

GOVERNANCE LEGALISM: HAYEK AND SABEL ON REASON AND RULES, ORGANIZATION AND LAW

AMY J. COHEN*

The field of new governance has generated passionate debate about the potential effects of its efforts to democratize political decision-making through the bottom-up production of law. Some analysts suggest that new governance may reinforce neoliberal efforts to replace the state with market forms of regulation and control. But predictions about the effects of new governance’s techniques—self-regulation, devolution of state power, subsidiarity, anti-adversarialism, and so on—are extraordinarily complex: agents can and do deploy all these means for multiple and shifting social ends. This Article therefore explores how two of the most innovative thinkers of new governance, on the one hand, and neoliberal governance, on the other, themselves understand key conceptual distinctions between their normative projects. Specifically, it traces the ways in which Charles Sabel and Friedrich Hayek hold disparate conceptions of three interrelated ideas: the individual’s capacity for reason, the relation between small-scale organizations and the overall order of society, and the possibilities of making bottom-up rules of law.

Building on these distinctions, the Article puts forth an account of new governance that diverges from most contemporary scholarship. Analysts widely distinguish new governance from liberal legalism—for example, they describe new governance as a rejection of the kind of centralized legal regulation favored by liberal advocates of the New Deal state, and as an embrace of informal, flexible, lay, and even extralegal problem solving. This Article, however, explores new governance as an effort to bring formalizing and law-like procedures to bear on Hayekian models of flexible organization. It suggests that studying the discontinuities between new governance and neoliberalism—and the continuities between new governance and liberal legalism—may help clarify ongoing questions about new governance’s view of law as a tool of distribution and social change.

Introduction	358
I. Tacit Knowledge and Formal Rules	361
II. Selfhood and Social Organization.....	368

* Assistant Professor of Law, The Ohio State University Moritz College of Law; Visiting Professor of Law, The University of Turin, Faculty of Law, fall 2009. I wish to thank Raffaella Caterina, Ilana Gershon, Janet Halley, Michele Graziadei, Garry Jenkins, Genevieve Lakier, Charles Sabel, Bill Simon, Jason Solomon, and Annecoos Wiersema for conversation, comments, and generous reading, and Steven Druckenmiller and Naila Awan for research assistance. I am also grateful to Dean Alan Michaels of The Ohio State University Moritz College of Law and Dean Gianmaria Ajani of the University of Turin for research funding and, most especially, the organizers and participants in this Symposium event.

III. Bottom-up Lawmaking	376
Conclusion: Individual Responsibility, Social Accountability, and Questions of Justice	382

INTRODUCTION

The field of new governance has generated passionate debate about the distributional effects of its efforts to democratize political decision-making through the bottom-up production of law. New governance proposes to devolve state power to non-state actors to generate the rules and norms that will govern their own behaviors and practices.¹ Several scholars, however, have cautioned that new governance is unlikely to redistribute political power as it claims.² To the contrary, various analysts have observed conceptual overlaps between new governance and neoliberal critiques of the welfare state;³ some have suggested that

1. See, e.g., Christine Parker, *The Pluralization of Regulation*, 9 THEORETICAL INQUIRIES L. 349 (2008).

2. For a smattering of criticisms, see, e.g., Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117, 131-32 (2009) (suggesting that new governance's decentralized and soft-law mechanisms are unlikely to protect the interests of disadvantaged groups); Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 333 (2007) (critically examining the progressive potential of new governance measures that "bypass courts and legislatures"); Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel's Approach to Reform of Public Education*, 28 N.Y.U. REV. L. & SOC. CHANGE 319, 322 (2003) (predicting that without greater attention to state-enforced rights, governance networks may become exclusive and non-transparent); John A. Powell & Marguerite L. Spencer, *Brown is Not Brown and Educational Reform is Not Reform if Integration is Not a Goal*, 28 N.Y.U. REV. L. & SOC. CHANGE 343, 347 (2003) (arguing that new governance approaches to education reform represent "the triumph of process over substance"); César A. Rodríguez-Garavito, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, 33 POL. & SOC'Y 203, 205 (2005) (criticizing the "the governance paradigm" for paying insufficient attention to "the problems created by large power asymmetries among the nonstate actors . . . who are supposed to engage in deliberation and collaboration within governance systems"); David Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PENN. L. REV. 541, 542, 545 (2009) (insisting that to address poverty in the United States, planners need centralized policymaking, not the decentralized participatory decision-making promoted by new governance); Annecoos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL L. 1239 (2008) (arguing that new governance approaches to resource management cannot ensure long-term environmental protection).

3. See, e.g., Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 343 (2009) ("New Governance resonates with neo-liberalism; the impulse toward less centralized regulation and an appeal to privatization reflects neo-liberal

new governance stands to reinforce broader efforts to replace state-enforced rights and entitlements with market forms of regulation and control.⁴ But predictions about the politics of new governance's techniques—self-regulation and self-monitoring, citizen participation, horizontality, subsidiarity, benchmarking, anti-adversarialism, and so on—are extraordinarily complex: agents can and do deploy all these means for a shifting range of social ends.⁵

This short Article therefore explores how two of the most important and innovative thinkers of new governance, on the one hand, and neoliberal governance, on the other, themselves understand key conceptual distinctions between their normative projects. To that end, I begin by describing a 1995 conference paper by Charles Sabel that leaves little doubt about Sabel's overwhelming influence on the development of new governance.⁶ Sabel's early paper is stunningly comprehensive—there is virtually no element of the contemporary

ideals which have enjoyed currency in the American post-welfare state.”); see also Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 20, 48 (2008) (discussing features, such as subsidiarity and public-private partnerships, that new governance and neoliberalism share in common); Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 511 (David Sugarman's remarks, observing that “governance is a linguistic politics . . . associated with the ‘third way,’ with particular versions of neoliberalism”).

4. See, e.g., Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 ECON. & SOC'Y 1, 7–8 (2008) (linking new governance ideas to the decline of state responsibility and the expansion of individual responsibility shaped by cost-benefit calculations); see also William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy*, 17 CANADIAN J.L. & JURISPRUDENCE 101, 125–26 (2004) (noting “the uglier facets of a system of capitalism organized according to the principles of benchmarking, concomitant engineering, and independent monitoring” and questioning the social consequences if new governance succeeds in using these principles to reorganize state regulation); Hershkoff & Kingsbury, *supra* note 2, at 321–23 (discussing new governance's conceptual roots in industry and management and arguing that, as applied to social policy, new governance may intensify inequalities and undermine social values that defy quantification).

5. See, e.g., JOEL F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* (1996); Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 43 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

6. Charles F. Sabel, *Design, Deliberation, and Democracy: On the New Pragmatism of Firms and Public Institutions* (paper presented to the Conference on Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations, European Univ. Inst., Dec. 15–16, 1995), in LIBERAL INSTITUTIONS, ECONOMIC CONSTITUTIONAL RIGHTS, AND THE ROLE OF ORGANIZATIONS 101 (Karl-Heinz Ladeur ed., 1997), available at <http://www2.law.columbia.edu/sabel/papers/Design.html>.

project that we cannot already find prefigured in its pages. But this paper also develops a crucial point that is absent from later writings: Sabel fashioned new governance partially by invoking but also by critically disavowing the ideas of Nobel laureate and economic philosopher Friedrich Hayek⁷—the theorist widely credited as the father of contemporary neoliberalism, with his blustery attacks on government planning, social redistribution, and the welfare state.⁸ Sabel in fact suggested that Hayek inspired “the most promising” but ultimately flawed program for democratic reform.⁹

By comparing Sabel’s critique of Hayek with Hayek’s own writings, I trace the ways in which these two thinkers hold disparate conceptions of three interrelated ideas: the individual’s capacity for reason, the relation between small-scale organizations and the overall order of society, and the possibilities of making bottom-up rules of law. I illustrate, moreover, how these differences inform the governance techniques that they alternatively endorse, as well as their predictions about the sorts of normative ends they anticipate will follow.

By distinguishing Sabel-inspired new governance from Hayek-inspired neoliberalism, this Article also offers a picture of new governance that is missing from contemporary scholarship. Numerous analysts distinguish new governance not from neoliberalism but rather from left-of-center liberal legalism.¹⁰ They describe new governance as a turn away from the kind of centralized command-and-control regulation favored by liberal advocates of the New Deal welfare state, and as a turn toward informal, flexible, lay, and even extralegal

7. In this paper, Sabel develops new governance through a partial invocation and partial rejection of Hayek, on the one hand, and Durkheim, on the other. My Article, however, addresses only Sabel’s engagement with Hayek.

8. See, e.g., Rachel S. Turner, *The “Rebirth of Liberalism”: The Origins of Neo-Liberal Ideology*, 12 J. POL. IDEOLOGIES 67, 69–71 (2007). Hayek himself acknowledged that “Americans have done me the honour of considering the publication of *The Road to Serfdom* as the decisive date . . . [of bringing] about the rehabilitation of the idea of personal freedom especially in the economic realm.” *Id.* at 78. Fittingly, he subtitled his three-volume work on law “a *new* statement of the liberal principles of justice and political economy.” 1–3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973, 1976, 1979) (emphasis added).

9. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 132.

10. I intend the term “liberal legalism” to approximate what William Simon broadly describes as legal liberalism, that is, “a cluster of ideas associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund, Ralph Nader, and the legal aid and public defender movements.” William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 127 (2004). See also Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 827 (2008) (describing new governance as “a critique of and (for some) an intentional challenge to the rights-based model of legal liberalism”).

collaboration and problem solving—thus laying the groundwork for comparisons between new governance and the informalization and privatization promoted by neoliberalism. But Sabel’s early engagement with Hayek suggests that we should *also* understand new governance as a set of formalizing, reason-seeking, indeed law-seeking revisions to Hayekian models of informal flexible organization and, hence, as a vision of law and social order that holds far more in common with liberal than neoliberal legalism.¹¹

This Article proceeds in four parts. In Part I, I outline the points of convergence and divergence between Sabel and Hayek, and then I link these points to competing ideas about selfhood and social organization in Part II, and bottom-up lawmaking in Part III. In conclusion, I compare new governance and Hayekian conceptions of accountability and justice. This final comparison is the most general and the most dependent upon the analytical distinctions worked out in the preceding Parts and serves as my conclusion. It suggests that emphasizing the continuities rather than the gaps between new governance and liberal legalism helps to clarify ongoing questions within the field about the role of law as a tool of distribution and progressive social change.

I. TACIT KNOWLEDGE AND FORMAL RULES

Several commentators have noted commonalities between new governance and Hayek—most frequently, their emphasis on *unknowingness* as an intrinsic feature of human life.¹² Indeed, both Sabel and Hayek built their respective projects of political governance out of insights about the limits of individual knowledge and their shared claim that none of us can dictate complete solutions to social problems. And both used these insights to justify their assertion that government should decline from imposing prior substantive or distributional ends.

Hayek, for example, famously claimed that we are all necessarily and irremediably ignorant of “most of the particular facts which determine the actions of all the several members of human society.”¹³

11. A brief note on this potentially confusing terminology: the first usage of the term liberal is intended to signify a (peculiarly United Statesian) association with progressive social-legal ideals. *See, e.g., supra* note 10. By contrast, the second usage broadly signifies a reconstruction of ideas of individual freedom promoted in neoclassical economics and classical legal thought. *See, e.g., supra* note 8. *See generally infra* Part III.

12. *See infra* notes 18–19 and accompanying text.

13. 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 12 (1973) [hereinafter HAYEK, 1 *LAW, LEGISLATION AND LIBERTY*]; *see generally*

For him, government's primary function was therefore not to direct individual action but rather to ensure that individuals can surpass the limits of their ignorance by utilizing dispersed bits of knowledge possessed by their neighbors.¹⁴ "All we can hope to secure," he argued,

is a procedure that is on the whole likely to bring about a situation where more of the potentially useful objective facts will be taken into account than would be done in any other procedure which we know . . . [and that] best assist[s] the optimum utilization of the knowledge, skills and opportunities to acquire knowledge, that are dispersed among hundreds of thousands of people, but given to nobody in their entirety.¹⁵

New governance begins with a very similar claim. As Michael Dorf puts it: "people increasingly find that their problem is not so much an inability to persuade those with different interests or viewpoints of what to do; their problem is that no one has a complete solution to what collectively ails them."¹⁶ As a result, new governance scholars propose to replace top-down regulation with institutions designed to collect and pool local knowledge.¹⁷ These institutions aim to enable, but also to require, individuals to pursue joint solutions to public problems by building on the dispersed knowledge of others—guided by state supervision, but not direct or centralized state control. Thus, for example, John Braithwaite explains that an unmistakably "Hayekian analysis of impoverished local knowledge under state planning" informs contemporary strands of new governance.¹⁸ And Philip Alston and James Heenan observe that defenders of new governance style regulation claim that "[t]he rights approach or fixed principles approach . . . [will] fail in part because it is unable to take account of all relevant contextual considerations or to adjust to unintended consequences. In

FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 22–38 (1960) [hereinafter HAYEK, *CONSTITUTION*].

14. See HAYEK, 1 *LAW, LEGISLATION AND LIBERTY*, *supra* note 13, at 12–15.

15. 3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 68 (1979) [hereinafter HAYEK, 3 *LAW, LEGISLATION AND LIBERTY*].

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

17. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267, 317 (1998).

18. John Braithwaite, *Methods of Power for Development: Weapons of the Weak, Weapons of the Strong*, 26 *MICH. J. INT'L L.* 297, 308 (2004) (describing work by Clifford Shearing and others that draws on Dorf and Sabel's scholarship).

that respect, the analysis is remarkably similar to that of Friedrich Hayek”¹⁹

But despite these overarching similarities, new governance and Hayek diverge widely on how they understand—and how they propose to manage—the limits of human knowledge and, accordingly, how they understand the possibilities of political governance. As Sabel knew well, Hayek did not simply argue, as new governance scholars often do, that knowledge is fragmented, diffuse, and contextual; Hayek also argued that human knowledge is very often tacit.²⁰ Hayek suggested that people—particularly as they engage in intensively interactive practices with others—come to know many things that they cannot consciously explain to others or even to themselves.²¹ Government, Hayek claimed, should therefore delineate permissible spheres of action so that individuals can freely utilize their knowledge to coordinate their tasks and pursue their purposes.²² But because individuals are limited in their abilities to generate explicit formulations about their purposes, capabilities, and skills, government should not expect that individuals will make their knowledge the subject of conscious reflection or intentional debate. Rather, government should assume that *through* informal social processes individuals will spontaneously create things greater than anyone could deliberately design or consciously foresee.²³ For this reason, Hayek advocated a system of state governance that enforces formal rules at a high level of abstraction—what he often called rules of just conduct (and described, for example, as field defining rules of property and contract).²⁴ Only abstract formal rules, Hayek claimed, with no purpose other than informing people how they

19. Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT’L L. & POL. 221, 250, 249–51 (2004) (describing Sean Cooney’s pragmatist approach to labor regulation and its reliance on Sabel’s work among others).

20. See, e.g., Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 107–08.

21. See, e.g., HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 11–12, 19.

22. F.A. HAYEK, *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS* 77 (1978).

23. See, e.g., HAYEK, *CONSTITUTION*, *supra* note 13, at 159–61 (describing polycentric orders).

24. See, e.g., *id.* at 148–61; F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 63 (1988); 2 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 16–17 (1976) [hereinafter HAYEK, 2 LAW, LEGISLATION AND LIBERTY].

may permissibly pursue their own purposes, could plausibly achieve spontaneous or self-generated social ends.²⁵

Sabel's vision of governance borrows Hayek's idea that the state should cultivate environments conducive to learning, experimentation, adaptability, and growth.²⁶ Moreover, Sabel shares Hayek's argument that individuals evolve their interests and preferences through social interactions with others, and that decentralization is therefore necessary to ensure that diffuse local knowledge and interests are effectively used.²⁷ For example, Sabel suggests that new governance mobilizes "the contextual intelligence that only citizens possess" through "practical deliberation" about shared social problems.²⁸ And like Hayek, Sabel plainly rejects the post-war promise that planners can engineer adequate responses to complex social questions from above.

But by emphasizing the possibility of citizen *deliberation* about problems, Sabel also rejects what he describes as Hayek's distinction between tacit knowledge and abstract formal rules—that is, between "tacit knowledge that guides local action yet cannot be formalized and formal rules that coordinate action at a distance."²⁹ In other words, Hayek supposed that given the tacit nature of a great deal of human knowledge, formal rules framed at a high level of abstraction should demarcate only the boundaries of permissible individual conduct (and

25. See, e.g., HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 112–13; HAYEK, 2 LAW, LEGISLATION AND LIBERTY, *supra* note 24, at 114. Hayek argues further that we should understand rules of just conduct "not as means but as ultimate values, indeed as the only values common to all and distinct from the particular ends of the individuals." *Id.* at 17.

26. See, e.g., Dorf & Sabel, *supra* note 17, at 314–15. Hayek famously claimed that

[i]f man is not to do more harm than good in his efforts to improve the social order, he . . . will therefore have to use what knowledge he can achieve, not to shape the results as the craftsman shapes his handiwork, but rather to cultivate a growth by providing the appropriate environment, in the manner in which the gardener does this for his plants.

HAYEK, NEW STUDIES, *supra* note 22, at 34.

27. See, e.g., Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in LAW AND NEW GOVERNANCE IN THE EU AND US 395, 402 (Gráinne de Búrca & Joanne Scott eds., 2006) (describing "directly deliberative problem solving"); see also FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 15 (1948) (rejecting the "presumption that each man knows his interest best" because "nobody can know *who* knows best . . . the only way by which we can find out is through a social process in which everybody is allowed to try and see what he can do").

28. Charles Sabel, Archon Fung, & Bradley Karkkainen, *Beyond Backyard Environmentalism*, in BEYOND BACKYARD ENVIRONMENTALISM 3, 6–7 (Joshua Cohen & Joel Rogers eds., 2000).

29. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 103.

not attempt actively to structure conduct within those boundaries). Abstract formal rules, he explained, are the necessary and sufficient conditions for otherwise informal and tacit flexible coordination among individuals. By contrast, Sabel argued that government could play a far more interventionist role in social and economic life. He suggested that discursive micro rules framed at a high level of specificity (not abstraction) could regulate *how* individuals act flexibly in informal processes—and, indeed, make possible the “precise, joint determination of [their] activity.”³⁰ Rules that set reason-giving and other kinds of speech requirements to rationalize individual conduct could tell people how to make their knowledge explicit and accessible to others so that local actors could set their own ends and means *but* always through transparent and accountable action.³¹ Thus whereas Hayek’s theory of governance by abstract formal rules assumes that individuals are limited in their capacity to make explicit formulations, Sabel’s theory of governance via specific discursive rules depends upon exactly the opposite presumption.

To justify his alternate vision, Sabel argued that Hayek’s thesis about the limits of explicit discourse was not only unduly pessimistic but also disproved by recent developments in industrial society, specifically, the emergence of new flexible firms. These firms, which emerged in Japan, Italy, and other industrialized economies in the latter part of the twentieth century, did not rely on Fordist-style assembly lines. Rather they divided work among specialized teams whose tasks were not static but instead constantly responsive to changing market demands.³² Sabel claimed that these new firms demonstrated, contrary to Hayek’s argument, that collective work teams could organize themselves according to explicit, not merely tacit, rationality. By “allow[ing] each part of a collaborative whole to reflect deliberately, and in a way accessible to the others, on the aptness of its ends and the organizational means used to prosecute them” these firms revealed, he argued, how social organization could emerge out of what he described as maximally formalized flexibility.³³

30. *Id.* at 122–25, 127.

31. *See id.* at 120–30, 138–43.

32. *See generally* MICHAEL J. PIRE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 194–250 (1984); Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 137 (Neil J. Smelser & Richard Swedberg eds., 1994), available at http://www.law.columbia.edu/null/Working+paper+No?exclusive=filemgr.download&file_id=64129&showthumb=0; *see also* RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 47–59 (1998).

33. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 103.

Sabel's descriptions of these firms, and the "practical reasoning" they enable and produce, bear only brief repeating here. A provisional design (such as for a car) is fractionated into its component parts, which are tasked among work teams. Each team compares its parts to models on the market or to new or unexpected developments. As each team modifies the design of its part, it invariably offers new proposals for the design of the whole. During this process of "iterated goal setting," each team continuously compares its performance with that of others to determine whose contributions are necessary and efficient. Each team must therefore repeatedly express and justify its actions to its peers—hence "learning-by-monitoring."³⁴

In Sabel's analysis, this system of maximally formalized flexibility is made possible for two reasons. First, all knowledge is made explicit; there is "no place [in the new institutions] for tacit knowledge . . . that defies discussion."³⁵ Second, the rules governing the articulation of knowledge are intrusive—they impose highly specific behavioral regularities on all the workers.³⁶ But although these rules affirmatively specify how conduct should be performed, they do so ambiguously. As a result, the rules coordinating activity require interpretative elaboration by the workers, and, moreover, anticipate that their explicit elaboration will result in the revision of the rules themselves.³⁷

Sabel contrasted his account of the new firm with what he described as Hayekian accounts of "minimally formalized flexibility."³⁸ Here "knowledge is tacit: the actors are sure of what they do, but cannot say how."³⁹ Although each actor depends on the knowledge of others, their shared practice is produced through informal enculturation and socialization rather than through critical reflection and intentional debate. Innovations happen, discoveries emerge, and "[t]hought progresses, but never in a way that allows explicit knowledge of [their] motor mechanism."⁴⁰ Rules are not intrusive and ambiguous but rather unobtrusive and fixed; they "regulate relations among the jurisdictions

34. *Id.* at 105, 120–25. For other detailed accounts, see Sabel, *Learning by Monitoring*, *supra* note 32; Dorf & Sabel, *supra* note 17, at 286–88, 297–313; William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US 37* (Gráinne de Búrca & Joanne Scott eds., 2006).

35. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 128.

36. *Id.* at 124; *see also id.* at 120 ("[N]ew economic organizations . . . depend on an institutional framework that is much more intrusive in its formal regulation of cooperation than any system of rules sanctioned in the Hayekian view.").

37. *Id.* at 124.

38. *Id.* at 122.

39. *Id.* at 123.

40. *Id.* at 115–18 (describing "microscopic Hayekian accounts of flexibility").

within which various types of tacit understanding are developed.”⁴¹ And rather than striving for “more explicit and self-conscious . . . connection[s] between the fixing of ends and the determination of means,” actors in minimally formalized flexible organizations are habituated, instinctive, and unreflective.⁴²

Sabel then proceeded to use the new firm as a template to revise Hayek’s model of political governance from already existing facts. In other words, Sabel did not frame his overarching challenge to Hayek as simply theoretical or conceptual but rather as grounded in the empirical innovations of new economic organizations. Just as the new firm transcends the limits of informal economic organization not by reissuing clumsy commands but by designing explicit reason-giving processes, public authorities need neither promulgate only “simple rules for a complex world”⁴³ (as Hayek would have it) nor write laws so complex that they defy their own implementation. Instead, government can redesign lawmaking as a discursive yet decentralized process analogous to the practical reasoning developed in new flexible firms.⁴⁴ With legislative authorization and supervision, local actors can declare their intent to solve a particular problem, formulate their ends in consultation with affected others, and begin to fix their means.⁴⁵ At every moment, they can announce reasons for the means they choose, explain these reasons to themselves and their peers, and propose measures by which those peers should judge their reasons and results.⁴⁶ “Thus the actors become practical lawmakers,” Sabel explained, “accountable to each other for their choices.”⁴⁷ New governance can achieve all this, he argued, because like the new firms, it enables “actors to make explicit, through deliberate, joint re-evaluation . . . the ends and means they set themselves.”⁴⁸

Sabel’s faith in the example of the flexible firm thus allowed him to start, like Hayek, with a set of insights about the limits of individual knowledge and the failures of state planning, but to reach a very different set of normative prescriptions. Hayek proposed to work within the limits of individual knowledge that he identified. In his political schema, abstract rules tell us only what *not* to do because “our intellect

41. *Id.* at 123.

42. *Id.* at 124.

43. *See generally* RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

44. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 132.

45. *Id.* at 139–41.

46. *Id.* at 140.

47. *Id.*

48. *Id.* at 120.

is not capable of grasping reality in all its complexity.”⁴⁹ Conversely, Sabel proposed to intervene and incrementally transcend individual epistemic constraints. As a result, he envisioned a system of governance in which actors could redesign the rules coordinating human activity through decentralized flexible processes—provided, however, that these actors submit to specific discursive rules and reason-giving procedures. Thus, rather than the minimalist state that Hayek envisioned, the new governance state that Sabel promoted would seek actively to formalize and regulate not substantive outcomes but dialogic processes.

In the Part that follows, I suggest that Hayek and Sabel’s divergent visions of political governance clearly reflect their divergent understandings of human capabilities to self-manage the limits of knowledge. They also reflect their differing willingness to analogize from the example of economic organizations to governance itself.

II. SELFHOOD AND SOCIAL ORGANIZATION

As we have seen, Sabel used the empirical example of the firm to refute Hayek’s argument that individuals are limited in their capacities to organize themselves through explicit and jointly reasoned deliberation. “The objection to the Hayekian project,” Sabel explained, is that we do not find “Hayekian rules of good conduct at their alleged source: in transactions within and among firms.”⁵⁰ “[I]terated goal setting,” he claimed, “contravenes . . . Hayekian expectations.”⁵¹ “The pooling of information and joint articulation of understandings,” he continued, “have nothing to do with either the nearly wordless collaboration of the simplest . . . forms of Hayekian flexibility, nor with the anecdotal connection among stores of knowledge in its more complex variants.”⁵²

But, as we have also seen, Sabel argued that the firm could catalyze a “radical reimagining” of what political governance entailed and how it should function.⁵³ Sabel justified this shift from the economic to the political and the small to large scale on the following grounds. First, he suggested that, in the hands of Hayek’s followers, Hayek’s theories of political governance became (at least implicitly) a

49. HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 32; *see also* HAYEK, NEW STUDIES, *supra* note 22, at 7–8.

50. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 138.

51. *Id.* at 121.

52. *Id.* at 123.

53. *Id.* at 103–04 (“It is precisely [the] distinction between tacit action and formal, ultimately political rule, I will argue, that is overturned by the central innovation of the new organizations . . .”).

set of theories about the management of small-scale economic institutions. To that end, he described the work of economists and other scholars who extended Hayekian principles to analyze and organize firms and other forms of small-scale economic activity.⁵⁴ “Just as [Hayekians] are at pains,” Sabel explained, “to create a state that registers practice through incremental adjudication rather than regulating it by legislation, so they are at pains to channel economic activity not by formalizing it but rather by organizing informally.”⁵⁵ Sabel then offered a parallel response. Because, he argued, “[i]deas of economic flexibility are . . . closely tied in the canonical views to ideas of the state and representative democracy . . . [i]nadequacies of understanding in the one realm suggest inadequacies in the other,” and, by extension, possibilities in one realm suggest possibilities in the other.⁵⁶ Hence, Sabel proposed that the new flexible firm suggested analogous possibilities for new maximally formalized yet flexible structures of political governance.

Fair enough as a general and, as it has turned out, extremely generative claim. But we can nonetheless question whether, for Hayek, the empirical description of the new firm can accomplish similar analytical work. An overarching theme in Hayek’s own writings is minding a gap between two types of settings. The first are settings where individuals *can* rely on deliberative reason to guide their actions—for example, settings where individuals are familiar with others and their circumstances and thus are assisted by their “positive knowledge of cause and effect.”⁵⁷ The second are settings where Hayek suspects deliberative reason is far less dependable—namely, what he calls the “great” or “abstract” or “open” society inclusive of us all. In this Part, I suggest that even if the new flexible firm provides evidence that organizational innovations can stretch an individual’s capacity for deliberation, where Sabel sees possibilities, Hayek would surely see limitations of reason to navigate what for Sabel and Hayek is sharply contested terrain: not (or not only) the individual’s capacity to use

54. *See id.* at 111–20.

55. *Id.* at 118. He wrote further:

Just as the state must defer, through democracy, to the superiority of local, practical knowledge as against the theoretical knowledge of the elites in legislative chambers, so individuals and groups must defer to the deep forms of sociability or conviviality out of which cognition grows, never concluding that the ability to do something accords the right to say in detail how it should be done.

Id. at 116.

56. *Id.* at 131.

57. HAYEK, *NEW STUDIES*, *supra* note 22, at 8.

reason to manage problems, but the individual's capacity to use reason *as one's social contexts expand*.

As I have argued in detail elsewhere, new governance envisions an individual with considerable capacity for deliberate self-direction—someone who is endowed with progressively expansive capabilities to transcend her own epistemic constraints through ongoing, incremental, and iterative reasoning and means-ends calculations.⁵⁸ This person is not someone who is (or can be) fully transparent to her self. Rather, she is someone who can learn purposively to incorporate the limits of her knowledge into her comparative deliberations and decisions, to see how her choices reflect contingent and uncertain rather than stable or objective realities, and, ultimately, to use this self-understanding to manage her choices for problem-solving ends.⁵⁹ Thus, for example, Dorf and Sabel argue that “self-interest assumes as the starting point for subsequent calculations the surprises of practical deliberation that formerly confounded it.”⁶⁰

Hayek, however, begins with a (quite extensive) set of presumptions about selfhood that limit the individual's possibilities for self-transcendence.⁶¹ Because his account of the self is so unusual, it is worth examining his claims up close. Individuals, he argues, are constrained by a presupposed set of mental ordering rules that allow them to comprehend objects and events not through purposive reasoning (at least not as a first-order phenomenon), but rather and only through classifying, comparing, and linking them to experiences of other objects and events. Thus, for example, Hayek claims that “what we perceive can never be unique properties of individual objects but always only properties which the objects have in common with other objects. Perception is thus always an interpretation, the placing of something into one or several classes of objects.”⁶²

An individual's particular set of mental ordering rules—which constrain and enable perception in this way—are not innate or inevitable but rather produced through experience in both conscious and prereflective form. Experience, however, is a tricky concept: because experience makes perception possible, for Hayek, experience “does not begin with sensations or perceptions, but necessarily precedes them.”⁶³

58. See Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008).

59. See *id.* at 522–29.

60. Dorf & Sabel, *supra* note 17, at 322.

61. See generally F.A. HAYEK, *THE SENSORY ORDER: AN INQUIRY INTO THE FOUNDATIONS OF THEORETICAL PSYCHOLOGY* (1952) [hereinafter HAYEK, *THE SENSORY ORDER*].

62. *Id.* at 142.

63. *Id.* at 166.

If each sensation, he explains, is “an interpretation of an event in the light of the past experience of the individual or the species,”⁶⁴ then “experience is not a function of mind or consciousness, but . . . mind and consciousness are rather products of experience.”⁶⁵ In other words, Hayek argues that *all* we know about the external world is produced through experience-cum-mental-ordering-rules, which, in turn, enable us to link objects and events to past experiences.⁶⁶

But although Hayek supposes that all knowledge is experiential, he does not suppose that knowledge is either stable or necessarily correct. “[W]e are not entitled to assume,” he argues, “that the world appears to us as it does because it is like that.”⁶⁷ To the contrary, “[i]t requires a *deliberate* effort to divest oneself of the habitual assumption that all we have learned from experience must be true.”⁶⁸ Indeed, it is precisely because mental ordering rules are the result of experience that individuals can and should revise them in light of new experiences.⁶⁹ But this possibility for deliberate revision requires higher order mental rules that, although themselves a product of experience, cannot be recognized or communicated. As Hayek explains,

there will always be some rules governing a mind which that mind in its then prevailing state cannot communicate, and that, if it ever were to acquire the capacity of communicating these rules, this would presuppose that it had acquired further higher rules which make the communication of the former possible but which themselves will still be incommunicable.⁷⁰

Nor can these higher order meta-rules “be the outcome of a conscious process, not something at which the mind can deliberately

64. *Id.*

65. *Id.* He writes further that “[w]henver we study qualitative differences between experiences we are studying mental and not physical events, and much that we believe to know about the external world is, in fact, knowledge about ourselves.” *Id.* at 6–7.

66. *Id.* at 143. Indeed, Hayek claims that “[a]n event of an entirely new kind which has never occurred before, and which sets up impulses which arrive in the brain for the first time, could not be perceived at all.” *Id.* at 142.

67. *Id.* at 6.

68. *Id.* at 168 (emphasis added).

69. *Id.* at 145, 168–69.

70. F.A. Hayek, “*Meta-Conscious*” *Rules and the Explanation of Mind, in ORDER—WITH OR WITHOUT DESIGN?: SELECTIONS FROM F.A. HAYEK’S CONTRIBUTION TO THE THEORY AND APPLICATION OF SPONTANEOUS ORDER* 65 (Naomi Moldofsky ed., 1989).

aim, but always a discovery of something which *already* guides its operation.”⁷¹

Put differently, Hayek claims that we cannot consciously create or even know the abstract rules that produce the conditions for conscious deliberation with our selves or others.⁷² Consciousness allows us access only to the particular *effects* of the rules that guide our mental activities—the concrete things we feel and think.⁷³ Although these effects “appear to us as the absolute and irreducible data of consciousness,”⁷⁴ for Hayek, any unitary deliberative self is only an appearance—a cover for a series of cognitive relations and classifications that are guided by “a supra-conscious” system that operates above and upon our conscious thoughts.⁷⁵

For Hayek, two claims follow from this argument that the individual is and must remain unaware of the abstract rules that govern her conscious thoughts. The first claim is that our thinking rests on more than we can consciously express and more than we can derive from known connections between means and ends.⁷⁶ Our traits, talents, and actions reflect prior (and unknown) cognitive and social ordering rules as much as individual characteristics and deliberate calculations.⁷⁷ The second claim is the flip side of the first. As we respond to the effects of our mental orders (i.e., what we think and feel) and to the

71. HAYEK, *NEW STUDIES*, *supra* note 22, at 46; *see also* HAYEK, *THE SENSORY ORDER*, *supra* note 61, at 169–70 (“There is, therefore, on every level, or in every universe of discourse, a part of our knowledge which, although it is the result of experience, cannot be controlled by experience, because it constitutes the ordering principle of that universe by which we distinguish the different kinds of objects of which it consists and to which our statements refer.”).

72. For an excellent discussion of this point on which this discussion draws, *see* Gary T. Dempsy, *Hayek’s Terra Incognita of the Mind*, 34 S. J. PHIL. 13, 22–27 (1996).

73. *Id.* at 26.

74. HAYEK, *THE SENSORY ORDER*, *supra* note 61, at 142.

75. Hayek, “*Meta-Conscious*” Rules, *supra* note 70, at 63; *see also* Dempsy, *supra* note 72, at 26. Take note of Hayek’s quite self-conscious rejection of the Freudian metaphor: “It is generally taken for granted,” he explains, “that in some sense conscious experience constitutes the ‘highest’ level in the hierarchy of mental events, and that what is not conscious has remained ‘sub-conscious’ because it has not yet risen to that level.” HAYEK, *NEW STUDIES*, *supra* note 22, at 45. Hayek, however, does not describe a subconscious but “a supra-conscious mechanism,” which, he argues, should supplant erroneous descriptions of “conscious thought and explicit statements as in some sense the highest level of mental functions.” Hayek, “*Meta-Conscious*” Rules, *supra* note 70, at 63. For Hayek’s criticisms of Freud (and specifically the idea of freedom from repression), *see* HAYEK, 3 LAW, LEGISLATION AND LIBERTY, *supra* note 15, at 174–76.

76. *See, e.g.*, Hayek, “*Meta-Conscious*” Rules, *supra* note 70, at 63; HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 11–12.

77. HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 17–19.

symbols and codes of our social orders (i.e., prices, moral esteem, social shame), we are constrained in our ability to deliberately control our mind's activity.⁷⁸ To suggest otherwise would envision, as Gary Dempsy writes, "the presence of a free-floating consciousness that is independent of the precursory workings of our 'linking' mind."⁷⁹ For Hayek, however, there is no such self-directing, self-articulated overseer of consciousness. To the contrary, Hayek argues that there are costs to imagining otherwise and striving, as far as possible, to make our mental processes explicit.⁸⁰ Our mental ordering rules allow us to move through a world that is imperfectly known—stretching the "the scope of phenomena which we can master intellectually," by enabling us broadly to interpret, classify, and ascribe meaning to objects through linkages to past experiences.⁸¹ The more we try to master the particulars, shape events according to our wills, or pursue agreement on specific ends, the narrower the scope of the social order we can induce to form or hope to comprehend.⁸² Thus Hayek concludes that an individual's capacity for purposive reason and rational means-ends calculations works best in defined and limited social contexts.⁸³ Beyond these contexts, the individual "stumbles," relying on largely tacit or unarticulated structures beyond her conscious awareness, such as the conventions of her communities or the experiences of others.⁸⁴

Hayek's theory of the organization, while not nearly as elaborate, is strikingly analogous to his theory of the individual. When individuals combine to pursue shared ends, he argues that the organization that results remains "one 'person' among others," with a system of means and ends that is intelligible within its own "separate and limited sphere."⁸⁵ The organization, like the individual, must therefore mediate

78. See, e.g., *id.* at 30.

79. Dempsy, *supra* note 72, at 23.

80. See, e.g., HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 29–31. For a similar (and quite extensive) argument about the costs of formalizing tacit knowledge, see generally MICHAEL POLANYI, THE TACIT DIMENSION (Peter Smith ed., 1983).

81. HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 32.

82. See, e.g., *id.* at 29, 33, 41.

83. See, e.g., FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 14 (1948). Indeed, as Ernst-Joachim Mestmäcker explains, "in Hayek's theory, rational choice is limited to the micro level." ERNST-JOACHIM MESTMÄCKER, A LEGAL THEORY WITHOUT LAW: POSNER V. HAYEK ON ECONOMIC ANALYSIS OF LAW 34 (2007) (suggesting that "the hostility of Austrian economics to efficiency as a guide to public policy" has its roots in Hayek's theories).

84. See F.A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 14 (1988); HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 17–18, 30–31.

85. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 60 (1944).

its capacities for deliberate and extra-deliberate or tacit ordering.⁸⁶ The “family, the farm, the plant, the firm, the corporation and the various associations, and all the public institutions including government,” Hayek explains, achieve their ends through a combination of specific purposive commands that govern means-ends calculations within a limited sphere *and* through abstract rules that enable the flow of tacit knowledge within and beyond that sphere.⁸⁷ Consider the following passage:

[T]he general rules of law that a spontaneous order rests on aim at an abstract order . . . while the commands *as well as the rules* which govern an organization serve particular results aimed at by those who are in command of the organization.⁸⁸

Indeed, Hayek explains that unlike the abstract rules of society, the rules of organization—although still sufficiently general to enable learning and cooperation—serve the purposes established by the organization and are interpreted in light of those purposes.⁸⁹ But

[t]he more complex the order aimed at, the greater will be that part of the separate actions which will have to be determined by circumstances not known to those who direct the whole, and the more dependent control will be on rules rather than on specific commands. In the most complex types of organizations, indeed, little more than the assignment of particular functions and the general aim will be determined by command of the supreme authority, while the performance of these functions will be regulated only by rules—yet by rules which at least to some degree are specific to the functions assigned to particular persons.⁹⁰

As organizations increase in complexity, Hayek thus anticipates that they will rely less on commands and more on general yet still purposive rules. But between the most complex organization and society there is a qualitative shift:

86. HAYEK, 1 *LAW, LEGISLATION AND LIBERTY*, *supra* note 13, at 46 (“In any group of men of more than the smallest size, collaboration will always rest both on spontaneous order as well as on deliberate organization.”).

87. *Id.* at 46–50.

88. *Id.* at 50 (emphasis added).

89. *See, e.g., id.* at 49 (“Rules of organization are . . . necessarily subsidiary to commands, filling in the gaps left by the commands.”).

90. *Id.* at 50.

Only when we pass from the biggest kind of organization, government, which as organization must still be dedicated to a circumscribed and determined set of specific purposes, to the overall order of the whole of society, *do we find an order which relies solely on rules and is entirely spontaneous in character.*⁹¹

Hayek's description of the organization thus does *not* insist on spontaneous, wordless, or habituated cooperation all the way down. He instead tries to envision how to shift from small-scale organizations to the overall order of society by shifting from purposive rules that enable individuals deliberately to pursue particular means and ends in circumscribed contexts to rules that are independent of any particular ends at all. But neither does Hayek envision an ever-expanding, mutually reinforcing, and radically democratic setting of means and ends by self-articulated actors. That is Sabel's description of the firm, which rests on a different set of assumptions about individual capacities and part/whole relations.

Sabel argues that organizations can induce within individuals the ability continuously to expand their capacities for explicit and comparative means-ends calculations. As individuals articulate and readjust these calculations through discursive interactions, they reorient their goals, their strategies, and even their identities.⁹² This capacity for purposive reinvention enabled by the organization in turn has reciprocal effects on the organization and society as a whole. Just as the new firm's federated work teams redesign the product as they redesign the product's parts, individuals can aspire to a "second-order application" of learning-by-monitoring principles. In Sabel's words: "[j]ust as the actors are learning to co-design products, they have to learn how to co-design the institutions that make this first-order cooperation more robust."⁹³ And more still: just as individual actors learn to redesign organizations, organizations can aspire to redesign the relations among

91. *Id.* (emphasis added).

92. See, e.g., C.F. Sabel, *Beyond Principal-Agent Governance: Experimentalist Organizations, Learning, and Accountability*, in DE STAAT VAN DE DEMOCRATIE: DEMOCRATIE VOORBUJ DE STAAT 173, 191 (E.R. Engelen & M. Sie Dhian Ho eds., 2004). See also Sabel, *Learning by Monitoring*, *supra* note 32, at 138 ("[I]nstitutions transform transactions into discussions, for discussion is precisely the process by which parties come to reinterpret themselves and their relation to each other by elaborating a common understanding of the world.").

93. Charles F. Sabel, *Pragmatic Collaborations in Practice: A Response to Herrigel and Whitford and Zeitlin*, 11 INDUS. & INNOVATION 81, 82 (2004).

themselves, the “public sphere that includes them all,” and “the self rule of the polity.”⁹⁴

Thus I am suggesting that between Hayek and Sabel is a qualitative and conceptual—not empirical—divide. For Hayek, the new firm is only ever an organization that, like an individual, will eventually face the limits of its deliberate cognition and is incommensurate with society as a whole. For Sabel, the new firm represents what, across hybrid levels of scale, society could be.

III. BOTTOM-UP LAWMAKING

By arguing that the new firm cannot accomplish for Hayek what it does for Sabel, I have foregrounded divergent assumptions about individual reason and social organization that leads the two thinkers to promote, from a similar starting point, quite different visions of social and political governance. In this Part, I suggest that distinguishing Sabel-inspired new governance from Hayek-inspired neoliberalism along these same axes of selfhood and organization helps to elucidate their divergent approaches to bottom-up lawmaking, even as both seek to limit top-down legislation. For Sabel, the overarching problem with welfare-state style legislation and adjudication is that they fail to achieve their own ends—namely, to ensure democratic accountability and rights under conditions of complex and rapid technological, economic, and social change. Our existing structures of enacting and enforcing legal rules, he argues, cannot simultaneously stay apace with shifting social circumstances *and* stay faithful to the directives set by sovereign authorities.⁹⁵ Sabel thus endorses Hayek’s praxis of flexible coordination but, as we have seen, aims to formalize it by adding a “duty to articulate” incumbent upon local problem-solvers and decision-making units.⁹⁶ In this way, Sabel claims, individuals and groups can “become practical lawmakers, accountable to each other for their choices” about the variable regulation of social life.⁹⁷ For Hayek, however, the irremediable problem with welfarist legislation is that it depends upon erroneous assumptions about individual reason and social organization—assumptions that Sabel seeks to radicalize and reconstruct rather than upend.

94. Sabel & Simon, *supra* note 27, at 402–03 (explaining that reconceiving the relations among these entities raises unanswered questions, but questions that suggest that new governance requires a rethinking of democracy).

95. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 104, 135–37; *see also* Sabel & Simon, *supra* note 27, at 398–400.

96. I borrow this phrase from Simon, *supra* note 34, at 48.

97. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 140.

Throughout writings that spanned nearly the entire Cold War, Hayek aimed to refute ideas that he associated with “social” conceptions of law.⁹⁸ Again, it is worth pausing to make sense of his ideas. According to Hayek, the term “social” had morphed from a word descriptive of human processes to a term of “moral approbation” with a specific normative end.⁹⁹ “[Social] gradually came to mean,” he wrote, “that ‘society’ ought to hold itself responsible for the particular material position of all its members . . . [and] that the processes of society should be deliberately directed to particular results.”¹⁰⁰ Against this vision, he relentlessly contested the idea that “social” ends are qualitatively distinct from the identical ends of many individuals,¹⁰¹ as well as the corresponding idea that the “distinctive” interests of social groups could justify the coercion of other individuals in their pursuit.¹⁰² He also rejected the underlying methodological premise that planners—but more accurately that *anyone*¹⁰³—could advance (putatively) social ends in deliberate or predictable ways by applying purposive and context-specific techniques.¹⁰⁴ He repeatedly argued that “socialists” erroneously prefer “everything that is done ‘consciously’ or ‘deliberately,’” and therefore vastly undervalue the irrational (or non-rational) and haphazard interactions of individuals to organize the actual possibilities of collective human life.¹⁰⁵

98. Hayek’s famous writings against socialism began in 1944 with *The Road to Serfdom* and ended in 1988 (near the end of his life) with *The Fatal Conceit: The Errors of Socialism*.

99. See HAYEK, 2 LAW, LEGISLATION AND LIBERTY, *supra* note 24, at 78–79. He argues that the term social “came increasingly to displace such terms as ‘ethical’ or simply ‘good’”—it “became more and more the description of the pre-eminent virtue, the attribute in which the good man excelled and the ideal by which communal action was to be guided.” *Id.* at 79.

100. *Id.*

101. HAYEK, ROAD TO SERFDOM, *supra* note 85, at 60.

102. See *id.* at 85–87.

103. As Andrew Gamble explains, for Hayek, “[t]here were ‘constitutional,’ not just empirical, limits to human knowledge,” which humans could not overcome “through getting more of it. Knowledge was limited because the human mind was limited.” Andrew Gamble, *Hayek on Knowledge, Economics, and Society*, in THE CAMBRIDGE COMPANION TO HAYEK 111, 117 (Edward Feser ed., 2006). See also *supra* notes 61–84 and accompanying text.

104. See HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 56–59.

105. *Id.* at 11. Indeed, Hayek repeatedly argued that the crucial difference between (classical) liberals and socialists was not normative but logical. See, e.g., HAYEK, 2 LAW, LEGISLATION AND LIBERTY, *supra* note 24, at 136 (“Socialism is not based merely on a different system of ultimate values from that of liberalism, which one would have to respect even if one disagreed; it is based on an intellectual error which makes its adherents blind to its consequences.”).

But because Hayek argued that social reformers overvalue reason and the powers of the deliberate will, he did not counter left-liberal (or, for him, socialist) legalism by reviving individualist doctrines of classical legal thought and will theory. Indeed, not only did he reject the socialist's idea of law as an instrument to advance desirable social ends, he also rejected the classical liberal's idea of law as a set of positive explicit "premises from which the whole system of rules of just conduct could be logically deduced,"¹⁰⁶ and which sees "individual man as the starting point and supposed him to form societies by the union of his particular will with another in a formal contract."¹⁰⁷

In place of both visions, Hayek offered a distinctively cultural theory of law.¹⁰⁸ He argued that abstract rules of social cooperation are known not through the announcement of their deliberate creation—either through deduction from prior premises or through scientific efforts to engineer particular results.¹⁰⁹ Rather, they are known through the social fact of being already observed.¹¹⁰ "Law in the sense of enforced rules of conduct," Hayek claimed, "is undoubtedly coeval with society . . . there can be no doubt that law existed for ages before it occurred to man that he could make or alter it."¹¹¹ Rules of just conduct (i.e., private and criminal law) are produced through a collective and experiential winnowing and sifting of social practice, values, and conventions—selected because they enable the societies that adopt them to prevail over others, and often made effective through unorganized social pressure rather than explicit sanctions.¹¹²

New governance (which emerged after the end of the Cold War as an alternative to deregulation and privatization as much as to socialist planning) shares Hayek's emphasis on lawmaking as emergent from

106. HAYEK, 2 LAW, LEGISLATION AND LIBERTY, *supra* note 24, at 44.

107. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER, *supra* note 83, at 10 (internal citation omitted).

108. On Hayek's theories of "cultural evolution," see generally HAYEK, 3 LAW, LEGISLATION AND LIBERTY, *supra* note 15, at 155–58. For an exploration of the Hayekian roots of the contemporary emphasis on norm generation and informal ordering in legal scholarship, see David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996).

109. See, e.g., HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 21.

110. *Id.* at 95.

111. *Id.* at 72–73. For a similar argument, see Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455, 456 (1995) ("The point is that 'the Lawgiver' is a recent entry into the domain of Law and that law may live, and lived, even without a lawgiver."). See also LA DIMENSIONE TACITA DEL DIRITTO [THE TACIT DIMENSION OF LAW] (Raffaella Caterina ed., 2009).

112. See HAYEK, NEW STUDIES, *supra* note 22, at 6–7; see also HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 43, 99; HAYEK, 2 LAW, LEGISLATION AND LIBERTY, *supra* note 24, at 34.

social practice rather than through abstract deduction or sovereign will. As Gráinne de Búrca explains, new governance is “radically bottom-up in seeing social actors/stakeholders as generative of norms, and responsible for the spread and dispersal of these through their ongoing practices and activities.”¹¹³ Or as Anne-Marie Slaughter suggests, new forms of horizontal democratic governance “rest[] on the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities . . . generate the rules, norms, and principles they are prepared to live by.”¹¹⁴ Both these scholars describe the empirical expansion, along with the value, of governance regimes that empower individuals and regulated entities to formulate, elaborate, and/or enforce their own rules.

But, following Sabel, new governance proponents do not adopt Hayek’s understanding of tacit or “grown” law. For Hayek, actors make evolved rules of conduct explicit only at certain moments (for example, when it is necessary to resolve “differences of opinion about appropriate behavior”).¹¹⁵ And only rarely does Hayek think governments should make explicit laws (for example, when rules of conduct evolve unjustly “deliberate legislation may . . . be the only practicable way out”¹¹⁶). By contrast, new governance envisions bottom-up lawmaking not only as diffuse, decentralized, and emergent from practice but also as self-reflexive, transparent, and dialogically reasoned. De Búrca, for example, describes a (new governance-esque) European Union directive that requires Member States to combat workplace (and other forms) of discrimination by promoting “*social dialogue*” to achieve “the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.”¹¹⁷ And Joanne Scott and Susan Sturm explain more

113. Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 97, 98 (Gráinne de Búrca & Joanne Scott eds., 2006) (comparing new governance with a human rights perspective).

114. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 194 (2004).

115. See, e.g., HAYEK, 1 *LAW, LEGISLATION AND LIBERTY*, *supra* note 13, at 43, 78. Consider, for example, Hayek’s reproach of those who hold that “with the recognition of the principles of private property and freedom of contract . . . all the issues were settled, as if the law of property and contracts were given once and for all in its final and most appropriate form, i.e., in the form which will make the market economy work at its best.” FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 111 (1948), *quoted in* Fritz Machlup, *Hayek’s Contribution to Economics*, in *ESSAYS ON HAYEK* 13, 38 (Fritz Machlup ed., 2003).

116. HAYEK, 1 *LAW, LEGISLATION AND LIBERTY*, *supra* note 13, at 88–89 (explaining that “the most frequent cause is probably that the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice”).

117. de Búrca, *supra* note 113, at 101 (quoting the directive, art. 11) (emphasis added).

generally that new governance “locates responsibility for law-making in deliberative processes which are to be continually revised by participants in light of experience, and provides for accountability through transparency and peer review.”¹¹⁸ Indeed, as Sabel initially argued by analogy to the dialogic practices of the firm, making behavioral regularities explicit is not a post hoc correction to extant law but rather is the very condition for making social practice into law.

Moreover, whereas Hayek claimed that law should evolve from practice to delineate only general rules of conduct applicable to us all,¹¹⁹ Sabel did not propose that bottom-up lawmakers should *themselves* resist the pursuit of particular social objectives. His proviso, instead, is that individuals must use explicit reason to justify them. As he explained with Joshua Cohen, “[c]itizens contemplating the exercise of collective power owe one another reasons, and owe attention to one another’s reasons.”¹²⁰ And whereas Hayek’s theories of law rest on his overarching understanding of society comprised of only individuals (and of organizations that act analogously to individuals), new governance, as Simon explains, takes “collective action as paradigmatic.”¹²¹ In other words, overarching ideas about individual reason and collective behavior—which, for Hayek, inform conceptions of law so erroneous he laments that they share the same name¹²²—appear in new governance transformed in method, actor, and scale but nonetheless intact.

118. Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 566 (2007). I should add: although new governance scholars widely share this emphasis on dialogue and deliberation, their conceptions of the role of law and lawmaking in new governance are also varied and contested. For careful, detailed accounts, see Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 1 (Gráinne de Búrca & Joanne Scott eds., 2006); David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2007); Neil Walker & Gráinne de Búrca, *Reconceiving Law & New Governance*, 13 COLUM. J. EUR. L. 519 (2007).

119. See, e.g., HAYEK, NEW STUDIES, *supra* note 22, at 80 (arguing against “the increasing replacement of rules of just individual conduct . . . by conceptions of ‘social’ or ‘distributive’ justice”).

120. Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313, 327 (1997).

121. Simon, *supra* note 34, at 64.

122. See HAYEK, THE ROAD TO SERFDOM, *supra* note 85, at 83 n.3 (describing a “conflict . . . between different kinds of law—law so different that it should hardly be called by the same name”); see also HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 62 (“[L]aw’ no longer [has] a clear meaning.”); *id.* at 132 (“During the last hundred years it has been chiefly in the service of so-called ‘social’ aims that the distinction between rules of just conduct and rules for the organization of the services of government has been progressively obliterated.”).

The comparison thus far makes clear that we can understand new governance as a familiar kind of liberal legalism—that is, as a “demand,” to borrow from Duncan Kennedy, “for ethical rationality in the world.”¹²³ After decades of left and right disenchantment with law, new governance resuscitates the claims that law can embody reason, and that through law—or, more accurately, through ordinary people as practical lawmakers—we can regulate the affirmative ways we live together and the affirmative obligations the state assumes for our well-being.¹²⁴

Legalism, however, is not the feature of new governance made salient in most contemporary accounts, which analyze it as a break from liberal law. Analysts, for example, describe new governance as an “undermining of law,”¹²⁵ a “move away from law-centered strategies,”¹²⁶ and “informality, soft law, and extra-legal forms in action.”¹²⁷ But when read against Hayekian neoliberalism, new governance emerges as a formalizing, reason-seeking, indeed *law-seeking* project; that is, as a deliberate (but democratic) effort to try one’s “absolute best to decide what principles govern and then apply them.”¹²⁸

This Article ventures one final comparison. In the concluding Part that follows, I consider whether emphasizing new governance’s continuities with liberal legalism, rather than the breaks between them, helps explain why new governance “brackets,” whereas Hayek categorically rejects, social distribution as a first-order goal of law and legal policy. As we shall see, for Hayek, social justice is not a matter to

123. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 72 (David M. Trubek & Alvaro Santos eds., 2006).

124. In the new governance paradigm, professional judges and legislators engage in meta-analysis: they use reason not to reach right outcomes but to induce and evaluate the deliberations of others. For example, they may ensure rights of participation; grant remedies for exclusion; issue mandates or incentivize local actors to produce information, justify their decisions, and proffer comparative standards of evaluation; and award penalties for the failure to so engage. See, e.g., Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 145; see also Dorf & Sabel, *supra* note 17, at 396–98; Scott & Sturm, *supra* note 118.

125. Solomon, *supra* note 10, at 827 (suggesting that for Sabel and Simon “[n]ew forms of governance are emerging because of the limits of law, and further undermining of law ought to be embraced”).

126. NeJaime, *supra* note 3, at 351.

127. Alexander, *supra* note 2, at 175 n.351. But see Orly Lobel, *The Paradox of ExtraLegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 *HARV. L. REV.* 937, 983 (2007) (refusing a description of new governance as extralegal activism).

128. Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1159 (2001) (describing legalism).

suspend in order to facilitate bottom-up innovation, but belongs “to the category of . . . nonsense, like the term ‘a moral stone.’”¹²⁹

CONCLUSION: INDIVIDUAL RESPONSIBILITY, SOCIAL
ACCOUNTABILITY, AND QUESTIONS OF JUSTICE

Sabel, no less than Hayek, proposes to create governance frameworks that are general and end-independent. That is, rather than promote the kind of “centralist egalitarianism” (or any other particular distributivist aim) that they associate with left-liberal or socialist ideals, both thinkers argue that governance should aspire primarily to maximize opportunities for individuals to learn, contribute to, and benefit from decentralized social processes.¹³⁰ But many new governance proponents nonetheless find the suspension of distributive ends normatively troubling. As Simon puts it:

a salient feature of [new governance] institutions that . . . I think should trouble anybody [is] that they tend to *bracket* distributive questions—that they tend to focus on the possibility of collective gains, mutual gains, and hope that those gains will be large enough so that it will be worth it to people not to focus on the distributive issues.¹³¹

Some new governance proponents condone the shelving of distributive claims at the micro level (to stimulate collaboration) but reject its implications on a larger scale. Orly Lobel, for example, describes Sabel and Dorf’s “strong collapse between means and ends [as] a perilous step,” and argues that new governance scholars should defend basic “[s]ubstantive criteria of the common good” even as they propose to catalyze collaborative and stakeholder-driven negotiations.¹³² Others challenge the point in stronger terms. For example, whereas Sabel speaks of promoting experiments before experiments,¹³³ Susan Sturm argues for a nearly opposite set of priors: *if* new governance

129. HAYEK, 2 LAW, LEGISLATION AND LIBERTY, *supra* note 24, at 78; *see also* HAYEK, 1 LAW, LEGISLATION AND LIBERTY, *supra* note 13, at 121 (defining social justice as the “aiming at particular results for particular persons or groups”).

130. *See* Dorf & Sabel, *supra* note 17, at 408.

131. Handler et al., *supra* note 3, at 506 (William Simon’s remarks) (emphasis added).

132. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 468–69, 396 (2004).

133. Sabel, *Design, Deliberation, and Democracy*, *supra* note 6, at 125 (describing how new flexible organizations cannot assume prior knowledge of even their design choices).

aspires to “far-reaching social equity” (she poses the matter as a question), then perhaps “equality is necessary for new governance to work in the first place.”¹³⁴ Some skirt the point entirely. Lani Guinier, for example, describes new governance as an effort to connect participatory democracy with social justice.¹³⁵

Within the new governance enterprise, then, there is a toggle of views—at times, questions of ex ante distribution are fully bracketed; at others, they are made a condition of participatory deliberation. Sabel tends towards the first side of this distinction and various participants range themselves out along it in multiple ways. But given the differences between Sabel and Hayek outlined above, it remains to explain *why* Sabel (and various collaborators) provisionally decline to endorse direct efforts to remedy social inequalities through law. The answer that several scholars propose is distinctly Hayekian. If planners cannot know what bits of dispersed and contingent knowledge decentralized collaborative and competitive processes will enable individuals to discover and use, planners who direct these processes or “pick winners” risk undermining their innovative potential.¹³⁶ Indeed, new governance plainly shares Hayek’s unwillingness to derive the utility of means from predefined ends,¹³⁷ as well as Hayek’s description of cooperation, competition, and experimentation as “first and foremost

134. Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 323, 331 (Gráinne de Búrca & Joanne Scott eds., 2006); see also Joshua Cohen & Joel Rogers, *Power and Reason*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 237, 251–53 (Archon Fung & Erik Olin Wright eds., 2003) (proposing that under particular conditions “gaining the benefits of deliberation may well require direct efforts to address inequalities of power”).

135. Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 67–68 (2002) (describing work by Dorf and Sabel and others); cf. NeJaime, *supra* note 3, at 327 (“I hope to position New Governance as a contingent model of *cause lawyering* that complements, rather than replaces, other (and specifically litigation-focused) models.”) (emphasis added).

136. For example, Simon explains that rather than advocate for the direct transfer of resources to weaker groups, new governance tends to emphasize the indeterminacy and the frequent impossibility of assessing the risks and benefits of deliberation in advance. Simon, *supra* note 10, at 207–08. Dorf and Sabel caution that even if redistribution *can* produce sustained social change, decentralized experimentalist deliberation is the most effective means to determine how to apply (and perhaps even distribute) resources. Dorf & Sabel, *supra* note 17, at 410–13. Illustrating the point, Liebman and Sabel argue that, in the absence of experimental new governance means, efforts to equalize school financing produced “no or disappointingly little educational improvement.” James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 204 (2003).

137. See, e.g., HAYEK, 2 LAW, LEGISLATION AND LIBERTY, *supra* note 24, at 18.

a discovery procedure” that refuses to assume “that the facts to be discovered are already known.”¹³⁸ But Hayek’s own rejection of a “just distribution” of material/social goods (scare quotes his) is too closely intertwined with his theories of reason and scale to map easily onto new governance.¹³⁹

Hayek uses the term “responsibility” to describe obligations that individuals owe to themselves and others, and the term “justice” to describe obligations that the state can legitimately enforce. And he limits both concepts according to his (by now familiar) claim that reason diminishes as social organization expands. For example, he argues that although “reason in fact plays only a small part in determining human action,” individuals can use the discipline of individual responsibility “to make that little go as far as possible” *if* they can decipher within what limited contexts responsibility can likely influence individual actions.¹⁴⁰ Hayek thus distinguishes responsibility, like reason, according to shifts in levels of scale. Responsibility, he argues, “forcefully directs” an individual’s “attention to those circumstances that he can control as if they were the only ones that mattered.”¹⁴¹ “To be effective,” he continues, “responsibility must be both definite and limited,” applicable to problems and solutions individuals can plausibly make their own, and thus properly “adapted to the capacities of our mind[s].”¹⁴² Social reformers risk eviscerating responsibility entirely when they press upon the individual member of society the kinds of collective obligations suited to the small group.¹⁴³ Hence, the genesis of the contemporary neoliberal condition: relentless

138. HAYEK, 3 LAW, LEGISLATION AND LIBERTY, *supra* note 15, at 68.

139. *Id.* at 176.

140. HAYEK, CONSTITUTION, *supra* note 13, at 76–77. Hayek similarly rejects the idea that individual responsibility is undercut by the limits of individual rationality and self-direction. For example, he writes (in a sentence with a confusing double negative): “[i]t is just because there is no separate ‘self’ that stands outside the chain of causation that there is also no ‘self’ that we could *not* reasonably try to influence” through experience, education, approval, and/or shame. *Id.* at 74 (emphasis added).

141. *Id.* at 71.

142. *Id.* at 83–84. It is worth noting that, for Hayek, responsibility is “not a statement of fact or an assertion about causation,” but a means to make man’s “actions different from what they would be if he did not believe [responsibility] to be true,” *id.* at 74–75, and “a discipline that man must impose upon himself if he is to achieve his aims.” *Id.* at 72. Even if, he explains, there is no direct relation between self-cultivation and achievement, perpetuating *belief* in individual responsibility is likely to enhance human behavior, provided, however, that responsibility is properly restricted and defined. *Id.* at 82–83.

143. *Id.* at 83–84.

but circumscribed responsibility for one's self and no responsibility for abstract others.¹⁴⁴

Hayek applies analogous logic to justice. Strikingly, he locates justice first in the realm of the non-rational and tacit.¹⁴⁵ He explains that his efforts to render intelligible what people mean when they speak of justice led to his discovery of the "super-conscious" ordering principles of the human mind.¹⁴⁶ Yet, in many of his writings, he aspires to make justice, like responsibility, limited and rational.¹⁴⁷ Even if members of small groups can assist their neighbors commensurate with their tacit moral feelings, "the spatial range of 'social justice'" is "wholly different in the Great or Open Society."¹⁴⁸ In modern society, where the division of labor extends the effects of individual conduct beyond what any individual can foresee, justice can only rationally describe conduct that individuals can control directly.¹⁴⁹ Organizations, like individuals, can act justly,¹⁵⁰ but society cannot.¹⁵¹ Spontaneous social orders can produce bad effects, and markets, Hayek explains, always produce winners and losers, but these disparate effects are never a question of justice.¹⁵² "Who," Hayek repeatedly asks, "has been unjust?"¹⁵³

144. See, e.g., WENDY BROWN, *Neoliberalism and the End of Liberal Democracy*, in EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 37 (2005).

145. For example, Hayek explains that "if we speak of the 'sense of justice,' . . . we refer to such rules which we are able to apply, but do not know explicitly." HAYEK, *NEW STUDIES*, *supra* note 22, at 8.

146. *Id.* at 45–46.

147. Indeed, Hayek aspires to make justice *objective* and repeatedly rejects the Kelsenian idea that "from the point of rational cognition there are only interests of human beings and hence conflicts of interests," and the corresponding idea that justice is "a balancing of particular interests at stake in a concrete case." HAYEK, 2 *LAW, LEGISLATION AND LIBERTY*, *supra* note 24, at 53, 39 (internal quotation marks omitted).

148. *Id.* at 88; see also *id.* at 38–39.

149. *Id.* at 31–32, 90–91. For Hayek, individual conduct *is* just when it conforms to an abstract rule of law. That rule of law, in turn, is just not because a sovereign has deduced it from explicit premises but rather because she has tested its potential for "universalization" against the "whole complex of rules which in fact are observed in a given society." *Id.* at 51–54.

150. *Id.* at 32–33. For Hayek, "how far [the] duty [of the organization] in justice extends must depend on its power to affect the position of the different individuals in accordance with uniform rules." *Id.* at 33.

151. *Id.* at 67–73 (discussing "the inapplicability of the concept of justice to the results of a spontaneous process").

152. For example, Hayek writes:

Justice requires that in the "treatment" of another person or persons, i.e., in the intentional actions affecting the well-being of other persons, certain uniform rules of conduct be observed. It clearly has no application to the manner in which the impersonal process of the market allocates command over goods and services to particular people; this can neither be just or

Sabel does not speak in Hayek's terms of "responsibility" or of "justice," but rather of institutional and structural accountability.¹⁵⁴ And as these terms suggest, Sabel's description of accountability is not individuated or moralizing, nor does it propose to predigest its own limits. Rather accountability aims to "ratchet up" individual and collective obligations by systemically and reciprocally linking, first, the individual and the organization and, second, the organization and the polity.¹⁵⁵ Through specific discursive rules and reason-giving procedures, individuals make their means and ends accessible to others affected by a shared problem: problem-solving organizations make their choices and criteria open to public view, and public officials pool, compare, and measure outcomes across organizations—expanding *through discursive networks* the kinds of demands that members of the polity can make upon others and the kinds of obligations they owe to one another.¹⁵⁶

This blueprint for the progressive expansion of discursive accountability does not answer—it deliberately postpones—questions about first-order distribution. Hence Simon and other scholars carefully use the term "bracket" to describe new governance's relation to the distributive dimensions of law and legal institutions.¹⁵⁷ The term suggests that the matter is not rejected or resolved yet is nonetheless not essential to the unfolding of the new governance project. But by tracing the discontinuities between new governance and neoliberalism—and the continuities between new governance and liberal legalism—this Article has sought to show that, perhaps more than any other theorist, it is Hayek who would demand that new governance un-bracket, so to

unjust, because the results are not intended or foreseen, and depend on a multitude of circumstances not known in their totality to anybody.

Id. at 70.

153. *Id.* at 69.

154. See, e.g., Sabel & Simon, *supra* note 27, at 397–98, 400–01; Dorf & Sabel, *supra* note 17, at 288.

155. See, e.g., Charles Sabel, Dana O'Rourke, & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, Feb. 23, 2000, <http://www2.law.columbia.edu/sabel/papers/ratchPO.html>; see also Sabel et al., *supra* note 28, at 8 (explaining that new governance "creates a collaborative and mutual accountability of center to parts, parts to center, parts to other parts, all to the whole enterprise – and to the public generally").

156. Cf. Kathleen G. Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 555 (2009) (linking accountability across layers of review to the duty to articulate).

157. See *supra* note 131 and accompanying text; see also Alexander, *supra* note 2, at 133 ("Many new governance scholars . . . 'bracket' critical questions of distribution and power."); Rodríguez-Garavito, *supra* note 2, at 209 ("[T]he governance paradigm tends to bracket power asymmetries.").

speak, and make explicit (and defend if it can) its vision of distributive justice.

The term “bracket” could indicate that new governance architects are unwilling to advocate for particular social objectives, but they nonetheless believe that through the expansive frameworks of accountability they design, individuals will use reason to improve organizations *and* advance the ends of distributional equity. This hypothesis, which I am proposing, flows readily from Sabel’s rejection of Hayek’s radical theories of epistemic constraints and my description of new governance as a democratized, reconstructed form of liberal legalism. On this reading, there is little, if any, justification for new governance to bracket, rather than discursively engage, liberal concerns about social distribution and justice. To the contrary, it would seem that new governance proponents should themselves view the extent to which their dialogic processes produce equitable outcomes on the ground as direct endorsements (or indictments) of their methods.

But it is also possible that the term bracket indicates a different notion; namely, that new governance architects suspect that to remedy historical injustices that elude individual causation or to reconcile reasons that are internally conflicted, individuals and groups must return questions of justice to where Hayek found them: in the realm of the wordless and inexpressible. Brackets would thus signify new governance’s own deferral of meaning to a realm beyond the reach of explicit reason. On this reading, Sabel and other new governance theorists have yet to make clear their own assessments of the limits of the scalar range of reason. As a result, they have also yet to suggest whether the irrationalism of social justice is, following Hayek, a cause for its disavowal or, reminiscent of left critiques of liberal legalism, grounds for its embrace.

* * *