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Changes in Governance: A Cross-Disciplinary Review of Current Scholarship

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CHANGES IN GOVERNANCE: A CROSS-DISCIPLINARY REVIEW OF CURRENT SCHOLARSHIP

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I. INTRODUCTION

More and more scholars and activists are talking about governance, but the literature is "numerous, diverse and fragmented, and has not formed any consistent tradition."[1] The move to governance seems broadly to reflect the view that paradigms like "regulation" or the "Westphalian" system in international relations are no longer capacious enough to generate useful theory or guide the humane practice of social control.[2] There is widespread agreement that governance is important[3]

1. Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 41, 44 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004). While our review is limited to material published in English, the concern with governance is, as this volume itself illustrates, global. Given the size and diversity of the literature, our account is necessarily selective; we have aimed more to represent the geographic and disciplinary diversity of governance work than to exhaustively catalog any particular thread.

2. *Compare,* Michael Moran, *Review Article: Understanding the Regulatory State*, 32 BRIT. J. POL. SCI. 391 (2002) (categorizing major scholarly trends within a "regulation" paradigm), *with* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought,* 89 MINN. L. REV. 342 (2004) (tracking the emergence of a "Renew Deal" governance paradigm); *see also* David Fidler, *Constitutional Outlines of Public Health's "New World Order"*, 77 TEMP. L. REV. 247 (2004) (discussing emergence of a new paradigm of international governance).

3. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE

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and that it is (or ought to be) changing.[4] But exactly what is governance? How is it changing, what is happening to the state, and how are actors at various levels of social organization promoting or adapting to changes in governance? The aim of this paper is to explore for a broader legal audience what researchers and theorists in a wide range of fields have made of the ferment in governance, and to identify important lessons for people interested in how to improve it locally,

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ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1993); COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBOURHOOD (1995); Richard Dodgson & Kelley Lee, *Global Health Governance: A Conceptual Review in* Global Governance: Critical Perspectives 92-93 (Rorden Wilkinson & Steve Hughes eds., Routledge 2002); U.N. Human Settlements Programme [UN-HABITAT], *The Global Campaign on Urban Governance: Concept Paper* (2d ed. March 2002), *available at* http://hq.unhabitat.org/downloads/docs/2099_24326_concept_paper.doc [hereinafter UN-HABITAT]; R.A.W. RHODES, UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY AND ACCOUNTABILITY (Open University Press 1997); [hereinafter RHODES, UNDERSTANDING GOVERNANCE]; John Braithwaite, *Accountability and Governance under the New Regulatory State,* 58 AUSTL. J. PUB. ADMIN. 90 (1999); Jody Freeman, *The Private Role in Public Governance,* 75 N.Y.U. L. REV. 543 (2000); Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001); Jan Kooiman, *Governance: A Sociopolitical Perspective, in* PARTICIPATORY GOVERNANCE. POLITICAL AND SOCIETAL IMPLICATIONS 71-72 (Jürgen R. Grote & Bernard Gbikpi eds., 2002); Goran Hyden, Julius Court & Kenneth Mease, *Making Sense of Governance: The Need for Involving Local Stakeholders* (Overseas Development Institute 2003), *available at* www.odi.org.wk/wga_governance/Docs/Making_sense_Governance_stakeholders.pdf; Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law,* 79 CHI.-KENT L. REV. 355 (2004); Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State, in* THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE 145-46 (Jacint Jordana & David Levi-Faur eds., 2004); Jennifer Wood, *Cultural Change in the Governance of Security*, 14 POLICING & SOC'Y 31 (2004); Louise G. Trubek, *New Governance Practices in US Health Care*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 245-46 (G. DeBurca & Joanne Scott eds., 2006); Thomas Dietz, Elinor Ostrom & Paul C. Stern, *The Struggle to Govern the Commons*, 302 SCI. 1907 (2003); Tony Bovaird, *Public Governance: Balancing Stakeholder Power In A Network Society*, 71 INT'L REV. ADMIN. SCI. 217 (2005); Monica Blagescu & John Young, *Partnerships and Accountability: Current Thinking and Approaches Among Agencies Supporting Civil Society Organizations* (Overseas Development Institute 2005), *available at* http://www.odi.org.uk/RAPID/Publications/Documents/WP255.pdf.

    4. TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges, Inger-Johanne Sand, Gunther Teubner eds., 2004); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Kooiman, *supra* note 3, at 71; Peter N. Grabosky, *Using Non-Governmental Resources to Foster Regulatory Compliance*, 8 GOVERNANCE 527 (1995); Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3 (Christian Joerges, Inger-Johanne Sand, and Gunther Teubner eds., 2004); David Post & David R. Johnson, *Chaos Prevailing on Every Continent: Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055 (1998); Lobel, *supra* note 2; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Peter J. Spiro, *NGO's in International Environmental Lawmaking: Theoretical Models, in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 770 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007); David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 542 (2007).

nationally, and internationally. We seek to link what lawyers are writing to a rich literature on governance theory and practice in other fields. Specifically, we address two main problems. The Description Problem poses the question of what is the most accurate, as opposed to the formal, description of where governance is located and how it is exercised? The Prescription Problem is how to reform or replace institutional forms and constraining norms that no longer perform the functions they once did. In the words of Roberto Unger, legal scholars tend towards a kind of "institutional fetishism" in matters of governance, behaving as if the only institutions that can deliver the goods of good governance are those that have done so in the past.[5] The Prescription Problem in this light is a challenge to practice true innovation in governance.

We begin, in Part II, by canvassing definitions of governance. Here there is considerable overlap, if not agreement, across fields as diverse as health, the environment, and international relations. Governance may be defined as organized efforts to manage the course of events in a social system. Governance is about how people exercise power to achieve the ends they desire, so disputes about ends are tied inextricably to assessments of governance means. "Governance" is not synonymous with "good governance." Any given contemporary governance system may be inefficient, corrupt, or unresponsive to the needs of the governed. Governance can be "good" in at least two senses: it can deliver good results and it can work through processes and institutions that meet broadly accepted standards of justice and due process. Ideally governance is good in both of these ways, and, indeed, many people believe that governance that fails the second criterion normally will have difficulty delivering on the first.

In Part III, we look at how scholars in a variety of fields have described the changes in contemporary governance. The main theme in the literature is the fragmentation of state sovereignty and the consequent multiplication in the number of agencies and forms of power that are active in the management of social systems. There is also fairly wide agreement that it no longer makes sense to conceive of the state as the monopolist of governance. Once it was dogma that our collective world was divided into two fundamentally different spheres: the public sphere—which was the realm of governance, and the private sphere— the realm of the governed. This crucial distinction has eroded. States do

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5.   ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 8-10 (Verso 1996).

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not enjoy a monopoly on governance, and themselves are often governed by non-state actors.

It now makes more sense to describe our world as polycentric, with multiple agencies and sites of governance that govern through a variety of forms of power. Both public and private governance have substantial collective effects, and in both forms there are important (though different) kinds of democratic deficits between the stake people have in decisions and their capacity to influence or be protected from them. This is as true at the international level (where the proliferation of non-state governing actors has been characterized as a "post-Westphalian" regime) as it is at the local (where resource-poor governments and non-governmental organizations struggle to cope with the externalities of a global economy over which they have little or no control). Citizens are enlisted in new governmental and hybrid institutions to oversee community policing, set local budgets, and monitor public expenditures. Throughout the literature, there is discussion of the governing power of transnational corporations. Non-governmental organizations ("NGOs") and foundations, though not generally as wealthy or effective as corporations, are also vital governors at all levels. There is no mistaking their expanding role in setting health priorities and providing services. "Dark networks," like Al Qaida or organized crime syndicates, are also seen as agencies of governance.

None of this means that states are no longer important governors. Many states retain decision-making powers in many spheres. Moreover, states are deliberately sharing power as a means of exercising it. Much of this falls under the umbrella of "partnership" approaches to governance, wherein the state attempts to maintain a hand on the tiller, steering governance processes in the public interest. Even where states are not decision-makers in governance, they typically remain powerful transmitters and implementers of decisions made by others.

Complexity, diversity, and particularity drive accounts of governance today. The structure of governance is most commonly described in network terms. Writers point to phenomena as diverse as the Internet, public-private partnerships, markets, informal policy networks at the international level, and "whole of government" initiatives as examples of networked governance in action. Though there are differences in how the network metaphor is used, network accounts of governance tend to emphasize the importance of information flow as a means and measure of good governance. Those that have, and can use, information are at a significant advantage over those that are cut off from information or unable to gather or use it effectively.

The fracturing of governance has led to an explosion of interest in the tools of governance. Force, which the Hobbesian state was designed to constrain, continues to be a tool of both state and non-state governance. Money is also a staple. At the same time, scholars have been extremely successful in highlighting how governance may be accomplished through "the regulation of social meaning."[6] Information is proposed hopefully as a prime tool for constraining and replacing these traditional means of exercising power.[7] New institutions and practices of deliberation, and better mobilization of local knowledge and capacity, are pursued as means of making governance systems fairer and more efficient.

Our review finds that writers across disciplines consistently discuss three key variables of governance change and innovation:

Shifts in the institutions exercising governance control. There is an apparent shift of the locus of control as new institutions emerge and others decline in influence or disappear.

Changes in the methods of power. Governance is changing as governors find new ways to project power towards other governors and individuals in the system.

Changes in the nature or effectiveness of constraints on governors. Governance systems change with variation in the potency of social norms, institutional checks and balances, and technologies of accountability and transparency.

Governance is not just changing, but, many scholars argue, is also in a state of poor health. The diagnoses of the causes of these problems differ, as therefore do the prescriptions for practical remedies. Much of the difference in opinion hinges on expectations of the state. Some see the state as too weak, and needing to be strengthened. To others, the state remains too strong, too undemocratic, and therefore needs to be better constrained or stripped of some of its jurisdiction. A number of scholars have argued that old models of governance are paralyzed, and

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6. *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). Foucault is primary source for this sort of thinking, yet one must be careful about drawing on Foucault in this discussion. Most of the literature we review is frankly positivist and instrumentalist, devoted to governance as a tool for doing things. The literature follows Foucault in his recognition of the decentralized, social character of power, but is far less attentive to the problematization element of Foucault's governmentality framework. For an excellent discussion of new governance from a Foucaultian governmentality perspective, *see* Nikolas Rose, *Government and Control*, 40 BRIT. J. CRIMINOL. 321 (2000).

7. MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE, ECONOMY, SOCIETY AND CULTURE (2d. ed. 2000); Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUROP. L. J. 313 (1997).

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need to be replaced, while some have been concerned that new modes of governance are increasingly exploited by the strong at the expense of the weak. While it is not our purpose in this paper to offer an intellectual history of the recent move to governance,[8] we do briefly highlight two fundamental critiques of state-centered governance that seem to appear throughout the governance literature: that "old" institutions of traditional state governance are no longer working very well, and that a principal reason for this is, as it were, epistemological—social systems have become too complex, diverse, and particular for centralized, top-down governance to manage.

Part IV examines efforts to remake governance over the past twenty years. These may be separated into two "genres" of reform, reflecting contrasting views of the proper, or feasible, role of the state: "reinvention of government" and "reinvention of governance." Reinventing government consists in efforts to improve state regulatory capacity with new tools, mentalities and institutions. Its emblematic expression comes in strategies that devolve the "rowing" of governance (providing services) to non-state agencies, while retaining the "steering" (specifying the goals) within traditional state institutions. If reinventing government is a matter of partnership between public and private agents, reinventing governance can be thought of as a divorce. Reinventing governance uses some of the same methods of power, but focuses on innovation governors that may act with little or no connection to the state.   The key distinction between reinventing government and reinventing governance seems to be the ceding of true power to non-state actors. New governance institutions and practices cannot flourish unless new governors are given real control over budgets and priorities. Reinventing government has had some successes, but is no panacea. Reinventing governance has proven to be an exciting concept, put into practice in a variety of interesting ways, but its broader effects remain a matter of debate.

In Part V, we conclude with some critical observations about contemporary scholarship on governance innovation.   The most important question is the extent to which the reports of the death of the state have been exaggerated. Much of the impetus (and, to be fair, the creativity) in the new governance literature comes from the claim that top-down, state rule is often failing, which means both that the state cannot be counted on to deliver crucial governance goods and that it

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8.   For an ambitious attempt to do so, ignore the unfortunate coinage in the title and see Lobel, *supra* note 2.

really cannot stand in the way of democratic innovation. A second concern has to do with the centrality of local democracy in the innovation literature. Are advocates of innovation idealizing participatory democracy at the lowest possible level of social organization? The literature often suggests as much, in spite of the well-known perils of localism. Finally, there is the relation of research to practice and the importance of implementation factors on any sort of governance innovation. With a topic as complex as this, the "correct" description of governance in theoretical or empirical terms is an infinitely receding goal. We need both theoretical and empirical tools, but the more important issue is the prescription: what should governance become and how should it get there? In the literature we review, we see many examples of theory and data being moved into practice, on scales both large and small. We also see too many instances of good theory becoming good practice—and then failing for lack of social investment for sustainability and scale-up.

II. DEFINING GOVERNANCE

There is little disagreement that governance is changing, but what "governance" means and what sorts of changes are occurring are not always specified. Governance has become a popular topic, and so risks becoming a point of false rhetorical convergence, a term that means all things to all people.[9] We begin by adopting a definition of governance to ground this article.[10] Aiming for a level of abstraction on which we

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9. Bovaird, *supra* note 3; Mark Bevir & R.A.W. Rhodes, *Searching for Civil Society: Changing Patterns of Governance in Britain,* 81 PUB. ADMIN. 41 (2003) [hereinafter Bevir & Rhodes, *Searching*]; MARK BEVIR & R.A.W. RHODES, INTERPRETING BRITISH GOVERNANCE (Routledge 2003) [hereinafter BEVIR & RHODES, INTERPRETING]; Mark Bevir, R.A.W Rhodes & Patrick Weller, *Traditions of Governance: Interpreting the Changing Role of the Public Sector,* 81 PUB. ADMIN. 1 (2003) [hereinafter Bevir, Rhodes & Weller, *Traditions*].

10. There are many definitions of governance in many literatures. *See, e.g.*, Dodgson & Lee, *supra* note 3; OSBORNE & GAEBLER, *supra* note 3; UN-HABITAT, *supra* note 3; Kooiman, *supra* note 3; COMMISSION ON GLOBAL GOVERNANCE, *supra* note 3. In the broadest sense, the essence of modern purposive governance is captured in Guillaume de la Perrière's famous statement in *Mirroire Politique*: "the right disposition of things, arranged so as to achieve convenient ends." Michel Foucault, *Governmentality, in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 94 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991) [hereinafter Foucault, *Governmentality*). The earliest modern practitioner incarnations of the concept of "governance" pertained to the management of the population and economy as entities, the internal characteristics and processes of which were rendered conceptually available by the advent of the statistical sciences. Thus, statistics made it possible for practitioners to think in terms of where the population or economy stood on aggregate measures (i.e. empirical "norms") and, by extension, where they would like these aggregates to be on the same measures (i.e., desired "ends"). "Governance"

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thereby became the "rational" affair of systematic observation, policy design, implementation, measurement, and adjustment towards closing the gap between norms and desired ends.

Contemporarily, "good governance" in the field of economic and social development—epitomized in the language and practices of such international agencies as the World Bank, International Monetary Fund, and World Trade Organization—is orientated around the twin tracks of enhancing the efficiency of the state administration (i.e., combating corruption and engaging "governmental rightsizing") coupled with so-called "second-generation reforms" to build the critical physical infrastructure and promote the individual skills and collective capacities necessary for the development of health, security, and industry under the banner of "universal human rights." *See* Kees Van Kersbergen & Frans Van Waarden, *'Governance' as a Bridge Between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy,* 43 EUR. J. POL. RES. 143-45 (2004) Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters V: Aggregate and Individual Governance Indicators for 1996-2005* (World Bank 2006), *available at* http://econ.worldbank.org (follow "Document Search" hyperlink; search for "Governance V Kaufmann").

With respect to the social sciences, governance as an object of study is approached in a variety of ways. Thematically, it can be said that differences in the usage of the term are a matter of emphasis more than substance. Universally, it is acknowledged that governance entails a set of both repressive and constitutive processes oriented towards shaping outcomes that extend beyond the state. Nevertheless, commentators differ on the relative importance they assign to the state versus other agencies, and repressive versus constitutive forms of power, in processes of governance. Commentators representing different academic perspectives also differ in terms of the level at which they focus their analysis in keeping with the "conceptual legacy" of their particular research traditions. Thus, "international relations" scholars have come to understand "governance" in terms of "systems of rule … that sustain mechanisms designed to ensure [a collectivity's] safety, prosperity, coherence, stability, and continuance." "[I]nternational collectivities" are not limited to the state or state-sanctioned international institutions but include other entities such as international non-governmental organizations. *See* James N. Rosenau, *Change, Complexity and Governance in Globalizing Space, in* DEBATING GOVERNANCE: AUTHORITY, STEERING AND DEMOCRACY, 167, 171 (Jon Pierre ed., Oxford University Press 2000). Another usage of the term "governance" is derived from the "network studies" stream of political science. This literature tends to see governance in terms of the tendency of networks of governmental players to derive both formal and informal protocols for interactive and independent conduct through the "messy actualities" of partisan brokerage, and more "ideological" modes of deliberation. *See*, *e.g*., Elinor Ostrom, *Coping with Tragedies of the Commons*, 2 ANN. REV. POL. SCI. 493 (1999), *available at* http://plato.acadiau.ca/COURSES/pols/grieve/3883/readings/ostrom_commons_tragedy.pdf.

Similar themes are spoken in various streams of development studies literature. Françoise Barten et al., *Democratic Governance—Fairytale or Real Perspective? Lessons from Central America*, 14 ENV'T AND URBANIZATION 129, 131 (2002), for example, argue that "governance expresses the relationship that exists between the state and civil society with respect to problems and policies of national interest." Other authors working within this framework retain much of the flavor of Barten's definition, while moving beyond the collective envelope of the nation. Lars Kohlmorgen observes that governance includes "the interplay of different institutional forms ranging from public to private forms of regulation (with different logics of steering and action) and comprises the interaction of different actors (with different power resources and interests)." LARS KOHLMORGEN, INTERNATIONAL ORGANIZATIONS AND GLOBAL HEALTH GOVERNANCE. THE ROLE OF THE WORLD HEALTH ORGANIZATION, WORLD BANK AND UNAIDS 2-3 (German Overseas Institute 2005). Further, given that "there is not only an increase of intergovernmental and international activities, but also a significant [rise in] transnational activities [involving civil society and the private sector], we can speak of global instead of international governance . . . [which entails] the totality of collective regulations to deal with international and transnational interdependence problems." *Id.*

Also very useful for our purposes is the "socio-legal" or "political sociological" treatment of the

can move across many literatures, we take governance to mean "the management of the course of events in the social system."[11] To the same end, we will reduce the complexity of governance structures to three main elements: *institutions*—organizational sites where governing resources are gathered and mobilized (government agencies, corporations, foundations, NGOs, street gangs);[12] *methods of power*—tools that governors use to project influence (deliberation, bribes, military force, claims of legitimate right to rule, forum-shifting);[13] and *constraints on governors*—limitations on the freedom of action of

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concept of "governance" developed in the "governmentality" literature that originates in the work of Michel Foucault. Rather than approaching governance as a problem to be solved, Foucaultian work understands the concept in terms of a conceptual category that shapes the ways in which we subsequently look at and attempt to engage the world. *See, e.g.*, H.K. Colebatch, *Government and Governmentality: Using Multiple Approaches to the Analysis of Government,* 37 AUSTL. J. POL. SCI. 417 (2002); Rose, *supra* note 6.

11. *See* Scott Burris, Peter Drahos & Clifford Shearing, *Nodal Governance*, 30 AUSTL. J. LEG. PHIL. 30 (2005).

12. *See* Teubner, *supra* note 4, at 10-13; Wayne Cameron, *Public Accountability: Effectiveness, Equity, Ethics*, 63 AUSTL. J. PUB. ADMIN. 59 (2004); G. SHABBIR CHEEMA, BUILDING DEMOCRATIC INSTITUTIONS: GOVERNANCE REFORM IN DEVELOPING COUNTRIES (2005); Vivien Collingwood & Louis Logister, *State of the Art: Addressing the INGO 'Legitimacy Deficit'*, 3 POL. STUD. REV. 175 (2005); M. Shamsul Haque, *Governance and Bureaucracy in Singapore: Contemporary Reforms and Implications*, 25 INT'L. POL. SCI. REV. 227 (2004); M. Shamsul Haque, *Governance Based on Partnership with NGOs: Implications for Development and Empowerment in Rural Bangladesh*, 70 INT'L REV. ADMIN. SCI. 271 (2004); THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); Spiro, *supra* note 4.

13. *See, e.g.*, John Braithwaite, *Methods of Power for Development: Weapons of the Weak, Weapons of the Strong*, 26 MICH. J. INT'L. L. 297 (2004) [hereinafter Braithwaite, *Methods*] (elaborating on the concept of "methods of power"); Spiro, *supra* note 4 (describing strategies used by NGOs in international legal fora). Work in the field of public administration studies has been especially useful in describing the practical tools of governance. *See* Rita Abrahamsen, *The Power of Partnerships in Global Governance*, 25 THIRD WORLD Q. 1453 (2004); Bovaird, *supra* note 3. On broader theoretical issues addressing the nature and machinations of power behind tools and techniques of governance, see various domains of socio-legal studies: Graham Burchell, *Liberal Government and Techniques of the Self, in* FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT 19, 22 (Andrew Barry, Thomas Osborne & Nikolas Rose eds., 1996); BARBARA CRUIKSHANK, THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS 2 (Cornell University Press 1999); Foucault, *Governmentality*, *supra* note 10, at 87-104; BARRY HINDESS, DISCOURSES OF POWER: FROM HOBBES TO FOUCAULT (Blackwell Publishers 1996) (cataloging dominant scholarship on the concept of power); Nikolas Rose, *The Death of the Social? Refiguring the Territory of Government*, 25 ECON. & SOC'Y. 327 (1996) [hereinafter Rose, *Death of Social*]; NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT (1999) [hereinafter ROSE, POWERS]; Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOC. 173 (1992); *see also* Pierre Bourdieu, *Epilogue: On the Possibility of a Field of World Sociology*, *in* SOCIAL THEORY FOR A CHANGING SOCIETY (Pierre Bourdieu & James S. Coleman eds., Westview Press 1991) (working in field of "reflexive sociology"); *accord* PIERRE BOURDIEU & LOIC WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY (University of Chicago Press 1992).

governors that may arise from laws (like a constitution or treaty), competition from other governors (as in a market), or from culture (social norms).[14]

Much of what is meant by governance has to do with manipulating the elements of governance to achieve effective and efficient management—i.e., governance that works. In the political science literature (especially that associated with the science of public administration), well-functioning management and control is referred to as the "governability" of the system.[15] A system of governance that is high on governability is equipped with appropriate tools and capacities to manage itself (e.g., clear lines of information transfer) and to intervene effectively in various policy domains of interest (e.g., clear and effective legal powers, adequate and well-managed resources, etc.). There are on-going attempts to operationalize "good governance" in the sense of accountable, honest administration of state business.[16]

Good governance is not merely about governability or management, however. It also implies goals towards which systems are being directed, and so governance as a process is inextricably linked to

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14. *See* Jean Marc Coicaud, *Reflections on International Organisations and International Legitimacy: Constraints, Pathologies, and Possibilities*, 53 INT'L SOC. SCI. J. 523 (2001); RICHARD A. FALK, THE DECLINING WORLD ORDER: AMERICA'S IMPERIAL GEOPOLITICS (Routledge 2004); David Held, *The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalization*, *in* GLOBAL DEMOCRACY: KEY DEBATES 17, 22 (Barry Holden ed., Routledge 2000); Björn Hettne, *In Search of World Order*, *in* GLOBAL GOVERNANCE IN THE 21ST CENTURY: ALTERNATIVE PERSPECTIVES ON WORLD ORDER 6, 13 (Björn Hettne and Bertil Odén eds., 2002); Teubner, *supra* note 4, at 10-13; Martin Hewson & Timothy J. Sinclair, *The Emergence of Global Governance Theory*, *in* APPROACHES TO GLOBAL GOVERNANCE THEORY 3, 9 (Martin Hewson & Timothy J. Sinclair eds., 1999); PETER MARDEN, THE DECLINE OF POLITICS: GOVERNANCE, GLOBALIZATION, AND THE PUBLIC SPHERE (2003); Anthony McGrew, *Power Shift: From National Government to Global Governance? in* A GLOBALISING WORLD? CULTURE, ECONOMICS, POLITICS 128, 162-63 (David Held ed., Routledge 2000); Craig N. Murphy, *Global Governance: Poorly Done and Poorly Understood*, 76 INT'L AFFAIRS 789 (2000); John Gerard Ruggie, *The United Nations and Globalization: Patterns in Limits of Institutional Adaptation*, 9 GLOBAL GOVERNANCE 301 (2003); Michael Zurn, *Global Governance and Legitimacy Problems*, 39 GOV'T. OPPOSITION 260 (2004); John Braithwaite, *Responsive Regulation and Developing Economies*, 34 WORLD DEV. 884 (2006); PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (New Press 2003); Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 J. L. & SOC'Y. 56 (2002).

15. Bovaird, *supra* note 3; Kees Van Kersbergen & Frans Van Waarden, *supra* note 10.

16. *See, e.g.*, Daniel Kaufmann, Frannie Léautier & Massimo Mastruzzi, *Governance and the City: An Empirical Exploration into Global Determinants of Urban Performance* 2-40 (World Bank 2004); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004* (World Bank 2005); Kaufmann, Kraay & Mastruzzi, *supra* note 10; Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 117 (Michael Dowdle ed., 2006).

normative questions of what the governor is seeking to accomplish. Mussolini's fascist regime famously made the trains run on time, but the ends of his government were odious. Hence, "good governance" is not just governance that works efficiently, but governance that works by fair and open processes towards just and socially beneficial ends.[17]

In much of the literature there is a strong normative preference for democracy as the essence of good governance.[18] This reflects, in part, the evident virtues of democracy as a mode of governance, or at least its superiority to the alternatives, but as we will discuss further, it also arises in many cases from an empirical proposition: modes of decision-making that enroll more diverse knowledge, and are subject to validation of analyses through competition, are more likely to produce correct answers more of the time.[19]

Much writing on governance is devoted to questions of its ends, and, conversely, judgments about ends frequently influence assessments of effectiveness in governance.[20] Thus, for example, the imposition of structural adjustment, or other rigorous policies aimed at promoting long-term socioeconomic improvement, is seen by its proponents as the

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17. Mashaw, *supra* note 16; Jens Steffek, *Sources of Legitimacy Beyond the State: A View from International Relations, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 81-82 (Christian Joerges, Inger-Johanne Sands & Gunther Teubner eds., 2004) ("International governance is likely to be regarded as legitimate when it is directed towards the agreed values of the international community, and when it respects commonly shared procedural standards."); *cf.* Mashaw*, supra* note 16, at 117 ("at base, much of the dispute about accountability is a dispute about what particular institutions are meant to do, not how accountable they are in the doing of it.").

18. *See* CHEEMA, *supra* note 12 at 11, 16-17 (discussing the advantages of democracy, such as sustainability, independence of media, and quality of institutions).

19. *See, e.g*., Cohen & Sabel, *supra* note 7 at 319. The idea of "enrollment" of governors is an important topic in contemporary regulatory analysis. *See* Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services*, PUB. L. 2003, at 63.

20. This is especially the subject matter of normative political theory. See, for example, Jürgen Habermas, who explicitly connects the question of norms to institutional design. *See* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984) [hereinafter HABERMAS, VOLUME 1]; JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION VOLUME 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 60-62 (Thomas McCarthy trans., Beacon Press 1987) [hereinafter HABERMAS, VOLUME 2]; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (MIT Press 1996) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS]; JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY (Ciaran Cronin & Pablo De Greif eds., MIT Press 1998) [hereinafter HABERMAS, STUDIES IN POLITICAL THEORY]; *see also* SEYLA BENHABIB, CRITIQUE, NORM AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY (Columbia University Press 1986); Boris Frankel, *Confronting Neo-Liberal Régimes: The Post-Marxist Embrace of Populism and Realpolitik*, 226 NEW LEFT REV. 57 (1997); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (Oxford University Press 1998); Van Kersbergen & Van Waarden, *supra* note10, at 156-60.

epitome of good governance—willingness to impose short term pain for long term gain—while its opponents see the archetype of unfair and damaging top-down rule-making by outsiders.[21] Canvassing, let alone resolving, these sorts of ultimately substantive debates is beyond the scope of this article.

III. WHO GOVERNS AND HOW? DESCRIBING CONTEMPORARY GOVERNANCE

Despite differences in conceptual emphasis across the literature, it is widely agreed that we are living in times of profound governance transformation as a matter of empirical fact.[22] The main theme to which all the transformations in governance that we describe are ultimately reducible is the fragmentation of state sovereignty and the consequent multiplication of agencies and forms of power that are active in the management of social systems. Once it was dogma that our collective world was divided into two fundamentally different spheres: the public sphere—the realm of governors, and the private sphere—the realm of the governed. This crucial distinction is no longer accepted as an accurate representation of the way things are.[23] Much of the impetus behind the current interest in governance seems to be a sense that the normative goals that (in theory) once animated a state-centered account of governance—equity, stability, accountability, transparency, efficiency—are ever further from being achieved, making it important to consider whether other descriptions of governance might guide us towards governance practices that produce better results.[24]

There is also fairly wide agreement that the state-centered system of governance has been replaced by some form of distributed governance, in which governance power is spread among a wide range of actors of

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21. *See, e.g.*, TITUS ALEXANDER, UNRAVELLING GLOBAL APARTHEID: AN OVERVIEW OF WORLD POLITICS (Polity Press 1996); NOAM CHOMSKY, 9-11 (1st ed. 2001); Jonathan Di John, *Economic Liberalization, Political Instability, and State Capacity in Venezuela*, 26 INT'L POL. SCI. REV. 107 (2005); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (Norton & Co. 2002).

22. *See* COMMISSION ON GLOBAL GOVERNANCE, *supra* note 3; CASTELLS, *supra* note 7; UN-HABITAT, *supra* note 3.

23. *See, e.g.*, COMMISSION ON GLOBAL GOVERNANCE, *supra* note 3; UN-HABITAT, *supra* note 3.

24. On how our concepts are failing our normative objectives, *see* Clifford Shearing, *Reflections on the Refusal to Acknowledge Private Governments, in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY 11, 20-23 (Jennifer Wood & Benoît Dupont eds., Cambridge University Press 2005); S.T. Akindele, *The Concepts of Democracy and Governance: A Theoretical and Empirical X-Ray of Their Linkage and Practical Application Within the Nigerian Political Landscape,* 6 J. SOC. SCI. 173 (2002); Dorf & Sabel, *supra* note 4.

many different types.[25] Very often the metaphor of the network is used to capture the imagery of diffuse systems of governance involving multiple nodes that interact in a wide variety of ways.[26] The unity of the network metaphor, however, masks diversity in how the concept is being used across a range of literatures.[27] The fracturing of governance has likewise led to an explosion of interest in unpacking the tools of governance—the means (ranging from controlling resource and information flows to influencing culture through setting the abstract terms for debate) through which governing decisions can be influenced and effectuated.[28]

The harmony in the literature in acknowledging profound shifts in the ways in which governance is organized and delivered goes sour on the question of what these agreed changes mean in terms of their origins and practical impacts, and whether they are positive or not. Few think the state is in any danger of disappearing, and fewer still that the disappearance of the state would be a good thing.[29] Many who

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25. *See, e.g.*, Lobel, *supra* note 2, at 344-45 (describing changes in the global political economy that militate toward a new paradigm of governance); Black, *supra* note 19, at 64-66 (describing the emergence of a "decentred" account of regulation); James N. Rosenau, *Governing the Ungovernable: The Challenge of a Global Disaggregation of Authority*, 1 REG. & GOVERNANCE 88, 89 (2007) (discussing "proliferation of spheres of authority").

26. *See* CASTELLS, *supra* note 7 (discussing the "network society"); Burris, Drahos & Shearing, *supra* note 11 (discussing "nodal governance"). On "networked governance," *see* Bevir and Rhodes, *Searching*, *supra* note 9; BEVIR AND RHODES, INTERPRETING, *supra* note 9; Bevir, Rhodes & Weller, *Traditions*, *supra* note 9.

27. For a discussion of this point, *see* L. Johnston & Clifford Shearing, *Models of 21st-Century Security Governance: Reflections on the Fallacy of Nodal-Network Equivalence* (Draft, cited with permission).

28. *See, e.g.*, Braithwaite, *Methods*, *supra* note 13 (describing "methods of power" weak states can use to regulate powerful ones); Jane E. Fountain, *Toward a Theory of Federal Bureaucracy for the Twenty-First Century, in* GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE 117 (E.C. Kamarck, and J. Joseph S. Nye ed., 2002) (describing changes in ideal bureaucratic strategy flowing from new information technologies). On the forms of power contests that are waged between participants in networked practices of governance, *see* BEVIR & RHODES, INTERPRETING, *supra* note 9. For a similar analysis of power flows within nodal assemblages, *see* Benoît Dupont, *Power Struggles in the Field of Security: Implications for Democratic Transformation, in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY 86 (Jennifer Wood & Benoît Dupont eds., 2006). For a generic discussion on the modalities of power that actors mobilize in order to contest and shape governance (as well as broader social "outcomes"), *see* BOURDIEU & WACQUANT, *supra* note 13. For the more specific analysis of constitutive forms of power that colonize the mind to produce citizens of various sensibilities, and the "governmentality scholars" that have drawn upon the social theory of Michel Foucault to analyze the character of neoliberal programs of "governance at-a-distance," see Rose, *Death of Social*, *supra* note 13; ROSE, POWERS, *supra* note 13; Burchell, *supra* note 13.

29. For example, in the policy domain of policing, *see* Ian Loader & Neil Walker, *Necessary Virtues: The Legitimate Place of the State in the Production of Security, in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY 165 (Jennifer Wood & Benoît Dupont eds., 2006); Lucia Zedner, *Too Much Security?* 31 INT'L. J. SOC. L. 155 (2003). *See generally* Adam Crawford,

document the weakness or failure of the state look to strengthening the state, or state-based international institutions, as the response.[30] Conversely, there is widespread concern that distributed governance systems are being dominated by actors with greater resources to recognize and game new governance structures to suit their own (short-term, we would argue) ends. We canvas these points in this section.

A. The King is Dead

Ever since Thomas Hobbes, the state has figured for many thinkers on governance as the one essential decision-maker and coordinator, the one center of governance that could pacify the war of all against all through the application of repressive sovereign force.[31] This set of rhetorical aspirations reached its institutional apotheosis in the middle decades of the 20th century, but has been in accelerating decline ever since.[32] Indeed, it is now seen as a grossly inaccurate caricature, both of who does governance and how governance is done.[33] In the context of accelerating movement of information, capital, and people in globalizing times, the primary envelope of collectivization has ceased to be the state: all manner of non-state spaces (both real and virtual) have opened up and expanded, presenting challenges and opportunities for governance that have been seized by non-state actors.[34] It is not simply that the

Networked Governance and the Post-Regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Security, 10 THEORETICAL CRIMINOL. 449 (2006) (analyzing how new governance literature assesses the state of the state).

30. *See* Loader & Walker, *supra* note 29; IAN LOADER & NEIL WALKER, CIVILIZING SECURITY (Cambridge University Press 2007).

31. *See* HINDESS, *supra* note 13. For many scholars, the public-private distinction has never described reality; it has always been an inspirational, rather than an empirical, distinction. *See* Michael Kempa, Philip Stenning & Jennifer Wood, *Policing Communal Spaces: A Reconfiguration of the 'Mass Private Property' Hypothesis*, 44 BRIT. J. CRIMINOL. 562 (2004); Andrew Von Hirsch & Clifford Shearing, *Exclusion From Public Space*, *in* ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION 77-96 (Andrew Von Hirsch, David Garland & Alison Wakefield eds., 2000); *see also* Dietz, *supra* note 3, at 1907 (noting that the simple dichotomy between central government control and property rules ignores a long tradition of governing commons through social institutions). However, this observation should not be used to blind us to the fact that there has been meaningful change in governance practice that directly relates to both the empirical and the inspirational value of the public-private distinction.

32. *See, e.g.*, Teubner, *supra* note 4, at 13-15 (discussing the significance of globalization for governance).

33. *Id.*; Abrahamsen, *supra* note 13; CASTELLS, *supra* note 7; RHODES, *supra* note 3; Lobel, *supra* note 2.

34. Centre for Globalisation and Governance, *Global Health Governance: Institutional Change and the Interfaces Between Global and Local Politics in the Poverty-Oriented Fight of Diseases*, German Overseas Institute (2004-05) (*prepared by* Wolfgang Hein et al.,) [hereinafter,

public and private spheres have become blurred or that there are now hybrid spheres. The distinction itself is no longer valid. Rather than living in a world in which states exercise a monopoly on governance in the public interest, we now live in an unmistakably polycentric world with multiple agencies and sites of governance. Such agencies and sites govern through a variety of forms of power, and largely in their own interests, but with far-reaching collective impacts. In the most dramatic instances, private corporations may, for all intents and purposes, *be* the government in some communities.[35] More commonly, non-state actors are simply important competitors for governing control, able in many instances to manage events in their own interests, and in some instances to do so through the governance of states themselves.[36] Even the state no longer stands as a unitary Leviathan, but is itself seen as an assemblage of nodes or networks working with more or less independence, and frequently at cross-purposes or loggerheads. In the name of reinventing government, the state may be in the business of actively shedding governance authority to non-state or hybrid bodies.[37]

The impetus for new governance paradigms is the fear that a continued focus upon the state and the mechanisms of repressive sovereign authority is undermining our ability to govern effectively in a whole variety of domains,[38] including the environment,[39] international

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Institutional Change and Interfaces]; KOHLMORGEN, *supra* note 10; Eeva Ollila, *Global Health Priorities—Priorities of the Wealthy?* 1 GLOBALIZATION & HEALTH (2005).

   35. *See, e.g.*, Amy Sinden, *Harms Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs, in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) (describing governance by Texaco and Freeport-McMoran in extraction reserves).

   36. For example, Orly Lobel describes the current terrain of governance as characterized by:
      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.
Lobel, *supra* note 2, at 348, 371-404.

   37. *See, e.g.*, Slaughter, *supra* note 3 (discussing transnational networks of state agencies); Burris, Drahos & Shearing, *supra* note 11 (describing governments as nodal assemblages); Colin Scott*, Accountability in the Regulatory State*, 27 J. L. & SOC'Y 38 (2000) (mapping accountability structures in government).

   38. B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004); Van Kersbergen & Van Waarden, *supra* note 10.

   39. Thierry Desrues, *Governability and Agricultural Policy in Morocco: Functionality and Limitations of the Reform Discourse*, 10 MEDITERRANEAN POL. 39 (2005); Andrew E.G. Jonas &

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development,[40] and health.[41] In the international relations literature, for example, commentators have proposed the emergence of a "post-Westphalian" era in which international governance is no longer a club reserved for states.[42] International NGOs, such as Amnesty International, are able to mobilize popular opinion against particular states to constrain and shape state action by issuing reports that they systematically amplify through their access to global information media.[43] In some instances, NGOs effectively participate in international state governance by providing expert "diplomats" to represent weak states in international negotiations.[44] Transnational corporations wield both political power within states and the weight of a threat to move capital. Such capital movement influences global policy and constrains individual states from pursuing autonomous socioeconomic and environmental policy agendas that are unfriendly to the maximization of corporate profits.[45] The World Health Organization ("WHO"), one of the weakest international agencies, was able to govern China's response to SARS because of its ability to enroll the global media to spread the word which in turn spurred global businesses to withhold investment.[46] None of this is fully comprehensible within a paradigm of exclusive state governance in the international sphere.[47]

Gavin Bridge, *Governing Nature: The Re-Regulation of Resources, Land Use Planning, and Nature Conservation*, 84 SOC. SCI. Q. 958 (2003).

40.   Mamadou Diawara, *Globalization, Development Politics, and Local Knowledge*, 15 INT'L SOC. 361 (Maria Arnason trans., 2000).

41.   Ilona Kickbusch, *Action on Global Health: Addressing Global Health Governance Challenges*, 119 PUB. HEALTH 969 (2005); Jon Cohen, *The New World of Global Health*, 311 SCI. 162 (2006); Ilona Kickbusch, *Mapping the Future of Public Health: Action on Global Health*, 97 CANADIAN J. PUB. HEALTH/REVUE CANADIENNE DE SANTE PUBLIQUE 6 (2006).

42.   *See, e.g.*, Fidler, *supra* note 2; STIGLITZ, *supra* note 21.

43.   Peter Leigh Taylor, *In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change*, 33 WORLD DEV. 129 (2005); Spiro, *supra* note 4; Kal Raustiala & Natalie Bridgeman, *Nonstate Actors in the Global Climate Regime*,   UCLA School of Law Research Paper No. 07-29 Available at SSRN: http://ssrn.com/abstract=1028603.

44.   *See* Spiro, *supra* note 4.

45.   For example, state government policies throughout Southern Africa have been turned in the direction of conditions favorable for the maintenance of the primary resource extraction economy most beneficial for major transnational corporations. Elias K. Bongmba, *Reflections on Thabo Mbeki's African Renaissance*, 30 J. S. AFR. STUD. 291 (2004); Pádraig Carmody, *Between Globalisation and (Post) Apartheid: The Political Economy of Restructuring in South Africa*, 28 J. S. AFR. STUD. 255 (2002).

46.   Jason Sapsin et al., *SARS and International Legal Prepared*ness, 77 TEMP. L. REV. 155 (2004); Jacques deLisle, *Atypical Pneumonia and Ambivalent Law and Politics: SARS and the Response to SARS in China*, 77 TEMP. L. REV. 193 (2004).

47.   *See* Chief Emeka Anyaoku, *The End of Multilateralism: Whither Global Governance?* 93 THE ROUND TABLE 193 (2004); Chimni, *supra* note 38; Ruggie, *supra* note 14; Zurn, *supra* note 14.

The eclipse of the Leviathan is seen with equal clarity at the local level. A much discussed example is the proliferation of "mass private property" and other forms of new communal space that look like traditional public spaces, but are privately owned and regulated. These spaces include malls, golf courses, theme parks, and secured corporate and residential complexes and towers.[48] Owners of such property take full advantage of the legal rights that accrue to property ownership—and of the inapplicability of constitutional limitations on action that apply only to *public* authorities—to set and enforce behavior and surveillance standards within the space they own.[49] This has seen the explosion in the size and role played by the paid private security industry globally over the last three decades.[50] These agencies have become the dominant force in the process of "the governance of security" at the local and international levels over this time period, which has seen much of the business of "policing" turn directly in service of the interests of wealthier classes.[51] Of great import is the fact that private security agencies often mobilize the public police to do their bidding. Absent such an invitation, the nature of private property law makes it difficult for the public police to enter and intervene. Thus, in an important sense, the public police are themselves governed by the private security industry and their employers in the expanses of mass private property that dot the contemporary landscape.

As the above examples illustrate, it is not just that the state now shares governance with "private" actors in policy networks that remain

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48. Clifford Shearing, and others, have told the story of how shopping districts on public streets morphed into malls that gradually refashioned themselves from public squares to "mass private property"—a form of space that admits the public, but on terms set by the owner. A recent refinement is the creation of local business improvement districts in the old shopping areas; these "private" authorities have the power to tax and field their own police, among other state-like functions. Shearing, *supra* note 24.

49. Kempa et al., *supra* note 31; Von Hirsch & Shearing, *supra* note 31.

50. TERESA P. R. CALDEIRA, CITY OF WALLS: CRIME, SEGREGATION, AND CITIZENSHIP IN SAO PAULO (University of California Press 2000); Teresa P. R. Caldeira, *Building Up Walls: The New Pattern of Spatial Segregation in Sao Paulo*, 48 INT'L SOC. SCI. J. 55 (1996); Kempa et al., *supra* note 31; Clifford Shearing & Phillip Stenning, *Private Security: Implications for Social Control*, 30 SOC. PROBLEMS 493 (1983) [hereinafter Shearing & Stenning, *Private Security*]; Clifford Shearing & Phillip Stenning, *Modern Private Security: Its Growth and Implications*, *in* CRIME AND JUSTICE, AN ANNUAL REVIEW OF RESEARCH, VOL. 3 193-245, (Michael Tonry & Norval Morris eds., 1981) [hereinafter Shearing & Stenning, *Modern Private Security*]; ALLISON WAKEFIELD, SELLING SECURITY: THE PRIVATE POLICING OF PUBLIC SPACE (Willan Publishing 2003). Even the government uses private security guards, as the role of Blackwater in protecting American diplomats unflatteringly illustrates. Eric Schmitt & David Rohde, 2 Reports Assail State Dept. Role in Iraq Security, N.Y. TIMES, Oct. 23, 2007.

51. Shearing & Stenning, *Private Security*, *supra* note 50.

state-coordinated. It is now recognized that the state itself is governed by non-state actors—which makes it possible to speak of the rise of "private government" in contemporary systems of governance.[52] This highlights the analytic point that useful accounts of, and programs for engagement with, governance must consider the cases in which the state is following orders, in which it may be a transmitter, rather than maker, of decisions. The fact that a government in a nodal world is democratically elected has, on this basis, proved to be no guarantee that it will realize broadly based, rather than narrowly partisan, agendas.[53]

None of this means that states are no longer important. Many states remain extremely potent in many spheres. Through disseminated governance mechanisms, some scholars argue that the functional capacity of the state to direct its influence into an expanding range of matters of everyday life is in fact increased, with sometimes positive and sometimes negative results.[54] What is more, repressive power has not been dropped from the arsenal of tools deployed by state governments in the process of governance. This is especially the case where efforts to govern at-a-distance through the light touch of constitutive power break down, such as in the case of controlling hard-to-reach groups—notably the economic underclass of marginalized, undereducated, and thereby unemployable persons, persons that have no stake in conforming to, or supporting, the mainstream governance order.[55]

In the context of growing security concerns in a post-9/11 world, where state governments have awoken to the apparent threat posed by an expanding global underclass whose ears are receptive to violent radical ideology, the direct use of coercive power by state authorities and through private proxy is increasing.[56] But the end of the state monopoly poses the fundamental question, both theoretical and practical, of how

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52. Freeman, *supra* note 3; STEWART MACAULEY, CONTRACTS: LAW IN ACTION (1995); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANN. AM. ACAD. POL. & SOC. SCI. 12 (2005); R.A.W. Rhodes, *The Unholy Trinity and Network Governance,* Public Lecture, Australian National University (August 2005) [hereinafter Rhodes, *Network Governance speech*]. We do not begin to explore the enormous literature on corporate governance, much of which concerns itself with the structure and operation of private regimes of rule.

53. *See* Bovaird, *supra* note 3; Di John, *supra* note 21; Van Kersbergen & Van Waarden, *supra* note10.

54. *See* Shearing, *supra* note 24, at 25 (noting that, in some important respects, the government has strengthened under a steering-rowing model).

55. *See* HINDESS, *supra* note 13; Barry Hindess, *Not at Home in the Empire*, 7 SOC. IDENTITIES 363 (2001); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA (1995).

56. *See* Conor O'Reilly & Graham Ellison, *Eye Spy Private High: Reconceptualising High Policing Theory*, 46 BRIT. J. CRIMINOL. 641 (2006).

private government is to be conducted with decent regard for the collective interest. The answer to that question begins with a description of non-state governance.

B. Long Live the Extended Royal Family

States exist today as one nodal assemblage among many in an increasingly complex field of governance relationships and practices. In the context of the fragmentation of sovereignty in globalizing times, the reach of such non-state actors extends beyond any type of clearly delimited private sphere into a wide variety of areas of collectivization that have broad impact on the social and physical environment. Governance is a multilevel affair,[57] and therefore we can expect to see the proliferation in involvement of non-state actors in processes of governance at the local, national, and inter/supra-national levels of collectivization.

So who else governs? This is an empirical question that has received considerable attention in the literature. The most influential and powerful agencies involved in contemporary governance are without a doubt those representing corporate power at the local, national, and inter/supranational levels.[58] The mechanisms through which these forms of non-state agencies govern are most clearly spelled out in the global business regulation literature, which provides detailed analysis of the legal and cultural conditions of possibility that have enabled corporations to seize an increasing number of the levers of governability away from public authorities. As commentators like John Braithwaite, Peter Drahos, Colin Scott, and David Levi-Faur have pointed out, much of this has turned on the creative use of private property concepts in contract, patent, and intellectual property law.[59] For example, the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") agreement in the General Agreement on Tariffs and Trade ("GATT") has rendered it possible for pharmaceutical conglomerates to claim patents over remedies derived from plants and other biotic matter, even though such

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57. *Institutional Chance and Interfaces*, *supra* note 34; KOHLMORGEN, *supra* note 10.

58. Freeman, *supra* note 3; MACAULEY, *supra* note 52; Shearing, *supra* note 24; Bevir & Rhodes, *Searching*, *supra* note 9; BEVIR & RHODES, INTERPRETING, *supra* note 9, at 83-86; Bevir, Rhodes & Weller, *Traditions*, *supra* note 9.

59. *See* DRAHOS & BRAITHWAITE, *supra* note 14; JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000); Scott, *supra* note 14; Levi-Faur, *supra* note 52; Moran, *supra* note 2.

remedies themselves are originally sourced from local indigenous knowledge.[60]

Non-commercial NGOs are also exerting a great deal of influence in contemporary governance.[61] Although these bodies are not directly state-sponsored or incorporated in the traditional sense of profit-making institutions, they derive substantial authority to govern states through their capacity to mobilize and shape public opinion through the publication of reports and access to the world's media. Examples include work in human rights, access to medicines, and sustainable trade and agriculture, all of which are kept on the global agenda by NGOs and NGO networks.[62] Foundations like the Bill and Melinda Gates Foundation, with their enormous wealth, virtually have taken control of the agenda in certain topics.[63]

In addition to autonomous activity, both corporate organizations and NGOs have been mobilized to participate in collective governance processes through mainstream partnership approaches to governance. The public-private partnership has been an emblematic device in neo-liberal systems of governance that see the state attempting to govern at-a-distance by harnessing the ordering capacity of markets and other autonomous local orders. Within this framework, contributors to partnership governance often are authorized explicitly in law, or in contract, to undertake service provision functions in the public interest.[64] Often, these agencies are, at least partially, governed by the state through quasi-independent oversight bodies,[65] but scholars have also observed the converse "trend, towards systematic oversight of government (akin to regulation) carried out by private (i.e. non-state or non-governmental) actors."[66] No domain of public policy has been excluded from such devolution of service planning and delivery: as we have mentioned, even in the domain of "the governance of human security," thought in most liberal democratic theory to be part of the basic justification for a state,

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60.   Peter Drahos, *Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach*, 77 TEMP. L. REV. 401 (2004).

61.   Collingwood & Logister, *supra* note 12; Haque, *supra* note 12; Spiro, *supra* note 4.

62.   *See, e.g.*, Susan K. Sell, *The Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions*, 77 TEMP. L. REV. 363 (2004); Joanne Csete, *Lessons Not Learned: Human Rights Abuses and HIV/AIDS in the Russian Federation,* 16 HUM. RTS. WATCH (2004); Spiro, *supra* note 4.

63.   *See* Cohen, *supra* note 41 (discussing the influence of the Gates Foundation in global health governance).

64.   Abrahamsen, *supra* note 13; Freeman, *supra* note 3; Haque, *supra* note 12.

65.   *See* RHODES, *supra* note 3.

66.   Scott, *supra* note 14 (citing, e.g., the contracting out of audits of government activities to private auditors).

public authorities have engaged partnership approaches to policing in collaboration with local citizens and the paid private security industry (and have seen corporate authorities take control over their own policing autonomously). The effect is that much of the "policing" today is done by non-state actors.[67]

"Dark networks," such as organized crime or terror syndicates, exert influence on contemporary governance principally through force and the threat of force.[68] These actors powerfully contribute to the spread of the "risk mentality" that dominates contemporary life. As scholars such as Ulrich Beck[69] and David Garland[70] have detailed, in the context of uncertain global futures and the apparent failure of science to deliver on the "modernist dream" of a well-administered social and physical environment, individuals increasingly have become fearful of potential and unknown harms. In turn, these fears often are fanned further by politicians for partisan and electoral benefit.[71] Thus, Al Qaeda governs the West through actual and threatened violence that produces both specific and generalized fear that is associated with xenophobic reactions that further help Al Qaeda's cause to turn the balance of the planet violently against the West.

C. What Does Distributed Governance Look Like?

Descriptions of distributed governance have been dominated by the image of the network and the consequent "de-centering" of governance. The use of the network idea ranges considerably in analytic rigor, from

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67. *See* Kempa et al., *supra* note 31; WAKEFIELD, *supra* note 50. Governance scholars have worked to define generic elements of regulation and governance in order to separate activities from actors, which is essential to understanding distributed governance. Thus, Julia Black wrote:

> [I]n challenging the notion that regulation is a uniquely or even primarily state activity, decentred analyses throw into question what 'regulation' is. If we are to pursue the analysis of regulation as a form of contemporary governance a broad and non-state centred understanding of regulation needs to be developed. In response, regulation is understood here to be the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, and which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.

Black, *supra* note 19, at 65.

68. Jörg Raab & H. Brinton Milward, *Dark Networks as Problems*, 13 J. PUB. ADMIN. RES. & THEORY 413 (2003).

69. ULRICH BECK, WORLD RISK SOCIETY (Polity Press 1999).

70. David Garland, *The Rise of Risk*, *in* RISK AND MORALITY 48-86 (Richard V. Ericson & Aaron Doyle eds., 2003); David Garland, *The Culture of High Crime Societies: Some Preconditions of Recent 'Law and Order' Policies*, 40 BRIT. J. CRIMINOL. 347 (2000) [hereinafter Garland, *High Crime*].

71. Garland, *High Crime*, *supra* note 70.

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the metaphorical to the mathematical, but the thrust is that governance systems can best be understood as being comprised of many more or less independent governors and providers that are linked in some way that enables them to project influence across social space.[72]

Networks can be highly stable, but in the network model, there is also an inherent expectation of flux, with institutions being capable of rapidly making new connections and abandoning old ones. As we discuss later, the fascination with networks also has an epistemic element, the belief that networks are the expression of a social complexity that defies comprehension by traditional, centralized, and government-centered forms of governance. To illustrate the variety and richness of the many literatures touching on networked governance, we describe here several leading accounts.

i. The Network Society

The most elaborate account of networks as a feature of social organization is found in the work of Manuel Castells.[73] For him, networks have become the primary mode of social and institutional organization in conditions of "advanced information economy" and "late modernity."[74] In such an economy, the capacity to generate, process, and manage information fundamentally determines productivity and competitiveness, and so much of governance is centered on, and conducted through, the management of information flow in networks.[75] A critical feature of Castells' work is to ponder the broader social, political, and economic impacts of the spread of different forms of information sharing networks, and his ideas have influenced scholars particularly concerned with governance.

In its strongest form, the network account of social organization

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72. Julia Black writes:

[W]hat 'networks' are contested. The term is used in a number of ways ranging from a loose metaphor to describe a constellation of actors that seem to interact in some way, through to being a hard-edged mode of analysis of the extent and depth of social interlinkages using formal mathematical modelling. Nonetheless, networks are generally seen to be qualitatively different from markets and hierarchies, contracts and organisation, and not to be simply a hybrid form, and to possess three central characteristics. These are that they involve a variety of actors each pursuing their own goals, between whom there are relatively stable sets of inter-relationships, and critically, who are dependent on one another for resources.

Black, *supra* note 19, at 85 (citations omitted).

73. CASTELLS, *supra* note 7; Manuel Castells, *Materials for an Exploratory Theory of the Network Society*, 51 BRIT. J. SOC. 5 (2000) [hereinafter Castells, *Materials*].

74. *See generally* CASTELLS, *supra* note 7.

75. Castells, *Materials*, *supra* note 73.

takes as an empirical truth the proposition that the state is not, and for a variety of practical reasons cannot be, a governance monopolist. Partly, this is because governments are being pushed aside or bypassed. "Governments today are competing with private entities for power, influence, and representation."[76] More fundamentally, old-fashioned "brick and mortar" institutions cannot manage networks that are complex to start with and capable of rapid reconfiguration. While centralized institutions have a role, "[t]he task for the architects of the post cold war governance system is to recognize and take advantage of the complex synergies between networks of actors operating at multiple levels of international politics."[77]

Whether this is a good or bad thing for most of the world's population remains open to question. Leaving aside for a moment the decisive question of network access, the literature veers between excitement at the potential for governance reform and the fear that the global "haves" will only increase their wealth and control in a network society. For many, the internet is a model of new, and effective, network governance,[78] while the story of the manipulations of intellectual property holders around the TRIPS agreement is the archetype of networked governance in the service of the rich.[79] Braithwaite, who has written the definitive account of how transnational corporations exploit governance networks, has argued that there is space for networked governance to work for the "have-nots" that can team up and concentrate their power.[80]

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76. Charlotte Streck, *Global Public Policy Networks as Coalitions for Change, in* GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS & OPPORTUNITIES 121-122 (Daniel C. Esty & Maria H. Ivanova eds., 2002).

77. Peter M. Haas, *Addressing the Global Governance Deficit*, 4 GLOBAL ENVTL. POL. 1, 13 (2004); Lobel, *supra* note 2; Dorf & Sabel, *supra* note 4.

78. Post & Johnson, *supra* note 4; Teubner, *supra* note 4; *see* Haas, *supra* note 77 (discussing networked governance in the environment).

79. Burris, Drahos & Shearing, *supra* note 11.

80. Braithwaite states:

I have become persuaded that we live in an era of networked governance. An implication of this is that developing countries might jump over their regulatory state era and move straight to the regulatory society era of networked governance. Developing states might therefore cope with their capacity problem for making responsive regulation work by escalating less in terms of state intervention and more in terms of escalating state networking with non-state regulators.

Braithwaite, *supra* note 14 at 890. .Peter Spiro provides the following example in the case of rain forest destruction: "Unable to influence policymaking in Brazil, local activists turned to U.S. and European NGOs, who in turn pressured the multilateral banks (both directly and through their own governments), who in turn pressured Brazil to attend to deforestation." Spiro, *supra* note 4 at 11.

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ii. "Whole of Government": Networks in a Policy Framework

Whereas Castells and those he has influenced address the flow of information through networks as their primary focus of analysis, an important group of scholars typified by Roderick Rhodes have adopted the network model within an institutional, policy-oriented framework.[81] This literature deals concretely with the problem of making and implementing policy in state-centered networks comprised of both public and private nodes. Policy network analyses began by analyzing and categorizing the many forms of networks that could exist in terms of what kinds of policy domains they address, and the types of institutions that tend to dominate them.[82] Thus, there exist multiple forms of policy networks in the contemporary landscape of governance: some are largely coordinated by public authorities, others have more minimal forms of state involvement, and still others are dark networks organized contrary to state law, in service of illegal activities.[83] Turning their cacophony into harmonious governance is a major, if not the main, challenge for government.

Of late, more emphasis in the literature has been placed on analyzing the internal political dynamics of policy networks, and their impacts in terms of how they distribute "collective benefits," such as security, education, and health services.[84] This literature has found policy networks, as they have so far developed, to generally be exclusive in their membership. The networks tend to take seriously the "voices" (and by extension, the forms of knowledge) of their members. Consequently, they tend to serve the policy interests of those members. This raises the fear that contemporary policy networks are, for the most part, characterized by a lack of legal, political, and fiscal accountability. This characterization contributes to themes of a widening "democratic deficit" between "have" and "have-not" segments of the community in

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81. Rhodes, *Network Governance speech*, *supra* note 52; RHODES, UNDERSTANDING GOVERNANCE, *supra* note 3; R.A.W. Rhodes, *Policy Networks: A British Perspective*, 2 J. OF THEORETICAL POL. 293 (1990). [hereinafter Rhodes, *Policy Networks*].

82. *See* Rhodes, *Policy Networks*, *supra* note 81. Cf. Slaughter, *supra* note 3 (discussing emergence and role of policy networks in international relations).

83. Rhodes, *id.*

84. Ostrom, *supra* note 10; Rhodes, *Network Governance speech*, *supra* note 52; RHODES, UNDERSTANDING GOVERNANCE, *supra* note 3; Rhodes, *Policy Networks*, *supra* note 81; Eva Sorenson & Jacob Torfing, *Network Politics, Political Capital, and Democracy*, 26 INT'L J. PUB. ADMIN. 609 (2003).

neo-liberal times.[85] This is true across a range of social services, ranging from the environment,[86] to health,[87] to human security.[88]

A number of scholars have worked to define appropriate institutional arrangements within networks to ensure effective forms of deliberation that lead to rational policy outcomes that serve the common interest.[89] On the one hand, there is empirical evidence to suggest that there ought to be rules excluding "symbolic" and/or "emotional" communications from deliberation.[90] On the other hand, some theorists have mobilized evidence indicating that including more emotional arguments serves an important psychological function: catharsis, it is argued, gives people a higher emotional stake in their agreements, increasing the likelihood that policy approaches agreed upon through deliberation will be sustainable in practice.[91] What is of clear importance is the role of political brokerage and exchange between network constituents in accounting for the emergent character of policy forms around us.

iii. Nodal Governance: A Focus on the Institutions in Networked Governance

The concept of "nodal" governance has emerged from diverse scholarship that has made networks a central element in governance theory.[92] In contrast to accounts that highlight the structure of the

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85. Sorenson & Torfing, *supra* note 84.

86. Lorraine Elliot, *Global Environmental Governance*, *in* GLOBAL GOVERNANCE: CRITICAL PERSPECTIVES 54-74 (Rorden Wilkinson & Steve Hughes eds., Routledge 2002); Ostrom, *supra* note 10.

87. Ollila, *supra* note 34.

88. Michael Kempa & Les Johnston, *Challenges and Prospects for the Development of Inclusive Plural Policing in Britain: Overcoming Political and Conceptual Obstacles*, 38 AUSTL. AND N. Z. J. CRIMINOL. 181 (2005).

89. *See* Ostrom, *supra* note 10; *see also* John S. Dryzek, *Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia*, 33 POL. THEORY 218 (2005); JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (Oxford University Press 2000); JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS (2004).

90. HABERMAS, STUDIES IN POLITICAL THEORY, *supra* note 20; HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 20; HABERMAS, VOLUME 2, *supra* note 20; HABERMAS, VOLUME 1, *supra* note 20.

91. CHANTAL MOUFFE, THE DEMOCRATIC PARADOX (Verso 2000); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?,* 66 SOC. RES. 745 (1999).

92. Braithwaite, *supra* note 14; Jennifer Wood, *Research and Innovation in the Field of Security: A Nodal Governance View, in* DEMOCRACY AND THE GOVERNANCE OF SECURITY 217 (Jennifer Wood & Benoît Dupont eds., 2006); Drahos, *supra* note 60; Clifford Shearing & Jennifer Wood, *Nodal Governance, Democracy, and the New "Denizens"*, 30 J. LAW AND SOC'Y 400

network—its web of connections—nodal governance focuses on the nodes—the institutions of governance—in systems of networked power: their internal constitutions, their cultures, their resources, and the strategies they use to amass and project power. A "node" is any formal or informal institution that is able to secure at least a toe-hold in a governance network. This definition emphasizes the role of networks in contemporary governance, but also that robust governance capacity generally requires that the point of network access be a structure that enables the accumulation, and directed mobilization, of resources into the network over time.[93] In contrast to the work on policy networks, nodal governance accepts, without reservation, the premise that governance is not the sole prerogative of government, and indeed that the claims of right and legitimacy, bundled up with the notion of "government," are themselves forms of discursive power.[94]

Governing nodes take many forms, from government entities, to foundations and NGOs, to street gangs. From a nodal perspective, many large organizations can be seen as nodal assemblages rather than unitary institutions. For example, state governments are made up of many nodal assemblages (judiciary, legislature, executive), which are themselves comprised of further nodes down to the level of a local constituent or enforcement office.[95] Messy assemblages, like states, ultimately aim to integrate their constituent networks. Drahos has written extensively about the importance of the "super-structural node." This type of node does not integrate networks, "but rather is a structure that brings together actors who represent networks in order to concentrate resources and technologies for the purpose of achieving a common goal."[96] His work documents, for example, how intellectual property holders have relied on super-structural nodes, like the Business Software Alliance, to nodally coordinate patent enforcement with U.S. and European governments.[97] Civil society organizations typically use a super-

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(2003); Burris, *supra* note 11; Benoît Dupont, *Security in the Age of Netwo*rks, 14 POLICING AND SOC'Y 76 (2004); Jan Froestad *Environmental Health Problems in Hout Bay: the Challenge of Generalising Trust in South Africa,* 31 J. S. AFR. STUD. 333 (2005); Michael Kempa et al., *Microscopic and Macroscopic Responses to Inequalities in the Governance of Security: Respective Experiments in South Africa and Northern Ireland,* 49 TRANSFORMATION: CRITICAL PERSPECTIVES ON S. AFR. 25 (2002) (discussing a special issue on crime and policing in transition).

93. Dupont, *supra* note 92; Burris, Drahos & Shearing, *supra* note 11.

94. *See* Crawford, *supra* note 29.

95. This structure is what enables the sort of networked global governance arrangements among subordinate state nodes described by Anne-Marie Slaughter. *See* Slaughter, *supra* note 3.

96. Drahos, *supra* note 60, at 404; Peter Drahos, *The Regulation of Public Goods*, 7 J. INT'L ECON. L. 321 (2004). [hereinafter Drahos, *Public Goods*].

97. Drahos, *supra* note 60; Drahos, *Public Goods*, *supra* note 96.

structural device—the coalition—to concentrate and project their power resources into governance. Normatively, a nodal view de-centers the state. The aim of good governance becomes not just good government, but the adaptation of widely accepted norms of transparency, accountability, and human rights for application to non-state and hybrid forms of governance.

iv. The Post-Westphalian Paradigm: Networks in Global Governance

In the international relations literature, the idea of post-Westphalian governance has been influenced heavily by the architecture of networks. In particular, Anne-Marie Slaughter has emphasized the ways in which states, and their departments, have become fragmented into largely autonomous bureaucracies that are directly linked to one another, and to other important non-state players in international policy networks.[98] Thus, for example, the bureaucrats of the Canadian Ministry of Development are directly linked to their counterparts in Botswana, and to representatives of international development agencies, nongovernmental organizations, and local community leaders, all with minimal levels of ministerial involvement or accountability on either end.

Differences in how states deal with each other are only part of the post-Westphalian phenomenon. Further, as we have intimated above, state-backed international governance agencies, such as the U.N., are under serious pressure to shape their behavior to suit the preferences of the most powerful nation-states, corporate actors, and sometimes even high-profile nongovernmental organizations.[99] Yet, international organizations also acquire new power by their capacity to project information into potent private governance networks. Lawrence Helfer has documented the long-term success of the International Labor Organization in using its monitoring powers to name and shame state actors – even non-ratifying ones -- into compliance with treaties.[100] The case of the WHO and the SARS outbreak in China offers another excellent example.[101] As we have already discussed, the activities of

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98.   Slaughter, *supra* note 3; SLAUGHTER, *supra* note 4; Fidler, *supra* note 2.

99.   Anyaoku, *supra* note 47; Chimni, *supra* note 38; FALK, *supra* note 14; GEORGE MONBIOT, THE AGE OF CONSENT: A MANIFESTO FOR A NEW WORLD ORDER (2004); Zurn, *supra* note 14.

100.   Lawrence Helfer, *Monitoring Compliance with Un-ratified Treaties: The ILO Experience*, 71 L. & CONTEMP. PROBS. __ (forthcoming 2008).

101.   *See* supra *note 46 and accompanying text.* Jacques deLisle, *Atypical Pneumonia and*

NGOs in the international system have contributed powerfully to the view that a state-based conception of international relations is outdated.[102]

v. The Problems of Access and Membership

Networks make possible a global, information-based society of the sort Castells envisions, but he himself notes that it also creates a new "Fourth World"—a marginalized social class comprised of the vast majority of the Earth's population. This Fourth World is relegated to informational black holes, cut off from the information flows that drive the knowledge economy.[103] Niklas Luhmann argued that the worst calamity of contemporary society is "no longer exploitation and suppression but neglect."[104] Shearing writes of how gated communities that exist cheek-by-jowl with slum settlements in Cape Town exemplify a new world order in which global elites live on islands of privilege in a world of deprivation.[105] The nodal governance writers argue that it is essential to identify and promote models of governance that ensure that all have "substantial and equal opportunities to participate directly in decisions that effect them."[106] This problem of "democratic deficits" has the potential to undermine the legitimacy of networked governance theory as a means of advancing democracy, and render the governance

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Ambivalent Law and Politics: SARS and the Response to SARS in China, 77 TEMP. L. REV. 193 (2004).

    102.   *See* Spiro, *supra* note 4; Haque, *supra* note 12; Blagescu & Young, *supra* note 3.

    103.   *See* CASTELLS, *supra* note 7, at 19.

    104.   Niklas Luhmann, *Globalization or World Society: How to Conceive of Modern Society?*, 7 INT'L REV. OF SOC.—REVUE INERNATIONALE DE SOCIOLOGIE 67, 74 (1997). Luhmann's work, mediated through Teubner, has been an important influence on governance literature. Of particular importance is the concept of autopoiesis, which in this context refers to the tendency of systems (and components of systems, like governance institutions) to become self-referential—that is, to reconstruct external reality in conformity with the demands of internal coherence and cohesiveness. Such institutions or systems cannot be open to the ideas and demands of outsiders, even when they appear to be. *Id.*; Andrew Dunshire, *Tipping the Balance: Autopoiesis and Governance*, 28 ADMIN. & SOC'Y 299 (1996); AUTOPOIESIS AND CONFIGURATION THEORY: NEW APPROACHES TO SOCIETAL STEERING (Roeland J. In' T. Veld et al. eds., Kluwer Academic Publishers 1991). Seeing only what it wants to see, the institution proceeds on a self-destructive course of action in which each setback is interpreted as validation. An important point emerging here is that a critical feature on which to evaluate any system for governance is the capacity to gather, and then process, information with a minimum of bias arising from the culture or interests of the governing system.

    105.   Shearing, *supra* note 24, at 14-15.

    106.   *See* Burris, Drahos & Shearing, *supra* note 11; NICK DEVAS, WHO RUNS CITIES? THE RELATIONSHIP BETWEEN URBAN GOVERNANCE, SERVICE DELIVERY AND POVERTY (1999); ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY (Princeton University Press 2004).

reform project an idle past-time that will never benefit the mass of the world's population.

One reaction is to consider better ways to design and manage networks to be inclusive.[107]   Thus the suggestion of "microgovernance"—the seeding of new governance institutions within excluded communities.[108]   More broadly, the impulse towards community deliberation and participatory structures in a wide range of activities reflects the recognition that active intervention often may be needed to open network societies to all stakeholders.[109]   Some scholars have tried to address exclusion from governance by breaking down conventional assumptions about the membership and rights of inclusion in networks. In contrast to notions of "citizenship" in state collectives, membership in contractual non-state orders has been thought about in terms of "denizenship," under which stake, rather than point of origin, would define access to at least certain rights and benefits.[110]   Rather than classify institutions in terms of their location in the public versus private sphere, some authors have begun to draw functional distinctions between auspices, under whose authority governance is undertaken, and providers, who undertake the actual business of governance.[111]   As we introduced above, governance can be initiated by either state or non-state impetus, and, subsequently conducted by either state or non-state agencies—in the contemporary interlinked society, all of these forms of governance will have profound collective impacts. In taking such a functionalist view of governing agencies, addressing these difficulties leads to questions about where best to locate, and how best to control, broader collective resources and oversight functions to ensure the equitable distribution of collective goods.

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107.   Castells certainly encourages this. *See* CASTELLS, *supra* note 7.

108.   Scott Burris, *Governance, Microgovernance and Health*, 77 TEMP. L. REV. 335 (2004); accord Maurits Barendrecht & Patricia Van Nispen, Microjustice (2007), *available at* http://ssrn.com/paper=1022936 (describing bottom-up approach to justice services based on small, local institutions).

109.   *See, e.g.*, Leonardo Avritzer, *Public Deliberation at the Local Level: Participatory Budgeting in Brazil* (2000); Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing,* 29 POL. & SOC. 73 (2001); Louise Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139 (2006).

110.   Shearing & Wood, *supra* note 92; *see also* PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2007).

111.   *See* David H. Bayley & Clifford D. Shearing, *The New Structure of Policing: Description, Conceptualization, and Research Agenda* (National Institute of Justice 2001).

D. How Do Distributed Governors Govern?

The *techniques* of governance have received considerable attention in various literatures, ranging from the social theory of Michel Foucault to the extensive technical literature on regulation associated with the Anglo-Australian school of regulatory studies. Despite the diversity in these literatures, which deal at varying levels of abstraction with multiple levels of social organization, there is a similarity in the fundamental recognition of the problem of governance as managing complex systems in which governing power is distributed effectively across many more actors than can be managed by centralized command and control techniques. In this section, we describe several important literatures on the techniques of governance.

i. Soft Law and "The Regulation of Social Meaning"

"Soft law" methods depend upon the power of social and institutional norms, information, and transparency to mobilize voluntary compliance. For states, this has the theoretical benefit of efficiently reserving the use of hard sanctions, or direct government command and control, for a few special cases.[112] Non-state governors have limited recourse to hard law,[113] so their natural realm is the softer one of discourse. Social entrepreneurs have become adept at deploying sophisticated information strategies to influence mass opinion and government action. Researchers have documented the use of many time-honored, and a few new, strategies that depend upon creating and disseminating information: shaming and other strategies that heavily depend on enrolling the media; product certification schemes, which rely on market forces to promote desired behavior;[114] and new information and mobilization strategies that exploit decentralized media, like the

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112. On the one hand, such programs for governance at a distance can be thought of as enhancing the capacity of the state to govern a widening sphere of social processes more effectively and efficiently. On the other hand, however, other trends in the form and exercise of authority indicate that state governability and accountability are slipping. The diffusion of decision-making authority throughout the bureaucracies of state governments can obscure responsibility, with the effect that ministerial accountability for governmental policy increasingly stands as a "strange legal fiction." Van Kersbergen & Van Waarden, *supra* note 10, at 156-57.

113. Braithwaite, *supra* note 14 at 895 (discussing the potential for *qui tam* statutes to empower non-state governors).

114. *See* Spiro, *supra* note 4; Taylor, *supra* note 43; Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006). Governments also use certification regimes to regulate other governments. *See, e.g.*, Julie Ayling, *Conscription in the War on Drugs: Recent Reforms to the U.S. Drug Certification Process*, 16 INT'L J. DRUG POL'Y 376 (2005).

internet and cell-phones.[115] Much of their effectiveness depends upon the development and effective use of technical expertise concentrated in institutions operating at strategic nodes of advocacy networks.[116]

"Soft" law is not just a project of the weak. Braithwaite and Drahos extensively documented how transnational corporations use information and networking techniques to govern.[117] For example, those who hold intellectual property patents now hire private agencies to search out evidence of piracy in software music and video, and then use the evidence gathered to convince the US trade authorities to threaten sanctions within the World Trade Organization regime on countries that are not exerting enough influence to stamp out counterfeiting.[118] Timur Kuran and Cass Sunstein cite the example of how tort reform has been framed by agents of large corporations that have promoted the availability of stories of (aberrantly) large punitive damage verdicts.[119]

The idea of soft law runs through a variety of new governance literatures.[120] It has considerable resonance with the constitutive school of law and society scholarship, but perhaps owes its greatest debt to Foucault's account of truth and systems of knowledge as themselves being key mechanisms of governance.[121] Foucault was very concerned with identifying the key conditions of possibility that *enabled* particular ways of thinking about and so doing the business of governance, the business of personal and collective health, the business of economy, etc.[122] Foucault set about examining overarching rationalities of

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115. *See, e.g.,* William H. Dutton & Wan-Ying Lin, Using the Web in the Democratic Process: The Web-Orchestrated 'Stop the Overlay' Cyber-Campaign, 9 EUROPEAN REVIEW 185 (2001); Herman Wasserman, *Renaissance and Resistance: Using ICTs for Social Change in Africa*, 64 AFRICAN STUDIES 177 (2005).

116. John Braithwaite has defined a set of effective strategies for weak states and non-state governors to use based on the successful governance efforts of the powerful. *See* Braithwaite, *Methods*, *supra* note 13; *see also* JENNIFER WOOD & CLIFFORD SHEARING, IMAGINING SECURITY (Willan Publishing 2006) (applying Braithwaite's analysis to define methods of power for the weak in security); Scott Burris et al., *Emerging Strategies for Healthy Urban Governance*, 84 J. URB. HEALTH 154 (2007) (applying Braithwaite's analysis to define methods of power for the weak in health).

117. BRAITHWAITE & DRAHOS, *supra* note 59.

118. DRAHOS & BRAITHWAITE, *supra* note 14; Scott, *supra* note 14.

119. *See, e.g.*, Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683 (1999) (describing how "availability entrepreneurs" can instigate "availability cascades" to influence policy).

120. *See* Lobel, *supra* note 2, at 391-95 (discussing the idea of soft law).

121. *See* Colin Gordon, *Governmental Rationality: An Introduction*, *in* THE FOUCAULT EFFECT 1, 8 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991).

122. *See* Foucault, *Governmentality*, *supra* note 10 (contextualizing different "acts of government"); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Pantheon Books 1978); [hereinafter FOUCAULT, SEXUALITY]; MICHEL FOUCAULT, DISCIPLINE AND PUNISH:

governance by reading primary texts across of an array of domains, such as doctors' manuals, prison wardens' records and accounts, and policing institutions' texts.[123] He did so with the intent to uncover commonalities in ways of thinking about the world and how best to govern it. He demonstrates it is possible to speak of different forms of "liberalism" in terms of sets of beliefs, or, "régimes of truth," about how the world works and why and how people act the way they do with in it, that are literally embedded in particular governance practices. For Foucault, these overarching rationalities eventually become widespread enough to take on lives of their own, obscuring alternative ways to think about and do the business of governance.[124] Thus, the rationality of liberalism of various stripes can be mobilized by governing actors with the view to attaching legitimacy to their actions and de-legitimizing other forms of thinking and acting.[125]

ii. Mobilization and Coordination of Diffused Knowledge and Capacity

An equally influential account has conceptualized governance in terms of the mobilization and coordination of knowledge and capacity that is diffused throughout the system. Friedrich Hayek, who premised his analysis of governance on the complexity of social systems and the inability of central planners to comprehend or effectively manage them, has been a seminal thinker in this approach.[126] Hayek's account rested on the challenge of information flow, which he contended was best managed through a decentralized, polycentric process exemplified by markets.[127] His work has natural affinities with network accounts such

THE BIRTH OF THE PRISON (Vintage Books 1979) [hereinafter FOUCAULT, PUNISH]; Michel Foucault, *Candidacy Presentation Collège de France*, *in* ETHICS, SUBJECTIVITY AND TRUTH: ESSENTIAL WORKS OF FOUCAULT 1954-1984, 5-10 (Paul Rabinow ed., New Press 1997) [hereinafter Foucault, *Candidacy Presentation*]; Michel Foucault, *Politics and the Study of Discourse*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 53-72 (Graham Burchell, Colin Gordon & Peter Miller eds., University of Chicago Press 1991) (1968) [hereinafter Foucault, *Politics and Discourse*].

123.   *See, e.g.*, Gordon *supra* note 121, at 3.

124.   *See id.* at 7 (noting Foucault's thesis of sovereignty as the interdependence between the "government of men" and the "manifestation of truth"); *cf.* Scott Burris, *The Invisibility of Public Health: Population-Level Measures in a Politics of Market Individualism,* 87 AM. J. PUB. HEALTH 1607 (1997) (describing how market ideology renders public health invisible in policy).

125.   *See* ROSE, POWERS, *supra* note 13; Rose, *Death of Social*, *supra* note 13; Rose & Miller, *supra* note 13.

126.   FRIEDRICH A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (W.W. Bartley III ed., 1988).

127.   HAYEK, *supra* note 126. For an example of Hayek's influence in contemporary analysis of

as Castells',[128] which centers on the fact that hierarchical, bureaucratic modes of organization are inadequate to the task of accommodating the massive amount of information that moves through networks.

If new governance draws on Hayek for its account of decentralized decision-making in complex systems, it has little interest in leaving things to the market. Left unregulated, better resourced nodes in a market network will be more successful in gaining access to, compiling, and making use of valuable information than poorer, weaker ones. As we have noted in the work of the policy network theorists,[129] the game of partisan politics adds the additional layer of competition between in-groups for dominance in directing and reaping the benefits of governance processes. All things being unequal, networks that are powerful tend to be dominated by the most powerful segments of society, who accomplish this largely by taking control of the flow of information in their favor. The remedy, if remedy there be, is to create more access to governance networks for the weak, and for weaker players to learn to use more effectively the methods perfected by the powerful.[130]

Here John Dewey provides the inspiration: the dominant mechanism proposed for mobilizing change is "democratic experimentalism," expressed largely through "institutional innovation."[131] At the local level, this may take the form of new institutions that provide public goods that the state seems unable to,[132] or that give voice and collective efficacy to people that have been excluded in the past.[133] Creative invention and reinvention of democratic

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governance, see, e.g., Cass R. Sunstein, Deliberating *Groups Versus Prediction Markets (or Hayek's Challenge to Habermas)*, EPISTEME (forthcoming 2008), *available at* http://ssrn.com/paper=956189.

128. CASTELLS, *supra* note 7.

129. Rhodes, *Network Governance speech*, *supra* note 52; RHODES, UNDERSTANDING GOVERNANCE, *supra* note 3; Rhodes, *Policy Networks*, *supra* note 81.

130. *See* Braithwaite, *supra* note 13; WOOD & SHEARING, *supra* note 116.

131. *See* Teubner, *supra* note 4; Dorf & Sabel, *supra* note 4; UNGER, *supra* note 5.

132. For example, the Zwelethemba Project in South Africa is built around a micro-institution called the Peace Committee, which provides dispute resolution and community development services in informal settlements underserved by the police and courts. *See* WOOD & SHEARING, *supra* note 116.

133. For example, the Sonagachi Project introduced a new institution—the sex worker collective—as an HIV prevention intervention in Calcutta in the early 1990s. It deployed a mentality of worker's rights and occupational safety among sex workers using simple community organization techniques like peer education. It has grown to thousands of members, significantly improved sex workers relations with madams, pimps, and the police, and has been given substantial credit for the unusually low rates of HIV among Calcutta sex workers compared to other major

institutions is seen as an essential means of destabilizing systems that have are dominated by elites.[134]

At the border between reinventing governance and reinventing government are participatory institutions, like the advisory bodies praised by Archon Fung in his work on schools and policing,[135] or the models that Louise Trubek has described in health care.[136] The work of people like Gunther Teubner, Michael Dorf, Charles Sabel, and Joshua Cohen take the approach to a higher (and more abstract) level. Accepting polycentricity and diffusion in the governance of complex systems, they call for institutional forms and practices more adapted to coordination than command.[137] Courts, legislatures, and bureaucracies may remain in place, but they will be transformed. For example, legislatures more frequently will define areas and methods for direct local deliberation, rather than make substantive rules for conduct; administrative agencies will work to diffuse information, rather than write regulations; and courts' primary role will be to "require that decision-making proceed in a directly-deliberative way."[138]

iii. Forum Shifting

The fracturing of governance has brought one method of power—"forum shifting"—into particularly important use. Through forum shifting, changing the locus of governing control becomes a strategy.

Indian cities. *See* Ishika Basu et al., *HIV Prevention Among Sex Workers in India*, 36 J. ACQUIR. IMMUNE DEFIC. SYNDR. 845 (2004).

134. Unger, *supra* note 5.

135. FUNG, *supra* note 106.

136. Trubek, *supra* note 3.

137. *See, e.g.*, Teubner, *supra* note 4 (advocating "societal constitutionalism"); Cohen & Sabel, *supra* note 7. Dorf and Sabel put the matter like this:

> To reinvigorate our Madisonian heritage . . . we need a new model of institutionalized democratic deliberation that responds to the conditions of modern life. Such a reconceptualization must avoid the presumptions and coyness of an immediate partisanship claiming to speak for a revolution that speaks for itself. It must also resist the contrary rationalizing impulse that denies the possibility of all innovation by reducing novelty to a problem of classification in familiar categories or to new rules for rearranging the familiar furniture of our institutions. The foundation of this architecture would be a new connection between the broad pronouncements of the legislature and the courts, and applications of these pronouncements to particular situations. This connection would have to leave room for experimental elaboration and revision to accommodate varied and changing circumstances, yet credibly limit the opportunities for self-dealing that this very openness of necessity seems to create.

Dorf & Sabel, *supra* note 4, at 283-84. *Cf.* Black, *supra* note 19 (analyzing methods of "enrolling" actors to act as regulators in de-centered governance systems).

138. Cohen & Sabel, *supra* note 7, at 334-35.

Forum shifting may be defined as relocating interactions (like negotiation or regulation) from an institution of governance in which an actor encounters resistance to one where the actor is likely to achieve its objective.[139] It happens in many ways: moving from one forum to another; simply withdrawing from participation or recognition of a governing institution or network; or pursuing the same agenda in many fora.[140] Forum shifting has been an extremely useful tool of the powerful; it can also work for weaker players like cities and NGOs. Major intellectual property holders were pursuing a forum-shifting strategy when they promoted the TRIPS treaty as means of moving intellectual property disputes from the World Intellectual Property Organization to the World Trade Organization, a move that would not only entail new rules and new arbiters but also a new network of participants: whereas NGOs had some official standing and long-term relationships at WIPO, they were essentially excluded from the WTO.[141] Local governments are forum shifting when, for example, they file damages law-suits against gun makers in places where provincial and national legislatures have rejected gun-control regulation.[142]

   iv. Functionalist Accounts: Standards, Oversight, and Enforcement

   The regulatory literature identifies three generic tasks a regulatory system must accomplish: (1) set standards (whether of behavior or outcome); (2) monitor compliance; and (3) enforce compliance upon those who do not obey.[143] The weakening of the public-private distinction, and the recognition that governance is or can be distributed throughout a system, has allowed regulatory scholars to describe and prescribe regulatory schemes in which the generic elements of regulation are divided among or shared by many actors.[144]

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   139. BRAITHWAITE & DRAHOS, *supra* note 59. Laurence Helfer uses the term "regime shifting." Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L LAW 1 (2004).

   140. Braithwaite, *Methods*, *supra* note 13.

   141. Helfer, *supra* note 139.

   142. David Kairys, *The Cities Take the Initiative: Public Nuisance Lawsuits Against Handgun Manufacturers, in* GUNS, CRIME AND PUNISHMENT IN AMERICA, 363 (Bernard E. Harcourt ed., New York University Press 2003).

   143. Black, *supra* note 19, at 167; Braithwaite, *supra* note 14; Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 (2002); Robert E. Goodin, *Democratic Accountability: The Distinctiveness of the Third Sector*, XLIV ARCH. EUROP. SOCIOL. 359 (2003); Moran, *supra* note 2; Scott, *supra* note 14 at 160.

   144. The metaphor of "regulatory space" has been a useful heuristic for framing the inquiry of how to manage nodal social behavior towards good collective ends. *See* Leigh Hancher & Michael

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Government action is one model for setting standards, but there are many others. Market competition between providers can perform a similar function; where consumers vote with their feet in search of better services.   State regulators traditionally monitored compliance themselves, but now often contract out this function. Semi-independent watchdog organizations may do this work, or the state may leave monitoring to the organization in question itself, or some professional association comprised of representatives of a broader collective (i.e. "self-regulation").[145] With respect to enforcement, again, it is possible for the state to act directly, to engage the services of others to carry out discipline, or to leave discipline to the agency in question.

In practice, regulation in the neo-liberal order has most often taken on the character of states acting directly to set standards (sometimes in consultation with community advisory structures), acting at a distance to conduct monitoring through semi-independent watchdog organizations, and engaging discipline only where misbehavior has been extreme.[146] This has been the norm under partnership approaches to governance across a range of spheres of service provision. Under the rubric of reinventing government, states have sought to maintain a grip on the tiller steering privatized systems for governance while seeking to mobilize the private entities and market processes to serve the public interest.[147]

The impact of such systems for regulation has often been poor: the regulation literature has confirmed that the most powerful corporate actors have been able to hijack weak systems of accountability in service of their own ends. Some speak of the diffusion of a global system of regulatory capitalism in which governance is operated in the interests of a corporatocracy that populates power positions in government and industry.[148] The chance of doing things differently, of opening up the

Moran, *Organizing Regulatory Space, in* CAPITALISM, CULTURE AND ECONOMIC REGULATION 271 (L. Hancher, and M. Moran ed., 1989); *see* Colin Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, 2001 PUBLIC LAW 329 (2001).

145.   *See, e.g.*, Scott Burris & Jennifer Welsh, *Regulatory Paradox in the Protection of Human Research Subjects: A Review of OHRP Enforcement Letters*, 101 NW. U. L. REV. 643 (2006) (describing how U.S. government devolves primary oversight of researchers to Institutional Review Boards operated by regulated institutions).

146.   *See* Peter N. Grabosky, *Using Non-Governmental Resources to Foster Regulatory Compliance*, 8 GOVERNANCE 527 (1995); Moran, *supra* note 2; Scott, *supra* note 14.

147.   *See* WILLIAM D. EGGERS & JOHN O'LEARY, REVOLUTION AT THE ROOTS: MAKING OUR GOVERNMENT SMALLER, BETTER, AND CLOSER TO HOME (Free Press 1995); OSBORNE & GAEBLER, *supra* note 3.

148.   Levi-Faur, *supra* note 52; Steve Tombs & David Whyte, *Unmasking the Crimes of the Powerful*, 11 CRITICAL CRIMINOL. 217 (2003); O'Reilly & Ellison, *supra* note 56.

business of governance to a wider range of non-state entities has so been harder in practice than in theory. Nonetheless, there have been some interesting experiences on the ground, which we discuss in the next part.

E.   Changes in Governance: A Summary

In the cause of simplifying this diverse and useful literature, we can identify three kinds of governance change:

    i.   Changes in the Institutions Participating in Governance

Governance is said to be changing both because new institutions are emerging to exercise power, and because there is an apparent shift of the locus of control from some governors to others. The emergence of new, non-state institutions of governance has been documented and discussed throughout the literatures on governance.[149] For example, the Gates Foundation now exercises enormous authority over the global governance of health, while the influence of the World Health Organization has waned.[150] The World Bank and the World Trade Organization, operating under the GATT web of treaties, have taken on a powerful governing role, not just in international trade, but in matters like national standards for the environment or worker health and safety.[151] States, however, have less control over certain aspects of domestic policy by virtue of joining the WTO.[152]

Globalization is widely seen as increasing the ability of corporations to flex economic muscles in a fluid global economy.[153] To a lesser but still important extent, NGOs like Greenpeace have become important players in some areas of global governance, such as the environment.[154] At the national and local levels, shifts in governing control often reflect efforts to place power in the "right" hands for good governance. There is a broad theme of "subsidiarity" in many

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   149. *See, e.g.*, Haas, *supra* note 77 (environment); Rene Loewenson, *Civil Society Influence on Global Health Policy, Annotated Bibliography on Civil Society and Health*, CSI/2003/B14, (Civil Society Initiative, April, 2003), *available at* http://www.tarsc.org/WHOCSI/pdf/WHOTARSC4.pdf (health); Ana Hardoy et al., *Governance for Water and Sanitation Services in Low-Income Settlements: Experiences with Partnership-Based Management in Moreno, Buenos Aires*, 17 ENV'T & URBANIZATION 183, 190 (2005) (urban development).

   150. Cohen, *supra* note 41; Fidler, *supra* note 2.

   151. *See* KOHLMORGEN, *supra* note 10.

   152. *See* Chimni, *supra* note 38.

   153. *See, e.g.*, DRAHOS & BRAITHWAITE, *supra* note 14; Teubner, *supra* note 4.

   154. *See, e.g.*, Spiro, *supra* note 4. Framed in terms of agency, changes in the locus of control can be instigated by forum- or regime-shifting, two of the most important contemporary methods of power. *See* Helfer, *supra* note 139; DRAHOS & BRAITHWAITE, *supra* note 14.

literatures—the idea that power should be devolved to the (lowest) level of governance that can effectively formulate and implement policies,[155] as well as more specific activities like the development of optimal arrangements of metropolitan civil government[156] and the implementation of participatory practices in areas like policing,[157] schools,[158] and budgeting.[159]

ii. Changes in Methods of Power

A second form of change frequently identified in the literature is in the means that governors use to project power towards other governors and individuals in the system.[160] Dissatisfaction (justified or not) with traditional regulatory strategies has prompted interest in alternatives to traditional command and control regulation—regulation by markets (or deregulation),[161] but also techniques of "smart regulation,"[162] audit,[163] and a wide range of "rule at a distance" methods in which various forms of standard-setting and self-regulation are used instead of more command-and-control based forms.[164] A great deal of the literature

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155. Streck, *supra* note 76, at 125; *see also* Burris, *supra* note 116 (discussing localism in global public heath governance).

156. *See, e.g.*, Christian Lefèvre, *Metropolitan Government and Governance in Western Countries: A Critical Review,* 22 INT'L J. URB. & REGIONAL RES. 9 (1998); Katherine M. Johnson, *Sovereigns and Subjects: A Geopolitical History of Metropolitan Reform in the USA*, 38 ENV'T. & PLANNING 149 (2006).

157. FUNG, *supra* note 106; Fung, *supra* note 109.

158. FUNG, *supra* note 106; Fung, *supra* note 109.

159. Rebecca Abers, *From Ideas to Practice: The Partido Dos Trabalhadores and Participatory Governance in Brazil*, 23 LATIN AMERICAN PERSPECTIVES 35 (1996); Yves Cabannes, *Participatory Budgeting: A Significant Contribution to Participatory Democracy,* 16 ENV'T & URBANIZATION 27 (2004).

160. The utility of money as a method of power requires no discussion, and the use of force, legitimate or otherwise, is a topic in and of itself. *See* Shearing, *supra* note 24 (discussing the monopoly on the legitimate use of force as a core element of the state-centered governance paradigm).

161. MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE (John D. Donahue & Joseph S. Nye, Jr. eds., Brookings 2002).

162. *See, e.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992); Scott, *supra* note 3; NEIL GUNNINGHAM, PETER GRABOSKY, WITH DARREN SINCLAIR, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY (1998).

163. MICHAEL POWER, THE AUDIT SOCIETY: RITUALS OF VERIFICATION (1997).

164. Rose, *Death of Social*, supra note 13; ROSE, POWERS, *supra* note 13; Rose & Miller, *supra* note 13; RHODES, UNDERSTANDING GOVERNANCE, *supra* note 3. Considerable attention has been devoted to finding new ways to govern through accountability and transparency mechanisms that are unlinked from traditional state enforcement institutions and practices. *See* Mashaw, *supra* note 16; Charles F. Sabel, *Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability, in* DE STAAT VAN DE DEMOCRATIE: DEMOCRATIE VOORBIJ DE

explores a change from hard to soft law regimes that emphasize "negotiation, trust and the development of common normative understandings" as means of regulating behavior.[165]

iii. Changes in the Nature or Effectiveness of Constraints on Governors

Finally, some writers have observed changes in the nature or potency of constraints on governors.[166] Institutions and methods of power are distributed across social space, and operate as part of the adaptive process of people to their social and physical environment. Such systems are inherently dynamic, though the rate of change in the system or various constituent domains (like legal institutions) will vary.[167] Constraints in these systems—legal rules, social norms, information gaps, economic conditions, and so on—interact in complex ways, so that changes in any one may create new constraints, or alter the potency of existing constraints.

Writers in the governance literature focus, broadly speaking, on two kinds of change. The first type encompasses changes produced by the adaptive work of actors in a system. Much of this falls under the heading of gaming: any set of constraining rules is subject to the efforts of the players to subvert them to their own ends. Repeat players, particularly wealthier repeat players, have a long-term edge in most

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STAAT 173 (E. Engelen & M.S.D. Ho eds., 2004), *available at* http://www2.law.columbia.edu/sabel/papers/Sabel.definitief.doc; Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State,* 56 DUKE L. J. 377 (2006); Robert O. Keohane, *Accountability in World Politics,* 29 SCANDINAVIAN POL. STUD. 75 (2006); *The Social Accountability Sourcebook*, (World Bank 2006), *available at* http://www-esd.worldbank.org/sac; Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility?*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007); Freeman, *supra* note 3; Archon Fung et al., *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* (Ash Institute for Democratic Governance and Innovation 2004); Black, *supra* note 19.

165. Mashaw, *supra* note 16, at 132; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance,* 54 INT'L ORG. 421 (2000); Trubek, *supra* note 109. *See generally* Lobel, *supra* note 2, at 388-95 (describing the range of "soft law" theories in legal scholarship).

166. *See, e.g.*, András Sajó, *Book Review,* 3 INT'L I-CON. 697 (2005) (reviewing TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004)); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press 2004).

167. For governance analysis explicitly premised on this sort of complex systems view, *see e.g.*, Post & Johnson, *supra* note 4; Burris, Drahos & Shearing, *supra* note 11; Teubner, *supra* note 4.

games.[168]   Various forms of power are marshaled to capture the umpiring institutions, and to change the formal rules to further advantage the successful players.[169]   Methods of oversight can be reduced, in Michael Power's telling phrase, to "rituals of verification" largely devoid of real power to control.[170]   Both Teubner's concept of autopoiesis,[171] and the rich American literature on legal consciousness explore the regulatory implications of the way people in particular institutions or subcultures recreate law t for their own ends.[172]   Thus law, as a method of constraint, is caught in a "regulatory trilemma": if the law is strong enough to change the culture of the regulated organization, it risks crushing the organization's capacity to maintain robust, independent norms of virtuous behavior; if the law is too weak, it has no effect; if the rules are "just right," chances are we are seeing agency capture.[173]

A second flavor of changes in constraint arises from the inadvertent maladaptation of governance institutions and methods to a changing environment.[174]   This line of analysis tends to emphasize the increased complexity of modern systems and the obsolescence of state-centered forms of rule in organizing such systems. Dorf and Sabel, for example, argue that the New Deal Administrative state is no longer up to the task of legitimate or effective governance: "[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 the cases

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168. For the classic explication of this in the legal literature, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

169. *See, e.g.*, EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1977).

170. POWER, *supra* note 163. Gaming is not just a regulatory problem, of course, but is also a feature of politics in governing institutions themselves.

171. GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993).

172. *See, e.g.*, Austin Sarat, *". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor,* 2 YALE J. L. & HUMAN. 343 (1990); DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003); PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

173. The long-term consequences of this sort of competitive adaptation are grim, in some writers' eyes. Teubner argues that state-centered notions of constitutional government lead, in a modern society, to "a situation of intensive competition for positions of power and social influence, highly formalized social control, and political and social authoritarianism." Teubner, *supra* note 4, at 10.

174. *See, e.g.*, Shearing, *supra* note 24.

to which they will eventually be applied."[175]   Braithwaite notes how, "[b]y the 1990s for the first time, the majority of the largest 'economies' in the world were transnational corporations rather than states."[176] Globalization allows transnational corporations to avoid regulations originating at the individual state level, and to exercise often considerable governing power with few of the constraints placed on state governments in state-centered constitutional traditions.[177]

F. The State of Governance Today

The descriptive analysis of contemporary governance that we presented above certainly is not flattering. The fragmentation of state sovereignty, and multiplication of agencies and forms of power active in contemporary governance, allow wealthier groups to seize the levers of governance available in diffuse systems of collective governance. In general, wealthier actors can use their resources to more quickly comprehend events and project power than their poorer competitors.

The superior ability of the wealthy to operate in a world of distributed governance has contributed to the creation of a global "super first world"—a world comprised of fortified enclaves of privilege largely unfettered by the responsibilities associated with membership in a widely inclusive society. The excluded are relegated to an ever-widening fourth world[178] of exclusion from global networks of trade, culture, and development. This adds up to an emergent system of global economic apartheid, wherein approximately one billion people mould the social, political, economic, and biological realms to their purposes, on the backs of more than five billion marginalized individuals who are excluded from this vision of the good life.[179] Global governance thus becomes a conflict over values and visions for the future of the planet, leading to arguments about "the clash of civilizations,"[180] and attendant concerns over escalating sociopolitical conflict between the West and the rest of the planet. A governance system tending to conflict at a time when cooperation is sorely needed portends drastic and catastrophic

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175.   Dorf & Sabel, *supra* note 4, at 270.

176.   John Braithwaite, *The New Regulatory State and the Transformation of Criminology*, 40 BRIT. J. CRIMINOL. 222, 229 (2000).

177.   *See, e.g.*, Sinden, *supra* note 35.

178.   CASTELLS, *supra* note 7.

179.   *See* ALEXANDER, *supra* note 21; *see also* Drahos, *supra* note 60; Ollila, *supra* note 34 (discussing the implications of this system for the distribution of health and human wellbeing).

180.   Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

outcomes in terms of long-term planetary security, global health, and environmental integrity.[181]

Thus, governance is not just in a state of change, but is seen by many as being in poor health. While diagnoses are various, there are two fundamental critiques of state-centered governance that seem to appear throughout the governance literature: that "old" institutions of traditional state governance are no longer working very well, and that a principal reason for this is, as it were, epistemological: social systems have become too complex, diverse and particular for centralized, top-down governance to manage, which drives the interest in partnerships, markets, and local participatory democracy.[182] It is perhaps axiomatic that a scholar who turns to governance as a framework of analysis is dissatisfied with *government*. Reinventing government literature sees in old-fashioned command-and-control regulatory agencies any number of failures of imagination, efficiency, and responsiveness. The more the scholar moves towards a broader reinventing *governance* approach, the more likely she is to see the failings of old institutions as an inevitable consequence of social complexity. The governance literature has a definite Hayekian element in the widely accepted view that hierarchical systems of centralized government simply cannot understand the systems they inhabit well enough to properly regulate them.[183] Part of this claim is that the world is just empirically more complex; there is a lot more movement of people, capital, and information, which means there is a lot more information to deal with. But it is argued that the difficulty comes also from the fact that there are now so many more competing visions for what the proper outcomes of governance ought to be, and therefore more different ways of conceiving of the proper business of governance than the state, or any centralized authority, can internalize or harmonize. This is more than just a Hayekian argument about central authorities not being able to gather enough information to govern effectively; they also lack the breadth of perspective that will enable them to *conceptualize* problems to begin with in ways that are more likely to meet contemporary challenges. So it is not that the state is simply an idiot, but that the state currently reflects the assumptions about governance that were developed within the contours of a particular political economy that assumes the utility of its current way of operating. Given that that broader political economy is now the (inadvertent)

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181. FALK, *supra* note 14; MONBIOT, *supra* note 99; Luhmann, *supra* note 104.

182. *See* OSBORNE AND GAEBLER, *supra* note 3, at 11-12.

183. *See, e.g.*, Braithwaite, *supra* note 3 (claiming that Hayek's influence in governance accounts is as diverse as Clifford Shearing's and Margaret Thatcher's).

source of many of our most pressing governance challenges—such as environmental collapse and the attendant spread of contagions, forced migration, and other security issues—we need to leave space in governance programs for the inclusion of different framing mentalities, not just empirical information. Sabel writes:

> [I]f, as I and many other [sic] assume, there are no principals in civil society—not even the political parties that connect it to the agents in public administration—with the robust and panoramic knowledge needed for this directive role[;] [t]hen the problem for reform is at least as much determining ways actors can discover together what they need to do, and how to do it, as determining which actors ought to be the principals in public decision making. At the limit, if there are no actors capable of setting goals with the precision needed to guide effective public action, governance reform must attend *simultaneously* to institutionalizing public or social learning and allocating decision-making rights—rather than assuming, as often is the case now, that learning is automatic when the 'right' constellation of principals is in control.[184]

Many observers, reflecting a diversity of perspectives within the social sciences, have converged on the point that systems of governance are, after all, inhabited by people. This is a part of a conceptual turn in the social sciences to pay more attention to the human elements—cultural, cognitive and psychological factors—that inevitably influence the outcomes of governance processes.[185] Sunstein and colleagues, for example, have examined how the human element complicates the neat picture of democratic deliberation.[186] Likewise, some scholars now argue that there are certain cultural conditions of possibility that are essential to the proper functioning of any model of governance. Considerable work has been done to understand the implications of empirical comparative studies of trajectories towards democratic rule. This work centers upon trying to identify core factors relating to the interactions between political economy, institutional structure, and human agency that variously contribute to, and inhibit the consolidation of, effective systems for democratic rule.[187] This work connects

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184. Sabel, *supra* note 164, at 3-4.

185. *See* Janine R. Wedel et al., *Toward an Anthropology of Public Policy*, 600 ANNALS OF THE AMER. ACADEMY OF POL. & SOC. SCI. 30 (2005).

186. *See, e.g.,* David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?* 95 CAL. L. REV. 915 (2007); Sunstein*, supra note* 127.

187. *See*, *e.g*., Dietrich Rueschemeyer, *Different Methods—Contradictory Results? Research on Development and Democracy*, 32 INT'L J. COMPARATIVE SOC. 1-2 (1991); Wedel et al., *supra* note 185.

governance scholars with researchers interested in the nature and operation of phenomena such as social capital and collective efficacy.[188]

Two particularly important aspects of the human element, in terms of understanding how and why individuals engage systems for governance in this spirit of collaborative enterprise, are absolutely key: dynamics concerning "trust" and "hope." It has been pointed out that lack of trust between groups in society themselves (i.e., "horizontal" relationships of trust), and, between social groups and governments (i.e., "vertical" relationships of trust) degrades the form of their engagement in processes of governance.[189] Where social groups do not trust one another, they will either refuse to engage participatory mechanisms for governance, or, will engage with a view to maximizing their own personal or their own groups' benefit, for fear of lack of reciprocation on the part of competing groups. Where human actors have little or no hope that their personal and collective situation will improve, it has been suggested that they will disengage from dominant governance structures and pursue their ends through alternate means.[190]

IV. INNOVATION IN GOVERNANCE

The widespread sense that governance is in need of change is reflected in the volume of innovation at the all levels in the last two decades. Broadly, these innovations can be separated into two "genres" of reform: those that focus on the "reinvention of *government*" and those that focus on the "reinvention of *governance.*"

Reinventing government involves efforts to recalibrate state

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188.   *See* ROBERT D PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000); Robert Sampson, *How Neighborhoods Matter: The Value of Investing at the Local Level*, Congressional Seminar (American Sociological Association, Washington, D.C. 2000); Robert Sampson, Jeffrey D. Morenoff & Thomas Gannon-Rowley, *Assessing 'Neighborhood Effects': Social Processes and New Directions in Research*, 28 ANNUAL REV. SOC. 443 (2002); Robert Sampson, Jeffrey D. Morenoff & Felton Earls, *Beyond Social Capital: Spatial Dynamics of Collective Efficacy for Children*, 64 AM. SOC. REV. 633 (1999); Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918-24 (1997). For a careful critical analysis of the uses of social capital and collective efficacy in policy and governance, see W.G. Carson, *Is Communalism Dead? Reflections on the Present and Future Practice of Crime Prevention: Part One*, 37 AUSTRALIAN & NEW ZEALAND J CRIMINOLOGY 1 (2004); W.G. Carson, *Is Communalism Dead? Reflections on the Present and Future Practice of Crime Prevention: Part Two*, 37 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 192 (2004).

189.   TRUST AND GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 1998); TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS (Diego Gambetta ed., Blackwell Publishing 1990), *available at*: http://www.sociology.ox.ac.uk/papers/trustbook.html.

190.   *See Hope, Power and Governance*, *in* ANNALS OF THE AMER. ACAD. OF POL. AND SOCIAL SCI. 592 (Valerie Braithwaite ed., 2004).

structures to improve their capacity to exercise centralized control of diffuse systems, often somewhat paradoxically by ceding much of the implementation of policy to non-state actors through devices like governance partnerships and self-regulation. Many reinventing government schemes have been linked to a neo-liberal, smaller government ideology, but this category also addresses the capacity of governments to meet the minimal standards of good governance.[191] In the neo-liberal version of the reinventing government approach, states and state-backed international institutions devolve the "rowing" of governance (i.e., service provision) to non-state agencies, while retaining a firm grip on the business of "steering" governance processes (i.e., specifying the goals). The characteristic institutional expression of this approach is the partnership between state and non-state actors to deliver services previously delivered by the state. Sometimes the broader public may be included in the partnership in an advisory capacity, or in public-private oversight bodies that share, or even take from the state, the primary authority to oversee the workings of the partnership. Various incarnations of this approach have been widely deployed in a number of countries. The institutional form and mechanisms, along with the merits, drawbacks, and prospects for varying approaches to reinventing government, have been the subject of an enormously wide, and disciplinarily diverse, academic investigation and debate.

Reinventing governance differs in that it takes innovation beyond the state and public-private partnerships into efforts to identify, cultivate, and mobilize governors that may act with little or no connection to the state. Innovators in this realm tend to start with the view that the state will not be able to overcome the forms of corporate-directed power, and other factors, that prevent governance from working in the broader collective interest.[192] They seek to develop institutions and practices of governance that do not depend entirely upon the state, and that mobilize knowledge, capacity, and resources that have not been directed into governance before. In some cases, they are explicitly directed at democratic deficits by seeking to make distributed governance systems work for the poor. The central idea emerging from these experiments in governance is the importance of mobilizing knowledge and capacity that has previously been excluded from, or limited in participation in, governance. Innovation has been aimed particularly at developing new institutions, and new tools of governance, that can be placed at the

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191. *See* CHEEMA, *supra* note 12.
192. *See generally* FALK, *supra* note 14.

disposal of citizens and other stakeholders. Starting with a general appreciation of the potential for citizen/stakeholder deliberation, innovators seek to facilitate the emergence of effective governance, working sometimes in cooperation, and sometimes in competition, with the state.

A. Remodeling State Direction: Reinventing Government

Reinventing government, as a set of institutions, programs, and practical strategies, has been undertaken and studied under many conceptual banners, including "networked governance,"[193] "new public management,"[194] and the "new regulatory state."[195] Much of the innovation in state-centered governance ostensibly has been concerned with achieving two goals: overcoming the government's limited reach, and mobilizing or constraining non-state governors in the public interest. These efforts have been driven by a sense that the legitimacy and the capabilities of the state have deteriorated, but also that state-based governance retains a special claim to legitimacy.[196]

While neo-liberalism has not been the only discourse for political reform—and, as scholars who contribute to policy debates are at pains to point out, is not the only possible discourse upon which to build programs for devolved governance—it certainly has been the most influential in Britain, the United States, Canada, and Australia.[197] Neo-liberalism began largely as a critique of the perceived failures and excesses of welfarist "big government," which, it was posited, had created a dependent and non-entrepreneurial system incapable of managing the rigors of the new global economy. Its program for "rightsizing" government, and promoting efficiency and effectiveness through harnessing the power of the market within government and

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193. Bevir & Rhodes, *Searching*, *supra* note 9, at 49-54; BEVIR & RHODES, INTERPRETING, *supra* note 9; RHODES, UNDERSTANDING GOVERNANCE, *supra* note 3; Rhodes, *Policy Networks*, *supra* note 81.

194. THE NEW PUBLIC MANAGEMENT: LESSONS FROM INNOVATING GOVERNORS AND MAYORS (Paul J. Andrisani, Simon Hakim & Emanuel S. Savas eds., 2002); NEW PUBLIC MANAGEMENT IN EUROPE: ADAPTATION AND ALTERNATIVES (Christopher Pollitt, Sandra van Thiel & Vincent Homburg eds., 2007).

195. BRAITHWAITE & DRAHOS, *supra* note 59; Moran, *supra* note 2; Levi-Faur, *supra* note 52; Black, *supra* note 19.

196. Barry Hindess, *Democracy and Disenchantment*, 32 AUSTR. J. OF POL. SCI. 79 (1997); Malcolm Shaw, *Overview: Parliamentary Democracy Today*, 57 PARLIAMENTARY AFFAIRS 702 (2004); *see* EGGERS & O'LEARY, *supra* note 147; OSBORNE & GAEBLER, *supra* note 3.

197. *See* ROSE, POWERS, *supra* note 13; Rose, *Death of Social*, *supra* note 13; Rose & Miller, *supra* note 13.

across society has made huge inroads into reforming all manner of social services, ranging from health to housing to human security. This rationality of government has also informed global development policies advanced by the biggest players in international development: the International Monetary Fund, World Bank, and the World Trade Organization.[198]

Part of the project addresses inefficiency, and tends to pursue the idea that government services ought to be run in a more business-like fashion, treating citizens as "clients" or "customers." This can, of course, be instantiated in more or less symbolic measures, such as a customers' bill of rights, but has also taken the form of substantial reforms. For example, the work of Hernando de Soto has led to widespread efforts in developing countries to reform land titling and business regulation schemes as a means of supporting entrepreneurship among the poor.[199] Particularly in international development theory and practice, efforts to fight corruption and promote accountability have proceeded under the rubric of "good government."[200] At the heart of the reform practice, however, has been the rowboat metaphor of devolving the "rowing" of governance—service provision—to non-state agencies, while seeking to retain a firm grip on the business of "steering" governmental processes towards ends defined by traditional democratic and administrative processes.[201] Within the contours of this political-economic rationality, government makes the key collective decisions about the ends and standards of governance, but gives considerable discretion (and funding) to other actors to achieve these goals. This leads to a heavy emphasis on contracting out services[202] and deregulation.[203]

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198. *See* Abrahamsen, *supra* note 13.

199. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); Ayako Kagawa & Jan Turkstra, *The Process of Urban Land Tenure Formalization in Peru*, in LAND, RIGHTS AND INNOVATION: IMPROVING TENURE SECURITY FOR THE URBAN POOR 57 (Geoffrey Payne ed., 2002); Simon Johnson, Daniel Kaufmann & Pablo Zoido-Lobatón, *Government in Transition: Regulatory Discretion and the Unofficial Economy*, 88 THE AM. ECON. REV. 387 (1998); NORMAN LOAYZA, THE ECONOMICS OF THE INFORMAL SECTOR: A SIMPLE MODEL AND SOME EMPIRICAL EVIDENCE FROM LATIN AMERICA (1996); Tor Jansson & Geoffrey Chalmers, *The Case for Business Registration Reform in Latin America* (Inter-American Development Bank 2001).

200. *See, e.g.,* Kaufman, *supra* note 10; M. A. Thomas, *The Governance Bank*, 83 INT'L AFFAIRS 729 (2007).

201. EGGERS & O'LEARY, *supra* note 147; OSBORNE & GAEBLER, *supra* note 3.

202. EGGERS & O'LEARY, *supra* note 147; OSBORNE & GAEBLER, *supra* note 3. Examples of outsourcing and privatizing services are found everywhere—from the British rail system to municipal water supplies in cities throughout the world. *See, e.g.*, George R.G. Clarke, Claude Menard & Ana Maria Zuluaga, *Measuring the Welfare Effects of Reform: Urban Water Supply in Guinea,* 30 WORLD DEV. 1517 (2002); Antonio Estache, Andres Gomez-Lobo & Danny Leipziger,

Government oversight of the rowers heavily depends on audit mechanisms, if it is not left to the market and the ability of dissatisfied clients to vote with their feet.

In service of this approach, neo-liberal government has applied, and global development agencies have promoted, market principles of management and the principle of "subsidiarity"—that decision-making ought to fall to the lowest possible level within an organization—to both the management of non-state agencies that engage in service provision, and to government itself.[204] Thus, the defining institutional innovation underpinning neo-liberal approaches to the reinvention of government has been the partnership between state and non-state actors. Public-private partnerships have become increasingly common at the international level, where they are proposed as effective mechanisms to mobilize and spend resources in the public interest without the legal and political drawbacks of bilateral or multilateral government structures, or the inefficiencies of U.N. organizations. A well-known example is the Global Fund to Fight AIDS, Tuberculosis and Malaria, but there are hundreds of others.[205] At the local level, policing, education, waste management, water, and sanitation services are among the concerns most commonly, and effectively, addressed by partnerships.[206]

Given that neo-liberal government is interested in maintaining a hand on the tiller that steers governance, partnership approaches have been associated with promoting innovative and varied technologies for centralized regulation, which are often exercised in conjunction with one another within broader "tripartite" institutional arrangements. Tripartite structures combine quasi-independent oversight bodies (which have, over their histories, become increasingly open to citizen engagement) with representatives of the executive branch of government and upper-management-level members of a particular service-providing agency to carry out a range of governance activities.[207] For example, in Britain,

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Utilities Privatization and the Poor: Lessons and Evidence from Latin America, 29 WORLD DEV. 1179 (2001).

   203. *See* ROSE, POWERS, *supra* note 13; Rose, *Death of Social*, *supra* note 13; Rose & Miller, *supra* note 13.

   204. *See* Burchell, *supra* note 13 (providing an analytic account of neo-liberalism at the national level); Abrahamsen, *supra* note 13 (providing an analytic account of neo-liberalism at the supranational level of development studies).

   205. *See* Cohen, *supra* note 41.

   206. Luz Stella Velásquez, *Agenda 21; A Form of Joint Environmental Management in Manizales, Colombia*, 10 ENVT. AND URBANIZATION 9 (1998); Luz Stella Velásquez, *Agenda 21; A Form of Joint Environmental Management in Ilo: A City in Transformation*, 11 ENV'T AND URBANIZATION 181 (1998); FUNG, *supra* note 106.

   207. *See* Blanca P. Ananiadis, *Globalization, Welfare and "Social" Partnership*, 3 GLOBAL

responsibility for setting and monitoring policing policy and expenditure for policing is divided between Chief Constables, the Home Office, and Police Authorities that comprise local councilors, and some lay members of the public. Police Authorities have a legal mandate to carry out a supervisory and auditing function, as well as to inject public preferences into mid-term policing priorities.

The partnership theme is important, even when it does not take a fully distinct institutional form. For example, participatory budgeting has grown over the last twenty years from a Brazilian experiment to an international model. More than 200 cities in Brazil have adopted a form of the practice, in which citizens convene to advise the local government on (and in some models actually determine) the expenditure of public funds. Countries such as Peru, the Philippines, and the State of Kerala in India, have adopted legal provisions mandating that citizens directly voice their priorities in the local government annual budgeting process.[208]

Another common example is community policing. It comes in many versions and definitions, ranging from a largely rhetorical commitment from the police to "listen" to the community or acknowledge themselves as members of the community, to deployment of police officers to visibly patrol and interact in a neighborhood, to what would begin to look like governance change—the formation of boards, committees, or other institutional manifestations of partnership with some level of influence, if not control, being ceded to the community representatives.[209] More powerful, but rarer, is deliberation with some sort of participatory budgeting component in which the community has a means of contracting for additional policing services and coverage.[210] Generally, the police remain answerable to traditional authorities, but the contracting community establishes their agenda and priorities.[211]

In many cases, non-state service providers are left largely to

SOCIAL POLICY 213 (2003); Cameron, *supra* note 12.

208. *See* The World Bank, The Social Accountability Sourcebook, *available at* http://www-esd.worldbank.org/sac/essd9.swf; The World Bank, Social Accountability: an Introduction to the Concept and Emerging Practice. (Social Development Paper No. 76, 2004).

209. Fung, *supra* note 109; HESTA GROENEWALD & GORDON PEAKE, POLICE REFORM THROUGH COMMUNITY-BASED POLICING: PHILOSOPHY AND GUIDELINES FOR IMPLEMENTATION (International Peace Academy 2004), *available at* www.saferworld.org.uk/publications.php?id=34.

210. Adam Crawford, *Policing and Security as 'Club Goods': The New Enclosures?*, 10 THEORETICAL CRIMINOLOGY 449 (2006); INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND (1999), *available at* http://www.NIO.GOV.UK/a_new_beginning_in_policing_in_northern_ireland.pdf.

211. Crawford, *supra* note 210.

regulate themselves through programs of self-regulation. The concept of self-regulation gets considerable, and often highly technical, coverage in the literature, and can be advanced by a variety of techniques.[212] Compliance with state standards can be checked by audit, and enforced by markets. Self-regulation may be underpinned by state-directed constitutive programs for regulation that seek to reconstruct the non-state actor in such a way that its goals or methods are in alignment with the goals of the state.[213] So pollution trading schemes in the environmental realm align the corporate profit motive with the state's goal of reducing hazardous emissions from the industry as a whole. Of course, compliance with state standards can also be enforced through the traditional legal devices of threat of criminal or civil action against derelict providers along with definitions of good corporate and individual citizenship in law that call attention to the social significance of responsible civic engagement.[214] Also crucial is the mechanism of governmental control over public budgets for collective services, which can be withheld on grounds of inappropriate civil engagement.

The successes and shortcomings of these approaches to the extension of state regulatory authority across networks for governance have been mixed. State supervised audit and oversight functions have been subverted through the gaming efforts of corporations, which learn quickly how to turn the rules of the regulatory scheme to their own advantage.[215] On the other hand, quasi-independent oversight bodies have been subject to capture by the very industries they seek to regulate.[216] Private governors are often capable of taking advantage of

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212. *See, e.g.*, AYRES & BRAITHWAITE, *supra* note 162 (discussing "enforced self-regulation").

213. Abrahamsen, *supra* note 13; ROSE, POWERS, *supra* note 13; Rose, *Death of Social*, *supra* note 13; Rose & Miller, *supra* note 13.

214. Michiel S. de Vries, *The Changing Functions of Laws and its Implication for Government and Governance*, 68 INT'L REV. ADMIN. SCI. 599 (2002); ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001).

215. ALEXANDER, *supra* note 21; DRAHOS & BRAITHWAITE, *supra* note 14; BRAITHWAITE & DRAHOS, *supra* note 59; MONBIOT, *supra* note 99. *See generally* Lobel, *supra* note 2 (discussing how regulated parties typically learn to get around the rules).

216. *See* Ananiadis, *supra* note 207; Cameron, *supra* note 12; Hindess, *supra* note 196 (discussing regulation in general); TREVOR JONES & TIM NEWBURN, POLICING AFTER THE ACT: POLICE GOVERNANCE AFTER THE POLICE AND MAGISTRATES' COURTS ACT 1994 (1997); Kempa & Johnston, *supra* note 88 (discussing regulation in the sphere of policing); FRANCISCO R. SAGASTI, KEITH BEZANSON & FERNANDO PRADA, THE FUTURE OF DEVELOPMENT FINANCING: CHALLENGES AND STRATEGIC CHOICES (2005) (discussing regulation in the sphere of development); Ollila, *supra* note 34 (discussing regulation in the sphere of health governance); Ostrom, *supra* note 10; ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Matthew Paterson, David Humphreys & Lloyd Pettiford, *Conceptualizing Global*

holes in state authority, and, in other cases, can simply overpower existing state authority to subvert the collective benefit of partnership approaches to governance.

The achievement of representativeness in these public-private bodies has been incomplete. Sometimes community representation is purely nominal. Even when intended to be real, it can be difficult to achieve. Concern about bias, weakness and corruption on the part of regulatory agencies has undermined their public credibility, rendering difficult-to-reach groups, such as economically marginalized, urban-dwelling ethnic minorities, unwilling to engage with regulatory agencies in processes of partnership governance.[217] Too often, as well, marginalized groups simply are unaware of the role, or even existence of, these bodies.[218] This has raised concerns over the limited representativeness of participatory structures for regulation, echoing concerns over exclusivity in networks for service provision outlined in the previous sections.[219] Thus, in addition to corporate gaming, many efforts to innovate, in the form of fostering partnership approaches through implementing oversight and accountability measures to governance, have fallen flat on the vicissitudes of the human dimensions of partisan politics and social relationships.[220]

Environmental Governance: From Interstate Régimes to Counter-Hegemonic Strategies, 3 GLOBAL ENVIRON. POL. 1 (2003) (discussing regulation in environmental governance).

217. *See e.g*., Kempa & Johnston, *supra* note 88; JONES & NEWBURN, *supra* note 216 (discussing partnership governance in the domain of policing); Ananiadis, *supra* note 207; Cameron, *supra* note 12; Hindess, *supra* note 196 (discussing partnership governance in general).

218. *See e.g*., Kempa & Johnston, *supra* note 88; JONES & NEWBURN, *supra* note 216 (discussing partnership governance in the domain of policing); Ananiadis, *supra* note 207; Cameron, *supra* note 12; Hindess, *supra* note 196 (discussing partnership governance in general).

219. CENTRE FOR THE FUTURE STATE, SIGNPOSTS TO MORE EFFECTIVE STATES: RESPONDING TO GOVERNANCE CHALLENGES IN DEVELOPING COUNTRIES (Institute of Development Studies, 2005), *available at* http://www.ids.ac.uk/futurestate/pdfs/SignpoststoMoreEffectiveStates.pdf [hereinafter CENTRE FOR THE FUTURE STATE]; Bevir & Rhodes, *Searching*, *supra* note 9; BEVIR & RHODES, INTERPRETING, *supra* note 9 at 75-76; RHODES, UNDERSTANDING GOVERNANCE, *supra* note 3; Rhodes, *Policy Networks*, *supra* note 81; Sorenson & Torfing, *supra* note 84.

220. These themes are illustrated through a brief description of participatory governance structures in São Paulo, Brazil prepared by The Centre for the Future State. CENTRE FOR THE FUTURE STATE, *supra* note 219, at 21, 24-25. Over the course of the nation's transition to democracy, civil organizations were active in negotiating the design of Brazil's impressive democratic constitution of 1988. *Id.* The Constitution created extensive institutional mechanisms for direct citizen participation in the design of public policy and the regulation of government action. *Id.* As a result, participatory institutions for setting policy and defining budgets, in such domains as public health, security, and other collective services, were created at the federal, state, and municipal level in Brazil. *Id.* The most successful participatory structures were those that were given the widest mandate to coordinate networks of local associations, advocacy NGOs, and other actors, rather than those tasked with holding a particular public institution to account. Further, those structures that have been most successful in instigating participation from hard-to-hear groups are

Perhaps the most sensitive issue is whether government partners actually cede real power. In participatory budgeting, for example, officials are not always legally required to accept the decisions voluntarily made at these community-led meetings, and may partly or completely ignore them; some programs do not devolve any true power at all to the community.[221] Advisory partnerships, common in areas like community policing, exhibit the weakest (though not necessarily illusory) level of governance control—what might be called discursive or deliberative control.[222] The governing potency of the community police institutions or meetings largely depends on the willingness of the police to be governed, or on the extent to which the community involvement function is backed by the direct authority of city or police managers.[223] These kinds of limitations have, in part, driven the interest in more radical forms of reinvention, to which we turn now.

B. Diffusing Authority: Reinventing Governance

We should not be surprised to find that governance reform initiated by the state and state-backed international institutions will continue to emphasize the state's role and control: that is consistent with 300 years of immersion in Enlightenment analytic devices (e.g., scientific observation) and standards for public governance and citizen engagement (i.e., rational, centralized management).[224] For innovators in governance, such a traditional worldview is a barrier to effective

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those that have interests that stretch across the geographical space of the city, rather than interests limited to a particular locality.

Nevertheless, nearly 20 years into their operation, there has been some "slippage" in the form of participatory mechanisms being dominated by community leaders, neighborhood associations, and NGOs, rather than independent citizens. Given that most such collectivities are not membership-based, this raises serious questions as to whom they speak for when they participate in policy dialogue. *See* Abrahamsen, *supra* note 13; Ruggie, *supra* note 14.

221. CLAUDIO ACIOLY, JR. ET AL., PARTICIPATORY BUDGETING IN THE MUNICIPALITY OF SANTO ANDRÉ, BRAZIL (Institute of Housing and Urban Development Studies 2003); *available at* http://www.ihs.nl/start.htm (follow "Downloads" hyperlink; then follow "Staff Publications" hyperlink; choose "Claudio Acioly"; follow "Acioly 2004_Participatory Budgeting Sto Andre" hyperlink); Cabannes, *supra* note 159; Yves Sintomer & Jacques de Maillard, *The Limits to Local Participation and Deliberation in the French "Politique De La Ville"*, 46 EUR. J. POL. RES. 503 (2007).

222. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 JAIP 216 (1969).

223. Fung, *supra* note 109.

224. *See* Samantha Ashenden & David Owen, *Introduction, in* FOUCAULT CONTRA HABERMAS: RECASTING THE DIALOGUE BETWEEN GENEALOGY AND CRITICAL THEORY 1-20 (Samantha Ashenden & David Owen eds., 1999); BENHABIB, *supra* note 20; Foucault, *Governmentality*, *supra* note 10; *see* Hindess, *supra* note 13 (analyzing various formulations of state power); Ostrom, *supra* note 10, at 495-97.

reform.   Reinventing governance, like reinventing government, is an approach with many and diverse practitioners and theorists, but they tend to have in common a full acceptance of the picture of polycentric, distributed governance set out above. They believe that state-centered authority and rational central management cannot overcome the complexities that hobble government today. Therefore, they tend to start from scratch, looking beyond traditional Western models of governance and asking, "Where and how else has governmental authority been located and exercised in the broader collective interest?"

Those we place in the reinventing governance camp have been trying to solve two primary problems in state-centered governance: (1) democratic deficits, and (2) limited capacity to centrally manage normative and factual complexity.   Hence, whereas reinventing government is exemplified by the public-private partnership, reinventing governance promotes new non-state institutions in which local knowledge and capacity can be mobilized for independent decision-making and management.[225] There is considerable interest in developing institutions and methods of power that can allow the relatively weak to compete with transnational corporations and elites that control state governments.   In this we see both the strong normative orientation towards democracy and distributive justice, and the recognition that the powerful have done very well in adapting to polycentric, decentralized governance.

New governance thinking, like the reinventing government approach, tends to emphasize the importance of institutions that foster collective deliberation to shape public policy and oversee service delivery at various levels of social organization. But where the neo-liberal partnership model involves the state as senior partner, efforts to reinvent governance often aim to develop systems that feature little or no control or input from the state. The challenge has been to identify means of decision-making that balance efficacy and normative acceptability.[226] How can radical participatory mechanisms best be structured to ensure that they work in the common interest, and do not lead to either a tyranny of the majority or a dominant minority?

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225.   The literature can be a bit opaque on the role of government in governance. But few, if any, proponents of radical governance innovations ultimately advocate, or even predict, the withering away of the state. Government has a role in constituting, funding, or checking new non-state institutions, and in some accounts, in helping to coordinate or harmonize the outcomes and knowledge of diffused governors. *See, e.g.*, Cohen & Sabel, *supra* note 7; Scott Burris, *From Security to Health, in* DEMOCRACY AND THE GOVERNANCE OF SECURITY 196 (Jennifer Wood and Benoît Dupont eds., Cambridge University Press 2005).

226.   *See* Ostrom, *supra* note 10; OSTROM, *supra* note 216.

Cohen and Sabel capture many of the ideas in play in their concept of "directly deliberative polyarchy."[227]   In this model, "collective decisions are made through public deliberation in arenas open to citizens who use public services, or who are otherwise regulated by public decisions."[228] These deliberative bodies are, to some degree, constituted by the state, which retains ultimate responsibility for policy-making, but the state and its traditional institutions—courts, executives, and legislatures—change their roles; rather than deciding and implementing, they primarily work to constitute, facilitate, and coordinate directly deliberative institutions.[229]   The   process   allows   local   policy experimentation within a circuit of social learning, satisfying both the imperatives of democracy and the conditions of good governance in complex systems.[230]

Much of the discussion remains abstract and theoretical, and to some extent reflects the long-running debate in the social sciences between two major "schools" of deliberative democratic thought. In the domain of Continental theory that draws upon the work of Jürgen Habermas, the "ideal communication situation" is taken to be founded on the exclusion of open emotional contestation within deliberative forums,[231] coupled with a degree of "removal" from the political process, especially within the domain of hotly contested governance

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227. Cohen & Sabel, *supra* note 7. For other accounts of why decentralized participatory processes are important, and how they may work, *see*, *e.g.*, Teubner, *supra* note 4 (describing "societal constitutionalism"). Lobel describes the useful paradox that guides Teubner's view of why decentralized and reflexive legal practices can actually produce greater coherence and cooperation in a governance system. The more an institution "is autonomous, the more it can both reference and investigate social facts, political demands, social science research, and human needs." Lobel, *supra* note 2, at 361-62.

228. Cohen & Sabel, *supra* note 7, at 313-14.

229. In this regard, the partisans of directly deliberative governance draw away from the civic republicans of the 1990s, *see*, *e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 56-57 (1996), whom they regard as too conservative in their willingness to work within the traditional administrative state. *See, e.g.*, Dorf & Sabel, *supra* note 4, at 282.

230. Cohen and Sabel reject the view that democracy is now practically squeezed between the market and the state. Therefore, they reject the notion that new governance innovators should focus on modern ways of preserving "the pre-contractual, pre-political background responsible for accumulating the social capital we need to preserve our economic and political artifice." Cohen & Sabel, *supra* note 7, at 315. In this, their views are not entirely representative. See, for example, the work of Elliot Freidson on the importance of professionalism as "a third logic" of regulation that can mediate the market and the state. ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC (2001). Arguments rooted in professionalism have, at least, the virtue of being able to identify existing institutions and norms that may be turned towards innovative governance practices.

231. HABERMAS, STUDIES IN POLITICAL THEORY, *supra* note 20; HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 20; HABERMAS, VOLUME II, *supra* note 20; HABERMAS, VOLUME I, *supra* note 20.

issues.[232]   Habermas pins his project of the development of "discourse ethics" upon the belief that these situations are most likely to yield processes that lead participants in deliberation towards "rational outcomes" that are most directly in service of the broader "collective good" rather than merely "political compromises" that entail a "meeting place" somewhere between the extremes of two partisan preferred outcomes. Another stream of deliberative theory, which draws most extensively on the work of Chantal Mouffe,[233] has produced empirical evidence to support the "cathartic effects" of including emotional and symbolic arguments in processes of deliberation. In our view, it is likely that no one approach for deliberation will ever yield stable empirical findings that hold across all contexts: the value of this scholarly work seems to lie in the provision of suggestive "stories" for how deliberation *tends to work* in particular socio-political environments to form the basis of leading institutionalizations of programs that would require sufficient flexibility to adjust to be emerging realities of deliberation in each context—what Holland would call "complex adaptive systems" for deliberative regulation.[234]

There is good news for those that would turn over a significant portion of standard-setting and enforcement to local stakeholders. Namely, there exists considerable laboratory and field evidence to show that individuals who differ significantly in values, knowledge, and perceived self-interest can collaborate to effectively govern their collective affairs. Elinor Ostrom and her colleagues have presented much evidence in support of the contention that, while "no one is able to do a complete [rational] analysis before actions are taken . . . individuals learn from mistakes and are able to craft tools—including rules—to improve the structure of the repetitive situations they face."[235]   They

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232. Dryzek, *supra* note 89; DRYZEK, *supra* note 89.

233. MOUFFE, *supra* note 91; Mouffe, *supra* note 91.

234. JOHN H. HOLLAND, HIDDEN ORDER: HOW ADAPTATION BUILDS COMPLEXITY (1995); *see also* Ostrom, *supra* note 10, at 497.

235. Ostrom, *supra* note 10, at 496; *see also* PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS, AND GOVERNANCE (Clark C. Gibson, Margaret A. McKean & Elinor Ostrom eds., 2000); WAI FUNG LAM, GOVERNING IRRIGATION SYSTEMS IN NEPAL: INSTITUTIONS, INFRASTRUCTURE, AND COLLECTIVE ACTION (1998); OSTROM, *supra* note 216; Elinor Ostrom, *Incentives, Rules of the Game, and Development*, *in* 1995 ANNUAL PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS 207-34 (World Bank 1996); Edella Schlager, Model Specification and Policy Analysis: The Governance of Coastal Fisheries (1990) (unpublished Ph.D. dissertation, Indiana University, Bloomington); Edella Schlager et al., *Mobile Flows, Storage, and Self-Organized Institutions for Governing Common-Pool Resources* 70 LAND ECON. 294 (1994); SHUI YAN TANG, INSTITUTIONS AND COLLECTIVE ACTION: SELF-GOVERNANCE IN IRRIGATION (1992).

have shown that people with limited knowledge and real conflicts of interest, provided with the appropriate governance institutions, tools, and constraints, can solve complex social problems over time.[236]

The evidence is not unmixed, however. Some commentators have suggested that deliberation can increase group agreement, but at the cost of amplifying between-group disagreement.[237] The problem of how local decisions can be harmonized or coordinated in the larger polity has been discussed and theorized over, but there has been little actual experience in practice.

The line between reinventing government and reinventing governance is drawn clearly between advisory and binding community deliberation, and the acid test is control over local spending. Budgets for public goods are very tangible sets of resources that the state controls, and money is a prime mover, so using budgets to mobilize governance resources and realign institutions, or create institutional competition and even institutional death, is very important as a lever over systems of governance. Participatory budgeting with binding control gives citizens real decision-making authority over priorities, but does not necessarily change the locus of control of implementation.

A step further is what might be called "outsourcing to the poor," where the government devolves part of the budget to community

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236. *See* Ostrom, *supra* note 10; Schlager, *supra* note 235; Schlager et al., *supra* note 235. For many years, Elinor Ostrom and colleagues at the Workshop in Political Theory and Policy Analysis at Indiana University, United States, have collected an immense archive of original case studies concerning the governance of a range of common pool resources: irrigation systems, forests, inshore fisheries, and groundwater basins are notable examples. They have been concerned to uncover the types of dilemmas faced by actors in the field, as well as the types of rules that users have evolved over time to try to govern and manage the resources effectively in light of these challenges. Ostrom, *supra* note 10.
Ostrom and colleagues have identified four main clusters of rules that can be manipulated to affect appropriation situations in many common pool resources: boundary, authority, pay off, and position rules. *Boundary rules* mark and control space to increase the proportion of participants that, with regard to the community, are well known, have a long-term stake, and find it costly to have their reputation for trustworthiness harmed in that community. *Authority rules* are rights and duties (with respect to practices) awarded to individuals that are enforced through *payoff rules*. Ostrom, *supra* note 10, at 514-16. For example, a fisher may be assigned to a fishing spot subject to financial, or even criminal, sanction for breach of responsibilities. *Position rules* pertain to agreed procedures for monitoring and enforcing compliance with locally negotiated standards. Ostrom, *supra* note 10, at 516. For example, most inshore fisheries now use shortwave radios as a routine part of their day-to-day operations, allowing a form of instant monitoring to occur. Given that most fishers listen to their shortwave radios, negative publicity about one's breach of rules will be swift and widely spread, and thereby likely to be followed by a direct approach to the rule violator to correct the breach. *See also* FUNG, *supra* note 106.
237. *See* Schkade, *supra* note 186.; Sunstein, *supra* note 186.

stakeholders, rather than corporate providers.[238]   In Thailand, for example, modest results from a government-led effort at top-down housing improvement in the 1990s led to a more innovative approach in which community-based organizations were given responsibility and spending authority to plan and implement housing upgrades in their own neighborhoods under the auspices of a government-created and funded, but independent, public agency, the Community Organizations Development Institute ("CODI"). CODI has a partnership structure, with a board of government and civil society representatives, but primarily works through organizations and networks in the target communities.[239] The theory is that "[w]hen low income households and their community organizations do the upgrading, and their work is accepted by other city actors, this enhances their status within the city as key partners in solving city-wide problems."[240] As of the end of 2004, upgrading programs were proceeding based on this model in 175 communities involving more than 14,000 households.[241]

Interest in direct decision-making and real control over implementation come together in "microgovernance"—a brand of reinventing governance that emphasizes the need to create new civil society institutions to ensure that people have "substantial and equal opportunities to participate directly in decisions that affect them."[242] Microgovernance entails seeding communities that have been excluded from governance with small institutions around which people can mobilize their knowledge and capacity.[243] In South African townships, through a new institution called the Peace Committee, residents provide dispute resolution and community development services that traditional state bodies were failing to deliver.[244] In India, health promotion for sex

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238. WOOD & SHEARING, *supra* note 116, at ch. 4.

239. David Satterthwaite et al., Tools and Methods for Participatory Governance in Cities 26, presented at the 6th Global Forum on Reinventing Governance (May 24-27, 2005), *available at* http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN019656.pdf.

240. *Id.*

241. *Id.* at 27; *see also* Saad S. Yahya, *Community Land Trusts and Other Tenure Innovations in Kenya*, *in* LAND RIGHTS AND INNOVATION: IMPROVING TENURE SECURITY FOR THE URBAN POOR 233-63 (Geoffrey Payne ed., 2002).

242. FUNG, *supra* note 106, at 4; Burris, Drahos & Shearing, *supra* note 11; DEVAS, *supra* note 106.

243. Burris, *supra* note 108.

244. Michael Kempa and Clifford Shearing provide a detailed description of the initial dispute resolution program. Kempa et al., *supra* note 92, at 34-36. *The Zwelethemba Model for Peacemaking and Peace-Building* bears the name of the community in which the initial pilot work took place: Zwelethemba, a community within the Worcester municipality, a country town near Cape Town, South Africa. The name "Zwelethemba," a Xhosa word, fortuitously means "place of hope."

The Zwelethemba model provides a micro-institutional, technological, and resource basis for providing governmental services at the local level through the mobilization of local knowledge and capacity. The model approaches governance through the window of dispute resolution. It uses this window to foster the development of institutions of community self-regulation. It also uses this window to support a culture of collective efficacy in places where state government has had difficulty in delivering services over the course of South Africa's transition from Apartheid to inclusive democracy. Although designed to enhance community security in an immediate sense, the model also develops an institutional framework that can facilitate effective community direction in other domains of governance, such as health promotion, education, and housing.

The Zwelethemba model is built around the right and ability of communities to solve their own problems. It has two components: dispute resolution (i.e., peacemaking) and community development through financial grants that are derived from state and non-state sources (i.e., peace-building and local development generally) that are organized and conducted through Peace Committees made up of five to twenty people. When a dispute arises, members of the Committee sponsor a gathering of people thought to be in a position to contribute to dispute resolution. The gathering's focus is finding solutions that let people move forward amicably. Participation is voluntary and no coercion, punishment, or violence is allowed. A *Code of Good Practice*, which recognizes the governing authority of the South African Constitution, along with *Steps* that ensure consistency and compliance with the *Code*, regulate the process. Audit procedures, coordinated by a nongovernmental organization called the Community Peace Program (affiliated with the school of Government, University of the Western Cape and funded by international development grants, and partially by the South African state) are used to ensure that embedded regulations operate effectively. While any dispute can give rise to a gathering, the focus is on the small things that, if left unresolved, lead to larger problems.

The model is designed to be inexpensive, but not free. Each time a Peace Gathering is held, a payment is made to the Committee by local governments or other funders. Thirty percent of this goes to the members conducting the gathering to compensate them for their time. Sixty percent is paid into a peace building fund used by the Committee for community development projects. A final ten percent goes to an administrative fund for the costs of operating the Committee. Since these funds are earned locally, a great deal of care is taken to ensure that they are spent on the bottom line of community development. Thus, the program provides for greater security, responds to generic issues, enhances self-direction, and promotes human rights.

Since its inauguration in 1998, the Zwelethemba model has been continuously refined through ongoing experimentation, and has proven to be robust, sustainable, and easily reproduced. The model has been rolled out all over South Africa. To date over 80,000 people have participated in over 12,000 gatherings in South Africa.

In November 2000, the project was initiated in Rosario, Argentina through a partnership with the Universities of Rosario and Toronto, and national and local governments of Argentina and Canada. Already, work in Argentina indicates that the model is transferable to at least one other very different socio-political context.

In the pilot area of Zwelethemba, members of the Community Peace Programme have randomly surveyed the area on several follow-up occasions to determine the perceived efficacy of, and community satisfaction with, the dispute resolution process (on each of these occasions, the number surveyed was between 70 to 100 persons). The Community Peace Programme has also undertaken an assessment of the contribution being made by the process as a whole toward fostering collective capital and cohesion within the community.

In 1997, at the inception of the project, 19.7% of persons surveyed responded that "the way in which disputes are handled" in their communities had "improved" in the last six months, while 80.3% indicated that things had "stayed the same or become worse." By 1999, the proportion reporting an improvement increased to 49%, while the proportion reporting no difference or deterioration was reduced to 35%, with 15% responding that they were "not sure."

In 1998, respondents were asked whether they thought that the public police were being called for

workers has been built around collectives like the Durbar Mahila Samanwaya Committee (DMSC) in Sonagachi.[245] The DMSC collective has grown into a stable NGO that promotes sex-worker well-being broadly, through programs of microlending and education, but also in significant part by mobilizing sex worker's power to resist intimidation by police and other traditional community governors. New governance practices like these not only change how specific activities are managed, but also potentially the dynamics of the larger urban governance system.

Proponents contend that microgovernance projects like sex worker collectives and peace committees enable communities to manage the course of events in at least three ways. First, they create an institution around which resources and situated knowledge can cohere, and in which people can define their own needs and priorities for change.[246] Second, they reconfigure relations of governance within the community, filling governance gaps or competing with under-performing institutions.[247] In the Peace Committee example, both the police and African National Congress street committees were present to control

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similar dispute problems more or less often than in the past six months. The results are indicative of a trend towards the perception that the public police are being called less often rather than more often—46% versus 37.9% respectively.

Similarly, 1999 saw the belief that people in the community were capable of handling most local disputes increase to 59% relative to 48.2% in 1998. Finally, community awareness and use of local Peace Committees had clearly increased from 1998 to 1999, with 3.4% versus 32% mentioning these bodies when asked who had helped them solve a dispute problem in the past six months on the two respective occasions.

Taken together, these data indicate that perceptions of both the level of safety in the community, and the capacity of the community to actively bring about these positive outcomes, are on the rise. The increasing use of Peace Committees over this same time period indicates that the project is making a meaningful contribution towards facilitating both of these sets of outcomes. With regard to the objective of fostering community development, a range of projects have been supported through community-block grants earned through gatherings held. Such projects include: the building and maintenance of a children's playground in a shack area far from any other facility; the refurbishment of an old home; assistance in furnishing a new day care center; and a feeding scheme for children, designed to promote health.

The emphasis in these projects has been on using the services that local people are able to provide, thereby creating and increasing the number of baseline local market opportunities that are available to local micro-entrepreneurs. Resources earned this way can be used subsequently by micro-entrepreneurs to develop further market opportunities into which an expanding number of community members can be drawn. Kempa et al., *supra* note 92, at 34-36.

245. Smarajit Jana et al., *The Sonagachi Project: A Sustainable Community Intervention Program*, 16 AIDS EDUC. & PREV. 405 (2004); Flora Cornish & Riddhi Ghosh, *The Necessary Contradictions of 'Community-Led' Health Promotion: A Case Study of HIV Prevention in an Indian Red Light District,* 64 SOC. SCI. & MED. 496 (2007).

246. *See* Cornish & Gosh, *supra* note 245, at 504 (noting the success of the sex worker project due to involvement and negotiations among those affected by the industry).

247. *See id.* (noting that the addition of other people to the project was necessary for its success).

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crime in the townships; but their methods were not useful for dealing with smaller disputes or reducing violence. Peace Committees first filled a service gap, then began to work with the police to "share" jurisdiction over community security. Third, microgovernance institutions reconfigure relations between the community and the larger system it inhabits.[248] Microgovernance can be amplified by networking strategies through which community-based organizations increase their influence locally, and in upstream politics, by linking together.[249] Federations like Slum/Shack Dwellers International (SDI) "work together to support each other—from community to community within cities, from city to city within nations, and internationally."[250] The DMSC, and other sex worker collectives in India, have enabled sex workers to enter into the national debate about HIV/AIDS and sex work policy.

Finally, governance innovators have their own version of the market regulation characteristic of reinventing government. Information about the harmful consequences of consumer, distributor or producer behavior can be used both to punish bad actors and provide positive incentives for better practices. Responsible planetary stewardship and engagement in governance can be promoted in corporate and consumer circles through the distribution of information about the negative consequences of bad manufacture and consumption practices. These processes are illustrated in the "fair trade" movement, which certifies growers and traders of products like coffee who observe environmentally and socially sound production and import practices.[251]

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248. *See id.* at 505 (noting the effect that the sex worker project had on the relationship of sex workers with others in the community).

249. Arjun Appadurai, *Deep Democracy: Urban Governmentality and the Horizon of Politics*, 13 ENVT. & URBANIZATION 23 (2001); Sandra Yu & Anna Marie Karaos, *Establishing the Role of Communities in Governance: The Experience of the Homeless People's Federation Philippines*, 16 ENVT. AND URBANIZATION 107 (2004); Celine D'Cruz & David Satterthwaite, *The Role of Urban Grassroots Organizations and Their National Federations in Reducing Poverty and Achieving the Millennium Development Goals,* 2 GLOBAL URB. DEV. 1 (2006).

250. D'Cruz & Satterthwaite, *supra* note 249, at 2; Appadurai, *supra* note 249; Sheela Patel, Sundar Burra & Celine D'Cruz, *Slum/Shack Dwellers International (SDI)—Foundations to Treetops*, 13 ENVT. AND URBANIZATION 45 (2001); Sheela Patel & Diana Mitlin, *The work of SPARC, the National Slum Dwellers Federation and Mahila Milan*, Working Paper Series on Poverty Reduction in Urban Areas, Working Paper 5, Dec. 2001, *available at* http://www.iied.org/pubs/pdf/full/9074IIED.pdf.

251. Peter Leigh Taylor has described the success of Fair Trade Coffee initiatives in great detail. Taylor, *supra* note 43. Coffee is one of the five most important commodities in the world market, and is principally produced by poor, small-scale farmers in the global South. Since the collapse of the International Coffee Agreement in 1989, prices have fallen to their lowest levels in a

C. Innovation in Governance: Combating Institutional Fetishism or Succumbing to Intellectual Fashion?

The difference between reinventing governance and reinventing government is conceptually fuzzy, but practically stark: it marks the point at which true control over decisions and resources moves from government to non-state actors. As important as that difference is, however, there is a great deal of overlap between the two genres we have defined. The programs use similar tools, such as institutional redesign, deliberative negotiation, participatory budgets, and information. They both reflect, to a greater or lesser degree, the rejection of the belief that social goods can only be delivered through the institutions and processes that traditionally have delivered them—what Roberto Unger calls "institutional fetishism."[252] And both approaches are open to critical interrogation on the same key points.

Somewhere near the heart of both approaches is the belief that tradition approaches to state regulation have lost much of their bite. Explanations range from a sort of Hayakian "I told you so," to nuanced accounts of system complexity offered by Gunther Teubner, to the

hundred years. Millions of small farmer families have suffered the loss of their livelihoods as a result.

Fair Trade Coffee is an inter-organizational network clustered around circulating information about coffee production, and linking households, enterprises, and states to one another within the world economy. A point stressed by this network is that surplus profits accrue to roasters and distributing houses in coffee production chains, which are mostly located in the global North. The network aims explicitly to alter these trade relations through certifying coffee brands that make use of equitable coffee production chains. First, their producer operations must be small-scale and family based, be organized politically into democratic associations, and pursue ecological goals. Second, coffee buyers must purchase directly from local organizations with contracts extending beyond one harvest cycle, guaranteeing both an acceptable minimal price and a social premium per pound.

Fair Trade is unique among certification schemes worldwide because the buyer, rather than the producer, pays the cost of certification and monitoring by the Fair Trade organization. As these costs are passed up the commodity chain, Fair Trade is mostly financed by the consumer's willingness to pay more for fair coffee. This willingness to pay is supported by the building of direct personal ties between Northern consumers and Southern producers.

With special-needs commodities such as fair trade coffee, moral and ideological considerations are added to the value of the product itself. Consumers are conscious of the participation in humanitarian or charitable actions when they buy a certain product over another, and are thereby constituted as responsible global consumers.

Although its roots lie in the alternative trade movement, Fair Trade began offering products in large, non-alternative channels in the early 1980s. In 1997, the labeling scheme was introduced under the Fair Trade Labeling Organization. Today, Fair Trade pursues a "mainstreaming strategy" that aims to achieve rapid growth in market share by encouraging corporations, governments, major retailers, and other large economic actors to support fair trade. Mainstreaming has accomplished much on these measures. The strategy's most visible recent success has been the enlistment of Starbucks, now the largest U.S. buyer of fair trade coffee.

    252.   UNGER, *supra* note 5, at 6-8.

optimistic "we can fix this" prescriptions of regulatory technologists like Braithwaite, Rhodes, and Ian Ayres, to the happy pluralism of Shearing and Ostrom that embraces non-state governance.[253] Precisely because it is so widely accepted, it may be the idea most deserving of cautious treatment.[254] Certainly an idea reaches its point of greatest danger to clear thinking when it is universally acknowledged.

Many regulatory scholars have argued that it is just plain wrong, as an empirical matter, to claim that command and control regulation is doomed to failure, let alone that the state is withering away.[255] Even sympathetic readers of the new governance literature have argued that it "would be foolish to 'throw out the state' with the governance or governmentality bath water . . . [W]e should not get carried away with 'a giddy sense at the moment among many intellectuals that the state is passé.'"[256] Putting aside the utility of the state as a command and control regulator, Adam Crawford reminds us that it is useful to governance innovators in a number of ways, including "in its symbolic power and cultural authority; in its legitimacy claims and public perceptions of its legitimacy; as a distinctive (tactical) resource and source of information through which interests are pursued; [and] in its residual position as a back-up of last resort with regard to other forms of control."[257]

New governance scholarship is also at risk of overestimating the advantages of localism. Local participation in governance is certainly the foundation of many of the positive developments in governance. It is an enduring strategy in civic reform. But localism has its pitfalls, as well as benefits:

> Foremost among these are domination or capture by powerful factions or persons in small groups, the paralysis of local groups due to conflictual deadlock, and their lack of capacity and sophistication. Circumstances of pervasive inequality and conflict . . . further

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253. *See* Lobel, *supra* note 2, at 364-70 (describing a belief in regulatory failure as an important piece of new governance thinking).

254. To be sure, many of the new governance scholars reject the notion that government regulation is always a failure. *See*, *e.g.*, Cohen & Sabel, *supra* note 7. But that does not stop them from pushing the state into new roles on the basis of its maladaption to the needs of contemporary governance.

255. Moran, *supra* note 2, at 396 ("evidence in the wider literature is nothing like as damning as the critics of 'command' suggest and that the history of command in clean air regulation shows no clear tendency for the effectiveness of command to decline over time.").

256. Crawford, *supra* note 29, at 458 (citations omitted). *See generally* STEVEN CROLEY, REGULATION AND PUBLIC INTERESTS, THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008) (arguing that effective regulatory government is eminently possible).

257. *Id.* at 459.

compound these difficulties. These problems may well overwhelm the benefits to autonomy understood as neighborhood decentralization.[258]

Devolution may simply give more power to those in the community that already have it.[259] The voices of the poorer, weaker, more socially marginal can be ignored. Women may be denied the chance to speak at all. Those with greater resources of experience, money, or skill can game the local system as they can a national government.[260] Urban settings often have large populations of "illegal" internal or international migrants whose right to a place at the table is contested.[261] It is also easy to forget that local politics is not isolated from national politics. Urbanites do not necessarily, or even most of the time, organize themselves and vote as urban dwellers, but rather act as members of ideological or ethnic blocks organized around issues of national salience, issues that may reflect and worsen divisions at the local level.[262]

None of these caveats suggest that new governance scholars take a naïve view of the task. None of them would dispute that the promotion of innovation in governance will certainly benefit from a significant investment in research and practice. On the research side, more support is required for study of the "design principles" or grammars, of successful governance, particularly outside of, and in partnership with, government.[263] Research is needed, but it is probably even more important to fund governance "entrepreneurs" reinventing governance in communities around the world, and to support ongoing community processes of governance reinvention. Funders and governments speak about the importance of good governance and strong civil society, but investment in general governance capacity, unlinked to a particular categorical program or specific objective, is still too rare. From a governance point of view, the mechanisms now used to assure transparency and accountability too often also promote aid silos and the diversion of valuable local resources to filling out reports to funders. The resources that local problem-solvers need to fuel their innovation thereby become barriers to autonomous action.

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258. Fung, *supra* note 109, at 75. *See generally* JAMES MANOR, THE POLITICAL ECONOMY OF DEMOCRATIC DECENTRALIZATION (1999).

259. Craig Johnson, Priya Deshingkar & Daniel Start, *Grounding the State: Devolution and Development in India's Panchayats*, 41 J. OF DEV. STUD. 937 (2005).

260. ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).

261. Shearing & Wood, *supra* note 92.

262. DEVAS, *supra* note 106.

263. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005); Mashaw, *supra* note 16.

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Investment is also necessary to sustain and build on success. Even successful models of participatory governance – and there are many – remain "feel good" stories for researchers, governments, and NGOs unless they can be replicated at a sufficient scale to influence the condition of the mass of urbanites. "When such projects function well and are spread over the entire city, they are always characterized by a highly motivated municipality, civic commitment, active participation by the inhabitants of poor neighborhoods, effective communication, and stable funding over several years,"[264] but there are many stories of successful local health governance models that ultimately failed for lack of ongoing funding.[265] Particularly when dealing with civil society in developing countries, Northern actors must recognize that civil society organizations in developed countries are only sustainable because they receive annual infusions of cash from government contracts and private donors writing checks from within a philanthropic tradition reflecting general wealth, social norms and, often, tax incentives.

V. CONCLUSION

Governance is the management of the course of events in a social system. Even in periods of apparent stability, governance has always been an adaptive social process. Today, perhaps, developments in the collection and use of information have made changes more rapid and obvious. "Reinventing government" has been part of a primarily neo-liberal project of reform for almost two decades now, but has gradually broadened into a widespread effort to describe and prescribe changes in governance generally. Regardless of the label, observers have documented governance changes in the form of shifts in the institutions exercising governance control, changes in methods of power, and changes in the nature and effectiveness of constraints on governors. Contemporary governance is now widely understood to be polycentric, distributed along complex networks. These developments may be good for democracy in general and the world's majority of have-nots in particular, but so far much of that good remains to be realized. The efficacy of traditional hierarchical systems for governance is thought to have diminished, but few alternative systems for steering policy networks in the public interest have developed, with the net effect that

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264.   Isabelle Milbert, *Slums, Slum Dwellers and Multilevel Governance*, 18 EUR. J. OF DEV. RES. 299, 313 (2006).
265.   Barten et al., *supra* note 10.

governance has been skewed across all collective good domains in the interests of the most powerful classes.

The description one chooses of contemporary governance tends to shape the kinds of innovations one proposes. Those who see the state as still the most potent of governors, or who want to restore its strength, focus their innovation on "reinventing government." Typically, within the dominant neo-liberal prescription, state authorities attempt to retain a hand on the tiller to steer service design and provision, ostensibly in the public interest. Existing institutions are seen as largely the right ones, provided they can adopt some new mechanisms of oversight and cooperation. Existing constraints on state-centered governance (like voting, transparency, etc.) are seen as sufficient to prevent abuse of power or corruption.

Those who question either the capacity or the will of states to govern effectively for the public good, and who see non-state actors as prime engines of governance, tend to promote more innovation in institutions, tools of governance, and norms. They particularly favor institutions that mobilize previously untapped knowledge and capacity, and that give true control to these new institutions. Similarly, they look to governance tools suitable for non-state actors without either great wealth or the capacity to use force: information disseminated across networks is perhaps the primary such tool.

Thus, the problem of innovation in governance revolves around the distribution of governing power across social space. Participatory democracy, localism, and deliberation are acknowledged by all parties to the debate as promising, important and imperfect. Devolution may simply give more power to those in the community who are already powerful, further marginalizing those who are excluded from shaping governance practices and outcomes. Conversely, local groups might come up with programs for governance that offend basic principles of democracy—whether these groups are comprised of the mainstream or marginalized. These questions lead on to concerns of ultimate accountability and responsibility for governance: where governance is diffuse, who is ultimately responsible when policy develops in undesirable directions or service delivery goes off track?

The capacity of the global community to manage the challenges humanity has crafted for itself is perhaps the central question of our time. Governance has been a lens through which theorists and practitioners have tried to approach the question of rational, just and sustainable management of our world. The literature on governance offers many promising technologies, but there is still the human element,

for "what is government itself, but the greatest of all reflections on human nature?"[266] The changes in governance we have described have in many instances been deliberate and planned, but it would be error to see the ferment as either a rational or organized phenomenon. The challenge, after all, is not to adapt to a changing social and physical environment, but to adapt rationally and fairly. Systems of governance can help promote rationality and fairness, but these are, in the end, characteristics of people, not systems.

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266. JAMES MADISON, THE FEDERALIST NO. 51.