations by every generation of legal academics. Todd Rakoff, describing shifts between formal and informal modes of administrative law, suggests such a recurring pattern:

What we see in the American experience is a cyclical phenomenon in which less formal modes of regulation are invented; over time, they become increasingly formalized; and then newer, less formal modes are developed.<sup>85</sup>

In the context of the decline of American labor law, Cyn-

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82. See *infra* Part III.

83. Clinton, *supra* note 35, at 455.

84. See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002) (arguing that the ineffectuality of American labor law is due to its "insulation from democratic renewal and local innovation").

85. Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 170 (2000).

thia Estlund similarly argues that the shrinking scope of collective bargaining is traceable to the law's longstanding insulation from renewal and innovation.<sup>86</sup> The collective bargaining regime created by the National Labor Relations Act (NLRA) was the New Deal's answer to labor market discontents.<sup>87</sup> Not long after its enactment, however, the new statutory regime came to be viewed as deeply problematic by labor law scholars. They argued that during the decades succeeding the enactment of the NLRA, the courts, the National Labor Relations Board (NLRB), and other administrative bodies interpreted and implemented the statutory regime in ways that "deradicalized" the Act; thereby creating a rigid legal regime that naturalized a particular, limited vision of collective bargaining that was systematically hostile to labor militancy.<sup>88</sup> And indeed, from the 1960s to the 1980s, as unionism declined, individual employment law expanded and specific, substantive federal regulations on workplace issues increased from about forty-four to over two hundred.<sup>89</sup> During the 1990s, the government withdrew from some of its roles as an active player in the regulation of employment.<sup>90</sup> Today, commitment to employment regulation and its enforcement has eroded. This retreat has created some renewed interest in the foundations of collective labor laws. As Estlund points out, although labor laws now appear rigid and inefficient, the essence of collective bargaining responds to precisely the same demands for renewal, flexibility, and change that are pervasive in contemporary legal thought.<sup>91</sup> There is an historical logic to the pattern:

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86. Estlund, *supra* note 84, at 1527.

87. See Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121 (2001); National Labor Reform Act, § 7, 29 U.S.C. §§157-69 (2000).

88. See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 251 (1997); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 281-93 (1977); Lobel, *supra* note 87, at 184-87.

89. PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET 47 (2001) (citing John Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67, 67-74 (1976)).

90. Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146, 2161 (2003) (reviewing OSTERMAN ET AL., *supra* note 89).

91. Estlund, *supra* note 84, at 1528; see also Stewart, *supra* note 7, at 94 (describing early federal regulatory programs, particularly labor law and securities law as reconstitutive or reflexive strategies that promote "self-regulatory practices rather than . . . comprehensive central prescription of conduct").

[The “ossified” labor law regime] is at least potentially decentralized, tailored to local circumstances, flexible, and democratic. Indeed, collective bargaining would seem to represent a promising “third way” between the harsh regimen of individual contract and the much-maligned paradigm of centralized “command and control” regulation. That is no accident. The New Deal’s institutionalization of collective bargaining was designed to rectify the failings of individual “liberty of contract” at a time when mandated minimum terms were still constitutionally and politically suspect, and the increasing role of minimum standards legislation since then is often described as a response to the decline of collective bargaining and the regulatory vacuum it has left behind. There would thus be a certain historical logic to the revival of collective bargaining at a time when the centralized imposition of uniform regulations is increasingly questioned.<sup>92</sup>

Like many other scholars who have called for renewal, Estlund identifies possibilities for change paved by the process of ossification itself. This paradox of ossification leading to renewal is a recurring theme in legal scholarship.<sup>93</sup>

As in doctrinal fields like administrative, labor, and employment law, the more abstract field of legal theory calls for regeneration during every new generation of legal scholars. Repetitive similarities exist in modes of mediating contradiction in different structures of successive legal schools.<sup>94</sup> The solution also repeats—destabilization through the reinvention of a new paradigm and new conceptual frameworks for change. Paraphrasing Michel Foucault, Stepan Woods asks how it is that legal scholars repeatedly attempt to sever the “king’s head,” yet the next generation always seems to find the head back on the sovereign’s shoulders:<sup>95</sup>

Exploding, fragmenting or contextualizing the state, law, sovereignty,

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92. Estlund, *supra* note 84, at 1528–29.

93. *But see* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1080 (2002). Schlag argues that the opposite is also true—too much renewal energy risks ossification by exhaustion: “The energy aesthetic is threatened by its own explosive, uncontrollable force. Ironically, it is also threatened with exhaustion: the expenditure of energy leads to its depletion.” *Id.*

94. Orly Lobel, *Retrieving the Projects Beyond Deconstruction: Channeling the Social in Private Law Theory* (unpublished manuscript, on file with author) (describing a pendulum of private law theory, embodying “recurring patterns: the existence of both individual and social is identified, attempts are made to distinguish, justify and confine the social to distinct boundaries”); *see also* Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 96–97 (1991) (describing legal argumentation as “a product of the actual history of a particular legal discourse” that is incomplete and changing).

95. Stepan Wood, *Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance*, 10 BUFF. ENVTL. L.J. 129, 189 (2003).

public, private and so on, have been regular features of criticism and innovation in the social sciences and law throughout the last century, so that proclaiming the “death of the state” (or law or sovereignty) has become part of the ritual of renewal in discipline after discipline.<sup>96</sup>

A radical expression of the possibility that, in fact, there is nothing new under the sun in a the international law field of legal scholarship is made by David Kennedy. Describing repetitive reform agendas in the field of international law, Kennedy states: “The discipline of international law today is cheek by jowl with people calling for new thinking and renewal, even as they offer up the most shopworn ideas and initiatives. . . . For international lawyers, the performances of renewal, criticism, and reform are central to professional identity and competence.”<sup>97</sup>

While we should take seriously the occurrences of cyclical renewal, this pattern does not undermine the contemporary moment of a high peak of the cycle that is driving the Renew Deal paradigm shift. Moreover, despite the value in the reflexive exploration of recurring patterns of renewal, these claims should not be overstated. Even as history repeats, we never truly face the same challenges twice. We can and must learn from renewal efforts (successes as well as failures) of former eras, yet the particular constellation of multiple factors at the beginning of the twenty-first century makes the current experience of renewal unique. The internal and external factors triggering the emergence of a new vision interact powerfully to challenge, revive, and reaffirm our fundamental principles as a society:

For only through constant rethinking, in the face of changed circumstances, can we recall and rediscover what our deepest commitments truly are. What appears to be change is actually continuity; what appears to be revision is actually the deepest form of remembrance.<sup>98</sup>

Most importantly, in the contemporary vision for renewal, the strength of the governance paradigm is its integral com-

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96. *Id.*

97. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 335–37 (2000). According to Kennedy:

The occasion invites thought about the role of novelty and innovation in the field—what is it, how does it happen, how should it be valued? . . . [F]or more than a century, these lawyers have shared an argumentative terrain which can be analyzed using the tools of structural or semiotic analysis that have now been applied to the doctrinal terminology of various other legal fields.

*Id.*

98. Balkin, *supra* note 39, at 56.

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mitment to innovation as an ongoing, collective, intellectual, and programmatic project. The construct of openness sheds conceptually, epistemologically, and institutionally the baggage of predetermined solutions and widens our imaginative spectrum. What is particularly promising about the Renew Deal governance model is its self-conscious promise to continue the process of energized renewal from within the new paradigm.

Table 1: Coexisting Rationales for a Paradigm Shift

External	[—Cyclical—]	Internal
Noncumulative Developmental Episode	[Seasonal Regeneration]	An Evolution
Triggered by Political Economy	[Legal Systemic Ossification and Entrenchment]	From within Socio-legal theory
Reactive <i>real world increased complexity, speed, diversity, technological and scientific advancements</i>	[formal—informal/formal—informal]	Active <i>Linear progression from formal minimalist to regulatory substantive interventionist to active governance</i>
Crisis	[Professional Identity and Competence]	Progress; Opportunity
Decline	[Energy Aesthetic]	Growth
Alternative	[Historical Regulatory Vacuums]	Complimentary
Transitional	[Recurrent Insulation]	Permanent
Innovation	[Repetitive Similarities]	Resurgence
Outside the law	[Communities of Knowledge]	Authentic (true) Law

### III. THE ORGANIZING PRINCIPLES OF THE RENEW DEAL GOVERNANCE MODEL

#### A. PARTICIPATION AND PARTNERSHIP

During the New Deal era, a key feature of the organization of law and order was the commitment to centralized, institutional decision-making authorities relying on professional, official expertise: “The New Deal believed in experts. Those who rationalized its regulatory initiatives regarded expertise and specialization as the particular strengths of the administrative process.”<sup>99</sup>

The central proposition of the New Deal regulatory model was that a few well-educated, specially trained, and publicly appointed professionals could make the best decisions about national policies.<sup>100</sup> The belief in experts and the need for regulation were mutually reinforcing. The project of centralized social engineering required focused fact-finding and professional skills. Felix Frankfurter described how, with the rise of regulation, “we are singularly in need in this country of the deliberateness and truthfulness of *really scientific expertness*.”<sup>101</sup> Administrative law was developed under the idea that the regulatory policy-making powers of administrative agencies are based on their superior knowledge, information, and expertise.<sup>102</sup> The commitment to agency expertise influenced the development of legal doctrines involving delegation and deference to agency expertise, and permitting certain divergence from the scope of delegation to the implementation stage.<sup>103</sup> External participation was thought of as a threat to the expertise and le-

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99. JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 44 (1978); see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23–24 (1938) (describing how the rise of regulation increased the need for expertise).

100. Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272 (1997).

101. FREEDMAN, *supra* note 99, at 45 (quoting Note, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430, 433 n.16 (1973)) (emphasis added).

102. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 91 (1994) (“[A]lthough agencies may set regulatory policy, they do not make controversial, value-laden choices, but rather use their expertise to solve technical problems left to them by Congress.”).

103. See generally Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 422 (1987) (examining the nondelgation doctrine in the context of “reformist liberal ideals about administration”).

gitimacy of the administrative state, since expert agencies would be influenced by self-interest and thus more prone to capture by private industry pressures.<sup>104</sup>

The new governance model challenges these conventional assumptions. It broadens the decision-making playing field by involving more actors in the various stages of the legal process. It also diversifies the types of expertise and experience that these new actors bring to the table. Renew Deal governance is a regime based on engaging multiple actors and shifting citizens from passive to active roles. The exercise of normative authority is pluralized.

Increased participation permeates the many levels and stages of legal process—legislation, promulgation of rules, implementation of policies, and enforcement. In the last several decades, a range of policies has attempted to increase the participation of nongovernmental individuals and groups in public processes.<sup>105</sup> New groups demand more access to policy processes and a role in governing social institutions. Multiparty involvement is understood as a way of creating norms, cultivating reform, and managing new market realities. As we shall see, the overall goal of participation is broader than simply ensuring the achievement of policy goals; it enhances the ability of citizens to participate in political and civic life.

At the stage of implementation, stakeholder participation has been referred to as “a revolution in the technology of public action.”<sup>106</sup> Participation has included the creation of a system of third-party government, in which the public sector uses extensively third-party agents to carry out public functions, such as the delivery of social services.<sup>107</sup> Sharing tasks and responsibilities with the private sector creates more interdependence

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104. See generally Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954) (describing administrative action as “reflect[ing] predominantly the solution desired by the industrial group”).

105. As early as the 1970s, with environmental programs leading the way, there were attempts to promote participation of the people whose interests the policies were intended to serve. Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 526, 534–35 (1972).

106. See Symposium, *The Changing Shape of Government*, 28 FORDHAM URB. L.J. 1319, 1334 (2001) (remarks by Lester M. Salamon).

107. LESTER M. SALAMON PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE 104–105 (1995); *The Changing Shape of Government*, supra note 106, at 1334 (remarks by Lester M. Salamon).

between government and the market. In turn, increased participation leads to fluid and permeable boundaries between private and public.<sup>108</sup> This cycle thus explains, for example, how today's body of federal employees is one-third smaller per capita than it was immediately after the New Deal, even though massive new responsibilities have been undertaken by government.<sup>109</sup>

From this perspective, the Renew Deal model embodies a spatial dimension—a shift away from the singular focus on the formal legal arena and formal officials to activism in the second sphere of the private, for-profit sector, and the third sphere of civil society. Calls for a spatial shift appear not only at the local level, but also at the transnational and international levels, evoking the image of a global civil society.<sup>110</sup> Of particular importance is the role of private ordering and self-regulation, particularly new instances of private standard setting, accreditation, and certification plans by independent activists, as well as monitoring by both nonprofits and for-profit consulting firms.<sup>111</sup> New governance policies seek to enable individuals and organizations to act as private attorney generals and to block watch public action.<sup>112</sup>

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108. MINOW, *supra* note 22, at 142–74.

109. JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 4–5 (1989) (describing systematic efforts to reduce the size of the federal government despite constant demand for public spending); PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 1 (1999) (noting that the number of full-time federal government employees would increase by nearly eleven million if employees of private contractors and providers were included); Mashaw, *supra* note 79, at 46.

110. In the environmental context, see, for example, RONNIE D. LIPSCHUTZ, GLOBAL CIVIL SOCIETY AND GLOBAL ENVIRONMENTAL GOVERNANCE 49–78 (1996); PAUL WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS 3–5 (1996).

111. See, e.g., LESTER M. SALAMON ET AL., GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR 14 (1999); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1015–16 (2001); Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 352–55 (2001) (discussing the rise of transgovernmental regulatory networks); *Business Ethics: Sweatshop Wars*, THE ECONOMIST, Feb. 27, 1999, at 62–63 (discussing audits of “social accountability 8000” certificates by firms such as Pricewaterhouse Coopers, Ernst & Young, and KPMG); COUNCIL ON ECONOMIC PRIORITIES ACCREDITATION AGENCY, OVERVIEW OF SA 8000 STANDARDS, at <http://www.cepaa.org/SA8000/SA8000.htm> (last visited Oct. 14, 2004).

112. Peter Dobkin Hall, *Crisis in Governance: Comments* (unpublished manuscript, on file with author).

Unlike the earlier writings on legal pluralism<sup>113</sup> and the recent writings on law and organizing,<sup>114</sup> the governance model offers a framework that enables us to view the different sectors—state, market, and civil society—as part of one comprehensive, interlocking system. The focus is on government interactions with private actors in public action. The concept of partnership is more important to the model than the description of spatial shifts.<sup>115</sup>

New participatory arrangements emerge at all levels of government and nongovernment action. For example, at the international level, the idea of “transgovernmental regulatory networks” is attracting increasing attention as “a new and attractive form of global governance, enhancing the ability of States to work together to address common problems without the centralized bureaucracy of formal international institutions. They are fast, flexible, and decentralized—attributes that allow them to function particularly well in a rapidly changing information environment.”<sup>116</sup> Similarly, in the context of the European Union, scholars describe new policy networks of government officials, civil servants, social partners (labor and industry associations), and civil society in multilevel, public/private transnational networks.<sup>117</sup> At the more local level,

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113. See, e.g., Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1 (1981) (noting the widely held view among legal professionals that justice is a product created and distributed exclusively by the state).

114. See, e.g., Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Lobel, *supra* note 38.

115. See, e.g., SALAMON, *supra* note 107, at 104–05 (challenging the argument that increased partnership between government and nonprofit sectors would infringe on the latter’s independence or autonomy); Freeman, *supra* note 3, at 6 (arguing that a model of the administrative process that emphasizes problem-solving and shared responsibility better serves goals of efficiency and legitimacy).

116. See THOMAS RISSE-KAPPEN, COOPERATION AMONG DEMOCRACIES 38 (John Lewis Gaddis et al., eds. 1995) (defining transgovernmental coalitions as “transboundary networks among subunits of national governments forming in the absence of central and authoritative national decisions”); Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177, 179 (Michael Byers ed., 2000); Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 195 (1997). *But cf.* Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT’L L. & BUS. 1014, 1035–45 (1996–1997).

117. JACOBSSON, *supra* note 2, at 5–6; Trubek & Trubek, *supra* note 2, at 23.

American lawyers describe the emerging context of multidisciplinary networks, for example in the realms of environmental policy<sup>118</sup> and health care.<sup>119</sup> Increasingly, local professionals and community groups are coming together with the aim of figuring out the schema for responsible and effective delivery of care.<sup>120</sup>

#### B. COLLABORATION

The commitment to collaboration follows naturally from the commitment to participation, since an inclusive structure facilitates multiparty cooperative exchanges. Under the traditional regulatory model, industry and private individuals are the object of regulation. Their agency is limited to choosing whether to comply with the regulations to which they are subjected. Information flows selectively to the top while decisions flow down, following rigid parameters, and leaving decision making to a small, detached group of number-crunching experts.<sup>121</sup> Consequently, the regulatory model promotes adversarial relations, mutual distrust, and conflict. In contrast, under the governance model, individuals are norm-generating subjects. They are involved in the process of developing the norms of behavior and changing them. The governance model thus views traditional patterns of hierarchical top-down regulatory control as obsolete. It advocates instead the adoption of cooperative governance based on continuous interaction and sharing of responsibility.<sup>122</sup> It signifies a move to partnership, to horizontal relationships, and to two-way communications. The goal is to create microsystems of open communication in which policy is imagined, managed, and maintained.

In a cooperative regime, the role of government changes from regulator and controller to facilitator, and law becomes a shared problem-solving process rather than an ordering activity.<sup>123</sup> Government, industry, and civil society groups all share

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118. For example, organized in 1996, the Multi-State Working Group on Environmental Performance (MSWG), convenes parties in the business, non-governmental organizations, academic and government sectors to discuss the development and use of new tools, within the context of public policy, to achieve environmental performance. See Multi-State Working Group on Environmental Performance Web Site (Nov. 15, 2001), at <http://www.mswg.org>.

119. Trubek, *supra* note 32.

120. *Id.*

121. Farber, *supra* note 9, at 1280.

122. See Fiorino, *supra* note 31, at 464.

123. Freeman, *supra* note 3, at 28–30.

responsibility for achieving policy goals. Industry is expected to participate as part of a search for common goals, not just rigidly asserting its narrow economic or political interests.

Congress has recently endorsed the spirit of collaborative rulemaking by standardizing regulatory negotiation in the Negotiated Rulemaking Act of 1990, which was permanently reauthorized in 1996.<sup>124</sup> Negotiated rulemaking is a process through which stakeholders come together to negotiate and reach consensus as to the substance of regulation. As early as 1982, Philip Harter published an article entitled *Negotiating Regulations: A Cure for Malaise*.<sup>125</sup> Harter proposed the features of negotiated rulemaking as a way of giving stakeholders more voice in the regulatory process.<sup>126</sup> The process enables the sharing of information and the comparison of practices and outcomes among various participants.<sup>127</sup> The creation of a realm of regulatory negotiation is also intended to encourage discussion and establish a space for collaboratively reaching decisions, ideally through consensus building.<sup>128</sup>

The collaborative approach further affects the relations among social actors. The governance model urges dialogue at all levels of the economy—local communities, sectors of the economy, regional, national and transnational levels—and encourages more links among social movements.<sup>129</sup> At the non-governmental level, the model draws on the idea of multiparty social action that involves parties in relatively undefined relationships.<sup>130</sup> In a collaborative environment, the capacities as well as the identities of the participants evolve substantially over time.<sup>131</sup> Collaboration thus promotes mutual accountability, defined as “accountability among autonomous actors committed to shared values and visions and to relationships of mutual trust and influence that enable renegotiating expectations

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124. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–70 (1994 & Supp. I 1995); Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320, § 11(a), 110 Stat. 3870, 3873.

125. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1983).

126. *Id.* at 65–67.

127. *Id.* at 30–31.

128. *See id.* at 28–29.

129. *See* Lobel, *supra* note 90, at 2157–62 (examining the collaborative model’s impact on the labor market).

130. L. David Brown, *Multiparty Social Action and Mutual Accountability* (unpublished manuscript, on file with author).

131. *Id.*

and capacities to respond to uncertainty and change.”<sup>132</sup> It requires the identification of shared goals, which often requires abandoning entrenched positions that construct other actors as the problem, rather than as partners to a solution.<sup>133</sup>

The principle of collaboration therefore involves the recognition of interdependencies among social actors. Regulatory approaches to social policy have often been criticized for being based on a rights discourse which has a trump quality. Regulation entails a winner-takes-all approach, implying a message of zero sum distribution. Much of the struggle for rights is framed competitively:

Particularly where hard resources are involved, it is alarmingly easy to see that winner-take-all civil rights contests can take shape. Affirmative action programs are rife with such contests, which pit one recognized civil rights constituency against another. For instance, in minority business enterprise programs, blacks and Latinos have had ample opportunity to observe white women speed ahead of them in contests for finite resources.<sup>134</sup>

However, in reality, the ends of social policy are multiple and hard to measure.<sup>135</sup> The nature of social life is extremely complex and interdependent. A collaborative model increases the need for parties to work together to realize their interests and goals in a mutually respectful way. A shift from adversarial legalism to collaboration entails a move from an image of win-lose situations to a win-win environment. All actors come to realize their interlocking interest in the processes of governance. As will be discussed in the succeeding sections, such an environment heightens the need to include procedures that en-

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132. *Id.* at 7 (emphasis omitted).

133. See, e.g., L. David Brown, *Building Civil Society Legitimacy and Accountability with Domain Accountability Systems*, in PHILANTHROPY AND SOCIAL CHANGE IN LATIN AMERICA (Cynthia Sanborn et al. eds.) (forthcoming 2004) (discussing civil society organizations' contribution to governance and social problem solving); L. David Brown & Mark H. Moore, *Accountability, Strategy, and International Nongovernmental Organizations*, 30 NONPROFIT & VOLUNTARY SECTOR Q., 569 (2001) (discussing the importance of accountability among international nongovernmental development and environmental organizations).

134. Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW 115, 131 (David Kairys ed., 1998).

135. See, e.g., THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 222-28 (1990) (describing the "Basic Contradictions Thesis" as the contention that public programs and policy domains always have multiple purposes, which are often difficult to achieve simultaneously).

sure that parties' interests and externalities are taken into account, negotiation processes are adequately structured, and the bargaining power of stakeholders is addressed.

### C. DIVERSITY AND COMPETITION

The command-and-control regulatory model of the New Deal Era sought to control market rates, control entry into industries, and command the minimum conditions and requirements of production and service.<sup>136</sup> The aim was to unify, standardize, make activities routine, and, frequently, to suppress divergence. Responding to the increased complexity, diversity, and volatility of the new market, the Renew Deal aims conversely to promote diversification, pluralization of solutions, and increased competition.

A central critique of the old regulatory model is its one-size-fits-all approach.<sup>137</sup> The premise of the governance model is that, in order for a legal regime to be sustainable, it must encompass a multitude of values and account for conflict and compromise. It must acknowledge the diversity and changing interests of many stakeholders.<sup>138</sup> It must recognize the legitimacy of private economic interests while appealing to public values.

A second premise underlying the idea of diversity and plurality is derived from the principles of collaboration and participation—that no one institution possesses the ability to regulate all aspects of contemporary public life. Institutional design based on inclusion and the proliferation of normative authorities encourages the adoption of a wide variety of approaches, methodologies, and practices. This design must be coupled with the development of comparative measures to assess the relative success of varying methods in comparable circumstances. The new model must also create pressures and incentives to gener-

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136. SCHUCK, *supra* note 53, at 121.

137. See, e.g., Philip E. Karmel, *Achieving Radical Reductions in Cleanup Costs*, in NEW SOLUTIONS TO ENVIRONMENTAL PROBLEMS IN BUSINESS AND REAL ESTATE DEALS 2003, at 371 (PLI Real Estate Law & Practice Course, Handbook Series No. N-499, 2003) (asserting that there is no one-size-fits-all solution to the problems of environmental cleanups); Lobel, *supra* note 90 (remarking that there is no one-size-fits-all solution to the problems of the new labor market).

138. See, e.g., DANIEL A. FARBER, ECOPRAGMATISM 12–13 (1999) (asserting that environmental law must remain flexible and pluralistic to take diverse interests into account).

ate the information that would allow for such comparisons.<sup>139</sup> The generation of interjurisdictional and intrajurisdictional competition—through processes of decentralization, privatization, and participatory administration, as well as the sharing of information and incentives for comparison—signifies new public management tools of the governance model.

Some scholars, assuming the Renew Deal is transitional, call for more “experimentation with and evaluation of multiple approaches before settling on one or a few approaches that demonstrate superior performance.”<sup>140</sup> The most sophisticated articulations of the governance model, however, understand competition and diversity not as a temporary strategy before choosing the superior solution in any given scenario, but rather as a means for continuous change and improvement.<sup>141</sup> In both versions competition is understood as good and effective. However, the model is open to the possibility that in certain situations these assumptions may be found illusory, for example, when efforts to involve more actors in fact lead to the creation of private monopolies.<sup>142</sup>

#### D. DECENTRALIZATION AND SUBSIDIARITY

During the New Deal era, centralization was thought to be

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139. See Minow, *supra* note 78, at 1242-43 (arguing that public-private partnerships can regulate schools, social services, prisons, and welfare more efficiently due to the incentives generated by market style competition..)

140. OSTERMAN ET AL., *supra* note 89, at 165.

141. Lobel, *supra* note 90; Minow, *supra* note 78. Cf. Trubek & Trubek, *supra* note 8 (arguing that EU law regulating social policy should adopt a hybrid approach that transcends the hard/soft law distinctions by emphasizing diversity).

142. See DONAHUE, *supra* note 109, at 222 (claiming that privatization would not be a sufficient remedy for the complex public realm); ORLY LOBEL, REGULATING COEXISTENCE IN THE NEW POLITICAL ECONOMY: CROSS-SECTOR COLLABORATION IN A WORKFORCE DEVELOPMENT APPROACH (Harvard Univ., John F. Kennedy Sch. of Gov't, Hauser Center for Nonprofit Org., Working Paper, No. 21, 2003),

[http://www.ksg.harvard.edu/hauser/publications/working\\_papers/workingpaperlist.htm](http://www.ksg.harvard.edu/hauser/publications/working_papers/workingpaperlist.htm). A second tension occurs between an understanding of competition and diversity as instrumental—that is, as a means to produce the best results—and an embrace of diversity, pluralism and choice, whether in the market or in civil society, as intrinsic goods and a goal in itself, promoting respect, tolerance, and valuation of the variety of norms within society. On the many meanings of diversity and pluralism, instrumental as well as intrinsic, see PETER SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE (2003). See also Minow, *supra* note 78, at 1244-45 (claiming that the public-private collaboration can potentially create “a vibrant and nontoxic pluralism”).

essential to overcoming the economic crisis that the nation faced.<sup>143</sup> The Depression revealed the pervasive interdependencies of the economy. The national extent of the crisis made it difficult for reformers to believe that the individual states could solve their grave problems without a centralized federal order.<sup>144</sup> The New Deal regulatory model sought therefore to consolidate formerly dispersed power, often into the hands of the newly founded regulatory agencies and programs.<sup>145</sup> In contrast, the Renew Deal advocates a movement downward and outward—a transfer of responsibilities to the states and localities and to the private sector, including private businesses and nonprofit organizations.<sup>146</sup>

Decentralization serves at least four different purposes. First, it promotes the governance principles we have just explored—participation, diversity, competition, and experimentation. A decentralized public design realizes Justice Brandeis' metaphor of the states as laboratories of experimentation.<sup>147</sup> Each state and locality contributes to the evolution of law by first creating various programs that enact and test reforms, and then subsequently accepting or rejecting them. As a result of increased diversity and competition, decentralization further promotes choice and responsiveness.<sup>148</sup>

Second, decentralization affirms the pragmatic idea of subsidiarity, including the localness and partiality of human knowledge, and the difficulty of translation between localities.<sup>149</sup> In 1912, William James wrote about the humility of the

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143. Walker, *supra* note 100, at 1275.

144. See DONALD F. KETTL, *THE REGULATION OF AMERICAN FEDERALISM* 27 (1983) ("Roosevelt's programs were based on a novel sense of the national government's purpose. Serious problems that affected the country, even if they were economic as opposed to military or diplomatic, were *national* problems that deserved a *national* solution."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 425 (1987).

145. Walker, *supra* note 100, at 1275–76; David Yassky, *A Two-Tiered Theory of Consolidation and Separation of Powers*, 99 YALE L.J. 431, 437–38 (1989).

146. Trubek, *supra* note 32, at 72–76.

147. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

148. See SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 173 (1992).

149. See RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 465 (1990) (arguing that pragmatism is a preferable means of approaching problems due to a "full awareness of the limitations of human reason with a sense of the 'localness' of human knowledge").

human perspective:

Hands off: neither the whole of truth nor the whole of good is revealed to any single observer, although each observer gains a partial superiority of insight from the peculiar position in which he stands. Even prisons and sick-rooms have their special revelations. It is enough to ask of each of us that he should be faithful to his own opportunities and make the most of his own blessings, without presuming to regulate the rest of the vast field.<sup>150</sup>

As a guiding principle of social organization, subsidiarity maintains that all governmental tasks are best carried out at the level closest to those affected by them. Central authorities should leave the widest scope possible for local discretion to fill in the details of broadly defined policies. Those closest to the problem possess the best information leading toward a potential solution. Therefore, the specific elaboration and application of common standards needs local knowledge to reach the desired objectives. Local entities are consequently understood to be more properly situated to manage functions by which they are affected than a dominant central organization.

A third function of decentralization is the creation of relational density and synergy.<sup>151</sup> While the New Deal created a system of bureaucracies often experienced as faceless and inaccessible,<sup>152</sup> one of the goals of the governance model is to “replace remote impersonal relations . . . with face-to-face relations,” and convert impersonal duties into personal ones.<sup>153</sup> A relatively small-scale geographic focus gives people a sense of connectedness. Indeed, there are psychological and anthropological indications that scale matters for successful engagement—the smaller the scale, the easier it is for people to communicate and to reach sustainable solutions.<sup>154</sup>

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150. William James, *On a Certain Blindness in Human Beings*, in *ON SOME OF LIFE'S IDEALS* 46 (1912).

151. See WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* 227 (2002).

152. William H. Clune, *Unreasonableness and Alienation in the Continuing Relationships of Welfare State Bureaucracy: From Regulatory Complexity to Economic Democracy*, 1985 WIS. L. REV. 707, 715–17; Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1382 (1984); Ian R. MacNeil, *Bureaucracy, Liberalism, and Community—American Style*, 79 NW. U. L. REV. 900, 907 (1984); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1232 (1983).

153. SIMON, *supra* note 151, at 50 (citing Lewis D. Solomon, *Microenterprise: Human Reconstruction in America's Inner Cities*, 15 HARV. J. L. & PUB. POL'Y 191, 193–202 (1992)).

154. Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157 (2000).

Describing the rise of the Community Economic Development Movement in the 1990s, Bill Simon argues that the spatial shift to decentralization provides people with “a sense of place,” preventing them from experiencing public life as “anonymity . . . divorced from its surroundings.”<sup>155</sup> Similarly, Todd Rakoff, focusing on the temporal dimensions of social interaction, deplors the contemporary decline of engagement of ordinary citizens in the public and civic sphere. Analogous to Simon’s sense of place framework, Rakoff argues for providing people with a sense of time. Rakoff joins an increasing number of scholars who worry that we are investing too much of our time in economically productive activities, and hence neglecting our civic and expressive activities.<sup>156</sup>

A fourth rationale for decentralization follows naturally from the generation of multiple links among groups and individuals. The aspiration of the governance model is that increased engagement will contribute to the building of deliberative and collaborative capacities, thus sustaining an environment for democratic engagement. In the context of community development, Simon explains the function of multiplying the roles, capacities, and contexts in which people interact in a community. Neighbors become able to view one another in their relationships as sellers-consumers, employers-employees, property owners-tenants, planners-citizens, and administrators-service recipients.<sup>157</sup> When people encounter one another repeatedly,

Each encounter is an opportunity to develop collaborative capacities, and there is a synergy among the relations. People’s self-confidence, their knowledge of their neighbors, and their capacities for negotiation and deliberation spill over from one sector to another and hence

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155. SIMON, *supra* note 151, at 41 (citing OFFICE OF COMTY. PLANNING & DEV., U.S. DEP’T OF HOUS. & URBAN DEV., A GUIDEBOOK FOR COMMUNITY-BASED STRATEGIC PLANNING FOR EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES 13 (1994)).

156. See Orly Lobel, *The Law of Social Time*, 76 TEMP. L. REV. 357 (2003) (reviewing TODD RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002)). In recent years, Robert Putnam has been a leading voice in the argument that while societies have traditionally benefited from civil society associations, today’s societies are experiencing a troubling decline in associational life. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); Robert D. Putnam, *The Strange Disappearance of Civic America*, 24 AM. PROSPECT 34 (1996);.

157. SIMON, *supra* note 151, at 41.

develop cumulatively with collaboration across different areas.<sup>158</sup>

Finally, there is some ambiguity in the added value of generating synergy. By some accounts, generating synergy creates empathy and mutual trust among people.<sup>159</sup> But other versions contend that social density has the potential to produce additional layers of social control and mutual surveillance.<sup>160</sup> In economic terms, each of these possibilities may be viewed as a process in which externalities are internalized. Both versions assume that under certain circumstances individuals will follow norms against their immediate self-interest, even in absence of the threat of formal regulatory sanction. But while the first view describes a process of negotiated shared visions and values, the second in effect projects traditional understandings of human motivations (e.g., fear of sanction) from the formal regulatory realm to the governance environment. Recalling game theory models, it suggests that under the right architecture—increased social density that generates collaboration and interdependence—people will follow norms and conform without formal regulatory means because of the necessity of repeat dealings, adverse effects on reputation, relationship-based credibility, possibility of retribution, and the increased likelihood of reciprocation.<sup>161</sup>

This final tension further complicates the relationship between decentralization and diversity. The best interpretation of the governance model is that divergence is generative and desirable. However, following the alternative interpretation of synergy as creating pressures to conform, an architectural panoptic with “eyes upon the street”<sup>162</sup> springs forth, emerging

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158. *Id.* at 49.

159. *Id.*; see also FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 8 (1995); Scott E. Sundby, “*Everyman’s*” *Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558 (1988).

160. See, e.g., Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Neal Kumar Katyal, *Architecture As Crime Control*, 111 YALE L.J. 1039 (2002).

161. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373 (1990); Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CAL. L. REV. 1281 (2003).

162. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 35 (1961); see also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 201 (1979) (explaining the regulatory effect of a panoptic presence

from the competing analysis that “the experience of being watched itself inhibits deviance.”<sup>163</sup>

#### E. INTEGRATION OF POLICY DOMAINS

The governance model recognizes that doctrinal divides and boundaries between legal fields are contingent and are often defined through negotiation and revision. It therefore encourages the questioning of these divides through openness and fluidity of policy domains. The features of participation, collaboration, decentralization, and diversity all have the potential to illuminate how widely dispersed issues are nonetheless connected at the level of those who are most influenced by them. Governance scholarship acknowledges that the focus of our zoom lens determines much of what we see in the complex world we face.

In a regulatory model, law is fragmented into distinct, specified subfields. By contrast, the governance model takes a holistic approach to problem solving, aiming for a synoptic view of conditions as they exist simultaneously over a broad disciplinary spectrum. The constant question to be asked is what is left outside of the policy picture. Renew Deal scholarship aims to show how most social problems involve multiple issues including the interconnections between housing, employment, family, welfare, health, transportation, banking, and entrepreneurship.<sup>164</sup>

A large-scale example of the adoption of a governance approach is the novel policy process recently adopted by the European Union (EU), collectively termed the Open Method of Coordination (OMC). The process illustrates the significance of policy integration. The OMC was established in 2000 at the Lisbon European Council as a process of governance designed to spread best practices among EU member states.<sup>165</sup> The OMC serves member states by coordinating their social policies in areas such as employment, education, and health. The newly-adopted process allows the development of common goals with-

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in society).

163. SIMON, *supra* note 151, at 50.

164. *See, e.g., id.*

165. *Conference on the Open Method of Coordination (OMC): Improving European Governance?*, European Union Committee of the Regions (Sept. 30–Oct. 1, 2002), [http://consiglio.regione.emilia-romagna.it/europa/Monitor\\_Europa/Monitor\\_4/conferenza%20sull%20governance.pdf](http://consiglio.regione.emilia-romagna.it/europa/Monitor_Europa/Monitor_4/conferenza%20sull%20governance.pdf) (last visited Oct. 1, 2004).

out the formal requirement of state compliance and is therefore considered to be a novel form of soft law. The committees established under the OMC reveal how sectoral divides between legal fields are contingent and are defined through negotiation and struggle.<sup>166</sup> The emphasis of OMC processes is on policy linkage, integrating different considerations and aspects with the aim to account for the interconnections among issues such as economic policy, employment, fiscal and wage policy, social inclusion, pensions, immigration and the environment.<sup>167</sup> By integrating these issues, policy debates at the EU level aim to uproot structural impediments to human development, for example, by focusing on both supply-side and demand-side barriers to employment.

In both Europe and the United States, the rethinking of social policies has been largely motivated by the need to take a more active, holistic approach to welfare, social safety nets, and social mobility.<sup>168</sup> As we shall see in the domain of U.S. workforce development reform, and as has been integral to the design of the OMC, a governance approach to social provision emphasizes integration of related policy issues, such as the availability of vocational training, placement services, health care, child care, transportation, and tax credits. In the context of health care, legal scholars now advocate a broader approach to chronic disease management, pointing to recent initiatives that have been undertaken in the field. By forging relationships with the community and schools, diverse professionals—including lawyers, doctors, social workers, and educators—collaborate to address such broad issues as housing conditions, nutrition, environmental policy, consumerism, and prevention.<sup>169</sup> The metaphor of chronic problems persisting because of their isolation from structurally integrated solutions pervades Renew Deal governance literature.<sup>170</sup>

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166. The first OMC committee established was the European Employment Strategy (EES) committee, established in 2000. *Id.* More recent committees address policy questions on social exclusion, education, and pensions. See Caroline de la Porte, *Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?*, 8 EUR. L.J. 38 (2002); Joanne Scott & David Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

167. Gráinne de Búrca, *The Constitutional Challenge of New Governance in the European Union*, 28 EUR. L. REV. 814 (2003).

168. Lobel, *supra* note 142.

169. Trubek, *supra* note 32, at 575.

170. See, e.g., Sabel & Simon, *supra* note 16, at 1020 (“Destabilization

Finally, it should be noted that the integration of policy domains in the Renew Deal era is often generated by a change in the terms of the debate. A new appellation for an ongoing social problem frees participants from preconceptions of the range of familiar questions and the stereotypical answers of the past. For instance, in the context of Social Europe and the transformation of European welfare regimes, Kenneth Armstrong describes a shift from a “poverty” to a “social exclusion” discourse.<sup>171</sup> In the American context, commentators suggest that an opposite shift—from a welfare discourse to a poverty discourse—may generate new ideas and responses.<sup>172</sup>

#### F. FLEXIBILITY AND NONCOERCIVENESS (OR SOFTNESS-IN-LAW)

The governance model aims to create a flexible and fluid policy environment that fosters “softer” processes that either replace or complement the traditional “hard” ordering of the regulatory model. Scholars suggest a leap outside the regulatory box, developing new mechanisms to replace top-down ordering, implementation, and enforcement.<sup>173</sup> Over the past decades, commentators across the political spectrum have come to see aspects of the regulatory model as inherently cumbersome, ineffective, and heavily executed. Moreover, the gaps between law-in-the-books and law-in-action, have led many to seek more integrated approaches to law reform. The rapid rise of secondary, informal markets and underground economies—characterized by vast noncompliance, and underenforcement, and lucrative opportunities coexisting with pervasive exploitation—has further challenged the notion that traditional regulation can bring meaningful change in globalizing economies.<sup>174</sup>

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rights are claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.”).

171. Kenneth A. Armstrong, *Tackling Social Exclusion Through OMC: Reshaping the Boundaries of EU Governance*, in 6 THE STATE OF THE EUROPEAN UNION: LAW, POLITICS, AND SOCIETY 170, 173 (Tanja A. Börzel & Rachel A. Cichowski eds., 2003); see also The European Convention, Final Report of Working Group XI on Social Europe, Conv 516/1/03 Rev1, Brussels Feb. 4, 2003.

172. For a collection of essays discussing the import of social welfare for American democracy and balancing the delivery of assistance to the poor between the government and nonprofit organizations, see WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE (Mary Jo Bane et al. eds., 2000).

173. Trubek, *supra* note 32.

174. On informal or underground economies, see SASKIA SASSEN,

Finally, the broad dissatisfaction with the formalities of bureaucratic procedures in relation to the experience of citizenship has registered with scholars and practitioners. Increasingly, the new vision includes softer processes, which will create an environment more conducive to participation and dialogue.

There is a wide spectrum of what softer processes and increased flexibility might mean for law reform. Some Renew Deal scholars depict governance processes as informalization, while others, including myself, prefer to describe degrees and variations of formality.<sup>175</sup> The term “soft law” has been used in legal scholarship in a variety of ways. At one extreme, soft law regimes are comprised of interwoven rules of conduct, established and enforced within the private realm in the absence of a hard-binding regulatory regime.<sup>176</sup> Jerry Mashaw defines soft law as consisting of “social accountability” regimes” that are “infinitely negotiable, continuously revisable, often unspoken, oscillating between deep respect for individual choices and relentless social pressure to conform to group norms.”<sup>177</sup> This approach urges us not to equate law with formal regulation but

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GLOBALIZATION AND ITS DISCONTENTS 153–72 (1998); Richard Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157 (1994); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994); Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-home Care Industry in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89 (2001); Christian Zlozniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 YALE L.J. 2305 (1994).

175. On the use of the concept of informality in contemporary legal scholarship, see Annelise Riles, *User Friendly: Informality and Expertise*, 27 LAW & SOC. INQUIRY 613 (2002). See also, Lobel, *supra* note 38. One author has referred to certain variations in the degrees of formalities in decision making as “personal formality.” In the context of the community economic development movement, see SIMON, *supra* note 151.

176. See Steven R. Ratner, *International Law: The Trials of Global Norms*, FOREIGN POL'Y, Spring 1998, at 65; see also David Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187 (2000). On “soft law” labor regimes, see Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 121–23 (1999). On soft law in the context of environmental policy, see Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 432 (1991). For a discussion of soft law in the European context, see, for example, NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* (1999).

177. Mashaw, *supra* note 79.

rather to decenter the concept of law to include multiple instances of normativity, particularly nonstate generated norms. By requiring a move away from conventional notions of regulation, it calls for alternative avenues of reform, building on earlier formulations of the legal pluralism school of thought. Recent legal scholarship has looked at the role of soft law regimes and nonregulatory instruments in diverse contexts, including international law, labor and employment law, consumer laws, and environmental regimes.<sup>178</sup> These nonregulatory instruments include social labeling, voluntary corporate codes of conduct, private accreditation and certification by nongovernmental actors.<sup>179</sup>

At its best, however, the governance model assumes a harder definition of soft law; one that preserves an active role for the state and the legal regime. First, the type of soft law norms described above should be understood as interwoven and existing within an authoritative legal system. Even when actors who do not have the formal capacity to make law generate norms, the Renew Deal paradigm recognizes how these nongovernmental actors are sustained by the background rules of the legal system.

Second, governance scholars focus on the range of signals of authority within formal institutions.<sup>180</sup> Any given agency undertakes different activities that exert different degrees of authority as to the finality, rigidity, and control of their signals. Formal signals exist by which the same norm-generating institution distinguishes between hard law utterances and other communications, for example by choosing between oral and written deliberations, by the naming of documents, or by the procedures taken to make its activities known publicly.<sup>181</sup> For example, in recent years, several administrative agencies have issued “good guidance practices” instead of more conventional regulations.<sup>182</sup> In the mid-1990s, the Federal Drug Administration (FDA) decreased the number of its regulations by fifty per-

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178. *Id.*

179. *A Hard Look at Soft Law, Annual Meeting of the American Society of International Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988) [hereinafter *Hard Look at Soft Law*].

180. Rakoff, *supra* note 85, at 168; *Hard Look at Soft Law, supra* note 179, at 373 (remarks by Michael Reisman).

181. Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 43 (1983).

182. Rakoff, *supra* note 85, at 167.

cent compared with its activities during the 1970s and 1980s. But over the same time period, the number of guidance documents it has issued increased by four hundred percent.<sup>183</sup> The underlying assumption of these softer expressions of intent is that they will allow greater flexibility while still considerably affecting conduct. In industries in which regulated parties are repeat players, the relationship with the agency often provides a greater incentive for compliance than the issuance of harder regulation.<sup>184</sup>

A third understanding of regulatory flexibility within the governance model involves the process by which authoritative decisions are issued. Hard regulatory processes often include rigid requirements about the scope of participation, the forms of exchange between participants, and the ways in which decisions can be reached, such as the notice and comment requirements under the Administrative Procedure Act.<sup>185</sup> Softer processes loosen these requirements to allow open communication, fluid participation, and consensus-based deliberation. One effect of a more flexible attitude toward reaching decisions is that it allows more integration between stages of the legal process. Unlike the regulatory model, the governance model does not insist that legislation, implementation, enforcement, and adjudication are separate stages; but rather seeks to form dynamic interactions among these processes.

A final element of softness in the governance model involves the sanctions that are attached to legal directives. Flexibility implies variation in the communications of intention to control and discipline deviance.<sup>186</sup> Less coercive sanctions can promote flexibility in implementation and compliance. For example, a requirement for reporting is considered softer than mandatory fines in the case of noncompliance. This aspect of soft law has been described in the context of the increasing adoption of reporting requirements rather than the imposition of penalties as “structured but unsanctioned.”<sup>187</sup>

It is important to mention two other possible understand-

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183. *Id.* at 168.

184. *Id.* at 169–70.

185. See generally Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317 (1989).

186. See, e.g., *Hard Look at Soft Law*, *supra* note 179, at 375 (remarks by Michael Reisman).

187. Trubek & Trubek, *supra* note 2.

ings of softness-in-law that are more conventional and have developed within the traditional regulatory model. The most common accounting of degrees of softness and hardness of law involves the content of the law and the degree of openness in its articulation.<sup>188</sup> This analysis has been an integral part of the regulatory era, invoking the traditional realist concept of the choice between rules and standards. While this is not a novel feature of the governance model, this more traditional accounting continues to interact with other forms of softening under the new model. For example, recently adopted performance-based regulation, designed to allow a range of reasonable interpretations that can meet the legal requirement of comparable outcomes, promotes flexibility in the means adopted to achieve the specified goals.<sup>189</sup> Private firms are given incentives to search for the least costly approach to abide by the performance requirements. Often, along with the adoption of such mechanisms, firms are required to design plans that outline how certain goals will be achieved. The governmental agency assists the development of these plans, as well as approving or certifying them. Subsequently, firms need to show compliance with their own plans or provide reasons for divergence from them. They may alter the plans as conditions or new knowledge arrives.

A second and final understanding of softness that existed within the regulatory tradition is that actual enforcement of a law is weak, even as the threat of formal sanctions continues. Again, this is certainly not an innovative approach of the governance model, but it interacts with other variations of formality and informality in the legal system. Weak enforcement combines with softness when public commitment changes, such as in sodomy laws, or when there is a vast apparatus rendered

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188. This is the early legal realist understanding about rules versus standards, further elaborated through generations of critical legal thinking. See generally Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (defining legal directive as a rule when the directive binds a decision maker to respond a certain way with the decision to the facts and defining a legal directive as a standard when the directive “tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation”).

189. See Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 711 (2003).

invisible to public policy, such as in the case of the thriving underground economies of global cities.<sup>190</sup> From a regulatory perspective, this kind of softness is usually seen as an unintended, undesirable result. However, from a governance perspective, it is understood as a potential tool. Hence, Renew Deal commentators have proposed formalizing this feature of incomplete enforcement and law-in-action flexibility. While under the regulatory model, regulations usually apply to all members of an industry, Ian Ayres and John Braithwaite propose that, in some situations, “partial-industry regulation” is superior to all-or-nothing regulatory policies.<sup>191</sup> They claim that regulating only a subset of firms in an industry can engender “a system of checks and balances in which the regulated and unregulated portions of the market each curb the excesses of the alternative form of market governance. Partial-industry regulation can thus promote efficiency by restraining monopoly power without giving rise to the evils of either captured or benighted regulation.”<sup>192</sup>

Many of the writings within the governance model promote softness in more than one of these possible dimensions. Returning to the European OMC, the new EU governance approach has been defined as a soft law process.<sup>193</sup> In fact, the OMC embodies a combination of several flexible elements. It is soft law because it “has general and open-ended guidelines rather than rules [recalling the traditional standards vs. rules axis], provides no formal sanctions for Member States that do not follow the guidelines [communications of intentions], and is not justiciable [absence of formal enforcement mechanism].”<sup>194</sup>

As with other principles of the governance model, different rationales abound as to why, in certain contexts, soft mechanisms may be preferable to hard regulation. First, the complexity of many modern issues does not allow for obvious solution.

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190. On informal or underground economies, see *supra* note 176 and accompanying text. Sodomy laws are a highly politicized example of changing public norms and values that influence the enforcement of laws that continue to be on the books, but less dramatic examples are widespread. See Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 644 (2001).

191. Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CAL. L. REV. 13, 14 (1992).

192. *Id.*

193. Armstrong, *supra* note 171, at 193; de Búrca, *supra* note 167, at 823–26; Trubek & Trubek, *supra* note 2.

194. Trubek & Trubek, *supra* note 2.

Renew Deal thinking recognizes that it is often better to allow a range of interpretation, deviance, and trial and error without the constraints of rigid orders and fear of formal sanctions. A soft law approach reduces the often perverse incentives imposed by liability and sanctions.<sup>195</sup>

A second reason to use soft law involves circumstances in which the gap between the aspired norm and the existing reality is so large that hard regulatory provisions are meaningless. Many proposals for social and economic rights in developing countries rest in this rationale.<sup>196</sup> The underlying idea is that it is better for the normative order to recognize in advance the impossibility of immediate change and to explicitly acknowledge the space between real and ideal. Softer mechanisms allow a regime to establish minimum levels of adherence and to formalize advancement toward higher, aspirational standards.<sup>197</sup>

A related set of circumstances also points to the desirability of a softer governance approach. Often, large differences exist in the capacity of different entities under the law's authority to reach the desired regulatory goals.<sup>198</sup> This situation may be most evident where law operates on differently situated polities, for example international conventions or European unification. In sum, when material resources are greatly limited or social barriers to implementation are high, it might be preferable to promote certain policies in a flexible, noncoercive way.

A fourth context in which legal scholars advocate the softer

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195. See *infra* Part IV.C (discussing about employment discrimination) see also Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 521–22 (2001).

196. See generally HENRY J. STEINER & PHILIP ALSTON, HUMAN RIGHTS IN CONTEXT INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 35–46 (2000).

197. See, e.g., John C. Dernbach, *Sustainable Development As a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 9–14 (1998); John C. Dernbach, *Targets, Timetables and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 79, 93–94 (2002); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 366–67 (2001); William F. Pedersen, *Regulation and Information Disclosure: Parallel Universes and Beyond*, 25 HARV. ENVTL. L. REV. 151, 177–79 (2001) (describing the need for “operationally significant goals”).

198. This is, for example, a rationale for soft law approaches for the integration of Europe—where differently situated countries come together under a new legal regime. See Scott & Trubek, *supra* note 166, at 4–8; de Búrca, *supra* note 167.

approach of the governance model over the traditional coerciveness of the regulatory model is where there is intense disagreement among decision-making authorities. At times, no consensus can be reached within a single legislative or administrative body; at other times, in an environment of regulatory competition, controversy results over the authority of the forum to legislate.<sup>199</sup> This latter situation is exemplified in the European Union, where competition between member states and the union over hard legislative competence has led, in some areas, to the coexistence of national hard law and supranational semi-soft law.

A fifth context occurs in circumstances where there is too much political weakness to reach hard legislation or too much ideological resistance to ensure implementation. In such cases, if there is a de facto lack of competency to legislate, softer initiatives may often be enough to achieve similar results through a noncoercive, nonregulatory approach. Such is the case with international labor standards, in which activists have sought market-based pressures, coupled with the background support of official international and national bodies, to turn corporate codes of conduct into soft law norms.<sup>200</sup>

Finally, an overarching justification for softer, flexible approaches to policy is that they increase the overall legitimacy of the system. Soft law is experienced by the different stakeholders in a polity as less oppressive than regulatory means and force. Semivoluntary compliance encourages an environment of nonfear and increases people's willingness to contribute freely to the efforts of public policy; thus supporting other governance principles, including collaboration, diversity, and learning.

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199. See, e.g., Timothy A. Canova et al., *Labor and Finance As Inevitably Transnational: Globalization Demands a Sophisticated and Transnational Lens*, 41 SAN DIEGO L. REV. 109–14 (2004); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 82 (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 70–72 (2002).

200. See, e.g., Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 424–25 (2001); Owen E. Herrstadt *Voluntary Corporate Codes of Conduct: What's Missing?* 16 LAB. LAW. 349, 351–63 (2001); Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1098–99 (2002).

## G. FALLIBILITY, ADAPTABILITY, AND DYNAMIC LEARNING

Since a basic premise of the governance model is the inevitability and the fertility of change, the new vision is optimistic about uncertainty and doubt. In fact, unlike the traditional regulatory model, governance treats ambiguity as an opportunity rather than a burden to overcome. As we will further explore in Part VII, theoretical and practical hybridization is a key strength of the model. The coexistence of competing rationales for the shift to the Renew Deal paradigm, its richness of elements, and its open and fluid multitiered architecture all contribute to its boundless potential as a new paradigm.

The governance model engages Justice Jackson's famous declaration that "[w]e are not final because we are infallible, but we are infallible only because we are final."<sup>201</sup> In social life and public policy, nothing is ever final, not even adjudication. All arrangements are inherently fallible. The operative metaphor is that of living systems, where organic mutations and deviations can prove to be fitter, stronger, and more socially desirable.

The regulatory model has often proved stagnant and sluggish, curtailing revision and improvement. "[M]ost of the classic complaints about public bureaucracies are really criticisms of agencies for being too legalistic (too rigid, unimaginative, process-oriented, etc.) in their strict adherence to the statute, at least as they understand it."<sup>202</sup>

While regulation has been an ordering act, governing is a learning process. The new model is better positioned to accept uncertainty and diversity, advancing iteratively toward workable solutions. The role of law is to promote practices that allow revision and improvement. Michael Dorf and Charles Sabel describe their vision for an experimentalist regime as the open acknowledgment of the incomplete and ambiguous character of the initial specification of means and ends, and the use of the lack of specificity as a prod to inquiry and discovery.<sup>203</sup> When technology is widespread and knowable and standards are easy to define, command-and-control regimes might be preferable. Yet, under the realities of fast advancements, heterogeneity,

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201. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

202. PETER H. SCHUCK, *Delegation and Democracy: Comments on David Schoenbrod*, in *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 251, 262 (2000).

203. See *A Constitution of Democratic Experimentalism*, *supra* note 4, at 363–64.

and complexity, the informational and adaptability advantages of private firms should be configured into the legal system. Moreover, lack of clarity about appropriate solutions can benefit complex governance domains, because it enables conflicting parties to come together in multistakeholder negotiations, moving away from, at least tentatively, entrenched positions about each party's particular interests.<sup>204</sup>

Martha Minow, recounting the growing involvement of private actors in public activities, argues that “[p]rivatization stimulates new knowledge and infrastructure by drawing new people into businesses previously handled by government.”<sup>205</sup> By designing institutions that rely on self-discipline and self-surveillance to ensure performance, Renew Deal governance scholarship stresses the importance of capacity building of private actors. It borrows private sector techniques such as information pooling, learning-by-monitoring, reliable feedback, knowledge networks, and benchmarks and indicators for best practices.<sup>206</sup> Processes must be kept open since learning can be undermined by too much specificity about goals, tasks, and roles. All of these techniques and processes together form a system that is iterative and dynamic, generating virtuous cycles of innovation.

Sophisticated analyses within the governance school distinguish between different levels of learning.<sup>207</sup> In the context of environmental law, Pieter Glasbergen differentiates between four types of learning.<sup>208</sup> Among them, technical learning involves the application of a limited number of policy instruments, conceptual learning includes the redefinition of policy goals and problems, and social learning has to do with the interactions and communication among actors.<sup>209</sup> David Trubek and James Mosher, discussing the desirability of ongoing learning in the European Union context, characterize the implementation of the new European governance initiative of OMC as “an iterative multi-level, multi-actor process.”<sup>210</sup> They similarly

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204. See Sabel & Simon, *supra* note 16, at 1099.

205. Minow, *supra* note 78, at 1245.

206. OSBORNE & GAEBLER, *supra* note 80.

207. Peter A. Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 25 COMP. POL. 275, 288 (1993).

208. Pieter Glasbergen, *Learning to Manage the Environment, in DEMOCRACY AND THE ENVIRONMENT: PROBLEMS AND PROSPECTS* 175, 176 (William M. Lafferty & James Meadowcroft eds., 1996).

209. *Id.*

210. David M. Trubek & James S. Mosher, *New Governance, Employment*

describe three types of learning: first, the fine tuning of existing policy instruments; second, the modification of instruments; and third, making changes in policy goals themselves.<sup>211</sup> They argue that policy learning is facilitated by various measures, many of which are elements of the governance model that have been explored in the previous parts:

[M]echanisms that destabilize existing understanding; bring together people with diverse viewpoints in settings that require sustained deliberation about problem-solving; facilitate erosion of boundaries between both policy domains and stakeholders; reconfigure policy networks; encourage decentralized experimentation; produce information on innovation; require sharing of good practice and experimental results; encourage actors to compare results with those of the best performers in any area; and oblige actors collectively to redefine objectives and policies.<sup>212</sup>

In addition to addressing the *limits* of human knowledge, the principle of permanent learning is equally cognizant of the *unlimited* power of human learning that has been perceived as a threat under the regulatory model. On the one hand, the people who are regulated are the ones with the greatest familiarity and knowledge relevant to the goals of social policy. On the other hand, there is the continuous risk that, precisely for the reason that governmental regulation was required, self-regulation will fail. One could predict with good reason that, left to their own devices, private groups will not adhere to the social goals involved. The Renew Deal governance model actively engages Weberian insights about the natural learning process of organizations designed to overcome legal limitations. Consequently, if there are some activities that are likely to occur (e.g., because they are efficient) but we as a society believe there is reason to control them, then there is a need to keep law innately dynamic. Max Weber thought it obvious that,

those who continuously participate in the market intercourse with their own economic interests have a far greater rational knowledge of the market and interest [in the] situation than the legislators and enforcement officers whose interest is only ideal . . . . It is those private interested parties who are in a position to distort the intended meaning of a legal norm to the point of turning it into its very opposite . . . .<sup>213</sup>

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*Policy, and the European Social Model, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* 33, 38–41 (Jonathan Zeitlin & David M. Trubek eds., 2003).

211. *Id.* at 46.

212. *Id.* at 46–47.

213. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 38 (Max Rheinstein

Weber recognized the inevitable learning cycle of those in the market that want to avoid regulation—a cycle through which regulation, even if innovative when conceived, eventually becomes outmoded. Private actors quickly learn how to avoid certain provisions, while the regulatory machinery might take much longer to realize its dictates have been circumvented.<sup>214</sup>

In the Renew Deal, the legal system's constant engagement with evaluation, revision, experimentalism, feedback, and monitoring addresses both types of learning—the positive improvement of policy as well as its avoidance. The new physical infrastructure of advanced technology helps this practice by allowing better data collection and the comparison of outcomes. As David Osborne and Ted Gaebler report, “We can generate, analyze, and communicate a thousand times more information than we could just a generation ago, for a fraction of the cost.”<sup>215</sup>

Hence, the business of government agencies becomes “regulatory research and development,” rather than regulatory decision making, requiring “an ethic of experimentalism in which errors are not viewed as failures.”<sup>216</sup> Under the governance model, several policy tools are considered to be especially adapted to triggering mechanisms for renewal. One such policy tool is the use of time-centered rules, which specify a preset timeline or a rhythmic calendar for revision or change, for example sunset rules and temporary decrees.<sup>217</sup> A second central example of a dynamic policy tool is information-centered laws, including both private disclosure rules and public sunshine laws. Increasingly, information or disclosure regimes are policy tools, ensuring choice and participation.<sup>218</sup> For example, on en-

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ed. & Edward Shils trans., 1954), *quoted in* SALLY FALK MOORE, *LAW AS PROCESS* 56–57 (1978).

214. *See, e.g.*, Sturm, *supra* note 195, at 475–78 (arguing that employers develop a systematic ability to learn to avoid discrimination liability in a command-and-control regime).

215. OSBORNE & GAEBLER, *supra* note 80, at 141.

216. Freeman, *supra* note 3, at 31.

217. In private law, there are also examples of legislation that use time rules to ensure the generation of new knowledge, improvements, and industry advancements—like in the preset timelines for the expiration of intellectual property entitlements.

218. *See, e.g.*, Pedersen, *supra* note 197, at 151–52 (arguing information disclosure programs could effect significant changes in the status and functions of federal regulatory agencies); Albert J. Boro, Jr., Comment, *Banking Disclosure Regimes for Regulating Speculative Behavior*, 74 CAL. L. REV. 431, 472–89 (1986) (advancing a disclosure regime as a means of stabilizing banks).

vironmental issues, many countries now require industries to release information on their performance to the community and interested stakeholders.<sup>219</sup> In areas as diverse as securities regulation, banking and loan management, health care, pharmaceuticals, and consumer protection, the availability of information on performance, rates, and quality is increasingly understood as a way to generate better practices. Finally, performance-centered norms are a vital category of new policy tools that create a shared expectation of comparable outcomes while allowing the refinement of means and strategies.<sup>220</sup>

#### H. LAW AS COMPETENCE AND ORCHESTRATION

The final feature of the governance model is orchestration. Orchestration renders all other aspects of the governance model meaningful, separating the model from flat processes of devolution and deregulation. From the perspective of the micro-lens of decentralization, some reform agendas of the Renew Deal may best be accomplished at the local level. A more accurate view reveals, however, that under the governance model, a broader network of regional, state, and national efforts must support programs.<sup>221</sup> While power is decentralized to allow local knowledge to match solutions to their individual circumstances, decentralization must be coupled with regional and national commitments to coordinate local efforts and communicate lessons in a comprehensive manner.<sup>222</sup>

The greatest challenge of orchestration is to prevent the

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219. The U.S. Toxics Release Inventory (TRI) requires specified categories of manufacturing facilities to report annually on their use, storage, and release of about six hundred chemicals into the air, water, land, and underground injection wells. Fiorino, *supra* note 31, at 448. The Environmental Protection Agency then compiles the data in annual reports, often receiving extensive media coverage:

The TRI does not require firms to install technology or otherwise take steps to reduce emissions; it is purely an information requirement. Nonetheless, experience and empirical studies document that firms respond to the negative publicity that accompanies the release of TRI information. Companies do not want to be known as leading polluters in their communities.

*Id.*

220. Coglianesi et al., *supra* note 189, at 705 (summarizing a workshop discussion of the benefits and drawbacks of performance-based regulations).

221. In the context of community development, see SIMON, *supra* note 151, at 167–193. In the context of the new labor market, see Lobel, *supra* note 90, at 2157–61.

222. See *A Constitution of Democratic Experimentalism*, *supra* note 4, at 287–88.

isolation of problems by linking together geographically and materially dispersed efforts. Rather than an exclusively localized approach, which focuses only on specific problems in a confined geographical area, at its best, the new governance model addresses problems in their broader context.<sup>223</sup> The legal system must create opportunities to consider policies regionally and nationally.

In the Renew Deal vision, the central authority declares a need and an intention to address an issue and expresses willingness to provide resources. The role of government is to promote and standardize innovations that began locally and privately.<sup>224</sup> Scaling up, facilitating innovation, standardizing good practices, and researching and replicating success stories from local or private levels are central goals of government. Policymakers must observe and encourage a variety of practices that emerge in the market, and then decide how best to support and complement good practices. The federal government's role,

is less one of direct action than one of providing financial support, strategic direction, and leadership for other governmental actors. . . . [T]he federal role . . . lies . . . less in championing particular institutions and practices than in mobilizing resources, encouraging experimentation, facilitating comparison and evaluation of alternative approaches, and diffusing the best practices.<sup>225</sup>

Orchestration of the best practices found in different contexts has the potential to result in a "virtuous cycle of innovation and improvement."<sup>226</sup>

The normative authorities that proliferate within the mandate of an orchestrated system require a delicate, ongoing balance. How can a legal system preserve the implication of hierarchy without being jurispathic?<sup>227</sup> How does government maintain its authority while promoting the governance capaci-

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223. Nonorchestration is the greatest difficulty of many policy proposals in recent years. For example, this has been a primary weakness of many local development efforts that have been reenergized in the 1990s. See Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 299–301 (1999).

224. Cf. Freeman, *supra* note 3, at 21 (proposing a model of governance in which administrative agencies facilitate joint problem solving with private entities rather than react to interest representation).

225. OSTERMAN ET AL., *supra* note 84, at 151.

226. *Id.* at 178.

227. Robert Cover developed the term "jurispathic" to signify the violence of legal ordering upon other normative orders. Cover, *supra* note 181, at 40–44.

ties of other social actors? Governance scholars encourage the exercise of a new kind of legal self-restraint. Instead of taking over regulatory responsibility for the outcome of social processes, law restricts itself to the installation, correction, and redefinition of democratic mechanisms.<sup>228</sup> It creates incentives and procedures to cultivate internal reflection about behavior.<sup>229</sup> The legal process coordinates the multiple levels of government and nongovernment activities. Accordingly, recalling the processprudent project (or the Legal Process school) of the 1950s,<sup>230</sup> the governance model treats the legal system as the interaction of institutions and practices, rather than as a set of rules.

With the integration of policy domains and fields of foundational law—including constitutional law, administrative law, and jurisprudence—the Renew Deal vision promotes institutional analysis of the myriad of subsystems in the polity. The anomaly of the American legal system, in which common law courts were developed before the full constitution of an administrative state, has affected the path of legal theory by contributing to the dominance of jurisprudence. The governance model expands the center of legal thought beyond jurisprudence to include legisprudence and processprudence among different social arenas and institutions. The model's broad focus encompasses government agencies, as well as a host of private groups and organizations, operating together in a more holistic legal regime. In its treatment of the law as a comprehensive system, the model again recalls the postwar Legal Process school.<sup>231</sup> The governance model is, however, more sophisticated in the range of institutions it considers viable and its drive to reconfigure the interactions of these institutions.<sup>232</sup> Both private and

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228. Teubner, *supra* note 60, at 273–75.

229. REFLEXIVE LABOUR LAW, *supra* note 1, at 7. (“In distinguishing functions (with respect to society), performance (with respect to other social systems), and reflexion (with respect to the system itself) a sophisticated labour law approach tries to ‘regulate’ not only through ‘performance’ but also through influencing centres of ‘reflexion’ within other social subsystems.”)

230. For an introduction to the legal process movement, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William Eskridge, Jr. & Philip P. Frickey eds., 1994). See also *infra* text accompanying notes 488–491.

231. For a description of the legal process school, see *infra* notes 488–491.

232. Cf. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation As a Postmodern Cultural Form.*, 89 MICH. L. REV. 707, 737–61 (1991) (outlining the new public law movement); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1424–33 (1996) (describing the

public institutions should be open to transformation. "Until we make the underlying institutional and imaginative structure of a society explicit we are almost certain to mistake the regularities and routines that persist, so long as the structure is left undisturbed, for general laws of social organization."<sup>233</sup>

Critical legal theorist Roberto Unger describes legal thought as having suffered from "institutional fetishism," and calls on a new generation of thinkers to rebel against this tendency. "The institutional arrangements for production and exchange should be as open to experimental variation as all other parts of social life."<sup>234</sup>

The legal system must therefore promote experiments with institutional design rather than curtail them. In the governance model, centralized law does not occupy a privileged role controlling all other subsystems. Instead, law coexists with various subsystems, ever gauging the sustainability of the different organizations.<sup>235</sup> The law still dominates, however, through its capacity to coordinate among different social institutions (e.g., political, economic, legal, family, religion, education). Governance policies serve to integrate isolated efforts at the subsystem level, coordinating different scales of action. Law's coordinating function is achieved through its "competence competency," the competence to determine other actors' competencies. The legal system confines itself to a certain set of questions, namely, the

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methodology and substance of the new legal process).

233. ROBERTO MANGABEIRA UNGER, *POLITICS: THE CENTRAL TEXTS* 6 (Zhiyuan Cui ed., 1997). For example, Roberto Unger argues that, despite the redefinition of property in twentieth century American legal thought as a bundle of legal relations and conflicting rights, legal theory has failed to produce an understanding that "market economies, like representative democracies and free civil societies can take radically different institutional forms." UNGER, *supra* note 4, at 203–04.

234. UNGER, *supra* note 4, at 203. Michael Dorf and Charles Sabel similarly challenge legal institutional fetishism:

How bizarre the assumption that the one feature of our institutions that remained fixed as they somehow slipped from unimprovable to incorrigible is their inaccessibility to deliberate alteration! . . . [T]he legal-process idea of taking the institutions for granted becomes a form of self-fulfilling prophecy. . . . [W]hy not suppose simply that the institutions of government worked well in the immediate post-War period because by design, or by good fortune, they fit well with their environment? In time the environment changed, and the lack of fit explains the poor performance of the institutions . . .

*A Constitution of Democratic Experimentalism*, *supra* note 4, at 283.

235. *Cf. The Changing Shape of Government*, *supra* note 106, at 1334 (remarks by Lester Salamon) (describing the wide variety of forms of public action, many of which involve private entities).

capacities of different actors, arenas and subsystems; the division of scope and responsibilities among them; and their self-regulatory institutional processes. Yet, by this very action, law asserts its primacy in developing procedures and jurisdictional norms for the activities of other social systems. The European Autopoiesis school, similarly to the earlier American Legal Process school, points to this role of the law in determining competencies of the different social subsystems. It claims that “legal norms should produce a ‘harmonious fit’ between institutional structures and social structures rather than influence the social structures themselves.”<sup>236</sup> Similarly, in the American context, governance scholars offer the concept of “reconstitutive law,”<sup>237</sup> describing law’s function in providing rules about the procedure, organization, and constitution of other social fields without directly prescribing individual behavior. In this framework, law ensures that subsystems are responsive to their constituents, defines jurisdictions, coordinates activities, harmonizes subsystem activities with national goals, while preserving broad subsystem independence—creating a strategic coupling between national goals and local authority.<sup>238</sup> Law discerns the relative capacities of different institutions and supports self-sustaining balances in each context. In this capacity, a governance approach creates a middle ground—a space of regulated autonomy—between substantive regulation and non-regulation.<sup>239</sup> Law continues to play a crucial role under the governance model, but that role differs from the regulatory model’s conception of law as top-down and universal.

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236. Teubner, *supra* note 60, at 251.

237. Stewart, *supra* note 7, at 108–09.

238. *Id.* at 88, 104–11.

239. Teubner, *supra* note 60, at 254.

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Table 2: From Regulation to Governance

	<b>Traditional Regulatory Model</b>	<b>New Governance Model</b>
<b>Nature of Law</b>	Centered Substantive Centralized Command-and- Control Rigid and Fixed Uniform rules Generalized	Decentered and Proliferated Procedural; Reflexive Decentralized Coordination and Orchestration Flexible and Adaptable Diversity Contextualized Variances
<b>Institutional Organization</b>	Top-down Hierarchy Formal	Horizontal Network Informal
<b>Central Actors</b>	State National level Public	Multiple levels of government (local + transnational + international) Multiple public and private participation Decentralization and Principle of Subsidiarity
<b>Modes of Action</b>	Formal avenues of activism	Proliferation of modes of activism
<b>Law-Making Process</b>	Static One-shot Ossified, Entrenched	Dynamic Iterative; Repeat learning Experimental, Promotes innovation
<b>Motivator for Private Action</b>	Liability (Fear)	Reform, Problem-solving improvement
<b>Form of</b>	Discrete actions;	Holistic, systemic

<b>Engagement</b>	Distinct cases Separate fields of law	approach Integration of policy domains
<b>Role of Private Actors</b>	Individuals are the object of regulation—can comply or not	Individuals are norm-generating Active citizenship
<b>Use of Knowledge and Information</b>	Information is selective for fear of liability	Integrated approach All information should be considered over a long period of time and shared Regularized continuous reflection
<b>Procedural Frame</b>	Reactive; Defensive; Ex-post	Proactive; Ex-ante
<b>Adjudicative Approach</b>	Before and after the fact judgment	Ongoing benchmarking
<b>Source of Norms</b>	Legal regime as primary source of norms	Legal regime as part of a range of factors that are considered together—economic, ethical, customary
<b>Power of Law</b>	“Hard” Coercive Rules Mandatory Sanctioned	“Soft” Aspirational Guidance Voluntary Structured but unsanctioned
<b>Role of Lawyer</b>	Lawyer: professionalized, Operates in legal arena	Multi-disciplinary engagement Operates in diverse social arenas
<b>End Goals</b>	Convergence of policies	Partial convergence of processes and outcomes
<b>Conceptual Framework</b>	Haves/have-nots struggle for a share of the static pie Law asks: how to divide the pie	Win-win framework Law asks: how to enlarge the pie

#### IV. THREE EMERGING DOMAINS OF GOVERNANCE

As we have seen, the Renew Deal shift from regulation to governance is affecting a myriad of policy areas. This section critically explores the recent application of governance principles in three areas where it is particularly prevalent. First, in the area of employment law, new policies on occupational safety and health, second-generation employment discrimination, and vocational training programs, provide important insights into the ways the legal regime is confronting the new political economy and constructing innovative policies to produce socially responsible market practices. Next, in environmental law, the Renew Deal vision has had some of its earliest influences on policy and institutional design. Environmental scholars have begun developing the concept of civic environmentalism, which confronts the failures of traditional regulatory schemes and promotes participatory and decentralized arrangements to better conserve the ecology, habitat, and natural resources. The third area, Internet law, is an important terrain of implementation of governance principles in a new infrastructure. Technological advances are conducive to new demands of flexibility, increasingly facilitating reflexive regulation, enabling information and power sharing, and lowering the barriers of entry and engagement. They have also added a new layer of settings to which legal thought must react. These three leading areas of governance provide insights to both the promise and complexities of implementing an integrated governance model in legal fields previously shaped by the New Deal regulatory paradigm.

##### A. THE NEW WORKPLACE

The new economy, marked by a growing demand for flexibility, increased competitiveness, and rapid globalization, has created new patterns of work and employment.<sup>240</sup> Today's workplaces promise less stability; contingent employment relations are on the rise. Although any linear account is inevitably oversimplified, the last few decades have seen a move away from the "old" model of work—Fordist assembly-line production and Taylorist scientific management—to a post-industrial mode

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240. See Lobel, *supra* note 87, at 144–53.

of production, which is flexible, lean, and service based, and in which work is increasingly outsourced and part-time.<sup>241</sup>

As employers are adopting more flexible arrangements, workplace security has become scarcer.<sup>242</sup> New employment patterns, described by industrial-organization scholars as the “casualization of the labor market,”<sup>243</sup> the “new psychological employment contract,”<sup>244</sup> and the “boundaryless career,”<sup>245</sup> require workers to accommodate change rapidly and manage their own careers. Indeed, the new currency of the human-capital era is employability rather than stability. Those who are not well situated to this new world of employability are disproportionately women, minorities, and immigrants.<sup>246</sup> Moreover, new employment patterns have put into question the responsibility of the state to regulate the workplace as well as its capacities to enforce top-down regulations. The heterogeneity of the workforce and the workplace has made it more difficult for a centralized government agency to promulgate rules that will fit all firms. In today’s reality, no single model of work relations exists, and thus unitary conceptions of the workplace and unitary employment policies are impossible. Although existing legal and social institutions are based on the assumptions of a former era, in which uniformity and stability were much more widespread, the nature of the new labor market requires flexible and diverse institutions.<sup>247</sup> A governance approach is further needed to address a rapidly changing environment in which flexibility and adaptability are key to remaining competitive in the new global market. Technological innovations as well as unpredictable strains of heightened competition require constant change and adaptation.

New dimensions of the workplace are challenging the traditional ways policymakers and scholars have approached is-

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241. *Id.*

242. See Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 112–14 (2003).

243. SASSEN, *supra* note 174, at 34.

244. Katherine V.W. Stone, *The New Psychological Contract*, 48 UCLA L. REV. 519 (2001).

245. MICHAEL B. ARTHUR & DENISE M. ROUSSEAU, *THE BOUNDARYLESS CAREER: A NEW EMPLOYMENT PRINCIPAL FOR A NEW ORGANIZATIONAL ERA* (1996).

246. See generally Lobel, *supra* note 174, at 89–92.

247. Lobel, *supra* note 90, at 2157 (citing OSTERMAN ET AL., *supra* note 89, at 35–44).

sues of social justice in the area of work. The inadequacy of substantive prohibitions in the new economy requires alternative methods of social activism and reform. As employment patterns have radically changed in the new economy, misconduct and inequity must be prevented using strategies outside the traditional regulatory toolbox. New governance strategies have been employed in a variety of policies, including vocational-training reforms, occupational health and safety regulation, and antidiscrimination strategies.

### 1. Vocational Training

Worker training and adult education have always been a bridge between the state and the market, between welfare and work, and between low-wage and higher paying jobs. Even Adam Smith, dubbed father of the invisible hand and laissez-faire markets, believed that vocational education should be provided free to the working class to guarantee that they would be able to join society as full, productive citizens.<sup>248</sup> In the past two decades, however, training has become increasingly important. Changing market requirements and employment patterns place more value on skills and education than did the earlier industrial workplace. At the same time, reductions in direct welfare provisions constrain the ability of workers to seek aid outside of the market. These developments have sharpened the divisions between skilled (rather than stable or secure), upwardly mobile jobs and low-skill “dead-end” jobs.<sup>249</sup>

Reform agendas for workforce development thus face a trilemma. First, lifelong learning and training is becoming increasingly important in the new, ever-changing economy. The changing face of both the workplace and the workforce has placed a high premium on constant reskilling, networking, and employability. Second, because of higher mobility, dislocation, and worker turnover, individual firms have less incentive to invest in skill training, particularly of less-skilled workers. And third, welfare reform and reductions in direct governmental aid have created new constraints on the ability of workers to seek aid outside of the market.<sup>250</sup>

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248. AVISHAI MARGALIT, *THE DECENT SOCIETY* 157 (1996) (citing ADAM SMITH, *THE WEALTH OF NATIONS* (1776)).

249. DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* 11–13 (1997); see SASSEN, *supra* note 174, 138–42.

250. See Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 *UCLA L. REV.* 1739, 1741 (2002); Joel F. Handler, *US Wel-*

Federal regulatory initiatives and publicly funded training programs in the United States have long been criticized for lagging behind the economic realities and falling short of the efforts of other countries.<sup>251</sup> A recurring failure has been the lack of coordination with the needs of the private job market.<sup>252</sup> Existing public institutions, such as local high schools and community colleges, have played a central role in training. However, these training sites did not achieve the much-needed coordination between taught skills and actual job opportunities.<sup>253</sup> One of the key difficulties in training is anticipating the changing balance of supply and demand for different skills and jobs in a local economy.<sup>254</sup> Uncoordinated efforts have been largely inadequate to achieve the needed balance. Training also requires integration with the ability and readiness of firms themselves to make changes in their organizational structures. To be most effective, training initiatives must therefore also assume roles in human resource allocation and organizational consulting.<sup>255</sup>

Recognizing the principle challenges of the new economy, as well as the ongoing failures of the traditional approach to training, the Workforce Investment Act (WIA) of 1998 replaced

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*fare Reform: The Big Experiment*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 215 (Jonathan Zeitlin & David M. Trubek eds., 2003).

251. See, e.g., William H. Simon, *The Community Economic Development Movement*, 2002 WIS. L. REV. 377.

252. W. NORTON GRUBB, LEARNING TO WORK: THE CASE FOR REINTEGRATING JOB TRAINING AND EDUCATION 70–74 (1996); PAUL OSTERMAN, EMPLOYMENT FUTURES: REORGANIZATION, DISLOCATION, AND PUBLIC POLICY 90 (1988); Rashid Amjad, *Employability in the Global Economy and the Importance of Training: A Summary of the 1998–99 ILO World Employment Report*, 20 COMP. LAB. L. & POL'Y J. 715, 730–35 (1999); Marie-Louise Caravatti, *The Role of Governments in the Development of Human Resources Training for Employability: The U.S. Side*, 22 CAN.-U.S. L.J. 37, 40 (1996); Lisa M. Lynch & Sandra E. Black, *Beyond the Incidence of Employer-Provided Training*, 52 INDUS. & LAB. REL. REV. 64 (1998); see also Michael Cragg, *Performance Incentives in the Public Sector: Evidence from the Job Training Partnership Act*, 13 J.L. ECON. & ORG. 147 (1997) (using the Job Training Partnership Act to illustrate how the government approach to incentives differs from that of the private sector).

253. OSTERMAN, *supra* note 252, at 90.

254. See ROSEMARY BATT & PAUL OSTERMAN, WORKPLACE TRAINING POLICY: CASE STUDIES OF STATE AND LOCAL EXPERIMENTS 59–61 (Econ. Policy Inst., Working Paper No. 106, 1993) (discussing the problems faced by the Massachusetts Machine Action Project in its attempts to match supply and demand in the Springfield local economy).

255. *Id.* at 58.

previous federal legislation as the new legal regime for disseminating funding from the United States Department of Labor to local job training programs.<sup>256</sup> A highly decentralized system, the WIA aims to fully integrate federal grants into local programs and eliminate the lack of coordination present in the former system.<sup>257</sup> Under the previous regime, different organizations and agencies within each state operated narrowly focused education and training programs. In contrast, applying the governance principle of policy integration, the WIA creates local integrated marketplaces, where job seekers can choose among a broad array of job placement services and educational programs, as well as comprehensive personal and professional counseling. It merges into the new system other publicly funded services, such as special programs focusing on young adults in secondary and post-secondary vocational education programs.<sup>258</sup>

The WIA establishes a “one-stop” delivery system, which provides job seekers with neighborhood career centers where they can access core employment services.<sup>259</sup> The centralized location, where job seekers can obtain information about all aspects of the job market, is designed to make the job-seeking process more efficient and to empower individuals to make choices suited to their career needs and goals.<sup>260</sup> This approach enables citizens to actively participate in the implementation of training policy. The law also encourages collaboration among government, industry, and civil society. Each one-stop center is comprised of public and private partner organizations that provide core services.<sup>261</sup> Required partners include adult education providers, employment services, welfare-to-work centers, and unemployment insurance services.<sup>262</sup> Local agencies are

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256. Pub. L. No. 105-220, 112 Stat. 939 (codified as amended in scattered sections of 29 U.S.C. and 20 U.S.C.). WIA's predecessor was the Job Training Partnership Act of 1982. Pub. L. No. 97-300, 96 Stat. 1322 (enacting no currently effective sections).

257. Nan Ellis, *Individual Training Accounts Under the Workforce Investment Act of 1998: Is Choice a Good Thing?*, 8 GEO. J. ON POVERTY L. & POL'Y 235, 236 (2001).

258. For example, the WIA integrates the Carl D. Perkins Vocational and Applied Technology Education Amendments of 1998. See Pub. L. 105-332, 112 Stat 3076 (1998) (codified as amended in scattered sections of 20 U.S.C.).

259. 29 U.S.C. § 2864(c)–(d) (2000).

260. Ellis, *supra* note 257, at 236.

261. 29 U.S.C. § 2864 (d)(3)(B).

262. Ellis, *supra* note 257, at 238.

prohibited from directly providing training services, and are instead required to seek out other (private or public) providers. Training is provided through individual training accounts, in effect establishing a voucher system through which a participant chooses among eligible providers.<sup>263</sup> The one-stop system provides participants with a list of eligible providers and their performance information.<sup>264</sup> The WIA mandates universal access to the one-stop system,<sup>265</sup> which includes information on job vacancies, career options and counseling, employment trends, instructions on how to conduct a job search, student financial aid, unemployment insurance assistance, assistance in establishing eligibility for welfare-to-work case management, and follow-up sessions.<sup>266</sup> As a result of the decentralized, collaborative approach required by the Act, training services are directly linked to occupations that are in demand in local areas or other areas to which the individual is willing to relocate.<sup>267</sup>

The one-stop centers are funded directly by federal block grants.<sup>268</sup> The amount of funding each center receives annually depends on its success, based on criteria articulated in the WIA.<sup>269</sup> Performance-based regulation encourages localities to experiment and to dynamically compare and improve their practices. The law specifies core performance indicators that focus on rates of entry into and earnings in unsubsidized employment by participants.<sup>270</sup> Levels of performance affect the federal funding of the local program in subsequent years.<sup>271</sup> To encourage orchestrated learning, the Act also requires that states and local agencies establish standards for success for organizations that provide training services.<sup>272</sup> It further estab-

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263. 29 U.S.C. § 2864(d)(4)(F)(iii).

264. 29 U.S.C. § 2864(a)(2)(B)(i), (d)(4)(F)(iii).

265. 29 U.S.C. § 2864(c)(1) (describing accessibility requirements for state-wide one-stop delivery systems).

266. 29 U.S.C. § 2864(d)(2).

267. 29 U.S.C. § 2864(d)(2)(G)(iii).

268. Ellis, *supra* note 257, at 238.

269. *Id.*

270. 29 U.S.C. § 2871(b)(2)(A) (listing core performance indicators to be used to evaluate state workforce investment activities).

271. Ellis, *supra* note 257, at 238.

272. States may adopt performance indicators in addition to those prescribed by the WIA. 29 U.S.C. § 2871(b)(1)(A). Each provider must also submit information relating to the costs of the program. 29 U.S.C. § 2871(d)(2)(C). The local board may modify the performance criteria for programs of providers in the local area by increasing the levels of performance above the minimum lev-

lishes national employment statistics to help monitor these standards.<sup>273</sup> Finally, the new system aims to strengthen the role of the private sector by establishing local, business-led Workforce Investment Boards (WIB) to act as boards of directors, overseeing the local systems.<sup>274</sup> The WIBs receive information about the performance of each program and are required to seek public input and conduct meetings open to the public.<sup>275</sup> Effectively, community-based partners constitute the membership of the mandated regional WIBs.<sup>276</sup> Such partnership structure captures “the operative efficiencies of associational action, while being sufficiently tutored by local experience and allowing a speed and flexibility in government response, to satisfy firm demands for such attention to their new competitive realities.”<sup>277</sup> Through these new network partnerships, several efficiencies are reached, primarily relating to scale and scope. Partnerships are able to adopt an industry-wide approach that allows information sharing, standard setting, and benchmarking both public and private efforts across workplaces.<sup>278</sup> This allows industry participants to share the cost of replenishing a pool of skilled labor and facilitates joint investments.<sup>279</sup> By bringing together a growing number of employers, unions, public sector agencies, and community-based partners, a governance approach enhances learning and problem-solving capacities. It further enables firms to pool their investments in human capital, leverage the accountability of public institutions, and empower a wider range of players in the labor market.<sup>280</sup>

Community-based initiatives have been successful in leveraging public funds within the new governance workforce development system. For example, Project QUEST (Quality Em-

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els established by the governor. 29 U.S.C. § 2871(c)(2).

273. 29 U.S.C. § 655.

274. 29 U.S.C. § 2821 (creating and describing the composition of state workforce investment boards).

275. 29 U.S.C. § 2821(g).

276. Laura Dresser & Joel Rogers, *Part of the Solution: Emerging Workforce Intermediaries in the United States*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS, *supra* note 250, at 287.

277. *Id.* at 288.

278. *Id.* at 285.

279. *Id.* at 86 (“[S]uccessful sectoral initiatives create a ‘win-win’ situation for firms, workers, and new labor-market entrants from the community.”).

280. *Id.*

ployment and Skills Training), an award-winning training initiative in San Antonio, Texas, illustrates the multitiered action of the governance model. Founded by a national network of community organizations, the program is funded through a variety of sources, including federal and state grants, and local government funding.<sup>281</sup> Unlike conventional training programs, Project QUEST is aimed at preparing workers for long-term, skilled positions that would enable them to break out of poverty.<sup>282</sup> The ongoing link to community organizations and local private businesses has contributed to its success. Project QUEST managed to secure, in advance, job commitments from the business community and state funds.<sup>283</sup> Integrating policy domains, Project QUEST takes a comprehensive approach to workforce development that includes support services such as child-care subsidies, transportation, and referrals to health care.<sup>284</sup>

By involving a wide range of professionals, agencies, and civil society organizations, Project QUEST has successfully broadened the traditional tunnel vision of workforce development issues by linking questions of job training programs to school reform, living-wage campaigns, and local economic development.<sup>285</sup> The principles of subsidiarity and learning are realized through extensive meetings in which participants tell stories of past unsatisfactory training programs and economic dislocation.<sup>286</sup> The project has been recognized as successful in addressing the skills mismatch that employers and employees historically faced in the area, and that led employers to extensively recruit from outside of the region to fill high-skill jobs.<sup>287</sup> Massachusetts Institute of Technology economist Paul Osterman, who has extensively evaluated Project QUEST, describes the project as “one of the most successful job training programs in the nation.”<sup>288</sup>

Although Project QUEST has resulted in substantial gains

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281. Paul Osterman, *Organizing the US Labor Market: National Problems, Community Strategies*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 240, 257 (Jonathan Zeitlin & David M. Trubek eds., 2003).

282. Osterman, *supra* note 281, at 255

283. *Id.* at 254, 257.

284. *Id.* at 255.

285. *Id.* at 254, 258.

286. *See id.* at 255.

287. *See id.* at 256.

288. *Id.* at 259.

for its trainees, the program's goals extend beyond its individual clients. From the perspective of orchestration, the aim of the project is to impact the broader structures of the labor market, alter hiring patterns, and improve the curricula of community colleges for all attendees.<sup>289</sup> Through connections to other community networks, training efforts have been linked to broader political organizing.<sup>290</sup> Initiatives like Project QUEST have been replicated in other cities through diffusion of the principles and successful practices exhibited by the new workforce development framework. Each local area has further modified the applied programs, adapting to local circumstances and building upon shared information and experiences.

To conclude, the WIA represents a new framework for a comprehensive "workforce investment" system based on integration of resources, individual choice of training, performance measurements, and the encouragement of private-public partnerships. The Act promotes learning by requiring the articulation of standards and information sharing; and customizes services according to local and individual needs. Private sector labor market intermediaries are encouraged to take a more active and formal role in the public system of training.<sup>291</sup> Finally, the Act explicitly invites experimentation and provides the resources to sustain successful experiments like Project QUEST.<sup>292</sup> A governance approach to workforce development enables government and activists to link supply-side efforts (improving the skills of job seekers), demand-side initiatives (altering the hiring patterns of firms), and structural-impact initiatives, including the formation of new intermediary institutions, the revision of employment norms within a community, and the alternation of long-entrenched practices of existing organizations.<sup>293</sup>

## 2. Occupational Safety and Health

The decades following the New Deal brought subsequent waves of regulatory programs, such as extensive public safety and environmental regulation.<sup>294</sup> In 1970, Congress enacted the

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289. *Id.* at 256.

290. *See id.* at 257.

291. Dresser & Rogers, *supra* note 276, at 287.

292. *Id.*

293. *See, e.g.,* Osterman, *supra* note 281, at 264.

294. *See, e.g.,* National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4347 (1970)).

Occupational Safety and Health Act.<sup>295</sup> The statute established the Occupational Safety and Health Administration (OSHA) within the Labor Department. OSHA was granted broad power to regulate workplace safety across all industries. Because of this far-reaching power, the agency has been controversial since its establishment, and strong opponents have called for its dissolution. Indeed, OSHA has been treated by legal scholars as a paradigmatic case study of bureaucratic regulatory failure and has been accused of gross regulatory unreasonableness.<sup>296</sup> There have been drastic proposals to abolish OSHA altogether based on claims that economic incentives, including workers' compensation and hazard pay, generate the incentives needed for worker protection.<sup>297</sup> As Joel Handler has commented, "OSHA is usually cited as the prime example of the pathologies of the legal-bureaucratic regime."<sup>298</sup>

The critique of OSHA practices epitomizes the dissatisfaction with the regulatory model. In its early years, OSHA focused on the promulgation of rules that established universal standards for issues such as exposure to toxins. The agency enforced these rules by quasi-random inspections of work sites and prosecution of violations. At the beginning of the 1980s, major litigation called into question the validity of some of OSHA's central top-down regulations.<sup>299</sup> The extensive litigation brought by industry groups reflected the controversy surrounding OSHA's regulatory activity in the business community. In the famous Benzene case, the U.S. Supreme Court struck down OSHA's standard for protecting workers from ex-

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295. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (2000)).

296. See, e.g., EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982) (making repeated references to OSHA in the authors' attempt to illustrate the problem of regulatory unreasonableness).

297. See, e.g., THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* (1993); William J. Maukstad & Charles Helm, *Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives that Influence Employer Decisions To Control Occupational Hazards*, 17 N. KY. L. REV. 9 (1989).

298. Joel Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1025 (1988).

299. *Indus. Union Dep't., v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *Am. Textile Mfrs. Inst., v. Donovan*, 452 U.S. 490 (1981).

posure to benzene.<sup>300</sup> The court held that OSHA, rather than having the authority to prevent absolute risks, must first establish the existence of a “significant risk” before it promulgates preventative standards.<sup>301</sup>

In response to both the discontent with its original regulatory approach and to new challenges of regulating health and safety in the new economy, OSHA has in recent years adopted innovative approaches that are more akin to the Renew Deal governance model.<sup>302</sup> In its 2003 management plan, OSHA recognized that increased diversity, a shift from goods to services, and a decrease in the percentage of workers employed in stable full-time jobs have changed the American workforce significantly over the past several decades.<sup>303</sup> The agency acknowledged that these changes require new strategies to address occupational safety and health.<sup>304</sup> For example, immigrant workers often work in some of the most dangerous jobs, yet many are unable to read English instructions.<sup>305</sup> The 2003 plan states that “[t]hese demographic and workplace trends complicate the implementation of occupational safety and health programs and argue for enforcement, training, and delivery sys-

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300. *Indus. Union Dep’t.*, 448 U.S. at 662.

301. *Id.* Justice Marshall in his dissent stated:

[W]hen the question involves determination of the acceptable level of risk, the ultimate decision must necessarily be based on considerations of policy as well as empirically verifiable facts. Factual determinations can at most define the risk in some statistical way; the judgment whether that risk is tolerable cannot be based solely on a resolution of the facts.

*Id.* at 706 (Marshall, J., dissenting).

302. Even in its first years, the legislature directed OSHA to adopt existing private industry standards by reference. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 6(a), 84 Stat. 1593 (codified as amended at 29 U.S.C. § 655 (2000)) (suggesting that existing national consensus standards would be presumptively favored). At OSHA’s foundation, the agency entered into contractual relations with the American National Standards Institute (ANSI) for the provision of technical support for the development and application of safety standards. MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 56 (4th ed. 1998). ANSI develops these standards through collaboration with corporations or by forming committees from a pool of technical and professional organizations and trade associations. *Id.* It oversees the processes of private standard-setting organizations and recommends the incorporation of their conclusions into OSHA standards. *Id.*

303. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEP’T OF LABOR, OSHA 2003–2008 STRATEGIC MANAGEMENT PLAN, at <http://www.osha.gov/StratPlanPublic/strategicmanagementplan-final.html> (last visited Sept. 16, 2004).

304. *See id.*

305. *See id.*

tems that are different from those that have been relied upon to date.”<sup>306</sup> Similarly, OSHA now acknowledges that certain workplace safety issues have been overlooked and neglected due to the problematic divisions between policy fields. In 2003, the agency recognized that the most serious vocational risks include workplace violence and motor vehicle accidents, two areas that have not been traditionally addressed by the agency.<sup>307</sup> To facilitate the governance principles of integration of policy domains, the agency aims to establish more collaborative relations with other public and private institutions.<sup>308</sup>

Another significant dimension of the agency’s new approach is the adoption of flexible, noncoercive (or “soft”) practices. Reacting yet again to new workplace realities and previous failures in its regulatory strategies, OSHA has shifted its emphasis in recent years from extensive elaboration of standards and high rates of inspection to fewer inspections and more programs of collaborative, semivoluntary compliance. At the state and federal levels, agencies are experimenting with innovative governance approaches to occupational health and safety. For example, California’s Occupational Health and Safety Administration has adopted the California Cooperative Compliance Program (CCCP), which authorizes unions and employers to develop and implement safety requirements, delegating governmental inspection and enforcement roles to joint labor/management safety committees.<sup>309</sup> Through collective bargaining, unions and employers develop and implement workplace safety requirements in a collaborative, participatory manner. As long as this program of audited self-regulation proves to reduce accidents effectively, the agency does not intervene in the processes. This gives firms and industries incentives to learn and improve dynamically and to share information with others. Studying the implementation of cooperative compliance programs in the construction industry in California, sociologist Joseph Rees found that accident rates at CCCP pro-

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306. *Id.*

307. *See id.* For example, OSHA’s jurisdiction is vastly limited by the Department of Transportation’s responsibility for covering motor vehicle fatalities.

308. The agency explained: “Due to the diffuse nature of these problems as well as jurisdictional issues, reducing these risks will require collaboration with other federal, state and local organizations.” *Id.*

309. JOSEPH V. REES, REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY 134–74 (1988) (describing in depth the organization and role of the labor/management safety committee).

jects were significantly lower than those at companies operating under the traditional regulatory framework.<sup>310</sup> The federal OSHA has also experimented with similar programs, such as the Voluntary Protection Program (VPP), allowing companies with exemplary safety records to take over the role of OSHA inspectors themselves and to be exempt from regular inspections.<sup>311</sup>

As a public administrative agency, OSHA exemplifies the move to governance approaches to law making, implementation, and enforcement. OSHA's Strategic Management Plan for 2003–2008 described intentions to increase its use of cooperative programs with the private sector, expanding outreach programs, industry education, and compliance assistance.<sup>312</sup> OSHA views the development of guidance and standards for occupational safety and working with employers and employees as its primary responsibilities.<sup>313</sup> Among its vital activities are consultation services to small businesses, the provision of compliance assistance, outreach, education, and other cooperative programs for employers and employees.<sup>314</sup> According to OSHA's reports, injuries and illnesses have been cut nearly in half at work sites engaged in cooperative relationships with the agency.<sup>315</sup> OSHA also aims to foster relationships with other

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310. *Id.* at 2–3.

311. *Id.* at 1. Some studies on the effect of internal compliance mechanisms and OSHA violations have, by contrast, found the adoption of ethics codes programs to be of little impact on corporate illegality. For example, one study indicates that there is a positive correlation between willful repeat violations and internal compliance programs, leading the researchers to argue that the adoption of such a mechanism is a purposeful way for management to hide its involvement and reduce liability for safety violations. Marie McKendall et al., *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. BUS. ETHICS 367, 380 (2002). But see *infra* Part VI.C for a discussion of the various factors that contribute to successful collaboration in the context of occupational health and safety.

312. TRADE RELEASE, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, AGENCY BUILDS ON PREVIOUS SUCCESSES, SETS NEW GOALS (May 12, 2003), [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id+10214](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id+10214) (last visited Sept. 16, 2004).

313. *Id.*

314. *Id.*

315. U.S. DEP'T OF LABOR ANN. REP. FY 2002, Outcome Goal 3.1, [http://www.dol.gov/\\_sec/media/reports/annual2002/Goal3\\_1.htm](http://www.dol.gov/_sec/media/reports/annual2002/Goal3_1.htm) (“The lost workday injury and illness incidence rate declined by 47 percent at sites engaged in voluntary, cooperative relationships with [the Department of Labor].”).

civil society organizations to address critical safety and health issues, expanding collaborative partnerships, voluntary programs and outreach, education, and compliance assistance.<sup>316</sup>

### 3. Employment Discrimination

New employment antidiscrimination strategies are a third example of the adoption of the governance model in the area of work. Employment discrimination policies have largely been based on the civil rights model of the 1950s and 1960s—a regulatory, adversarial regime. The main strategy was the direct prohibition of certain practices, including illegal consideration of gender and race in hiring and promotions, followed by top-down implementation and enforcement. The regulatory model was based on the assumption that employment discrimination is intentional and relatively easy to comprehend and detect. The regulatory solution was usually a lawsuit for damages or an injunction against the particular discriminatory practices.<sup>317</sup> While the regulatory model has been effective in eliminating the most obvious and direct forms of discrimination, it has not effectively dealt with more complex and subtle discriminatory practices.

As the workplace has become more dynamic and multifaceted, discriminatory practices are frequently not the result of a distinct and direct decision to discriminate but rather of complex practices, including corporate culture, informal norms, networking, training, mentoring, and evaluation.<sup>318</sup> The complex nature of this type of discrimination “resists definition and resolution through across-the-board, relatively specific commands and an after-the-fact enforcement mechanism.”<sup>319</sup> An example is the recognition that a workplace can create a “hostile or offensive work environment,” even without any single individual acting as perpetrator.<sup>320</sup> The boundaries between legal and illegal conduct are blurred, although the consequences of discrimination are no less harmful. Susan Sturm describes the emergence of an alternative governance-based approach,

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316. *See id.*

317. Although disparate impact suits have been recognized under Title VII discrimination claims, traditional regulatory approaches have proven inadequate for long-term structural reform. *See Sturm, supra* note 195, at 469.

318. *Id.*

319. *See id.*

320. *Bundy v. Jackson*, 641 F.2d 934, 938 (D.C. Cir. 1981); *see also Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

recently employed in many workplaces, that focuses on ongoing problem-solving efforts, engaging both outside consultants and workers themselves in reflexive efforts to eliminate workplace discrimination.<sup>321</sup> By involving workers as key participants in antidiscrimination efforts, employers recognize their dependency upon the internal insights of those closest to the problem (i.e., subsidiarity) and their shared interest in eliminating discrimination (i.e., win-win collaboration). These efforts also recognize the significance of explicit articulation and specification of decision-making criteria and goals in order to allow comparison, learning, and continuous improvement. The voluntary adoption of ethical codes of conduct in the workplace is a common practice in recent years that encourages employers to articulate the corporation's values and practices.<sup>322</sup> Some companies have also shared lessons and data with other, similarly situated firms. Another important way of learning is the accumulation and preservation of data on hiring and promotions over time.<sup>323</sup> Finally, voluntary provision of diversity training is an increasingly common effort by employers.<sup>324</sup>

In relation to regulatory approaches, governance strategies may operate as a defense against liability or against the grant of punitive damages in case of discrimination allegations by employees.<sup>325</sup> In *Kolstad v. American Dental Ass'n*, the U.S. Supreme Court established a defense to punitive damages in discrimination suits based on the demonstration by managerial agents of good faith efforts to comply with Title VII.<sup>326</sup> In the past several years, employers have sought to point to such good faith efforts through the implementation of internal compliance structures, including self-adopted equal employment policies, codes, and diversity training programs.<sup>327</sup> Similarly, in *Burlington Industries, Inc. v. Ellerth*, the Supreme Court recognized a defense to sexual harassment suits by the adoption of

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321. See Sturm, *supra* note 195, at 522–25.

322. Over ninety percent of Fortune 500 firms report the use of ethics codes of conduct. Andrew Brien, *Regulating Virtue: Formulating, Engendering and Enforcing Corporate Ethical Codes*, 15 BUS. & PROF. ETHICS J. 21, 21 (1996).

323. Sturm, *supra* note 195, at 469.

324. Richard S. Allen & Kendyl A. Montgomery, *Applying an Organizational Development Approach to Creating Diversity*, 30 ORG. DYNAMICS 149, 149 (2001) (reporting that seventy-five percent of Fortune 500 firms and thirty-six percent of other firms have diversity training in the workplace).

325. Krawiec, *supra* note 15, at 504.

326. 527 U.S. 526, 542–43 (1999).

327. Krawiec, *supra* note 325, at 505.

internal antiharassment policies by firms.<sup>328</sup> These cases follow the principles of flexibility and noncoerciveness, leaving some practices unsanctioned in order to encourage experimentation in discrimination prevention.

A governance approach to discrimination thus changes the understanding of the nature and sources of discrimination. Rather than seeing the worker as the victim and the employer as the conscious, malicious villain, it understands that discrimination is frequently the consequence of processes and structures that can be transformed through learning and mutual engagement.<sup>329</sup> The recent adoption of governance strategies has proven to have positive effects on the promotion of equality and tolerance in many workplaces.<sup>330</sup> Moreover, some of these initiatives have been effective not only in increasing workplace equality but also in reducing employee turnover and the costs of hiring and training.<sup>331</sup>

However, some scholars have criticized governance approaches to antidiscrimination for allowing employers to avoid conventional legal liability. If antidiscrimination efforts are merely cosmetic, a governance regime potentially forms a liability shield.<sup>332</sup> The law allows employers to opt out of the regulatory framework without adequate assurances of the effectiveness of governance. For example, some studies have found that simply adopting voluntary codes of conduct only alters behavior in rare occasions,<sup>333</sup> yet courts consider their existence to favor employers in litigation. A major problem with these new efforts is that they have emerged mostly as voluntary initiatives or in

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328. 524 U.S. 742, 764 (1998).

329. See Simon, *supra* note 21, at 75–77.

330. See Loriann Roberson et al., *Designing Effective Diversity Training: Influence of Group Composition and Trainee Experience*, 22 J. ORG. BEHAV. 871, 871 (2001) (describing the increased popularity of diversity training in corporate America during the 1990s).

331. See generally Sturm, *supra* note 195, at 489–537 (providing examples of businesses that have effectively addressed equality, turnover, and other problems through internal workplace regimes).

332. See, e.g., Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. OF EMP. & LAB. L. 1 (2001) (questioning the effectiveness of employee training programs and decrying the Supreme Court's use of such programs as the basis for an affirmative employer defense to discrimination claims); Krawiec, *supra* note 15, at 505.

333. See, e.g., Mark S. Schwartz, *The Nature of the Relationship Between Corporate Codes of Ethics and Behaviour*, 32 J. BUS. ETHICS 247, 253 (2001).

the shadow of a litigation threat, rather than as systematic strategies supported, guided, and required by law. That is, the principle of legal orchestration has not sufficiently guided these initiatives. Because they lack a systematic backup, these new approaches have created wide variance across firms and controversy among employment law scholars as to the desirability of this change.

Federal agencies have taken an initial, although partial, step to orchestrate new governance antidiscrimination strategies. The Equal Employment Opportunity Commission (EEOC) recently initiated efforts to create stakeholder networks, including advocacy groups, community organizations, and racial and ethnic groups, to support the accumulation of knowledge about new strategies to promote equality.<sup>334</sup> Although the EEOC's purpose is to enforce antidiscrimination laws, it historically lacks power to promulgate rules or to sanction independently.<sup>335</sup> Instead, its main activities include issuing guidelines and conducting investigations, impact litigation, and mediation of individual violations.<sup>336</sup> It has more recently expanded its activities to include assisting with compliance, gathering systematic information, providing technical assistance, and encouraging antidiscrimination public education and outreach.<sup>337</sup> However, these initiatives have been limited. For example, while it collects data on hiring and promotion patterns from employers, it does not analyze the information systematically.<sup>338</sup> The EEOC continues to view its primary role as monitoring, enforcing, and sanctioning failure or noncompliance.<sup>339</sup>

#### B. CIVIC ENVIRONMENTALISM

Environmental law has been at the forefront of new governance experiments. Challenges to the traditional regulatory model have had some of their earliest influences in the field of environmentalism. As Bruce Ackerman and William Hassler

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334. PRIORITY CHARGE HANDLING TASK FORCE, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LITIGATION TASK FORCE REPORT app. c (1998), [http://www.eeoc.gov/abouteeoc/task\\_reports/pch-lit.html](http://www.eeoc.gov/abouteeoc/task_reports/pch-lit.html) (last modified Apr. 2, 1998).

335. Sturm, *supra* note 195, at 550.

336. *Id.* at 550.

337. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NATIONAL ENFORCEMENT PLAN pt. II, [http://www.eeoc.gov/about\\_eeoc/plan/nep.html](http://www.eeoc.gov/about_eeoc/plan/nep.html) (last modified Jan. 15, 1997).

338. Sturm, *supra* note 195, at 551.

339. *Id.* at 551.

describe, “the rise of environmental consciousness in the late 1960s coincided with the decline of an older dream—the image of an independent and expert administrative agency creatively regulating a complex social problem in the public interest.”<sup>340</sup> Contemporary debates about domestic environmental regulation in developed countries are characterized by calls for regulatory reinvention and the rejection of the command and control approach.<sup>341</sup> These calls are motivated by both external and internal push/pull factors for legal reform. A growing critique of top-down adversarial approaches to environmental protection has spawned innovative laws and practices. The need for governance has also been a response to the accumulation of new scientific knowledge about the nature of the ecology.<sup>342</sup> Increasingly, scholars advocate a new approach to environmentalism known as—*civic environmentalism*.<sup>343</sup>

### 1. Economy and Environment

The goals of stakeholders in the domain of environmentalism often conflict. Nongovernmental organizations seek to protect living and natural resources. Businesses, as well as labor unions, generally want to minimize limitations on their economic interests. Governments address public ends, including distributional concerns among localities, the preservation of the environment, and the promotion of sustainable economic devel-

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340. BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 1 (1981).

341. Kala K. Maluqueeny, Transnational Environmental Governance and Large Scale Projects: Corporations, Economic Actors, and Financial Institutions 10–11 (2004) (unpublished colloquium abstract, Harvard University Doctor of Juridical Science Program) (on file with author).

342. DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY 32–34 (1990).

343. DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES 7–10 (1994); WILLIAM A. SHUTKIN, THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY 128–41 (2000) (describing the emerging concept of civic environmentalism as a participatory process with community and regional planning, education, and sense of place); Debra S. Knopman et al., *Civic Environmentalism: Tackling Tough Land-Use Problems with Innovative Governance*, 41 ENV'T 24, 26–28 (1999). For a critique of civic environmentalism, see Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ENVTL. L. REP. 10,909, 10,916–21 (2000) (finding fault with civic environmentalism's high costs and problematic implementation as compared to the existing regulatory system).

opment. Despite significant divergence of interest, stakeholders have begun questioning the desirability of adversarial regulatory processes, seeking instead more collaborative approaches to environmental law. Particularly in the face of complex environmental problems, controversies about the management of ecosystems have often amounted to impasses among activists, corporations, and local and national governments.<sup>344</sup> These cases have resulted in an understanding that all parties risk losing in an adversarial environment. In some cases, stakeholders have begun to move away from win/lose campaigns to engage in institutional governance arrangements that can produce mutual gains to multiple interests.<sup>345</sup> A governance approach to environmental law allows parties to escape the traditional “economy versus environment” bind that has so often characterized environmental regulatory conflicts.

Traditional environmental policy constitutes a staggering number of disperse regulations, which, according to Chief Justice Rehnquist, “virtually swim before one’s eyes.”<sup>346</sup> Carol Rose critically describes the difficulty of making sense of top-down environmental law, stating that “[o]ur legislators churn out great undigestible [sic] masses of statutes about the environment, which in turn are interpreted by mounds of regulations, all densely packed with bizarre terms and opaque acronyms.”<sup>347</sup> Yet, the nature of ecological resource management requires intergovernmental coordination and continuous experimentation, learning, and adjustment.<sup>348</sup> The new governance approach of civic environmentalism aims to be participatory, collaborative, decentralized, and focused on problem solving. As such, policies must be integrated to allow those closest to the problem to contemplate their effectiveness and reasonableness. Environmental law scholars suggest that policy should engender a

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344. See Brown, *supra* note 133, at 12.

345. See EDWARD P. WEBER, BRINGING SOCIETY BACK IN: GRASSROOTS ECOSYSTEM MANAGEMENT, ACCOUNTABILITY, AND SUSTAINABLE COMMUNITIES (2003) (describing cases in which formerly conflicting parties moved to more collaborative models, increasing the outcomes from the perspective of all different stakeholders); Brown, *supra* note 133, at 12–13.

346. United States Steel Corp. v. EPA, 444 U.S. 1035, 1038 (1980) (mem.) (Rehnquist, J., dissenting from denial of certiorari).

347. Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 1 (1991).

348. Bradley C. Karkkainen, *Toward Ecologically Sustainable Democracy?*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 208, 219 (Archon Fung & Erik Olin Wright eds., 2003).

practice of environmentally responsible reflexive management.<sup>349</sup> In the words of one scholar, “[a] new generation of environmental policy . . . must be based on integrative and reflexive laws rather than on the current system of command-and-control regulation.”<sup>350</sup> Under such a regime, public authorities allow for cooperative implementation in which the government relies upon agents or employees of the regulated entities to help interpret, implement, and enforce applicable rules.<sup>351</sup> Government restricts its role to assisting in and providing incentives for self-implementation programs, promoting a system of “interactive compliance.”<sup>352</sup> Government further encourages private participation by the dissemination of information to the public. For example, environmental information disclosure initiatives such as the federal Toxics Release Inventory program require firms to report their environmental-related activities to the Environmental Protection Agency, which then releases the data in a yearly report for use by industries, consumers, and nongovernmental stakeholders.<sup>353</sup> Disclosure requirements have proven particularly viable in the area of environmental law where nonprofit organizations have taken an active role as ecological consultants, land managers, and coordinators of environmental policy implementation.<sup>354</sup>

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349. See, e.g., Orts, *supra* note 43; see also Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION 207, 210–12 (Gunther Teubner et al. eds., 1994) (advocating for a self-regulation approach to environmental legal issues based on Gunther Teubner’s model of reflexive law).

350. Fiorino, *supra* note 31 (describing the reflexive law approach and its role in environmental regulation); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41 (1999) (arguing for use of a reflexive approach to govern the behavior of corporate organizations); Dennis A. Rondinelli, *A New Generation of Environmental Policy: Government-Business Collaboration in Environmental Management*, 31 ENVTL. L. REP. 10,891, 10,902 (2001); see also Neil Gunningham & Darren Sinclair, *Integrative Regulation: A Principle-Based Approach to Environmental Policy*, 24 LAW & SOC. INQUIRY 853 (1999) (arguing that employing multiple rather than single-policy instruments and including a broader range of regulatory actors will improve regulation).

351. Michael, *supra* note 17, at 540–41.

352. CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE, *supra* note 18 (exploring cooperative approaches to interactive corporate compliance based upon ideas presented at a conference at New York University’s Leonard Stern School of Business held on April 21, 1990).

353. See Fiorino, *supra* note 31, at 448.

354. See Lee P. Breckenridge, *Nonprofit Environmental Organizations and*

At the federal level, one of the earliest environmental laws, the National Environmental Policy Act (NEPA),<sup>355</sup> embodies elements of the new governance model. Designed mostly as a procedural regime, NEPA requires federal agencies to disclose statements on environmental impact before taking action that will affect the environment.<sup>356</sup> NEPA effectively requires federal agencies to adopt internal procedures to evaluate the environmental consequences of their decisions and activities. The statute applies, however, only to government agencies.<sup>357</sup> Environmental law scholars have consequently described it as a “reflexive administrative law” regime.<sup>358</sup> More recent approaches to private sector environmental policies are similarly requiring industries to be reflexive about their practices. The following section illustrates a comprehensive effort for governance in the context of habitat conservation.

## 2. Endangered Species and Habitat Conservation Planning

An instructive example of the shift from a regulatory to a governance approach in the field of environmental law is the development of habitat conservation planning under the Endangered Species Act (ESA).<sup>359</sup> In the past, ecologists believed that nature had an ideal state of equilibrium and that species related to one another in a direct, linear way.<sup>360</sup> Over the past several decades, modern ecology has come to view nature not as static, harmonious, and balanced, but rather as a complex web of connected species with no fixed point of equilibrium.<sup>361</sup> Relying on the former idea of a predictable equilibrium, regulatory conservation regimes sought to limit direct threats to individual species by permanent top-down regulations.<sup>362</sup> Exemplify-

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*the Restructuring of Institutions for Ecosystem Management*, 25 *ECOLOGY* L.Q. 692 (1999) (discussing the increasing reliance on nonprofit organizations in the environmental field).

355. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

356. 42 U.S.C. §§ 4321-4370f (2000).

357. National Environmental Policy Act of 1969 §§ 101-102, 42 U.S.C. §§ 4331-4332 (2000).

358. Orts, *supra* note 43, at 1273.

359. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000). *See generally* Symposium, *The Endangered Species Act Turns 30*, 34 *ENV. L.* 287 (2004) (examining the history and significance of the ESA on its thirtieth anniversary).

360. *See, e.g.*, Wiersema, *supra* note 43.

361. *Id.*

362. *Id.*

ing this regulatory approach, the ESA prohibits public and private action that contributes to the extinction of endangered species. Section 9 of the Act prohibits any person or organization from taking fish or wildlife species listed as endangered by the U.S. Fish and Wildlife Service.<sup>363</sup> “Taking” is defined broadly to include basically any harm to the essential behavioral patterns of wildlife.<sup>364</sup> Until the early-1980s, the ESA established a prohibitive regulatory regime, imposing a near-absolute ban on land development in areas of wildlife conservation.<sup>365</sup> This rigid regime was deemed insensible, not merely by businesses, which were prohibited from developing conservationist areas, but also by activists and scientists, who recognized the uncompromising nature of the process.<sup>366</sup> The ESA regime is based on a formal process of listing species as endangered. Its rigidity—an on-off listing—has led to strategic behavior by all interested parties. Ecologists and policymakers questioned the absolute prohibition by the ESA, rather than the development of more sensible and comprehensive plans to preserve natural habitats.<sup>367</sup> Responding from below to these rigidities, as well as to the new accumulation of scientific knowledge about the ecology, private parties began to come together to plan more flexible conservation projects. As a result of local negotiation efforts between environmentalists and developers, government was presented with consensus agreements that included some taking of habitat in return for guarantees of sufficient open space for long-term species survival.<sup>368</sup>

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363. 16 U.S.C. § 1538(a)(1)(B)–(C); Paul Boudreaux, *Understanding “Take” in the Endangered Species Act*, 34 ARIZ. ST. L.J. 733, 744–48 (2002) (discussing whether § 9 requires intent or knowledge to take a protected species); see also Federico Cheever & Michael Balster, *The Take Prohibition in Section 9 of the Endangered Species Act: Contradictions, Ugly Ducklings, and Conservation of Species*, 34 ENVTL. L. 363 (2004) (arguing that section 9 covers injuries to both individual species members and the population of which there are a part).

364. See Cheever & Balster, *supra* note 335, at 365 (citing 50 C.F.R. § 17.3 (2004)).

365. Craig W. Thomas, *Habitat Conservation Planning*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, *supra* note 348, at 144, 146. See generally STEVEN L. YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT (1982) (studying the effects of prohibitive policy through an examination of the formation and implementation of the 1973 ESA).

366. See Thomas, *supra* note 365, at 146.

367. See *id.*

368. See *id.* at 146–47 (discussing a compromise reached in the late 1970s between a landowner, a developer, and ecologists to preserve a butterfly habitat near San Francisco while still allowing some development to occur).

In 1982, Congress amended the ESA to authorize permits that would allow such takings and encourage more multiparty planning.<sup>369</sup> The new law encourages an alternative path of governance by granting permits to nonfederal actors who submit satisfactory Habitat Conservation Plans (HCPs).<sup>370</sup> It now allows the taking of endangered species for economic purposes through this new planning process, if “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>371</sup> The new governance alternative has reframed the debate about species protection from “species *versus* jobs” to “species *and* jobs.”<sup>372</sup>

The habitat conservation planning process incorporates the principles of collaboration, diversity, learning, and integration. A submitted HCP must provide detailed information about the likely results of proposed activities, the measures that will be taken to monitor and mitigate adverse impacts, the funding plan, and alternative actions that were considered.<sup>373</sup> The design of the plan is left to the applicant’s discretion, allowing applicants to be creative and to tailor solutions to local problems.<sup>374</sup> Although the final approval of the plan must be done by the federal agency, responsibility for subsequent supervision and coordination of the various interests in the plan can be delegated to a private intermediary, such as a nonprofit land conservation environmental organization.<sup>375</sup> Bradley Karkainen explains:

Habitat Conservation Plans (HCPs) allow landowners to escape the rigidities of a notoriously inflexible command-style rule, the “no take” provision of the Endangered Species Act (ESA), by drawing up conservation-oriented land-use plans fitted to their own particularized circumstances. The HCP planning process thus establishes a new lo-

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369. Endangered Species Act Amendments of 1982, Pub. L. No. 97–304, § 6, 96 St. 1411, 1422–1425.

370. 16 U.S.C. § 1539(a) (2000); *see also* Albert C. Lin, *Participants’ Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 *ECOLOGY L.Q.* 369, 376 (1996) (noting that a “permit may be issued only after an HCP is submitted by the applicant and approved by the [United States Fish and Wildlife Service]”).

371. 16 U.S.C. 1539(a)(1)(B).

372. Thomas, *supra* note 365, at 147.

373. *Id.* at 147–49.

374. *Id.* at 148.

375. *See* Breckenridge, *supra* note 354, at 697–98 (noting the “extensive interaction of federal, state, and local governments with the Nature Conservancy in the development of habitat conservation plans under the Endangered Species Act has exemplified the increasingly communicative and collaborative relationship between government agencies and nonprofit organizations”).

cus for policy-making within a regulatory program heretofore defined almost exclusively by centrally imposed, nationally uniform, categorical rules.<sup>376</sup>

During the 1980s, the use of the optional HCPs was low. Only during the 1990s, as a result of knowledge diffusion and the issuance of new federal guidelines, did the number of HCPs grow rapidly.<sup>377</sup> By 2002, almost 400 HCPs had been approved.<sup>378</sup>

The habitat conservation planning process generates dependency among actors.<sup>379</sup> Applicants need certainty to avoid future lawsuits.<sup>380</sup> Therefore, advocates of habitat conservation planning have argued that the process increases the willingness of stakeholders to share information and resources.<sup>381</sup> It also requires applicants to consider a broader range of issues beyond endangered species, including “physical infrastructure, pollution, open space, development patterns, and transportation.”<sup>382</sup>

One of the weaknesses of the ESA regulations is that they do not require coordination among various applicants and between different habitat areas.<sup>383</sup> A broad study of fifty-five HCPs reveals that the participation process leading to the plans varies widely, ranging from active and inclusive processes to narrow, closed-door planning.<sup>384</sup> Some applicants have voluntarily chosen to coordinate their plans; in other cases local governments and developers were unable to find common ground for a single coordinated plan.<sup>385</sup> These variations have influenced the degree of deliberation and adaptability of the

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376. Karkkainen, *supra* note 348, at 208–09.

377. *Id.*

378. *Id.*

379. *Id.* at 161.

380. *Id.*

381. *Id.*

382. *Id.* at 164.

383. *See id.* at 157 (noting that neither the ESA nor the Fish and Wildlife Service regulations require coordinated action).

384. JEREMY ANDERSON & STEVEN YAFFEE, BALANCING PUBLIC TRUST AND PRIVATE INTEREST: PUBLIC PARTICIPATION IN HABITAT CONSERVATION PLANNING 0 (1998).

385. *See* Thomas, *supra* note 365, at 157–58 (comparing the Coachella Valley broad planning to other less participatory cases, such as in the case of the seventy HCPs of Travis County, Texas). *See generally* ANDERSON & YAFFEE, *supra* note 384, at 9–11 (discussing varied approaches to HCP negotiations involving primary parties and outside stakeholders).

plans.<sup>386</sup> Unlike plans focusing on narrow issues and narrow geographic areas, large-scale, multipartner HCPs have proven more aligned with a collaborative and sustainable governance vision.<sup>387</sup> Scholars therefore distinguish between two types of HCPs—bilateral plans and multiparty adaptive management plans.<sup>388</sup> The first type, bilateral planning, allows some regulatory flexibility but does not involve broad participatory or collaborative engagement.<sup>389</sup> The focus of such plans is typically narrow in both scope and geographic scale.<sup>390</sup> By contrast, multiparty adaptive management plans, a more recent model for HCPs, are larger in scale and scope and employ advanced strategies of monitoring management and governance.<sup>391</sup> They involve participation by multiple public and private parties, including landowners, agencies, conservationists, scientists, and interested citizens.<sup>392</sup> Not surprisingly, however, multipartner plans are more time consuming and demand both expertise and complexity. They therefore demonstrate how sustainable governance demands ongoing support and orchestration by government.

In 2000, revised federal guidelines for habitat conservation planning were issued, encouraging adaptive, iterative planning akin to multiparty planning.<sup>393</sup> The revised guidelines encourage the adoption of an “adaptive management strategy” in cases of information gaps.<sup>394</sup> Planners are advised to identify uncertainty and unresolved questions.<sup>395</sup> The new guidelines

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386. Thomas, *supra* note 365, at 159 (“Adaptive management (with monitoring) can also enhance HCPs as schools of democracy by extending deliberation beyond the planning phase in implementation.”); *see also* ANDERSON & YAFFEE, *supra* note 384, at 13–16.

387. *See* Thomas, *supra* note 365, at 166–67 (“We should focus on multipartner HCPs . . . so that they better approximate experiments in empowered participatory governance.”).

388. Karkkainen, *supra* note 348, at 210–12.

389. *Id.* at 210–11.

390. *Id.* at 211.

391. *Id.*

392. *Id.* at 211–12.

393. Thomas, *supra* note 365, at 155 (citing Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,241 (June 1, 2000) [hereinafter Notice of Availability]). Although these federal guidelines lack the authority of formal regulation, they guide both the agency and applicants in the planning and approval processes.

394. Notice of Availability, 65 Fed. Reg. at 35, 252.

395. Thomas, *supra* note 365, at 153–56.

also promote the description of alternative implementation strategies and proposed monitoring processes to evaluate implementation.<sup>396</sup> These new guidelines are part of an effort to make habitat conservation planning a sustainable governance alternative to the regulatory option. The Fish and Wildlife Service has recently created an online system, the Environmental Conservation Online System (ECOS), that summarizes habitat conservation planning data.<sup>397</sup> Innovations like ECOS recognize that centralized access to documents is needed to enhance sustainability, transparency, and accountability.<sup>398</sup> In order to fully realize the governance potential of these new planning processes, there is a need for more monitoring and coordination, information pooling and sharing, increased funding, and participation of diverse citizens.<sup>399</sup>

### C. E-GOVERNANCE AND CYBERDEMOCRACY

The move from a New Deal command-and-control model to a Renew Deal governance model can be captured by journalist Thomas Friedman's metaphor of a shift from walls to webs in our new global world.<sup>400</sup> No other environment is more reflective of the web structure than the World Wide Web. New technology holds the promise of facilitating new processes of governance in various fields. At the same time, it changes the landscape upon which law operates. Several levels of governance are exemplified through the environment of cyberspace. First, at the individual citizen level, the Internet enables citizens to become active users of information, proliferating the process of cultural production. Second, at the subsystem level, the Internet provides an experimental environment for self-governance, establishing participatory nongovernmental standard-setting institutions. Third, at the metasystem level, the Internet supports the shift from the regulatory to the governance model through the expansion of processes such as e-regulation and innovative venues for political and legal activities.

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396. *Id.* at 155.

397. *Id.* at 167.

398. *See id.*

399. *See id.*

400. THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 39–58 (1999).

## 1. Active Citizenship: From Consumers to Users

Emerging in its basic structure in the mid-nineteenth century, predigital mass media was unidirectional.<sup>401</sup> In this information environment, generally including the printed press, radio, and television, consumers were conceptualized as passive recipients of information. The technological environment of mass media was characterized by bottlenecks and gatekeepers, with a few licensed corporations controlling most of the provision of information.<sup>402</sup> The role of law was to regulate the activities of media providers to ensure that they would better serve their passive customers.<sup>403</sup>

By contrast, the introduction of cyberspace allows people to reach audiences outside traditional mass media channels. Rather than the industrial model of protection of a pre-packaged culture for consumption, the Internet has the potential to promote a model of peer-production and nonproprietary collaboration.<sup>404</sup> The digital revolution has loosened the traditional constraint of bandwidth, as well as constraints on reproduction and the use of information.<sup>405</sup> Because information, by its very nature, is a nonexclusive good, digital technology enables people to use materials produced by mass media in ways that add, reproduce, and redistribute them.<sup>406</sup> The Internet makes it possible for more individuals to participate in the creation, design, and transformation of information environments.<sup>407</sup>

In this new environment, Internet scholars advocate a category of Internet “users,” rejecting the dichotomous world composed of a small number of professional producers and a

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401. Balkin, *supra* note 39, at 10 (stating that mass media in general are “asymmetrical and unidirectional”); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 563–64 (2000).

402. Balkin, *supra* note 39, at 10.

403. Benkler, *supra* note 401, at 562.

404. *Id.*; Balkin, *supra* note 39, at 22; *see also* Yochai Benkler, *Coase’s Penguin, or Linux and The Nature of the Firm*, 112 YALE L.J. 369, 381–400 (2003); David R. Johnson et al., *The Accountable Internet: Peer Production of Internet Governance*, 9 VA. J.L. & TECH. 1 (2004) (arguing that “peer production of governance” is the most effective form of governance to increase online social order); Katyal, *supra* note 160, at 1041–42.

405. *See* Balkin, *supra* note 39, at 20.

406. *See id.* at 10–12. Balkin refers to these two new strategies as “routing around” and “glomming on.” *Id.* at 10–11.

407. *See* Benkler, *supra* note 401, at 563.

large number of passive consumers.<sup>408</sup> Users are both consumers and producers, who receive information and rework it for further distribution. Users, in effect, active and empowered citizens, are part of a dialogic conversation in a continuous process of cultural democratic production.<sup>409</sup>

Given the technological innovations of Internet infrastructure, the potential of a shift to a governance approach in the field of information technology law is high. Governance principles of participation, collaboration, active citizenship, proliferated production, dynamic learning, and adaptability are all potentially supported by the development of cybertechnology. However, the struggle among the regulatory, market, and governance models persists. It is often in the interest of businesses to limit the robust participation that the Internet enables.<sup>410</sup> Commercial interests are struggling to enforce limited access and distribution rights in this new environment. For example, participatory production in a digital environment is curtailed when courts ban users from utilizing media materials for political commentary on the Web. A recent example is the case of the Free Republic Web site, a forum for posting newspaper stories with a comment. In *Los Angeles Times v. Free Republic*, the *Los Angeles Times*, together with the *Washington Post*, won their argument that this practice was a violation of their copyrights. The decision reduced the ability of small nonprofit communities to administer weblogs that build on traditional mass media reporting as a platform for commentary.<sup>411</sup>

Moreover, the competition over control and influence in cyberspace is not limited to legal strategies. In addition to questions of intellectual property laws and media licensing, a governance vision for cyberspace illuminates the significance of spatial design, both in hardware and software, in guiding behavior. On the one hand, technology is being applied to create devices that limit control, access, use, and participation. On the other hand, commentators see potential for designing the physical infrastructure, logical infrastructure, and content layers in ways that are decentralized and prevent the concentration of the digital environment in the hands of few.<sup>412</sup>

Cyberspace also provides a vivid example of the interpen-

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408. *See id.* at 562.

409. Balkin, *supra* note 39, at 3–4.

410. *Id.* at 15.

411. 54 U.S.P.Q. 2d (BNA) 1453 (C.D. Cal. 2000).

412. Benkler, *supra* note 401, at 568.

etration between public and private arenas and actors. Jack Balkin asks, "Is the Internet a private space or a public space?"<sup>413</sup> Most digital communications networks are privately held by large corporations.<sup>414</sup> From the perspective of these media owners, "the 'publicness' of digital communications networks is merely a side effect of the use of private property by private actors."<sup>415</sup> From another perspective, cyberspace is public because it is a space for general interaction, exchange of information, and public participation.<sup>416</sup> In essence, the very value of the Internet is a function of its general public use. Rather than recognizing the public nature and significance of the Internet as a space for participation and democratic engagement, courts are accepting business interests in controlling the Internet, namely, that the right to speak is a right to be free from regulation.<sup>417</sup> Through such control, democratic governance is curtailed, since consolidation risks reducing the quality of public discourse and skews positions and information in the drive to higher ratings.<sup>418</sup> Cass Sunstein, in his book *Republic.com*, warns against the antidemocratic potential of cyberspace.<sup>419</sup> Sunstein worries that we are moving toward perfect filtering, which will allow individuals to see and read only the "Daily Me," a narrow collection of voices with which they already associate and agree.<sup>420</sup> This process will result in precisely the opposite of a democratic, deliberative new space. The Internet will become an antipublic forum. It will become a segmented, balkanized communications environment, leading to radical group polarization.

A traditional regulatory response to these worries has been policies such as the restriction of media concentration through antitrust laws, imposition of a public interest obligation requiring that programming cover public issues, and the regulation of more access to diverse groups.<sup>421</sup> Balkin argues that, in addition to the traditional recognition of rights and rules, the new system of democratic participation in the age of the Internet

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413. Balkin, *supra* note 39, at 23.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 26–27.

418. *Id.* at 30.

419. CASS R. SUNSTEIN, *REPUBLIC.COM* 65–69 (2001).

420. *Id.* at 44.

421. Balkin, *supra* note 39, at 30–31.

must be based on technological designs that facilitate decentralized control and popular participation.<sup>422</sup> Judicial creation and protection of individual rights alone are not suited for the new challenges of the Internet. Rather, the focus must shift to technological designs and standards:

Laws affect how technology is designed, the degree of legal protection that a certain technology will enjoy, and whether still other technologies that modify or route around existing technological forms of distribution and control will be limited or forbidden. But increasingly, these sorts of decisions will be made by legislatures and administrative agencies in consultation with private parties.<sup>423</sup>

Balkin advocates “a robust and ever expanding public domain with generous fair use rights,” so that intellectual property laws will not inhibit the spread of culture and knowledge.<sup>424</sup> Scholars imagine the virtual space of the Internet as the frontier of deliberative democracy.<sup>425</sup>

## 2. The Subsystem Level and Self-Governance: Internal Internet Standard Setting

At the level of the Internet as a social subsystem, governance can be described as a predominantly self-regulating system. There have even been famous declarations of the Internet as a “government-free zone.”<sup>426</sup> The 1996 Declaration of the Independence of Cyberspace urged “governments of the industrial world . . . you of the past . . . [to] leave us alone.”<sup>427</sup> However, the idea of a government-free zone is neither feasible nor desirable. The question is not whether to intervene, but rather how and what regulatory approach to employ in this new space.<sup>428</sup> The Internet itself was created through governmental efforts, primarily of the U.S. Department of Defense. Yet as the Internet expanded and became pervasively commercial in the mid-1990s, government transferred much of the standard-setting responsibilities within the cybersystem to nongovernmental in-

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422. *Id.* at 51.

423. *Id.* at 63.

424. *Id.* at 53.

425. Gunther Teubner, Lecture at Yale Law School, *Coincidentia Oppositorum: Networks and the Law Beyond Contract and Organization* (Oct. 8, 2003) (transcript on file with author).

426. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Electronic Frontier Foundation (Feb. 8, 1996), at <http://www.eff.org/~barlow/Declaration-Final.html>.

427. *Id.*

428. SUNSTEIN, *supra* note 419, at 128.

stitutions.

Most Internet standards processes take place in nongovernmental transnational settings.<sup>429</sup> Rulemaking processes are thus decentered from the formal state level and take place under new conditions. The Internet Engineering Task Force (IETF) that sets the basic technical standards that define Internet functions has been identified in legal scholarship as an example of a deliberative and cooperative rulemaking environment.<sup>430</sup> IETF, an unincorporated association with constantly changing members, operates to set standards through negotiations open to all.<sup>431</sup> Michael Froomkin describes the IETF model as a realization of the Habermasian vision of “a reenergized, activist, engaged citizenry working together to create new small-scale communicative associative institutions that over time either merge into larger ones or at least join forces.”<sup>432</sup> The Internet Corporation for Assigned Names and Numbers (ICANN) is similarly an institution that was envisioned in its conception to exemplify democratic governance. However, ICANN’s success in fulfilling a governance vision is far more controversial. Indeed, it has been characterized by some commentators as “an institution besieged” and “utterly disastrous,” and “accused of everything from bias, through self-service, to out-and-out conspiracy.”<sup>433</sup>

ICANN was established in 1998 as a nonprofit corporation charged with setting policy for Internet domain names and addresses. In effect, it was the result of the U.S. government’s decision to privatize its de facto control over those issues.<sup>434</sup> ICANN is a transnational and transgovernmental institution, with constituents from multiple places and interests.<sup>435</sup> Although based in California, it is not tied to any particular jurisdiction. It functions as a regulator, executive agency, and adjudicator, with the organizational structure of a corporate entity.<sup>436</sup> ICANN undertakes extensive regulatory functions,

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429. A. Michael Froomkin, *HABERMAS@DISCOURSE.NET: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 752 (2003).

430. *Id.*

431. *Id.* at 755.

432. *Id.* at 753.

433. Hunter, *supra* note 59, at 1153–54.

434. *Id.* at 1154–55; Management of Internet Names and Addresses, 63 FED. REG. 31,741 (June 10, 1998).

435. Hunter, *supra* note 59, at 1152; *see also* Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 246 (2000).

436. *See* Internet Corporation for Assigned Names and Numbers, Bylaws

standard setting, and the development of dispute resolution mechanisms for conflicts between trademark holders and domain name holders.<sup>437</sup> ICANN has also created the Uniform Dispute Resolution Policy (UDRP), a private adjudication mechanism for trademark and domain name disputes.<sup>438</sup>

Some scholars view ICANN as a way to bypass administrative law, namely the requirement for notice and comment in rulemaking and judicial review, pursuant to the Administrative Procedures Act.<sup>439</sup> Yet, ICANN has adopted many administrative features, such as notice and comment and external review processes.<sup>440</sup> The institution is relatively transparent, with its every decision and practice published online.<sup>441</sup> Its decision-making processes are primarily consensus based.<sup>442</sup> ICANN has also adopted processes familiar in representative legislatures, particularly in the appointment of its board of directors. Shortly after its establishment as a private, nonprofit organization, pressures mounted to conduct popular democratic elections for its board of directors, drawing on the constituency of the Internet as a whole.<sup>443</sup> ICANN held elections for several board seats, yet participation in the elections by the Internet community proved surprisingly low.<sup>444</sup> Dan Hunter argues that the vast criticism ICANN receives stems precisely from its nature as a quasi-governmental, quasi-corporate, quasi-nonprofit organization.<sup>445</sup> Yet, the ICANN model provides an initial example of the possibilities of participation in governance by non-governmental standard-setting institutions in a globalizing technological infrastructure.

### 3. E-Government, E-Rulemaking, and E-Activism

At the metasystem level, the new digital environment is increasingly serving government and society in the develop-

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(Apr. 19, 2004), at <http://www.icann.org/general/bylaws.htm>.

437. Hunter, *supra* note 59, at 1152.

438. See Internet Corporation for Assigned Names and Numbers, Uniform Domain-Name Dispute-Resolution Policy, at <http://www.icann.org/udrp/udrp.htm> (last modified Aug. 26, 2001).

439. A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 29 (2000).

440. Weinberg, *supra* note 435, at 228.

441. Hunter, *supra* note 59, at 1155.

442. *Id.* at 1153.

443. *Id.* at 1156.

444. *Id.* at 1178–79.

445. *Id.* at 1159.

ment of innovative legal and political processes. Regulatory agencies are increasingly harnessing the power of digital technologies to meet the informational demands of rulemaking and to expand public involvement in policymaking.<sup>446</sup> Similarly, nongovernmental organizations are using the Internet to expand their activities and agendas.

The E-Government Act of 2002<sup>447</sup> is part of a series of efforts to improve the federal government's online visibility, transparency, and accessibility, and to create a federal government that is more "citizen-centered, results-oriented, and market-based."<sup>448</sup> The Act reflects the Renew Deal spirit of simultaneously improving effectiveness and legitimacy through governance. It seeks to "enhance the management and promotion of electronic Government services and processes," and at the same time to enhance citizen participation in policymaking.<sup>449</sup> Federal agencies are required to use the Internet to centralize information and increase the number of public records that are accessible online. The Act establishes a new Office of Electronic Government within the Office of Management and Budget. The Act also requires all federal agencies to consider the impact of e-government on persons without access to the Internet.<sup>450</sup>

Both federal and state agencies are constructing Web sites with rulemaking documents, which allow citizens to submit electronic comments on proposed rules.<sup>451</sup> For example, the Environmental Protection Agency has adopted a system that makes available online full access to all studies, comments, and

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446. Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 354 (2004); JEFFREY S. LUBBERS, THE FUTURE OF ELECTRONIC RULEMAKING: A RESEARCH AGENDA (Harvard Univ. John F. Kennedy Sch. of Gov't, Working Paper No. RPP-2002-04, 2002).

447. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended primarily in scattered sections of 44 U.S.C. and 5 U.S.C.).

448. Presidential Memorandum from George W. Bush, to the Heads of Executive Departments and Agencies (July 10, 2002), <http://www.whitehouse.gov/news/releases/2002/07/20020710-6.html>; see Jaime Klima, *The E-Government Act: Promoting E-Quality or Exaggerating the Digital Divide?*, 2003 DUKE L. & TECH. REV. 9 (Apr. 15, 2003), at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0009.html>.

449. 44 U.S.C. § 3601(3)(A) (2000).

450. E-Government Act, § 202, 116 Stat. 2899, 2911 (2002).

451. Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1422 (2002).

records of the agency's rulemaking processes.<sup>452</sup> Such initiatives not only reduce the costs of storage of information, but also allow agencies to better coordinate their staff and interact with citizens.<sup>453</sup> Coordinating these efforts, the Bush administration introduced a single point of access to the federal government online—the FirstGov.gov Web site. FirstGov.gov allows users to access the Web site of any federal agency or government program. In 2003, it also launched a search-and-comment Web portal that is particularly designed for the electronic filing of public comments on proposed rules, improving the administrative process of notice, comment, and final rule.<sup>454</sup>

E-rulemaking recognizes that the development and implementation of rules is an interdisciplinary effort that requires the cooperation of various stakeholders.<sup>455</sup> The information intensity and complexity required for rulemaking can be facilitated by the use of information technology.<sup>456</sup> Within government, the embrace of the digital environment can increase cooperation among different offices within a regulatory agency, as well as among agencies. It can also help overcome problems of poor data and regulatory incoherence by engaging broader sectors of the market and civil society.<sup>457</sup> The new portals for notice and comment help make the public comment process more interactive and deliberative.<sup>458</sup> This improves government decision making by allowing government to better reach their policy goals, and increases public participation and democratic legitimacy. Successfully harnessing new technologies to promote the Renew Deal vision allows government to reduce administrative costs while increasing compliance. At the same time, the democratic process is potentially improved. Moving

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452. U.S. ENVIRONMENTAL PROTECTION AGENCY, RULES AND PROPOSED REGULATIONS, available at <http://www.epa.gov/rules.html#proposed> (last updated June 8, 2004).

453. Creating a similar online docket, the Department of Transportation has reported saving over one million dollars per year in storage costs because of its online system. Coglianesi, *supra* note 446, at 376.

454. *Id.* at 355; see FirstGov.gov: The U.S. Government's Official Web Portal, at <http://www.firstgov.gov> (last visited Sept. 16, 2004).

455. Coglianesi, *supra* note 446, at 373.

456. *Id.* at 356.

457. Cary Coglianesi, *Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy*, 54 STAN. L. REV. 1217, 1234 (2002).

458. Coglianesi, *supra* note 446, at 373; see also Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 278–79 (1998).

forward, a governance approach suggests that digital technology can further be used to create deliberative forums. Government agencies could create panels of citizens, like traditional juries, that would advise about rulemaking.<sup>459</sup>

Similarly, private industry and nongovernmental organizations use the Internet to expand their public activities and agendas and to more deliberately engage in governance. The Internet has lowered the threshold for groups to act collectively, triggering the emergence of new kinds of norm-generating institutions.<sup>460</sup> In the context of workers' rights for example, workers are better able to communicate, to strengthen local leadership, and to provide services such as benefit portability by using the Internet.<sup>461</sup> The Internet reduces the cost of organizing and providing information, advice, and services to members. Unions are gradually making fuller use of the technological capacities to improve communication and to recruit new members or to establish virtual worker communities that challenge the traditional National Labor Relations Act model.<sup>462</sup> IBM is an example of a company that resisted traditional unionization under the New Deal framework. Today, however, an employee Web site—Alliance@IBM—has been established to provide information about IBM's employment policies and worker relations.<sup>463</sup> Another example of a virtual union is that of the National Writers Union.<sup>464</sup> Again, most of its members operate without the possibility of traditional collective bargaining. However, the virtual union provides job postings, information, and advice to members, and has estab-

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459. CARY COGLIANESE, THE INTERNET AND PUBLIC PARTICIPATION IN RULEMAKING 8 (Harvard Univ. Kennedy Sch. of Gov't, Working Paper No. RWPO3-022, 2003).

460. HOWARD RHEINGOLD, VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER 2 (1993).

461. National Bureau of Economic Research Economist Richard Freeman argues that although the impact of the Internet on union organizing is still to be realized, the potential is "revolutionary." See W.J. Diamond & R. B. Freeman, *Will Unionism Prosper in Cyberspace? The Promise of the Internet for Employee Organization*, 40 BRIT. J. OF INDUS. REL. 569, 577-88 (2002) (detailing the ways in which unions' use of the Internet will improve and expand labor organizations).

462. Richard B. Freeman and Joel Rogers, *Unions on the Net*, THE NATION, June, 24 2002, at 22.

463. Alliance@IBM: Communications Workers of America, at <http://www.allianceibm.org> (last updated Sept. 30, 2004).

464. National Writers Union, at <http://www.nwu.org> (last visited Sept. 16, 2004).

lished a lobbying arm that recently participated in a U.S. Supreme Court case on freelance worker copyrights. Similarly, in other areas of social activism, “dot causes” are a growing form of social organization that rely—partially or completely—on the Internet to make their existence and activism possible.<sup>465</sup>

Employment, environment, and information technology law have been leading domains in the shift from regulation to governance. They provide us insights to the promises, as well as the difficulties, of implementing new governance regimes. Other fields, including health care,<sup>466</sup> education,<sup>467</sup> policing,<sup>468</sup> housing,<sup>469</sup> and prison management<sup>470</sup> have begun to experience similar developments.

## V. GOVERNANCE AS THEORETICAL HYBRIDIZATION

### A. THE THIRD WAY PROMISE

The governance model fosters a mixed ecology. A central strength of the Renew Deal is that it explicitly and ingeniously embraces theoretical hybridization, drawing together elements from rival schools of thought. In its spirit and style, the Renew Deal is integrative, accommodating, and optimistic. It advocates the proliferation of methods and structures and the pragmatic acceptance of each. By offering a big tent, it can respond to demands for flexible accommodation in the new economy and varied local conditions, as well as to the ongoing need for public action. Hybridization enables contemporary legal thought to live with paradox. For example, the obsessive main-

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465. See John Clark & Nuno Themudo, *The Age of Protest: Internet-Based ‘Dot Causes’ and the ‘Anti-globalization’ Movement*, in GLOBALIZING CIVIL ENGAGEMENT 109, 109–11 (John D. Clark ed., 2003) (describing the emergence of dot causes in recent years). The Internet-based OneWorld network is an example of a dot cause that is dedicated to free information access—it thus operates both at the subsystem and metasystem of transforming social organization through governance. See OneWorld Network, at <http://www.oneworld.net> (last visited Oct. 17, 2004).

466. See, e.g., Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J.L. & MED. 395, 395 (2003).

467. See, e.g., Liebman & Sabel, *supra* note 19, at 184.

468. See, e.g., Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC’Y 73, 75 (2001); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999).

469. Sabel & Simon, *supra* note 16, at 1047–53.

470. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 807 (1990).

tenance of traditional boundaries—including those of public and private, profit and nonprofit, formal and informal, theory and practice, secular and religious, left and right—is no longer a major concern with the shift to the Renew Deal paradigm.<sup>471</sup> On the contrary, the governance model aims to move beyond these pervasive dichotomies in search of sustainable structures. Its objective is not to police boundaries, but rather to seek out and open structures that will facilitate wider imaginative horizons. Furthermore, the model is comfortable making links among the local, regional, national, and global levels, as multiple overlapping authorities. As will be argued in the succeeding section, the model accepts a rich definition of democracy, combining direct, representative, associative, participatory, and deliberative aspects.

The governance model should thus be understood as an attempt to envision a third way between state-based, top-down regulation and a single-minded reliance on market-based norms; between centralized command-and-control regulation and individual free contract. It aims to transcend the conceptual dichotomies of regulation and deregulation; of legal directive and spontaneous market behavior.<sup>472</sup> Inventing flexible, responsive administrative practices may be the only alternative to big, blunt bureaucracies on the one hand, and private market mechanisms on the other.<sup>473</sup>

A key promise of the Renew Deal is its explicit suggestion that economic efficiency and democratic legitimacy can, under certain conditions, point in the same direction. Governance principles can increase both efficacy and accountability, thereby restoring the legitimacy of the legal regime. Governance is efficient because it encompasses multiple arenas and mechanisms by which to learn, adapt, and improve. It is de-

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471. See, e.g., MINOW, *supra* note 22; Lobel, *supra* note 38; Minow, *supra* note 78..

472. AYRES & BRAITHWAITE, *supra* note 5, at 3–18; Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 563–65.

473. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2026 (1997). A similar third way reasoning is expressed in the reflexive law literature: “[R]eflexive law represents a legal form especially suited to combine three advantages: (i) nonintrusive, postregulatory regulation, (ii) a renewed formal structure preserving the integrity of the legal medium, and (iii) the normatively desirable combination of freedom and regulation.” Andrew Arato, *Reflexive Law, Civil Society and Negative Rights*, 17 CARDOZO L. REV. 785, 786 (1986).

mocratic because it encourages the participation of more citizens and attention to more interests in legal processes. Moreover, the Renew Deal vision reconciles the ongoing tension between the fear of big government and the need for a public response to social challenges.<sup>474</sup> Coordinated decentralization addresses the expectation of Americans that government policy will reflect their moral values and sense of fairness, but “efficiently, leaving the greatest possible amount of control in the hands of those closest to the problems.”<sup>475</sup>

#### B. REGULATORY AND MARKET FAILURES ABOUND

As a third way vision, the governance paradigm comes at a moment when there are rich understandings in the legal world about the failure of both government regulation and market nonregulation.<sup>476</sup> The pathologies and chronic problems of both the public and private sectors are well studied.

Regulatory failures have been at the center of legal study for several decades. Regulation has been described as having become “the Stalingrad of domestic political warfare.”<sup>477</sup> Regulatory deficiencies are understood to include rigidity, monetary waste, a tendency to uniformity, and the suppression of innovation.<sup>478</sup> Peter Schuck describes the symptoms of regulatory pathology as “stifled competition, gross inefficiency, hostility to public participation in agency processes, frustration of innovation, administrative chaos and delay, secrecy, absence of long-range planning, and indifference to competing social objec-

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474. See, e.g., OSTERMAN, *supra* note 89, at 152; *A Constitution of Democratic Experimentalism*, *supra* note 4, at 271–73 (1998).

475. OSTERMAN, *supra* note 89, at 152.

476. The idea of nonregulation is itself highly problematic because of the many ways initial private law entitlements and system background rules (e.g., property rights, contracts, family, and work) construct interactions within the market. See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1520–22.

477. SCHUCK, *supra* note 53, at 117.

478. See generally Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979) (detailing the framework for the analysis of economic regulation); Paul Stephen Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1 (1989) (assessing the costs and benefits of regulation and deregulation while tracing the history of regulation); Christen Carlson White, *Regulation of Leaky Underground Fuel Tanks: An Anatomy of Regulatory Failure*, 14 UCLA J. ENVTL. L. & POL'Y 105 (1996) (analyzing the San Francisco Regional Water Control Board and its regulatory mission and enforcement).

tives.”<sup>479</sup> At the conception stage, regulation is often based on poor information and policy analyses that oversimplify the issue.<sup>480</sup> At the implementation and enforcement stages, interest-group resistance and bureaucratic limits can defeat the goals of the regulatory efforts.<sup>481</sup> Government agencies often lack the resources to monitor implementation, let alone adequately determine cause and effect. They are also susceptible to rent seeking and capture, where powerful interest groups control and disproportionately affect regulatory decisions.<sup>482</sup> Examples of misbehavior of government agencies have not been hard to trace, ranging from failures of the Food and Drug Administration to nuclear power control.<sup>483</sup> In the absence of an encompassing governance approach, regulation further risks regressive taxation when the costs of regulation are passed on to consumers.<sup>484</sup>

Conversely, market failures include distributional inequities, unincorporated externalities, collective action failures and free rider problems, information asymmetries, cognitive biases, and scale inefficiencies.<sup>485</sup> Certain markets, for example those with scarce resources, natural monopolies, or commons (and “anticommons”), are particularly vulnerable to failure.<sup>486</sup> Markets also frequently lack adequate spaces for the public exchange of ideas.<sup>487</sup>

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479. SCHUCK, *supra* note 53, at 119.

480. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 84–91 (1990).

481. *Id.*

482. *See, e.g.*, William W. Bratton and Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861 (1995).

483. SCHUCK, *supra* note 53, at 119.

484. *Id.* at 122.

485. *See, e.g.*, ACQUIRING SKILLS: MARKET FAILURES, THEIR SYMPTOMS AND POLICY RESPONSES (Alison A. Booth & Dennis J. Snower eds., 1996); Frank A. Sloan & Mark A. Hall, *Market Failures and the Evolution of State Regulation of Managed Care*, 65 LAW & CONTEMP. PROBS. 169, 172–83 (2002).

486. *See, e.g.*, ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION 202-223, 257-83 (1999) (detailing concerns related to the control of monopolies, the balance between regulation and the fostering of competition, and franchising); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (developing a theory of “anticommons” property to explain economic failure in the context of the Soviet shift from socialism to a market economy).

487. *See generally* MINOW, *supra* note 22 (arguing that emerging relationships between government and private entities calls for new approaches and a renewed commitment to public values).

Some evaluations of regulatory and market failures rely on factual distinctions between the capacities of market and public action. In such cases, the choice of public or private action is empirical and instrumental. Given a certain shared goal, such as the reduction of industrial pollution, the question is which institutional arrangement will best achieve the desired results. Other concerns are based on normative evaluations of the differences between various spheres—political, economic, and civic life. In such contexts, there may be an intrinsic value to privatizing, or publicizing, a social function, regardless of which forum is better situated instrumentally to achieve certain goals.

### C. RECONSTRUCTION

The accumulation of insights about regulatory and market failure reveals the importance of moving beyond existing patterns of lawmaking. In both its experimental construction of new institutions and in its theoretical linkages, the Renew Deal is a reconciliatory and reconstructive project, synthesizing the fundamental lessons of opposing intellectual camps. Just as the governance model is generated through the interaction between internal and external forces for change in the legal field, the model brings together competing theoretical and practical lessons. In this synthesis, the Renew Deal vision again recalls the legal process school of the 1950s, which was reactive in different ways to the emergence of the New Deal paradigm.<sup>488</sup> Edward Rubin has described the 1950s legal process scholarship, as “[t]he last unified approach to legal scholarship.”<sup>489</sup> Gary Peller similarly describes the legal process school as “the last great attempt at a grand synthesis of law in all its institutional manifestations.”<sup>490</sup> Legal process emerged as a school of thought at a moment when there was a critical need to explain the new realities of the growing regulatory administrative state and to find sources of legitimacy for a new centralized legal framework. But soon after its birth, ideological polarization de-

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488. See generally Erwin N. Griswold, *Preface* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* viii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting the effect of the New Deal on the legal process school).

489. Rubin, *supra* note 232, at 1393.

490. Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 568 (1988).

veloped within legal academia.<sup>491</sup> Two newer schools, critical legal studies from the Left and law and economics from the Right, proved especially discordant, which left little room for unifying moves in the last several decades.<sup>492</sup> However, the new governance school emerges at a period in which opposing schools of thought have challenged not only the assumptions and imperfections of its rivals but also its own premises. In both practice and theory, the Renew Deal paradigm enables the resurgence of broad structural thinking, combining critiques of conventional legal strategies, as well as the limits of critical insights.<sup>493</sup> In legal practice, breakdowns can be traced through changes in the professional approaches to “cause” lawyering. Legal practice has moved from a focus on the administrative state in the Progressive Era, to court-oriented civil rights litigation in the 1960s and 1970s, to the critical, rebellious, local, personal and “outside-of-the-law” positions of “cause” lawyers in the 1980s and 1990s.<sup>494</sup> In legal academia, both law and economics and critical legal studies have been challenging their own basic assumptions in recent years.<sup>495</sup> In general, economic

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491. Some scholars argue that the break actually coincided with the emergence of the legal process school. See William Eskridge, Jr. & Philip P. Frickey, *Introduction to THE LEGAL PROCESS*, *supra* note 488, at c-cxxv.

492. Rubin, *supra* note 232, at 1393–94.

493. For critiques of the critical positioning of progressive practitioners and thinkers in the 1980s and 1990s, see Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994). In former years, the internalized occupation with law was viewed to be paradoxically strengthening—the more law was deconstructed, the stronger it became. Although it was with reference to political/philosophical strands outside of the law, the discourse was narrowed to that of internal legal thought, a prophecy inherently predisposed to realize itself. The internal critique within the legal world has taken a toll on the ability to define camps, left/right. A revolution to move to a new paradigm is underway. In spirit and sometimes in body, thinkers are leaving the jurisprudential center and looking elsewhere for fuel and energy.

494. Trubek, *supra* note 146, at 272.

495. A behavioral approach to law has been challenging many of the traditional assumptions of law and economics. See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW FROM POSNER TO POST-MODERNISM* (1997); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); see also Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553 (1998). Gary Minda, describing second generation law and economics scholarship explains that “[t]he shift from abstract theory to concrete institutional analysis has been nurtured by a new understanding of economic theory—an understanding that views ‘theory’ merely as

theory has become more critical, while critical theorists have become more constructive. If law and economics analysis has been conventionally aligned with conservative projects, and critical scholarship with progressive projects, we have reached a critical moment within legal thought when it is possible to question these assumptions from both ends, allowing opponents to reconcile their pervasive conflicts. Second-generation law and economics scholars have recognized that government interventions can enhance both liberty and welfare.<sup>496</sup> The economic understanding of market failures, including problems of collective action and information asymmetries, has expanded. More than that, the very concept of linear maximization of individual welfare has been challenged. New institutional economics has challenged conventional assumptions about economic actors as isolated individuals engaged in didactic exchanges.<sup>497</sup> Rather, the new understanding of individuals is that of social beings whose actions and knowledge are at least partly constructed by their institutional settings. Drawing on psychological analysis, behavioral law and economics has introduced the understanding that individual preferences are endogenous, a function of

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a tool for investigating what may 'work' as a solution to some problem. . . . [T]he second generation views economics as an *applied* science." GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 87-88 (1995). Elsewhere, Minda describes that:

[t]he current generation of [law and economics] scholarship tends to be more modest in its own claims about the role of economics in law and less accepting of the conservative orientation of property rights analysis of the Chicago School founders. Only a small number of methodological issues appear to be settled; including claims that microeconomic theory is a basis for analyzing law, that demand curves are downward sloping, and that cost-benefit analysis and the economic definition of cost (opportunity cost) are essential for intelligent policymaking. Second generation [law and economics] scholars have retreated from the orthodoxy of "efficient" answers for nearly every legal question; instead, the second generation thinkers admit that "most law and economics questions are still open and likely to remain so for a long time." Second-generation law and economics scholarship is also more eclectic theoretically and much more sophisticated than the work of the [law and economics] founding fathers.

Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 607 (1989). From the perspective of critical scholars, second generation "crits" include critical race theorists, feminist legal theorists, and gay legal studies scholars. See Handler, *supra* note 493, at 706-10; Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 367-70 (1994).

496. SUNSTEIN, *supra* note 480, at 38-45.

497. Rubin, *supra* note 232, at 1413.

experience and existing collective norms.<sup>498</sup> As a result, recent law and economics scholarship recognizes that freedom is not identical to unlimited choice and that government intervention is inevitable in a functioning market.

From the perspective of critical legal scholarship, second-generation crits, including feminist, critical race, and gay legal theorists, have challenged the blank rejection by earlier critical scholars of the legal system as an engine for social change.<sup>499</sup> These scholars have pointed to the significance of legal rights, pragmatic programs, and immediate remedies within the existing legal system for disadvantaged minorities.<sup>500</sup> This newer scholarship has been more inclined to translate critique into prescriptive analysis, rather than settling for abstract condemnations.<sup>501</sup> Next-generation critical scholars have broadened their inquiry to include the exploration of the multiple roles of law in achieving social change and the relationship between government branches in realizing these changes.

The integration of rationales, theories, and systems represents a maturation of legal thought. Rather than oppositional, the Renew Deal aims for an appreciative positive stance, pulling together disparate ingredients and synthesizing elements from opposing schools of thought.<sup>502</sup> Through new governance approaches, contemporary thinkers can bring together in their

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498. SUNSTEIN, *supra* note 480, at 40–44.

499. Rubin, *supra* note 232, at 1407–08.

500. *Id.* at 1407–08 n.49. On the critical race theorists critique of critical legal scholarship, Rubin cites, among other scholars, Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988), Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 304, 307 (1987), and Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405 (1987). Rubin also cites feminist theorists Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1058 (1992) and Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 2 (1991).

501. Rubin, *supra* note 232, at 1408–09; *see also*, Handler, *supra* note 493 (urging progressive scholars to combine critique with constructive reform projects); Lobel, *supra* note 38.

502. Richard Stewart describes Cass Sunstein's writing as putting together "a bit of Hayek, nuggets of public choice theory, a substantial dose of welfare economics, considerable amounts of Mill and republican political theory, some New Deal leavening, and a trace of critical legal studies spice." Richard B. Stewart, *Regulatory Jurisprudence: Canons Redux?*, 79 CAL. L. REV. 807, 810 (1991). Stewart describes this *mélange* as "truest to our condition." *Id.*

research unlikely pairs, such as privatization and democratic theory.<sup>503</sup> The theory itself is thus reflexive, in the sense that it calls for integration in legal practice and correspondingly exemplifies hybridization in the academic field. Indeed, the theoretical basis for the Renew Deal vision mirrors its practical application in its inclusive spirit.

## VI. CENTRAL NORMATIVE CHALLENGES

The strengths of the governance model are many and its future promising, as shown by the increasing adoption of governance approaches in a wide spectrum of legal fields. As is often the case in a paradigm transformation, supporters of the nascent vision invest great efforts to demonstrate its potential and strengths, often by imagining the best possible scenarios for the adoption of the new framework. However, ideal theories are never risk free. Particularly in the rich setting of governance, with its affluence in meanings, there is also a need to warn against certain blind spots and difficulties.

Two mirror-image risks exist in the transition to the Renew Deal governance paradigm. First, when advancing a new model of law, there is some tendency to insist too much on its newness. The old is easily dismissed as conventional, its approaches antiquated. This tendency often results in aligning old approaches to law with our critical understandings of power, legality, action, and change. Thus, for example, some expressions within the Renew Deal literature overstate the allocation of power within the regulatory framework, while aligning governance with transformative social activism (decentering). In such cases, power is framed as a characteristic of the regulatory model, while *empowerment* is the promise of governance. Similarly, formal regulation is considered present only in certain settings, activities, and spheres of action; other issues and arenas are depicted as outside traditional legal mechanisms. These underlying tendencies run the risk of instigating a contemporary bias that universally aligns the regulatory model with conservative commitments, and the governance model with transformative politics.

Mirroring the first, a second risk involves the construction of problematic equivalences (recentering). New governance ap-

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503. See, e.g., Orly Lobel, *Rethinking Traditional Alignments: Privatization and Participatory Citizenship*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS (Clare Dalton ed., forthcoming 2005).

proaches often assume one-dimensional measurements in evaluating complex developments. For example, scholars may imply flat equations between advancement in business administration models and new public management models; between scientific learning and democratic learning; between small-scale knowledge and large-scale initiatives; and between accountability and responsiveness.

Although the Renew Deal vision is at an early stage in its elaboration by legal scholars and in its adoption in practice, it is important to recognize that the case studies we have explored can help us better evaluate the potential of the governance model, as well as its limitations.

#### A. ADDITION VS. SUBSTITUTION: THE REGULATORY MODEL AS COMPATIBLE WITH THE GOVERNANCE MODEL

What is the relationship between the regulatory model and the newer governance model? Does governance supplement or replace regulation? To be cautious, implementation of the new model should resist overly sharp breaks between traditional approaches and new ones. A statutory mandate may be a first step in the constitution of a governance model. The long-studied gap between law-on-the-books and law-in-action has recently been explored not simply as a weakness of the regulatory system, but rather as a strength. Daniel Farber describes the concept of slippage, the disparity between regulatory mandates and actual enforcement. Negative slippage results from weak enforcement by regulators and noncompliance by private actors.<sup>504</sup> Positive slippage occurs when regulators assist regulated parties in designing alternatives to compliance on a negotiated, case-by-case basis.<sup>505</sup> Such instances resonate with proposals for partial industry regulation advocated by John Braithwaite and Ian Ayres.<sup>506</sup> Farber argues that with positive slippage, top-down standards may often be the “opening gambits in a prolonged bargaining process” between agencies and regulated parties.<sup>507</sup> The dynamics of implementation demonstrate a process that is much more flexible than initially assumed. Therefore, the initial regulation should be understood

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504. Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 299 (1999).

505. *Id.* at 305–11.

506. Ian Ayres & John Braithwaite, *supra* note 191.

507. Farber, *supra* note 504, at 317.

as “the government’s opening demand in negotiations, and the final bargain is likely to be more favorable to the other side.”<sup>508</sup>

New governance practices of regulatory agencies, such as the increased issuance of informal guidance, are typically carried out in the shadow of a formal and standardized body of administrative law. Activities conducted in the shadow of the law possess background efficiencies when the law allows for variations in implementation. For example, Jason Johnston stresses that, in environmental regulation, regional and local variations in implementation of uniform federal law are precisely what Congress intended and planned for in its incentives analyses.<sup>509</sup> Similarly, referring to collaborative governance approaches as “contractarian regulation,” David Dana observes:

In the absence of the threat of the application of the default regime of command-and-control regulation, regulated entities would lack any economic incentives to negotiate alternative regulatory arrangements . . . . [I]n fact, we do not observe any contractarian regulatory activity where there are no applicable background command-and-control regulations in place or plausibly threatened to be in place. Thus, although it is true that contractarian regulation is a reform alternative to command-and-control regulation, it is also true that command-and-control regulation is a precondition for contractarian regulation.<sup>510</sup>

Regulatory approaches not only have ex-post effects but also ex-ante effects. They promote self-regulation and create incentives for parties to reach efficient allocations on their own. Often, actors that recognize the possibility of regulation, which would order them to alter their behavior, have an incentive to voluntarily reach a cooperative agreement with their competitors, as we have witnessed in the case of endangered species and HCPs. Similarly, in the contexts of employment discrimination and occupational safety and health, the possibility of traditional regulatory liability continues to motivate industries to improve their practices through self-governance. Several of the governance-based initiatives explored earlier condition continuation of the programs on proof of effectiveness. In such cases, regulatory agencies announce that as long as the program effectively reaches its policy goals, the agency will con-

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508. *Id.* at 316.

509. Jason Scott Johnston, *The Law and Economics of Environmental Contracts*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 291 (Eric W. Orts & Kurt Deketelaere eds., 2001).

510. Dana, *supra* note 13, at 47.

tinue to allow increased involvement of nongovernmental participants and allow flexibility in program interpretation and implementation. The retention of supervisory authority and the background threat of direct regulation and enforcement strengthen accountability in the shift to governance. Moreover, some initiatives, such as the California-OSHA audited self-regulation program, facilitate the shift to governance through the appointment of government officers to act as problem solving consultants to the process rather than as enforcement agents.<sup>511</sup> The continued presence of an official government representative in a collaborative setting encourages parties to participate in efforts to sustain responsible practices.

This interaction between flexible compliance and traditional mechanisms is a significant aspect of the Renew Deal. Discussing the merits of both soft and hard law, David Trubek and Louise Trubek suggest that “[t]he institutional debate should be about the *relative* capacities of different modes to handle specific governance tasks.”<sup>512</sup> Similarly, Richard Stewart suggests focusing on the comparative advantage between “prescriptive” and “reconstitutive” strategies.<sup>513</sup> To be most effective, the governance model must continue to explore such “inter-modal synergy and hybrid. . . governance modes,”<sup>514</sup> including the coexistence, complementarities, and mutual reinforcement of traditional regulation and new governance approaches.

#### B. SCARCE RESOURCES: EXPERTISE, EXPERIENCE, AND SOCIAL ENERGY

A second challenge posed by the shift to a governance model is striking a balance between the value of direct participation and the need for a high-quality representative democracy. This tension echoes the fragile balance between proliferation of authority and legal orchestration, but the perspective is different. Under the new model, the valuation of direct engagement and experience risks becoming too populist. The Re-

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511. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 651 (2000).

512. Trubek & Trubek, *supra* note 2, at 2.

513. Stewart, *supra* note 7, at 93; *see also supra* notes 71, 237 and accompanying text.

514. Trubek & Trubek, *supra* note 2, at 2 (referring in particular to combinations between “hard” and “soft” modes of law in the context of European Union governance).

new Deal should not abandon a Madisonian notion of democracy, based on checks and balances among branches of government backed by expert agencies. I have argued that the best versions of the governance model are those that accept tension, and do not uniformly choose one way over another. Here too the model should incorporate tension as part of an ongoing challenge.

There is some tendency in Renew Deal scholarship to replicate weaknesses of particular versions of the American pragmatist tradition. Such tendencies include an aversion to strong expressions of shared public values and to normative claims of morality. Stanley Cavell has vividly expressed this tendency as “a temptation to meta-snobbery, snobbery over not being a snob (like pride in transcending pride), an apparent effort to exempt oneself from the condition of morality (the divided human condition) by surpassing it.”<sup>515</sup>

The pragmatist impulse is to embrace the ordinary, lay experience. Ralph Waldo Emerson stated, “I embrace the common, I explore and sit at the feet of the familiar, the low.”<sup>516</sup> John Dewey’s “democratic faith in common people” involved scorn for high theory and the praise for practice and small projects.<sup>517</sup> Building on these ideas, some thinkers claim the precedence of direct experience over expertise, contending that the latter “sacrifices the insight of common sense to intensity of experience. It breeds an inability to accept new views from the very depth of its preoccupation with its own conclusions.”<sup>518</sup>

At the same time, however, governance embraces the essential significance of transparency and information disclosure. In the complex, highly technical environment of the twenty-first century, abundance in information demands an equivalent abundance in resources and knowledge to apprehend it. The governance model must assure that disclosure requirements, such as those we have discussed in the environmental field, will achieve its intended goals. Given the increased significance and complexity of information, the simultaneous and ongoing dis-

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515. STANLEY CAVELL, *CONDITIONS HANDSOME AND UNHANDSOME: THE CONSTITUTION OF EMERSONIAN PERFECTIONISM* XX–XXI (1988).

516. ALBERSTEIN, *supra* note 30, at 10 (citing RALPH WALDO EMERSON, *Nature*, in *SELECTED ESSAYS* 36 (Larzer Ziff ed., 1982)).

517. *Id.* at 12.

518. GLEN O. ROBINSON ET AL., *THE ADMINISTRATIVE PROCESS* 25 (1993) (citing Harold J. Laski, *The Limitations of the Expert*, *HARPER'S MAG.*, Dec. 1950, at 101).

persion of decision making creates certain risks. The production, distribution, and processing of information has become the key source of wealth in the information age.<sup>519</sup> However, information is not worth much if there are insufficient means to use it, sort it, make sense of it, apply it, and upgrade it. Indeed, too much information can be debilitating and counterproductive. In the context of federal agencies, Jerry Mashaw and David Harfst have documented how judicial insistence on exhaustive information for the federal auto safety program has impaired the ability of agencies to make important advancements in safety.<sup>520</sup> In the context of individual consumers, psychologists have documented the ways in which information ubiquity can curtail people's ability to make informed choices.<sup>521</sup> Asymmetry of resources among private groups and differences in the organization of knowledge communities further exacerbate these problems.<sup>522</sup> Moreover, the digital age has made a new kind of scarcity pertinent. Spam e-mailing is a paradigmatic example, illuminating how the costs of information processing, distribution, and filtering shift from the distributor to the receiver.<sup>523</sup> The ready availability of ubiquitous information as well as new ways to transmit it has brought new concern about the scarcity of audience attention—popularly termed “the eyeball dilemma.”<sup>524</sup> In information-based initiatives, such as those we have discussed in the context of environmental policies and e-regulation, variations in the capacity of stakeholders to utilize newly available data effectively are critical to their ability to contribute to governance processes in a meaningful way.

The Renew Deal vision must resist the illusion of information and transparency—that the information age, through its own mechanisms, can solve all problems. The illusion is twofold. First, it elides the tension between the desire of a society

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519. Balkin, *supra* note 39, at 3.

520. JERRY L. MASHAW AND DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 95–103 (1990).

521. See On Amir and Dan Ariely, *The Pain of Deciding: Indecision, Flexibility, and Consumer Choice Online* (2004) (unpublished manuscript, on file with author) (finding that under circumstances of ubiquitous information, consumers are more likely to fall into indecision).

522. See, e.g., John Kennan & Robert Wilson, *Bargaining with Private Information*, 31 *J. ECON. LITERATURE* 45, 48–50 (1993). For more information on knowledge communities, see MARTIN CARNOY, *SUSTAINING THE NEW ECONOMY: WORK, FAMILY, AND COMMUNITY IN THE INFORMATION AGE* 152–89 (2000).

523. Balkin, *supra* note 39, at 7.

524. *Id.*

to radically disperse decision making and the insistence on retaining the ability of decision makers to make meaningful choices. Second, there is some tendency to assume that comprehensive and widespread information on an issue will eventually lead people to converge normatively on the same positions.

In this context, the current dominance of economic expertise presents a particular risk. Pairing proliferated participation with the pervasiveness of economic jargon risks colonization of governance by economic models. Colonization is particularly dangerous in contexts of organizational reliance on technical formulae for value-driven policy choices.<sup>525</sup> The risk is enhanced because of the pervasive idea in modern thought that value judgments are subjective, while statements of fact are capable of being objectively true and warranted.<sup>526</sup> The governance model must resist the allocation of decision-making processes at the level of financial knowledge, rather than through substantive policy debates, even if both potentially occur under participatory, collaborative, and inclusive conditions.<sup>527</sup> Due to this fear and despite the growing enthusiasm about new governance networks, it is not surprising that some perceive such multilateral participatory networks as a techno-

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525. See generally HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY* (2002) (examining the history of the fact/value dichotomy and applying that to the field of economics). The regulatory model seeks to sort out fact from value. For example, take Amartya Sen's capabilities approach to welfare economics and his concept of human flourishing, and the realization that questions of economics and questions of ethics cannot be neatly separated. AMARTYA K. SEN, *COMMODITIES AND CAPABILITIES* PAGE (1985). Economics is most often reluctant to delve into a discussion of what human flourishing might mean. Such questions are deemed 'subjective,' and therefore not part of the scientific inquiry. It is thus that the notion of fact has been contrasted in modern thought both to values judgments and to analytic truth, "preventing us from seeing how evaluation and description are interwoven and interdependent." PUTNAM, *supra* note 525, at 3. Rational choice assumes "completeness"; science presupposes values, *epistemic* values, such as coherence and simplicity. *Id.*

526. *Id.*; cf. Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931 (2000) (critiquing the narrow scope of values applied in standard cost-benefit analysis).

527. Within public administration, this risk can be seen when decision-making powers are shifted from an agency such as OSHA or the Environmental Protection Agency to the Office of Management and Budget (OMB). OMB's lack of substantive expertise provided a frequent cause for criticism. MCGARITY, *supra* note 32, at 281. In the corporate world, similar tendencies have been proven to inhibit innovation. DAVID HALBERSTAM, *THE RECKONING* 500 (1986); Farber, *supra* note 9, at 1286-87 (1993).

cratic conspiracy intended to depoliticize issues in ways that will inevitably benefit the rich and powerful at the expense of the poor and weak.<sup>528</sup> One of the central goals of the new model must therefore be to explore how information ubiquity and technical jargon impairs the ability to truly participate in a polity.<sup>529</sup>

Several of the case studies that we have explored signify a continuous need to provide knowledge and training for new entrants. For example, in the context of workforce development and vocational training, local community-based organizations have recognized the importance of capacity building of their members engaged in collaborative private/public partnerships. Local programs under the new Workforce Investment Act training regime provide nongovernmental partners opportunities to attend workshops and training sessions on political organizing, public speaking, and active membership in network community associations.<sup>530</sup> Recognizing the difficulties in opening up the public arena to private nonprofessional participants, other governance initiatives similarly require citizens and participating partner organizations to undergo training in such areas as budgeting and finance, organizational behavior, strategic planning, and legal issues.<sup>531</sup> Only through adequate ongoing training and government support can a shift to governance successfully combine both participatory decision making and professionalism.<sup>532</sup> By and large, political and legal theorists have contrasted theories of democratic representation with

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528. Slaughter, *supra* note 111, at 347–48.

529. The governance model must also grapple with the problem of incommensurability of different contexts. In some governance literature big and small problems are treated as one. On the possibility of moving from one scale to another, see JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 229–70 (1990); Carol J. Greenhouse, *Figuring the Future: Issues of Time, Power, and Agency in Ethnographic Problems of Scale*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 108 (Bryant G. Garth & Austin Sarat eds., 1998).

530. Osterman, *supra* note 281, at 252.

531. For example, in the context of school reform, restructuring in Chicago has involved a decentralization of authority from district-wide administration to Local School Councils (LSCs) that are composed of elected parents, community residents, and teachers, as well as the principals. Chicago's LSC improved parent and community involvement and focused greater attention on local needs. JOEL HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 199–203 (1996). Parents and community participants have been required to undergo training in areas such as school budgeting and finance. FUNG & WRIGHT, *supra* note 20, at 29.

532. See, e.g., HANDLER, *supra* note 531, at 206–09, 234–35.

those of direct participation.<sup>533</sup> At its best, the governance model should aim to combine expertise and experience— involving representatives in many avenues while recognizing the importance of direct engagement.

C. ACCOUNTING FOR POWER IN A NONHIERARCHICAL COLLABORATIVE ENVIRONMENT

We have seen that a basic premise of the governance model is that participatory, collaborative, and flexible approaches can generate win-win situations. The theme of win-win is reminiscent of the postwar legal process school. In the Hart and Sacks legal process materials, the theme of multiple winners is described as “the fallacy of the static pie”:

The proposition that the supply of the good things of life is not fixed but expansible holds true even of tangible satisfactions, which the exponents of the dog-eat-dog view of human existence are likely to have chiefly in mind. It is still more conspicuously true of the intangible satisfactions of life, which are intensely desired also, and all the more intensely as the more urgent of tangible needs are met.<sup>534</sup>

In order to be effective, the governance model must not accept a naïve account of the win-win theme. Situations in which multiple interests are mutually enforcing are context specific. Unlike first-generation legal processors, most governance scholarship constructs a more sophisticated depiction of limited resources in society. In fact, as we have seen, some of the scholarship’s leading substantive areas involve the most difficult contexts of scarce resources, such as low-wage work, welfare, and distributive social policy. The governance school must therefore develop a richer basis for approaching collaboration in situations of pervasive competition, power imbalances, and limited resources.

It would be irresponsible to discuss the shift from a state-centered regulatory model to a new governance model based on

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533. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77 (1980); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 268 (1986) (“[T]he alternative is to abandon representative democracy in favor of either the anarchy of direct participation or the tyranny of judicial despotism.”); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2469–70 (1991) (“Obviously, democracy cannot exist in a modern polity as in ‘the Greek Polis’ or ‘the New England town.’ Representative democracy replaces direct participation. Nonetheless, democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed.”).

534. HART & SACKS, *supra* note 230, at 102–03.

collaboration and the empowerment of diverse actors without asking who will win and who will—at least some of the time—lose. The significance of bureaucratic structures in the Weberian ideal includes the predictability of a rule-bound administration.<sup>535</sup> What will replace the formalities of rules in flexible, collaborative, and relatively informal structures?

We must recognize the possibility that instead of resulting in a virtuous circle, a shift to governance approaches may produce a vicious cycle under certain circumstances—tilting more and more entitlements in favor of those already in power. A central challenge for the governance model is therefore to understand how collaborative environments can be nurtured to produce equitable results, especially in settings where vast power imbalances exist. This challenge is particularly resonant today, as a “deficit-induced imperative to limit government spending” has become part of our fin de siècle legacy.<sup>536</sup> Commitment to regulation and its enforcement has eroded.<sup>537</sup> During the 1980s and 1990s, government began to withdraw from its role as an active player in the market, at the same time allocating fewer resources for traditional enforcement.<sup>538</sup> Disturbingly, some contemporary reform projects “appear merely to be attempts to reduce benefits under the guise of governance and experimentation.”<sup>539</sup> Reform agendas for the new economy must not confuse the adoption of the new governance model with a declining commitment to public values and needs.<sup>540</sup>

The transcendence of left/right political alignments within the legal world has been described in the previous sections as an important asset of the governance model. Legal scholars long identified with progressive social reform are recognizing that governance need not be a clear-cut left or right ideological project.<sup>541</sup> This realization enables scholars to engage in a prac-

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535. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 1394–95 (Guenther Roth & Claus Wittich eds., 1978).

536. DONAHUE, *supra* note 109, at 3.

537. *See id.*; R. Kent Weaver, *Ending Welfare as We Know It*, in *THE SOCIAL DIVIDE: POLITICAL PARTIES AND THE FUTURE OF ACTIVIST GOVERNMENT* 382–86, 392–99 (Margaret Weir ed., 1998).

538. *See, e.g.*, Weaver, *supra* note 537, at 382–99.

539. Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare “Reform”*, 26 U. MICH. J.L. REFORM 741, 745 (1993).

540. *See generally* Lobel, *supra* note 90, at 2045–46 (discussing the dynamic between rules and morality).

541. *See, e.g.*, John C. Dernbach, *Toward a National Sustainable Development Strategy*, 10 BUFF. ENVTL. L.J. 69, 101–02 (2003). According to Dern-

tice of remembering and forgetting, strategically engaging in “magical realism” or “real utopias”—envisioning the ideal in nonideal circumstances.<sup>542</sup> While embracing this ambiguity and uncertainty is a strength of the governance paradigm, it is, however, not free of risks. Governance proponents need to make sure that converging to a seemingly unaffiliated discourse does not overlook important questions.

The most promising analyses in the governance school are those writings that directly consider the question of power. Shifts from one paradigm to another are always about shifts in power allocation. Governance processes not only provide a framework for decision making and action, but also alternate the power relations among the participants. Thus, governance scholars have pointed to the need for a growing convergence of interests to “reach a synergetic effect or a ‘win-win’ situation.”<sup>543</sup> The ability of groups to successfully interact under situations of asymmetrical power is at the center of much debate. While some consider informality—derived from involvement of the relatively unstructured and weak nongovernmental organizations—as an empowering feature, others view this self-claimed weakness as strategic powerlessness that only consti-

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bach:

Sustainable development falls outside the left/right political spectrum in which most people traditionally think about environmental politics. Among other things, though, sustainable development . . . premised on the importance of private efforts and the removal of subsidies—two points that are consistently emphasized by the right (but not exclusively by the right). But it is also premised on an ambitious and broad set of environmental goals and a desire to eradicate large-scale poverty—two points that are consistently emphasized by the left (but not only by the left). Because sustainable development is neither left nor right, liberal nor conservative, and because it is not primarily environmentalist or primarily business-oriented, it does not fit into the traditional left/right spectrum. Moreover, the emphasis of sustainable development on thinking and acting for the long-term is hard to fit into political election cycles.

*Id.* (citations omitted); *cf.* Handler, *supra* note 493, at 722 (describing the problems of the new populism as “neither left nor right” (quoting CARL BOGGS, SOCIAL MOVEMENTS AND POLITICAL POWER: EMERGING FORMS OF RADICALISM IN THE WEST (1986))).

542. On magical realism, see Lucie White, *Global Forces, Life Projects, and the Place of Care: Conversations with Women in Project Head Start*, in GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 145, 148 (Jane Jenson & Boaventura de Sousa Santos eds., 2000). On “real utopias,” see Erik Olin Wright, *The Real Utopias Project: Overview*, at <http://www.ssc.wisc.edu/~wright> (last visited Sept. 27, 2004).

543. Kooiman, *supra* note 14, at 251.

tutes other means of maintaining existing social hierarchies.<sup>544</sup> Some scholars view cooperative relationships as necessarily compromising the ability to exert pressure.<sup>545</sup> Others allege that cooperation can only occur in the rare circumstances in which the powerful believe empowerment to be a good thing, in other words, where the powerless have a tangible resource of value.<sup>546</sup>

Generally, when the interests of various actors are more

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544. See Orly Lobel, *supra* note 38, at 28–40.

545. A radical expression of this view is given by Richard Cloward and Frances Fox Piven, who argue that the power of underprivileged groups lies precisely in their power to (illegally) disrupt. In their view, formal organizing and engagement with other groups, in negotiation or legal reform activities, is inherently co-optive because it curtails this potential and capacity of disruption, drawing the movement to orderly strategies. See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (Vintage Books 1979); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (2d ed., Vintage Books 1993).

546. This debate is deeply present in discussions about the adequate framework for labor relations and collective bargaining. See generally Lobel, *supra* note 87 (discussing the competitive/cooperative duality that empowers employees in the workplace); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1667–68 (1983). These questions also arise in discussions of Alternative Dispute Resolution. See HANDLER, *supra* note 531 (providing an excellent account of the promising contexts in which dependent or powerless groups can cooperate in a meaningful way with powerful private or public groups and organizations); see also *infra* notes 549–554 and accompanying text; Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 743–51 (2003). For an exchange about the possibilities of empowerment through cooperation in the contexts that Handler explores, see Joel F. Handler, *Living with Ambiguity*, 23 LAW & SOC. INQUIRY 223 (1998) and Julie A. White & John Gilliom, *Up from the Streets: Handler and the Ambiguities of Empowerment and Dependency*, 23 LAW & SOC. INQUIRY 203 (1998). The literature on regulatory negotiation also provides insights into the dynamics of the cooperative-adversarial debate. See, e.g., Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1283 (1994) (noting that negotiated rulemaking can be successful in particular contexts of environmental issues); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206 (1994) (demonstrating that not all stakeholders are represented in the model of regulatory negotiation, and discussing instances in which the model can nonetheless help clarify the values at stake and assist disparate groups in reaching meaningful consensus within an identified range of choices); see also Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (providing broad critical views of regulatory negotiation); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997) (same).

likely to converge, governance is more likely to be effective. Writing about the emerging European Union regime, Oliver Gerstenberg and Charles F. Sabel state broadly that the starting point for their proposed experimentalist model is the implication of radical indeterminacy, and, in particular, “that, in a complex world, ‘strong’ actors cannot rule out the possibility that they will come to depend on solutions discovered by ‘weak’ ones.”<sup>547</sup>

Other governance scholars have been careful not to make overarching generalizations. In his book *Down From Bureaucracy: The Ambiguities of Privatization and Empowerment*, Joel Handler looks explicitly at the consequences of decentralization, deregulation, and privatization to citizen empowerment.<sup>548</sup> Handler rightly understands power struggles as including “not only the *definition of values* but also the *arenas and procedures of conflict*.”<sup>549</sup> Rather than equating the move to the local with empowerment, he sees the relationship between the “localized” and “empowered” as contingent and unstable. Handler describes empowerment as a dynamic, reflexive developmental process that is dependent on context.<sup>550</sup> He indicates that shifts for subordinate groups in terms of where and how regulation takes place “might only mean ‘re-regulation under another master.’”<sup>551</sup> Handler further warns that the process of empowerment through governance depends on constant renewal, because such shifts are always unstable, tentative, and easy to undermine and co-opt by bureaucratizing the local institution (whether private, public, or hybrid).<sup>552</sup> Successful renewal entails taking seriously the concept of process, in which the sharing of power, while not a zero-sum contest, invariably involves an alteration of power.<sup>553</sup> Always lurking in the background is

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547. Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289, 292–93 (Christian Joerges & Renaud Dehousse eds., 2002).

548. HANDLER, *supra* note 531.

549. *Id.* at 4.

550. *Id.* at 5.

551. *Id.* at 5.

552. *Id.* at 168.

553. *Id.* at 216–18. Two categories are distinguished under Handler's framework: *empowerment by invitation*, in which the powerful provide the resources for empowerment; and *empowerment through conflict*, in which the powerless obtain the resources on their own from the larger community. *Id.* at 133–219.

the possibility that cooperative relations will become adversarial if one party believes it will be made better off from the change.<sup>554</sup>

In many of the contexts we have explored, stronger parties are able to see the benefits of a shift to the governance model. These benefits include increased knowledge and information, the stability that is reached through agreement, and, at times, the existence of bona fide shared interests. For example, in the area of health and safety governance initiatives, OSHA has been able, in certain environments, to successfully promote collaboration within the firm between workers and employers because of a convergence of a number of positive factors. First, all parties broadly perceive the prevention of accidents as a positive and moral goal. Second, firms often need to maintain a good public image, and promoting a safe work environment can contribute to their public relations efforts. As a result, employers are likely to actively engage in the improvement of safety conditions within their firms. Third, since regulatory violations are often ambiguous, the cooperative mode has proven at times to be more effective in preventing accidents and achieving workplace safety.<sup>555</sup>

Sociologist Joe Rees, who carefully studied the implementation of a governance approach to occupational health and safety in the construction sector in California, found that in successful cases both management and labor faced strong incentives to cooperate.<sup>556</sup> Management viewed the traditional inspection system as inadequate and burdensome and sought to voluntarily improve safety due to the high costs of workers' compensation.<sup>557</sup> The labor union was motivated to increase its cooperation with management in order to prevent union decline.<sup>558</sup> There was also a general agreement between management and

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554. *Id.* at 220.

555. *Id.*; see also Freeman, *supra* note 3, at 49–55.

556. JOSEPH V. REES, REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY 136–54 (1988). Similarly, in the context of coal mine safety, John Braithwaite has argued that cooperative policy measures better serve the interests of workers. JOHN BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY 64 (1985); see also Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 716–24 (1997) (describing the utility of cooperative approaches to OSHA enforcement).

557. See REES, *supra* note 556, at 137–38.

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workers as to what constituted safety problems.<sup>559</sup> Moreover, the professional safety engineers within the firms were relatively independent actors. Their independence contributed an additional balanced voice in labor-management multiparty discussions about safety improvements.<sup>560</sup> Finally, the appointment of a flexible but engaged compliance officer by the state OSHA ensured continuing governmental facilitation of the program. Building on these sociological observations, Jody Freeman suggests that the success of collaborative governance as a regime of shared public/private authority depends on “a fragile conjunction of ingredients.”<sup>561</sup> Joel Handler believes that even in situations of extreme differences in power, a governance approach can be sustained when expert administrators or private parties come to rely on the weaker party’s knowledge and cooperation.<sup>562</sup> In such cases, mutually beneficial exchanges can occur.<sup>563</sup> Handler suggests that transforming relationships from regulatory hierarchy to cooperative governance requires the creation of “morally decent trust.”<sup>564</sup> In such relations, parties can be open about their motives and interests without undermining the relationship.<sup>565</sup> Yet, again, such a collaborative trust environment depends on the formation of *reciprocal* and *concrete* incentives.<sup>566</sup>

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561. Freeman, *supra* note 511, at 652.

562. JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY 13–38 (1990).

563. *See id.* at 28–31 (describing the context of social service administration and suggesting that both administrators and clients may benefit from cooperative relationships based on negotiation and mutual problem solving).

564. *Id.* at 136.

565. *Id.*

566. *Id.* at 127–29. An early example for participatory empowerment through the invitation of government is Project Head Start. Established in the 1960s, Head Start was a unique experiment for its time, and has been claimed by some commentators to be a program that embodies many of the features of the contemporary governance vision. *See, e.g.,* White, *supra* note 542, at 148. Lucie White describes two central features that characterized the novelty of Head Start. First, it established an open space for gathering as citizens. *See id.* at 148–49. Second, it distributed lawmaking powers to the people most affected by the program, the low-income parents of the children for whom the program was designed. *Id.* at Intended initially to help the children, the program became a sanctuary for the low-income mothers who were given the opportunity to become involved in its governance. *Id.* at 149. White views these features as creating a new constitutional order of plural democracy, rather than simply constituting direct redistribution of resources. *Id.* at 148. White, like Handler, is nonetheless cautious in making broad generalizations as to

In all of the domains we have documented, it is critical to distinguish between gaining real power over real decisions and real resources versus having merely advisory and knowledge-dissemination capacities. In the private market, a lucid example of the latter has been the adoption of various managerial techniques under the title of “employee participation plans.”<sup>567</sup> Many of the recently adopted schemes in the private sector, such as “self-managed teams,” have been depicted as empowering forms of employee voice which can replace traditional adversarial unionism, yet they are often used by management merely as mechanisms for monitoring, controlling, and exerting additional pressures on workers.<sup>568</sup> In the context of school reform initiatives, psychologists Dan Lewis and Kathryn Nakagawa similarly distinguish between an *enablement* paradigm, in which there is only a technical participation for the ends of the program, and an *empowerment* paradigm, in which participation takes on a political end—control over the program.<sup>569</sup>

Unless there is complete identity between parties, there are always conflicts of interests between the constituents of an economic enterprise.<sup>570</sup> Social relationships are *both* adversarial and cooperative. In sociology, this reality has been termed “antagonistic cooperation,” which is defined as “[a] relationship between or among persons in which they join their efforts to produce something of value to the participants, while at the same time being in conflict over other things, most particularly the division among themselves of the product of their joint efforts.”<sup>571</sup>

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the feasibility of replicating these features in any context. *See id.* at 149–50 (describing the particular political and social context surrounding Head Start’s inception); *see also supra* notes 550–551 and accompanying text. A significant aspect of the project, not explicitly mentioned by White, is that it involved a morally accepted cause—the care of children—for which it is relatively easy to mobilize support. Moreover, project Head Start was a comparatively small program, which raised less resistance than a large expensive program might have. *Id.* at 153.

567. *See* Lobel, *supra* note 87, at 150–53 (noting the rise of employee participation plans and listing the different programs that might fall under this category).

568. *Id.* at 169–72.

569. DAN A. LEWIS & KATHRYN NAKAGAWA, RACE AND EDUCATIONAL REFORM IN THE AMERICAN METROPOLIS: A STUDY OF SCHOOL DECENTRALIZATION 13 *passim* (1995).

570. Lobel, *supra* note 87, at 188.

571. Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2031 (1985).

These tensions may be enhanced or mitigated through policy and design, drawing on the concrete incentives for maintaining a governance environment in different legal fields.<sup>572</sup> The governance model must therefore assume the difficult task of developing a relational concept of power that is more complex than the simple traditional top-down understandings that form the analytical basis for the regulatory model. It must acknowledge both the potential and the perils of systems of multiple authorities and interlocking power hierarchies constituted under its principles.

## VII. CONCLUSION: GOVERNANCE AND DEMOCRATIC THEORY—BETWEEN EFFICIENCY, LEGITIMACY, AND FAIRNESS

The legal system is at a critical juncture between the New Deal regulatory system, deregulatory devolutions, and the Renew Deal governance paradigm. As the foregoing analysis of renewal projects suggests, three overarching projects are intertwined in the Renew Deal vision: economic efficiency, political legitimacy, and social democracy.

### A. ECONOMIC EFFICIENCY

The governance model promotes more efficient organization of public life, efficient use of public dollars, and effective delivery of governmental services. It aims, methodologically, to match means to ends more closely, and to enhance the impact of law and policy. The efficiency project emphasizes the instrumental nature of the governance model's innovative features. New governance mechanisms, including incentives for different stakeholders to internalize externalities, to measure performance, to coordinate, and to share information, all serve to create and maintain a better-functioning system. Both market and government practices can improve through the generation of more competition, choice, and involvement. By involving private industry and drawing on local knowledge, for example, in disseminating public funds for vocational training or promoting citizens' electronic participation in rule promulgation by administrative agencies, governance can reduce administrative costs and increase the cost-effectiveness of policymaking. At the same time, we have seen that promoting self-governance, industry networks, and social capital within the private sector

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572. Lobel, *supra* note 87, at 188.

can help organizations operate more effectively.

#### B. POLITICAL LEGITIMACY

The governance paradigm strives to restore the legitimacy of the democratic process and the legal system. By actively involving the private sector and supporting multilevel participation, the governance model addresses the increased dissatisfaction with political life and decline of social engagement under the regulatory regime. To achieve these goals, it stimulates increased participation, deliberation, responsiveness, subsidiarity, diversity, transparency, public scrutiny, and accountability. The political project emphasizes that policy stakes must be concrete, clear, transparent, and accessible. It asserts the value of ongoing mechanisms and procedural safeguards to control regulatory power and to ensure the legitimacy of collective decisions about public life. By increasing the number of voices that influence policy, as in the recent experiments of habitat conservation and Internet standard setting, the aim is to build an environment of structured deliberation together with differentiated competences among social institutions.

#### C. SOCIAL DEMOCRACY

The third project concerns the question of how to better achieve and promote the substantive ends that we value as a public. This project includes both the protection of basic rights and liberty and institutional responsiveness to human needs. By promoting goals such as structural equality in the workplace, the protection of animals and natural resources for future generations, or community economic development, the governance model strives for greater fairness of outcomes and realities, equitable distribution, and the fair allocation of resources, both material and symbolic.

While theoretical hybridization is a strength of the governance model, choices and balances must be made as the three projects intertwine. Part VII described the risk of economic approaches colonizing the public discourse about values. A similar risk is posed by privileging efficiency and legitimacy over substantive social democracy. The methodological and procedural goals of governance operate within the context of substantive normative arrangements. When tension arises, how do we strike a balance between the ideal of participation as a goal in itself and the ends it sets out to achieve? Is the Renew Deal era missing substance?

One of the characteristics of the New Deal regulatory revolution was the affirmation of the permissibility and legitimacy of governmental redistribution.<sup>573</sup> The New Deal model was committed to the idea of government as the agent of substantive social reform. Through the creation of large programs such as Social Security and Medicare, the federal government signaled its role in social provision and distributional reform. The governance model, innovative and promising for political and legal renewal, must not subvert older, long-fought-for substantive arrangements. There is a tendency to equate shifts from top-down regulation with deregulation, privatization, and devolution. The new governance paradigm resists this dichotomized world and requires ongoing roles for government and law. Current reform proposals must resist the balkanization of social policies in ways that reduce governmental roles in social reform—for example, through extensive welfare waivers to the states.<sup>574</sup>

To maintain the balance between the three overarching projects of governance, ideas of good and value must still be available and present in public discourse. Some Renew Deal scholars have argued for a “new form of deliberation,” which employs the pragmatist tradition of “reciprocal determination of means and ends.”<sup>575</sup> A strong collapse between means and ends is a perilous step. The idea that core substantive arrangements are left open becomes, under certain conditions, insufficiently value-oriented. We do not want a paradigm in which “conceptions of justice are . . . infinitely plural,”<sup>576</sup> suggesting a lack of ability to have a normative objective standpoint. As we continue to develop the new legal paradigm, Renew Deal scholars must consider how certain versions of the governance model affect our ability to make normative and prescriptive judgments and to advance public ends. The challenge to unjust or unequal social realities derives from the rejection

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573. Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL'Y 219, 220 (1998).

574. Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002).

575. See *A Constitution of Democratic Experimentalism*, *supra* note 4, at 284.

576. See MacDonald, *supra* note 47, at 77. Legal pluralism emphasizes the existence of plural legal orders that lend themselves to reconciliation, modification or aggregation in a monist, hierarchical way. See *id.* This is an example of a structure that is too loose and that does not sufficiently lend itself to orchestration and evaluation.

of certain realities and the advancement of alternative ones. The ability to engage in governance depends on the ability to hold ideas about what is right and what is wrong. Within the governance paradigm, reformers will continue to need independent variables to judge the success of innovative approaches. A process or methodological framework alone will not suffice. For procedural legitimacy to be meaningful, there must be a commitment to public values, such as political equality, which is endangered when power and wealth are deeply imbalanced.<sup>577</sup> Substantive criteria of the common good are required to fully realize the potential of governance.

The multiplicity of projects that underlie the new vision signifies the importance of a dialectic among normative theories.<sup>578</sup> Democratic legitimacy embodies the entire range of values of effective governance, processes, and outcomes.<sup>579</sup> This diversity is not a new feature unique to the emerging Renew Deal era. Yet, the new paradigm must seek to fulfill its promise of better grappling with diversity as it affects the quality of public life. Indeed, underlying the paradigm shift from a regulatory to a governance model is a fundamental understanding of the wealth of normative theory and practice. Most of us value the core of each of the three normative projects of governance. As William Eskridge asserts,

[Different normative theories] together more accurately capture our political society than any one separately. We value individual autonomy (liberalism), but we also understand our interdependence (legal process) and crave a society that stands for values we can be proud of (normativism). As a result, we usually favor limited government, but endorse state regulation to address social and economic problems and to foster national values.<sup>580</sup>

Addressing the problems of lawmaking, implementation, and enforcement, advances in legal theory are increasingly

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577. See, e.g., Sunstein, *supra* note 159.

578. To provide an example of a dialectic among normative theories, the value of individual justice in concrete cases often coexists and potentially conflicts with overall justice.

579. For a discussion of different strands in democratic theory, see generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1552–53 (1996).

580. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 109 (1994). Frank Michelman, in a similar attempt to link competing ideals that we commonly value, offers a genealogy of democratic concepts that seem attractive to many. Frank I. Michelman, *What (If Anything) Is Progressive-Liberal Democratic Constitutionalism?* 4 WIDENER L. SYMP. J. 181, 184–96 (1999). Michelman moves from liberalism to constitutionalism to democracy to progressivism. *Id.*

pointing to the possibility of renewal through governance. Recent policy reform initiatives also provide glimmers of the practical potential of the governance model. Taken together, contemporary legal thought and practice is beginning to shed light on the mismatch between dominant regulatory theories and sociopolitical realities. Governance at its best signifies the compatibility of different theories of democracy—liberal, constitutional, direct, representative, associative, participatory, and deliberative. As it struggles to harmonize theory and practice, the governance model is better positioned to fulfill the promises of a twenty-first century Renew Deal.