Law and Governance in the 21st-century Regulatory State

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In 1996, a Democratic President, Bill Clinton, famously declared: “The era of big government is over.”

The question for U.S. policymakers and legal scholars ever since has been: what is taking – indeed what should take – the place of the “command-and-control” post-New Deal regulatory state?
Legal scholarship and pedagogy on the regulatory state are at parallel, important junctures, and two new books stand at the cutting edge.

The first, Law and New Governance in the EU and the US (Hart Publishing, 2006), edited by Gráinne de Búrca and Joanne Scott, is a collection of works by some of the leading scholars in the “new governance” field.

The new governance scholars have both described and laid the theoretical foundation for what they see as promising and innovative efforts to address public problems.

These efforts attempt to be less hierarchical, more transparent and more democratic than traditional top-down forms of regulation.

The second, The Regulatory and Administrative State: Materials, Cases, Comments (Oxford University Press, 2006), by Lisa Heinzerling and Mark V. Tushnet, is one of the first casebooks for a class on the regulatory state and was no doubt influential in helping to persuade Harvard’s faculty that adding such a class to the first-year curriculum was feasible and desirable as part of their recent curricular reform.

Moreover, as the first in Oxford University Press’ 21st Century Legal Education series, an unusual foray by the elite academic publisher into books for American legal education, it will no doubt be influential in shaping both what comes next in the series and for curricular reform at many law schools.

In this review, I aim to link these two books and the developments in the legal academy for which they stand: the scholarly effort to rethink the role of the state in the 21st century and the curricular effort to make courses on the regulatory state a core part of legal education.

I think both books are tremendously important and largely succeed on their own terms. But I argue in this review essay that they share a common flaw: a lack of attention to the “adversarial liberalism” that pervades American policymaking and implementation.

LAW AND NEW GOVERNANCE

Under a traditional, command-and-control regulatory model – embodied in the post-New Deal administrative state in the United States and the harmonization efforts of the European Union – the state sets rules or standards, through the legislature or agencies delegated power by the legislature, and private actors must comply with those rules. The state enforces those rules through inspection and other means, sometimes with the help of private attorneys general.

But the command-and-control model has come under attack in the last few decades on a number of fronts. Primary among them is the inefficiency and stickiness of the rulemaking process.

In a world of uncertainty, legislatures and agencies are unable to predict what the best rules will be down the road, and the mechanisms for monitoring and adjusting the rules in light of experience are severely lacking.

As Michael Dorf, one of the leading new governance scholars, puts it, “in the conditions of modern life, people increasingly find that their problem is not so much an inability to persuade those with differing interests or viewpoints of what to do; their problem is that no one has a complete solution to what collectively ails them.”

Moreover, scarce state resources mean agencies are unable to sufficiently help private actors comply, enforce the law, or monitor and update rules in light of experience.

New governance, then, arises out of this critique of the command-and-control model.

Under the rubric of “democratic experimentalism,” scholars drawing on a pragmatist tradition have presented compelling case studies of new modes of regulation that incorporate robust public participation, benchmarking and information-sharing to solve public problems.

Administrative law scholars are observing that the traditional model of the administrative state, where regulatory agencies with expertise issue rules that regulated entities must follow, is giving way to a mode of “collaborative governance,” where agencies and industry representatives work together to define and revise standards.

Together, these scholarly strands make up the field of “new governance,” a series of efforts to reconceive the relationship between the state and those it governs.

Like many new paradigms, “new governance” defines itself in large part oppositionally.

The kinds of regulation encompassed in the term “new governance” tend to be less prescriptive, less top-down and more focused on learning through monitoring than compliance with fixed rules.

As one scholar put it, new governance mechanisms share emphasis on regulation through “centrally coordinated local problem-solving.”

Both in defining the problem to be addressed and devising solutions, new governance forms emphasize provisionality and revisability in light of experience.

The public agency acts to help local actors learn from one another about best practices and ensures transparency and public participation in problem-solving.

In such regimes, public and private actors interact in increasingly complex and collaborative ways to address problems of public policy.

Law and New Governance is an important collection of essays on new approaches to governance in the United States and the European Union.

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ongoing experiments in new governance in the United States and the European Union.

Second, the essays explore the relationship between law and new governance, with some exploring the “gap” between the two domains, others positing that new governance is “transformative” of law, and others pointing to a “hybrid” approach that might prove enduring.

Third, the essays look at the relationship between new governance and constitutionalism.

In the EU context, the authors are largely asking whether new governance mechanisms can help provide a raison d’être for the European Union; while in the United States, the new governance scholars largely pose the model as a possible answer to the question of what the role of the state is now that the “era of big government is over.”

The regulatory experiments examined in the case studies differ in their origins.

Most of the U.S. examples are what we might call “bootstrapping,” bottom-up examples of reform, originating either within administrative agencies or from particular institutional actors.

In the EU, however, new governance efforts have been more deliberate and top-down as the EU Commission has funded and otherwise promoted research on such efforts.

The principal new governance method in the EU, known as the Open Method of Coordination (OMC), involves “the setting of guidelines or objectives at EU level with the elaboration of Member State action plans or strategy reports in an iterative process intended to bring about greater coordination and mutual learning in these policy fields.”

Drawing on the international relations literature, some authors discuss this as a form of “soft law.”

Looking across the case studies, new governance seems less a structural or institutional description, and more a description of a particular epistemic approach toward the task of governance.

It draws on John Dewey’s pragmatist notion of learning by doing, and with its emphasis on benchmarking and rolling best practices, draws from the “lean production” model of business organization.

Are law and new governance compatible?

If “new governance” regimes are not a set of rules passed by democratic institutions that must be followed by others, though, are they really law?

As Charles Sabel and William Simon, two of the leading new governance theorists, articulate the concern, doubts emerge as to whether new governance forms can still be “law in the sense of holding officials accountable for their acts and assuring that citizens are otherwise secure in the enjoyment of their rights.”

For a few of the authors, there is this gap between law and new governance that may be insurmountable.

On one version of this thesis, law is simply blind to new governance schemes, as evidenced most distinctly by the failure of the EU Constitution to mention such forms of regulation.

In another, more dangerous account for new governance proponents, law actively resists or obstructs attempts at new governance.

An example is Orly Lobel’s account of how the courts struck down an innovative occupational health and safety program because it did not comply with formal rulemaking requirements.

For most of the authors, though, law and new governance can interact in fruitful ways.

De Búrca’s own contribution tells a successful hybrid story of how judicially enforceable rights of nondiscrimination in the EU are enforced with rolling best practices about how to promote equality.

Joanne Scott and Jane Holder’s discussion of the water framework directive in the EU is another example of this sort of hybrid: binding laws with new governance implementation regimes.

In the United States, Louise Trubek explains how medical malpractice litigation can lead to new governance mechanisms to improve the quality of care.

For these authors, law and new governance can peaceably coexist.

For Sabel and Simon, transformation of law by new governance is inevitable and desirable.

They remind readers of the “enduring insight of nineteenth-century social theory that great innovations only arise in conditions that undermine their antecedents.”

New forms of governance are emerging because of the limits of law, and further undermining of law ought to be embraced.
The No Child Left Behind Act of 2001, signed into law by President George W. Bush, is a working example of new governance in the United States. The act was created to strengthen performance-based accountability for all public schools and students.

For those concerned about accountability, Sabel and Simon point out the very notion of accountability as a meaningful concept has been undermined.

Under the traditional, hierarchical notion of principal-agent accountability, the principal, a democratically elected sovereign (through the legislature) hands down rules, and the administrative agent implements those rules and is disciplined if she goes astray by an independent judiciary tasked with enforcing accountability as a "matter of pedigree."

If this account was ever realistic, it is no longer. The legislature is both not particularly democratically representative and not able to lay down rules with enough specificity so as to eliminate discretion.

In such a regime, the new governance theorists argue that a more "dynamic accountability," where agents are forced to transparently justify their decisions and are evaluated by peers making similar decisions, better fulfills the desideratum of a government that is responsive to its citizens.

Most new governance scholars, then, welcome the challenge that new governance poses to law.

Many see the concept of law as no longer a useful one in analyzing the modern regulatory state, and they are not alone.

As another prominent U.S. scholar of regulatory theory recently put it, perhaps we ought to "bracket" the concept of law altogether, "suspending its claim to describe some aspect of our society in a useful or convincing way" and deploy the alternative concept of "policy and implementation" in understanding today's administrative state.

Is new governance compatible with constitutionalism?

Even if new governance is compatible with law, a further question arises: can it reach constitutional scale?

In fact, we currently have an ongoing experiment on that very question: the principal domestic policy innovation of the current administration, the federal No Child Left Behind education law.

New governance scholars greeted No Child Left Behind, and the state-level reforms in Texas and Kentucky on which it was based, with great excitement.

The law acts at the national level much like the EU’s Open Method of Coordination operates at the supranational level: setting goals but leaving it to the states to come up with plans for achieving the goals.

Though it constituted an unprecedented federal level of involvement in state and local education policy, states and local school districts were granted autonomy to devise their own plans for achieving progress, and even for defining the standards themselves.

In return, the federal government required accountability measures including data to ensure students, disaggregated by race and income, were making "adequate yearly progress."

Public participation was guaranteed by provisions requiring the federal Department of Education to include parent representatives on a committee that would review the implementing regulations and other provisions, giving parents the right to get information from their school districts about the qualifications of their children’s teachers.

If No Child is successful, it will be strong evidence that large-scale new governance regulation can work in the United States and may have broad political support as the basis for any “new constitutional order” in the United States.

The jury is still out on the success of No Child.

The No Child Left Behind Act of 2001, signed into law by President George W. Bush, is a working example of new governance in the United States. The act was created to strengthen performance-based accountability for all public schools and students.
On the positive side – indeed, this may make anything else mere quibbles – there is substantial evidence that the math and reading scores of disadvantaged students have gone up since the passage of the law, though the causal connection is not established.

On the other side of the ledger, teachers report increased time “teaching to the test” that may crowd out other important educational goals.

Scholars and policymakers have raised the question of whether the benefits of the law outweigh the unintended consequences of No Child, including encouraging states to lower academic standards, pushing poor and minority students out of schools, and creating an environment that discourages strong teachers from taking jobs in schools with high numbers of disadvantaged students.

Is this a successful regulatory model both for educational policy and other domains? Again, the jury is still out.

For new governance scholars, the model’s strength is its ability to learn from experience and to update both the goals of the regulatory scheme and the means in light of experience.

In the No Child context, states can both learn from their own experience and the experience of other states through the benchmarking coordinated at the federal level.

But when one talks about experimenting at a local level in light of uncertainty about how best to proceed, one thinks of the familiar federalism idea of states as “laboratories of democracy.”

Even if it is different than federalism, is the new-governance, No Child model really better?

One leading scholar of education policy, Harvard’s Richard Elmore, thinks not. He points out that before No Child states were experimenting with various kinds of performance-based accountability, and No Child “narrows the domain of experimentation drastically and hence limits the amount we can know.”

He believes annual testing is one way to measure performance, but it is not the only way and may not be the best way. Under No Child, it is the mandatory way.

From a different direction, scholars have criticized No Child for its mix of federal involvement but leaving flexibility to the states – precisely the recipe prescribed by new governance advocates.

As James Ryan puts it, perhaps the federal government “should get off the federalism fence.” Either the political and institutional dynamics are such that the states can be trusted to establish and enforce strong academic standards, or they can not. And if they cannot, then perhaps the federal government ought to just prescribe national standards, as a precursor to No Child passed under President Clinton did, and as was supported by the first President Bush.

To be sure, perhaps political reality would stand in the way of such standards – but that is not the new governance proponents’ argument. Their argument is that providing states flexibility is better as a policy matter because of the uncertainty about ends and means.

THE REGULATORY AND ADMINISTRATIVE STATE

Public law in legal education

As scholars rethink the role of today’s regulatory state, educators are exploring its proper role in legal education.

Since the rise of the administrative state in the United States with the New Deal, legal education has struggled to incorporate “public law” courses into their curricula.

The first courses to appear during the 1930s and 1940s were administrative law courses, dealing with the process by which agencies do rulemaking, judicial review and other related topics.

At roughly the same time, legislation courses grew, introducing students to the legislative process, and how to read and interpret statutes.

After World War II, two professors at Harvard, Henry Hart and Albert Sacks, developed what grew to be legendary materials called “The Legal Process.” These materials introduced students to the different ways society can deal with problems, including regulation through administrative agencies.

The administrative law and legislation courses have remained staples of the upper-level curriculum, and though the legal process was taught in dozens of law schools in the 1960s, 1970s and 1980s, it is now only taught in a handful.

In the meantime, beginning in the late 1980s, many law schools moved toward requiring some kind of “public law” course as part of the first-year curriculum.

Though some schools did this through an administrative law or legislation course, others such as Columbia, NYU and Georgetown developed a “regulatory state” course that focused in large part on questions of institutional or regulatory design.

With Harvard’s recent adoption of such a course into the required first-year curriculum, and a prominent scholar of regulation and Vanderbilt’s dean, Edward Rubin, leading curricular-reform efforts both at his own school and through the Association of American Law Schools (AALS), the issue has come to the fore again.

Heinzerling and Tushnet’s approach - The book’s strategy

Into the mix steps Harvard’s Tushnet and Georgetown’s Heinzerling with their new book, _The Regulatory and Administrative State_. This is a new casebook designed to fill the void in the market – where demand may also grow if other schools follow Harvard’s lead and require such a course – for materials to teach an introductory course in public law.

On the question of whether such a course should be required, Tushnet and Heinzerling are clear in the preface: “Lawyers in the 21st-century need course materials of this sort. They are deeply involved in public law and the regulatory state, and need the skills – including the ability to read and understand statutes – associated with the modern regulatory state.”

At this stage, the question of whether law students need the “skills ... associated with the modern regulatory state” is not controversial. The issue is whether or not this book provides them.

This book takes as its theme the regulation of risks to human life and health.

In exploring how the law regulates these areas, the book considers recurring issues of institutional choice, statutory interpretation, and market and regulatory failure. And, it is quite different from a standard administrative law or legislation book.

The book proceeds in four parts: First, it considers the basic justifications for regulation in circumstances where the individual parties contract.
Second, it explores the contours of common-law regulation of risks to human life and health through both criminal and tort law.

Third, the book takes up the emergence of the modern regulatory state as a response to the perceived failure in common-law regulation of risk. In doing so, it offers an introduction to statutory interpretation, administrative law and public choice theory.

Finally, the book closes with a section on “new perspectives” on the regulatory and administrative state in the 21st century, exploring some of the same issues explored in greater depth in Law and New Governance.

In guiding students’ reflections on these matters, the authors put the students, implicitly, in the role of policymakers, asking questions like “what is the best institution to use in responding to” work-related carpal tunnel syndrome, climate change and other issues.

As I explain further below, this perspective of the policymaker, or what the authors refer to in the book as the “disinterested social scientist,” is the primary perspective with which the authors approach these materials.

More promising, in my view, are the too-rare instances where students are asked to think about the role of lawyers.

In one chapter, for example, students are asked to think about how lawyers affect the process by which individuals complain about workplace sexual harassment or secondhand smoke – even here, though, the students are asked to play social scientists thinking about the role of lawyers, not thinking as lawyers themselves.

Part III, “The Modern Regulatory State,” is the core of the book, introducing students to statutory interpretation, the basics of administrative law and some modern features of contemporary regulation including cost-benefit analysis and information provision.

The authors provide a solid introduction to the key administrative law topics of rulemaking, judicial review, standard-setting and nondelegation, primarily through the principal U.S. Supreme Court cases and a few circuit opinions applying those cases.

To be sure, future lawyers in a regulatory practice would have to take the full administrative law course, but others could be confident that they have a decent foundation.

The authors also present interesting materials on regulatory design: cost-benefit analysis, some of the ways regulatory efforts fail and how providing information can be a market-based solution to regulating risk (but one that also has its limits, as psychological research presented indicates).

The materials on statutory interpretation, though, are inadequate, covering only one chapter and arguably not even that. This is a serious flaw.

The materials on statutory interpretation consist of excerpts from a few classic articles – by Karl Llewellyn, Frank Easterbrook and Stephen Breyer – to provide an excellent introduction to the overall approach in interpreting statutes.

These articles are followed by two cases – one, the classic “Holy Trinity” case, which demonstrates the conflict between statutory purpose and the text, and then a Seventh Circuit opinion interpreting the Sentencing Guidelines, which features interesting, dueling opinions from Judges Posner and Easterbrook.

After that, the authors go right to Chevron, the classic U.S. Supreme Court case about judicial deference to agency interpretation of stat-

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uates, and a more recent case on that topic, Brown and Williamson. The canons of statutory interpretation barely appear.

At the close of Part III, the authors take a welcome turn from the perspective of a “disinterested social scientist” to the perspective of politicians.

In this chapter, they introduce “public choice theory,” the micro-economic approach that looks at the self-interested incentives that politicians have in making regulatory choices. They want to run for reelection, they need to raise money for such a campaign and their choices are shaped by these realities.

Besides the excerpts from public choice theory, the authors include an interesting essay from Harvard political theorist Jane Mansbridge questioning the premises of public choice theory with its focus on self-interestedness, its acceptance of “adversary democracy” and the absence of deliberation from this view of public life.

No doubt the new governance scholars would agree.

But all must face the question of how exactly to get past the reality of “adversary democracy” and toward the aspiration of greater deliberation in public life, a theme I will return to later.

This book is ambitious. On the theory that students will learn more by “seeing the subjects in a unified course,” Heinzlering and Tushnet designed the book as an introduction to “the reasons for regulation, the ways in which regulation can go awry, the choice of legal institutions for regulation, the choice of regulatory instruments, and the theory and practice of statutory interpretation.” But in attempting to do so much, the authors risk accomplishing relatively little.

The authors believe that today’s lawyers need to know “both an understanding of statutory interpretation and an understanding of the reasons for regulation.”

However, it is not clear why exactly they need the latter.

To be sure, when Willard Hurst first designed such a course at Wisconsin during the 1940s, the place of the administrative state itself was much more tenuous. In that context, a course that spent some time demonstrating the limits of the common law or the need for scientific expertise as part of the executive branch might have made sense.

But today, the administrative state is an inescapable part of our legal system. No one is suggesting it is unnecessary in our complex modern society.

What is needed is more of an approach that focuses on training future lawyers to make arguments about how to interpret statutes.

Put simply, depending on the client and the situation, a lawyer will have to argue either that a client or his conduct is not covered by a statutory provision or is covered — and future lawyers need to be trained in how to make these kinds of arguments the same way they are trained to make doctrinal arguments.

ADVERSARIAL LEGALISM AND LAWYERS

What will the American regulatory state look like in 20 years? To a certain extent, both books are making wagers on that answer.

I argue that how each book deals with that question has an impact on the other and could help shape the very answer itself.

The argument goes like this: a key and largely unexplored variable in the scalability of new governance in the United States is our culture of “adversarial legalism,” to use Robert Kagan’s term. In not grappling with that issue, the new governance literature currently falls short.

The question is: why do new governance scholars think interests accustomed to battling over policy will put down their swords, share information and collaborate?

Perhaps the reason why new governance is much more widespread in the European Union, and may remain that way, is because of this lack of adversarial legal culture. But this variable is largely unexplored in the new governance literature thus far.

Indeed, the adversarial legal culture may carry over to new governance schemes.

To take one example, Kagan cites the Educational for All Handicapped Children Act as an example of a law that relies on due process rights and private lawsuits for enforcement, as opposed to an administrative enforcement mechanism that would not rely on the courts.

Anecdotal evidence suggests the same lawyers who challenged the schools under that law have also started bringing legal challenges under No Child Left Behind.

Moreover, parents and their lawyers are starting to use the No Child Left Behind right to transfer a student out of a low-performing school to challenge school rezoning decisions.

This is not to say these developments are necessarily bad, just that the shift from a rights-based, court-centric model to a problem-solving, collaborative one seems tentative at best.

In order for new governance to succeed, perhaps it will be necessary to amend the Administrative Procedure Act to limit judicial review considerably.

Will lawyers accept this? Regulated entities? Will citizens? Should they?

Alternatively, maybe it does not matter to the success of the new governance project if affected parties still have the opportunity to
challenge regulations once formulated. But this would seem an odd conclusion since continued opportunity for challenge would reduce the incentive to actually participate and collaborate in the policymaking process.

If the claim, then, is that the collaborative process itself will lead to less adversarial positioning for strategic advantage, then that requires some empirical support, particularly in light of the evidence to the contrary with respect to negotiated rulemaking.

The scholars in Law and New Governance largely position themselves as social engineers, technocrats deciding the optimal government programs.

But if the new governance scholars are going to succeed in understanding the circumstances in which such schemes will work, they must take greater account of how the schemes arise and are implemented.

For better or worse, lawyers are generally not trying to work with others to reach the “best” social outcome – whether it be lower drug use, higher school test scores or safer workplaces. Rather, they are trying to advance their client’s interests in the particular context.

But our adversarial legal culture is not fixed, either, and one explanatory factor here may be how we train tomorrow’s lawyers. Here, Heinzerling and Tushnet miss an opportunity.

To be sure, they do not ask students to play the role of warrior litigators, but nor do they ask them to play the role of problem-solving collaborators either. In doing so, they fail to maximize the chances that tomorrow’s lawyers will act to change the adversarial legal culture in which they will operate.

Like the new governance scholars, The Regulatory and Administrative State generally takes a neutral, technocratic perspective, that of a “disinterested social scientist, attempting to determine what choices among institutions would best serve the public interest.”

Focusing on the general topic of risk regulation, the book asks the questions: when is government regulation necessary and desirable, and what form can and should regulation take? These are important and interesting topics, but a lack of attention to adversarial legalism means this book falls short.

Tushnet and Heinzerling’s failure to attend closer to the role of lawyers and adversarial legalism is not just a pedagogical failure, then, it is a scholarly one as well.

If the relative success of the regulatory instruments depends in part on the role lawyers play, and the degree to which adversarial legalism can gum up the works, so to speak, then comparative institutional analysis that fails to look at these issues is incomplete and inaccurate.

The example of No Child Left Behind helps illustrate this common weakness.

With its accountability measures, the law was a promising example for the new governance scholars of the promise of democratic experimentalism (if properly implemented).

But only by examining how such a law has and could play out “on the ground” can one begin to understand the circumstances under which such a model of regulation can work and, where it fails, how it can be improved. And the way it will be implemented is not by everyone holding hands and working together for the public interest. It is through a complex pushing and pulling, with lawyers for teachers’ unions, school districts and government agencies battling over what constitutes compliance with the law.

Only by examining this “new governance” innovation in the context of our adversarial legal system can it be properly evaluated.

CONCLUSION

Put differently, the fate of the project at the heart of each book is inextricably linked to the other.

For the new governance scholars, the success of new governance as an overarching regulatory theory depends, at least in the United States, on the next generation of lawyers having the skills and inclination to overcome the culture of “adversarial legalism” that pervades policy implementation today. That is, in determining the success of new governance as a model for the 21st-century regulatory state, the training and receptivity of lawyers may well be an explanatory variable.

By the same token, for public-law curricular reformers like Tushnet and Heinzerling, their book only succeeds if it provides adequate tools to the next generation of lawyers to be effective in the 21st-century regulatory state.

To be sure, there is an empirical and unanswerable question here: What will the U.S. regulatory state look like in 20 years? But, I fear that the new governance scholars may be more right about the future than Tushnet thinks, and that the materials and skills in The Regulatory and Administrative State are therefore inadequate preparation for the post-regulatory state.

The students who are trained by The Regulatory and Administrative State will understand what it means to challenge agency-issued regulations in the courts under the Administrative Procedure Act (APA) but not how to work with a school district to develop a plan to meet the goals of the No Child Left Behind law or a hospital developing a system to protect information privacy under the Health Insurance Portability and Accountability Act (HIPAA). And yet, the latter tasks are likely to be more common than APA challenges for lawyers in 2020, perhaps even today.

At the same time, the new governance scholars could benefit from the kind of comparative institutional analysis that Heinzerling and Tushnet teach their students.

For example, is the No Child Left Behind method of allowing states the flexibility to define standards for students really likely to lead to higher student achievement than if the federal government set the standards themselves? If so, why?

This kind of comparative analysis is frequently absent from the inevitability narrative advanced by some of the new governance scholars.

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

Together, these two books are a promising start.