

2004

Setting the Agenda for New Governance Research

Orly Lobel

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

Part of the [Law Commons](#)

Recommended Citation

Lobel, Orly, "Setting the Agenda for New Governance Research" (2004). *Minnesota Law Review*. 665.
<https://scholarship.law.umn.edu/mlr/665>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Surreply

Setting the Agenda for New Governance Research

Orly Lobel†

In *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*,¹ I argue that an emerging paradigm—*governance*—has the potential to tie together recent developments in the political economy with advances in legal and democratic theory. The article describes the organizing principles of a new policy model, consisting of increased participation of nonstate actors, public/private collaboration, diversity and competition, decentralization and subsidiarity, integration of policy domains, flexibility and noncoerciveness (“soft law”), adaptability and learning, and finally, legal orchestration. I consider these features in the article in three legal fields—employment, environment, and information technology. I argue that these areas reveal how the emerging governance model can enable us to transcend the false duality of centralized regulation and deregulatory devolution. Bradley Karkkainen’s article “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*,² written in response to *The Renew Deal*, provides an excellent opportunity to refine the arguments on law and governance. As should be clear from our articles, Karkkainen has been a prominent member of the academic network that I identify in *The Renew Deal*, and his writings on environmental law and regulatory theory serve as exemplary contributions to the growing literature on New Governance. I am

† Visiting Lecturer in Law, Yale Law School; L.L.B. 1998, Tel-Aviv University; L.L.M. 2000, Harvard Law School.

1. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

2. Bradley C. Karkkainen, “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004).

therefore deeply grateful to receive his thoughtful and helpful commentary.

Karkkainen's response calls for more distinctions between competing formulations of the emerging paradigm and for elaboration on the continuing relationship between conventional regulation and New Governance approaches. Space permits me to address here only some of Karkkainen's observations, and I offer some distinctions of my own to suggest paths for future research in "this vast, complex, rapidly growing, and exciting literature."³

I. ACADEMIC MOVEMENT vs. SCHOOL OF THOUGHT vs. UNIFIED LEGAL MODEL

Perhaps the best characterization of the governance paradigm is as a vibrant, alternative ethos to two oppositional orthodoxies—regulation and deregulation.⁴ An ethos describes a given set of beliefs that guide consideration of social problems. Each ethos implies core tools and processes. Initiatives operating within the boundaries of one approach can be characterized by reference to a certain set of tendencies and default techniques. The importance of New Governance scholarship is to show that the best policy solutions frequently cannot be easily categorized as either regulation or deregulation. Karkkainen refers to New Governance as "a distinctive new brand of legal and policy scholarship," a "family of governance innovations," and "a family of scholars."⁵ But he warns against overlooking important conceptual differences that separate diverse scholarly ideas within this larger body of thought. Is the new model a unified one?

In *The Renew Deal*, I describe New Governance scholarship as forming a new school of legal thought. I further suggest that this *school of thought* is an active one, corresponding to a contemporary *movement* in legal academia. This explains why certain law schools—in the United States, primarily Columbia

3. *Id.* at 497.

4. For example, Philippe Nonet and Philip Selznick describe "the model of rules" as evoking the "ethos of modern bureaucracy." PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 64 (1978). Herman Schwartz, like many others, describes an "anti-government" ethos that emphasizes privatization and deregulation. Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233, 1235 (1995).

5. Karkkainen, *supra* note 2, at 473, 480.

Law School—have produced a particularly high concentration of governance scholarship.⁶ I also argue that both the movement and the school of thought correspond to policy reforms happening on the ground, pointing to the emergence of a legal model in practice.

While in formation, an active academic movement constructively presents the dynamic contest and internal disagreement within the school of thought. Often these disagreements correlate with the primary fields and projects that they oppose, in this case the traditional regulatory model. Legal Realism, for example, has been characterized by theorist William Twining as being, at its conception, a “movement,” rather than a distinct “school of thought,” consisting of “a loosely integrated collection of interacting individuals, with a complex network of personal relationships and an almost equally complex family of related ideas, given some coherence, perhaps, by a shared dissatisfaction . . . with the existing intellectual milieu of law in general.”⁷ As the governance school evolves, it will become easier to describe its underlying principles more in terms of what they stand for and less in terms of what they oppose. However, by its very definition as dynamic, flexible, adaptive, and iterative, governance as both a theory and a set of practical legal approaches cannot be captured, even if schematically, by a uni-

6. Increasingly active nodes also exist in other institutions, such as the University of Wisconsin, the Kennedy School of Government, Cambridge University, and the Australian National University. Exciting new multi-institutional collaboratives and research networks, such as the Project on Public Problem-Solving (POPPS) that Professor Karkkainen describes in his article, also contribute to the governance scholarship. *See id.* at 471 n.†.

7. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 26 (1973). Duncan Kennedy often draws the movement-versus-school distinction when comparing (nostalgically) critical legal studies (CLS) in the 1970s and today:

There isn't at Harvard Law School or nationally any CLS movement left. The movement completely collapsed several years ago. The school of thought, which is academic, is alive and well, but the school of thought doesn't have any activist component, period.

It is sort of ironic because the idea was to create an activist intellectual community, not just another set of bibliographical headings.

Hope Yen, *As HLS Mulls Its Mission, CLS Scholars Remain Quiet*, HARV. L. REC., Dec. 1, 1995, at 2 (quoting Duncan Kennedy). I would argue that, perhaps ironically, part of the indication of the success of a school of thought is the death of the active movement, as a result of the mainstreaming of its ideas. I also believe that, at least in the case of CLS, Kennedy uses the story of the collapse of the movement partly as a strategic narrative, alluding to the marginalization of some of its proponents and implying a de-radicalization of some of its ideas.

fied set of prescriptions. Although I attempt to provide both a theoretical framework for, and practical examples of, New Governance approaches, I recognize that any such formulation can and should be subject to continuous refinement and contextual application. In fact, it would be self-defeating if there was a fixed and ex ante agreement on all of its principles, rationales, and applications.⁸ The very core of the governance idea is applying law in a way that is sensitive to the particular context and nature of a social problem. It further demands continuously improving the chosen practices and relationships between the public and private policy partners.

II. THE SIGNIFICANCE OF A SYNTHESIS (BALANCING "LUMPING AND SPLITTING" IS NOT A NEUTRAL INTELLECTUAL MOVE)

Within legal thought, distressingly, there have not been many alternatives, in the form of midlevel engaged theory, to the dominant discourses of conventional regulation and recent calls for deregulation. In his presidential address at the 1992 annual meeting of the Law and Society Association, Joel Handler warned against the decline of metatheories by progressive thinkers: "[T]he opposition is not playing that game. It has belief systems, meta-narratives that allow theories of power, of action. When we look around, everyone else is operating as if there were Grand Narratives."⁹ Karkkainen's primary critique is that in putting together a vast range of academic literature and policy practices, important distinctions and differences are often unattended.¹⁰ Karkkainen is correct in his call for recognition of theoretical and practical debates within the evolving paradigm of governance, and I generally agree with the distinctions he draws. I would like to emphasize, however, that a crucial move within New Governance scholarship is the willing-

8. It is useful to refer here to Ian Ayres and John Braithwaite's description of "responsive regulation," which I characterize in *The Renew Deal* as part of the governance school. Lobel, *supra* note 1, at 345-47. Ayers and Braithwaite describe responsive regulation as "an attitude" that gives rise to "a wide variety of regulatory approaches" rather than "a clearly defined program or a set of prescriptions concerning the best way to regulate." IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 5 (1992).

9. Joel F. Handler, *The Presidential Address, 1992: Postmodernism, Protest, and the New Social Movements*, 26 *LAW & SOC'Y REV.* 697, 726 (1992) (emphasis omitted).

10. Karkkainen, *supra* note 2, at 480.

ness to generalize and to theorize across fields about the transformative potential of third-way public action.

While it may be true that “the two most basic intellectual moves are ‘lumping’ and ‘splitting’” and that any academic work should aim to do “a good deal of both,”¹¹ I disagree that the balance between “lumping and splitting” should be equal, or that it is politically neutral, across all contexts. In the contemporary political climate, *The Renew Deal’s* major contribution is the concerted effort to intervene in what has become a stalemated debate. The importance of New Governance scholarship is the growing consensus among progressive legal scholars that the regulatory state is no longer, and perhaps never has been, fulfilling the promise of just and equitable democracy.¹² Governance scholars recognize that the traditional structures of liberal democracy are limited in both their effectiveness and legitimacy.¹³ However, they refuse to abandon the role of an active state in a democracy.¹⁴ Recognizing the shortcomings of the two dominant orthodoxies of regulation and deregulation, governance as an operative project powerfully promotes an alternative vision that engages innovative public management techniques across legal fields. In their willingness to synthesize an emerging social vision, progressive reformers can move beyond entrenched and failed government structures while resisting flat attacks on the affirmative state.

The attempt to model new policy innovations across legal fields and to work through the ideas of renewal in a structured way is key in understanding the significance of the governance paradigm to the existing legal arena. Disparate areas of public policy reveal commonalities while requiring distinct combinations of policy approaches. I have argued that the governance model consists of eight clusters of approaches.¹⁵ There could, of course, be alternative formulations. Through modeling, we can begin to test the assumptions of governance against the richer

11. *Id.* at 479.

12. See DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003) [hereinafter DEEPENING DEMOCRACY]; Orly Lobel, *Rethinking Traditional Alignments: Privatization and Participatory Citizenship*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY (Clare Dalton ed.) (forthcoming 2005) (manuscript at 3–4, on file with author).

13. See DEEPENING DEMOCRACY, *supra* note 12.

14. See *id.*

15. See Lobel, *supra* note 1, at 371–404.

contexts of comparative and context-specific studies. We can also better show the contest between various commitments and meanings that underlie the theoretical vision. These are indeed important directions for future research and policy learning.

III. THE ROUTE OF IDEAS AND PLURALITY OF RATIONALES

In addition to providing a synthesis of an emerging governance vision, one of my motivations for writing *The Renew Deal* was to critically comment on the ubiquity of announcements of new approaches in various legal fields. I try to illuminate some of the dynamics of “newness” in the politics of legal academia and to historicize and problematize the ways in which new paradigms are translated into actual contexts.¹⁶ I therefore look for patterns in the logic and rationales that motivate New Governance scholarship. I find that many suggestions on policy innovation cite rationales that are at once internal to legal theory, externally triggered by the political economy, and cyclically recurring for professional and intellectual rejuvenation. I contend that it is not necessary to accept any one theoretical account, empirical observation, or causal explanation in order to accept the general argument on the necessity of adopting more governance-based approaches to public policy. Moreover, the constant availability of parallel and often incompatible logics for change serves the openness of the governance theory in complex ways. The hope is that precisely the understanding of the existence of competing, and often incompatible, rationales for a shift (not only *across* strands, as Karkkainen describes, but also *within* each account) will be liberating. Acknowledging the complex framework of such coexisting modes of crisis and opportunity, regression and progress, and stagnation and innovation advances the ways we debate, the ways we categorize and distinguish ourselves, and the ways in which we use the framework strategically. Moreover, we can learn to recognize the ways in which seemingly incompatible rationales all offer some truth in decoding contemporary realities.

Karkkainen helpfully describes how governance scholarship includes many strands and warns against conflating all of them with continental autopoiesis and reflexive law, developed primarily by Niklas Luhmann and Gunther Teubner. He ar-

16. See *id.* at 350–57.

gues that another leading strand, that of Deweyan “experimentalism,” is “deeply skeptical of Teubner’s systems theory-based approach, which both implies and demands a hyper-rationalist capacity to map and reengineer the internal dynamics of complex social systems so as to achieve the self-regulating reflexivity that Teubner recommends.”¹⁷ Karkkainen is correct that the theory of autopoiesis does not represent the full range of rationales and ideas within the governance literature. For one thing, there are certainly (as with other transatlantic jurisprudential schools of thought) important distinctions in form and substance between continental and American thinkers.¹⁸ However, an important goal of *The Renew Deal* is to show that there are strikingly similar patterns of explanation between, for example, the strands of reflexive law and democratic experimentalism. Both describe the need for third-way approaches between market and state as part of the crisis of the regulatory state in complex modern economies, and both demand internal progress in legal and democratic theory. Patterns of similarities also exist in the operative proposals of both theories. The importance of Luhmann’s systems theory, later developed by Teubner, is its shift in perspective from an image of state versus society to an analysis of law, politics, and economics all within one comprehensive framework. Interestingly, in his most recent writing on civil constitutions, Teubner explicitly links his writing to the idea of democratic experimentalism and the related ideas of a “directly deliberative polyarchy.”¹⁹ Simi-

17. Karkkainen, *supra* note 2, at 484.

18. It might be helpful to clarify here that by the term “Renew Deal,” I meant to signify both the “constitutional moment” of the shift—moving to a new stage in the public/private relationship—and to capture a key feature of New Governance, or the constant call for renewal from within the model. While I often focus on the divergence from the American New Deal paradigm, I try to show in the article, as Karkkainen helpfully elaborates, that the practices and the theory are transatlantic and global. Indeed, governance in many ways signifies the shift from the New Deal concept of law, society, and the market as exceptionally American to a new understanding of twenty-first century globalizations. On the notion of globalizations in the plural, see Orly Lobel, *Family Geographies: Global Care Chains, Transnational Parenthood, and New Legal Challenges in an Era of Labour Globalization*, in 5 *LAW AND GEOGRAPHY: CURRENT LEGAL ISSUES* 2002, at 383 (Jane Holder & Carolyn Harrison eds., 2003); Lobel, *supra* note 12, at 5–6.

19. Gunther Teubner, *Civil Constitutions in World Society: Alternatives to State-centred Constitutional Theory* 8 (2004) (unpublished manuscript, on file with author). Teubner cites writings on democratic experimentalism and describes the links between

ideas about private government in the US and about co-determination

larly, the concept of reflexive law notably informs directly and indirectly those identified with the experimentalist literature.²⁰ For example, Michael Dorf, coauthor of *A Constitution of Democratic Experimentalism*,²¹ has recently described political scientist Jean Cohen's account of reflexive law, which builds on, and partly modifies, Teubner's theory, as "quite similar to what Charles Sabel and I have called 'democratic experimentalism.'"²² Dorf offers, however, perhaps similarly to Karkkainen, "an amended account of reflexive law in which data drawn from experience at the relatively local level are continually refined and transmitted to the relatively central standard-setter, which uses the data continually to update the standards all must meet. This amended account is accordingly both top-down and bottom-up . . ." ²³ These exchanges reflect some of the transatlantic diffusion of governance ideas. The common theme is the shift to debates about *policy through design* and the *pluralization of forms* of public action. The focus is on institutional architecture and the relationships among private and public actors rather than on the substantive prescription of state legislation, rules, and judicial decisions. Questions about the balance between central coordination, monitoring, and bottom-up reflexivity are at the core of the debates about New Govern-

and other forms of democratisation of social sub-systems in Europe . . . Today, it can link up directly with post-Rawlsian approaches to deliberative theory of democracy that seek to identify democratic potential in social institutions, and to draw normative and institutional consequences.

Id. See also Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289, 291 (Christian Joerges & Renaud Dehousse eds., 2002) (describing a "new principle of differential, democratic problem-solving" called "experimentalism or directly-deliberate polyarchy").

20. See Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 CARDOZO L. REV. 1987 (1998).

21. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 322 (1998).

22. Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384, 386 (2003) (reviewing JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* (2002)).

23. *Id.* at 384. Dorf further explains that "[f]or Cohen, as for systems theorists like Luhmann and Teubner, reflexive law is a mechanism by which collective decisions of society as a whole steer other actors and institutions. In my version (democratic experimentalism), it is also a mechanism by which relatively local actors and institutions influence collective decisions." *Id.* at 398; see also Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 960 n.277 (2003) (describing Cohen's version of "reflexive law" as "something like what I call experimentalism").

ance, and there remains much on the agenda to be deliberated and learned.

IV. FORMALIZING FLEXIBILITY: "SOFT" DOES NOT EQUAL "VOLUNTARY"

Primarily international and European legal scholars have used the term "soft law" to name the shift to governance as a whole. European Union scholar Claire Kilpatrick emphasizes that "[s]oft law is shorthand for 'different from law (in its classical conception)', not 'less than law.'"²⁴ Questions about softness, regulatory flexibility, and regulatory/governance interactions are no doubt some of the most interesting and complex questions in the governance literature. Karkkainen accurately warns against the equation of governance approaches with merely voluntary guidance. It is true that the concepts of "soft law" or regulatory flexibility risk being misunderstood as informalization or deregulation. However, acknowledging the existence of flexibility in the legal process certainly does not imply a project "wholly reliant upon voluntarism or unsanctioned, aspirational norms."²⁵ In fact, what is new in the governance model is not the *existence* of soft aspects of law, but rather their *recognition*. Governance cannot and should not replace conventional, sanctioned approaches in all contexts. Moreover, governance processes often are sustained by the background of existing regulatory rules. Even more fundamentally, the very idea of "flexibility" depends on the relative perspective of those affecting and affected by the policy.²⁶ It may therefore be helpful to emphasize this point by describing the shift to governance as the *formalization of informal practices* that have always shaped policy.

In a series of articles, Karkkainen has contributed to our understanding of the complex, ongoing interactions between "hard" and "soft" measures in the area of environmental law.²⁷

24. Claire Kilpatrick, New EU Employment Governance and Constitutionalism 5 (2004) (unpublished manuscript, on file with author). The risk of misunderstanding flexibility as voluntarism is partly the reason why I prefer the term "governance" to such alternatives as "soft law" or "post-regulation," which can imply something "less" than conventional legal approaches.

25. Karkkainen, *supra* note 2, at 487.

26. See Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 111 (2003).

27. See, e.g., Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L.

In my own field of employment and labor law, I similarly warn against the mischaracterization of governance approaches as merely relying on voluntary processes.²⁸

In new research on occupational safety systems, I argue that we should expand governance-based approaches to worker safety while at the same time augmenting targeted enforcement.²⁹ The literature on regulating occupational risk has largely focused on the costs and benefits of top-down standards versus market-based approaches, including pricing, premium incentives, and information disclosure. Other aspects of the legal process, including the stages of implementation and enforcement and the ways in which government can diversify its interaction with regulated parties, remain relatively undeveloped. Writing about worker safety, I ask three questions: When are cooperative versus coercive styles of regulation most effective? What is the relationship between collaborative approaches and punitive enforcement? How can multiple approaches coexist and dynamically relate to each other so as to form a comprehensive policy system?³⁰ I argue that for the Occupational Safety and Health Administration (OSHA) to be effective, it must rely on both cooperative compliance and coercive enforcement.³¹ It is important to emphasize, however, that a dynamic and interdependent blend of governance and regulatory approaches to occupational safety represents a departure from the initial design of OSHA as a regulatory agency. And despite the fact that OSHA has been experimenting with governance approaches for some time now, it is also a departure from the paradigmatic perception of the Agency. The shift to workplace safety governance is the shift to a *broader spectrum of public*

REV. 943 (2003); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555; Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903 (2002).

28. See, e.g., Orly Lobel, *The Paradox of "Extra-Legal" Activism: Critical Legal Consciousness and Transformative Politics* 26–27 (2004) (unpublished manuscript, on file with author).

29. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety* (2004) (unpublished manuscript, on file with author).

30. *Id.*

31. *Id.*

interventions, including both sanctioned and semivoluntary reforms.

Similarly, in my work on transnational labor markets, I seek to differentiate some expressions of the Corporate Social Responsibility (CSR) movement, which focus almost exclusively on such voluntary mechanisms as corporate codes of conduct, social labeling, and private certification by nongovernmental actors.³² These privatized responses to labor globalization frequently lack effective implementation, monitoring, and adequate incentives to comply. They further permit the decline of public forums for defining labor standards and welfare principles. I contrast these with New Governance approaches to transnational labor regimes, which emphasize the interaction between formal (diversified) state laws and decentered processes.³³ These include leveraging the roles of existing international institutions and enhancing tripartite participation of governments, industries, and social partners, including labor movements and nongovernmental organizations. The emphasis is on multiparty participation, acceptance of regulatory heterogeneity, and policy-linkage.³⁴ On the agenda for New Governance scholarship is to continue to distinguish governance approaches, which maintain the perspective of public administration, from noncentered, privatized forms of civic action.

V. DIRECTIONS FOR FUTURE RESEARCH

Although I concur with Karkkainen on many of the distinctions he draws, I reemphasize the particular value in recognizing an emerging consensus. I hope that *The Renew Deal*, as well as this Surreply, will highlight points of convergence among diverse thinkers and “brands” among the governance scholarly community. Much remains to be studied regarding

32. See, e.g., Lobel, *supra* note 28, at 26–27.

33. *Id.* at 35–38.

34. See JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION (2004); Lobel, *supra* note 1, at 385–87 (discussing the European Union’s recent adoption of the Open Method of Coordination as a large-scale example of a governance approach); David M. Trubek & James S. Mosher, *New Governance, Employment Policy, and the European Social Model*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 33, 50–52 (Jonathan Zeitlin & David M. Trubek eds., 2003) (recognizing participation, integration of policy, and diversity as major objectives of governance, and analyzing them in the context of the European Employment Strategy).

the neglected aspects of the legal process and of policy design, including: How do traditional stages of the legal process—legislation, rulemaking, implementation, enforcement, and adjudication—that have been kept separate under different governmental branches, departments, and procedures become more dynamic and interdependent? What conditions are most likely to trigger shifts to governance-based approaches? What are contemporary success stories of governance-in-action? Legal scholarship certainly displays no shortage of case studies on the failure of public policy. Future lawyers in law school classrooms, as well as the legal community-at-large, can benefit from learning not only about what does not work, but also about what does work at the levels of policy implementation.

Critical thinkers have long explored how the pluralization of legal and social concepts can expand our imaginative spectrum. Rather than remaining monolithic, “public action” and “regulation” as concepts can benefit from the innovative work of governance scholars.³⁵ No particular process for collective action can promise results that follow *a priori* logic. However, given the current climate of disillusionment about the law’s potential to bring about social change, a shift in the default assumptions about the range of public solutions is a positive development. The departure from a certain set of conventional antagonistic moves in the debates about public policy and the new intellectual energy surrounding the New Governance paradigm broadens the range of responses available to lawyers and policymakers concerned with just and equitable social arrangements.

35. One example of such a benefit is the new ways in which legal scholars can debate the merits and the stakes of “privatization” in a more meaningful way. In *Rethinking Traditional Alignments*, I observe that for progressive legal thinkers, privatization has largely signified the retreat of government from public provision. Lobel, *supra* note 12, at 2. I argue that an alternative and more useful approach is one that recognizes that “[p]rivatization can be restructured as a *public* technique of governance to nurture greater citizen involvement to facilitate creativity and experimentation and to mobilize civil society.” *Id.* at 4–5. The first step in such a “progressive intervention in the discourse on privatization” is to “proliferate[], reflect[] upon, and internally challenge[]” the concept and execution of privatization. *Id.* at 5.