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Transnational Labor Regulation and the Limits of Governance

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Governance theories of regulation can be useful in describing and conceptualizing new forms of transnational labor regulation (TLR) that have emerged in a context of weak state regulatory capacity. This Article argues, however, that the prominent governance models that have been applied to TLR, namely systems theory, responsive regulation, and new governance are not suited to the exigencies of labor regulation in developing states. Accordingly, this Article proposes an alternative "integrative approach" to transnational labor regulation that draws upon the insights of governance theory, but that is committed to developing state capacity where the state has a comparative advantage over non-state regulation in realizing the goals of TLR.

INTRODUCTION

Transnational labor regulation (TLR) is the field of law that concerns the regulation of work in the transnational sphere, across jurisdictions.¹ It is expansive in scope, and is constituted by a number of regulatory and academic fields that impact transnational work, including *inter alia* public international law, labor law, trade law, and law and development. Its source of norms and methods of enforcement are also diverse, and include soft and hard,

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¹ BOB HEPPLER, *LABOUR LAWS AND GLOBAL TRADE* 3 (2005).

domestic and international, and both public (state) and private (non-state) law.²

Due to its normative heterogeneity, TLR has been described as a "spider's web"³ and a "mosaic,"⁴ making it a ripe candidate for the application of a heterogeneous school of regulatory and political theory that is often termed governance.⁵ Governance, broadly speaking, loosely refers to a diverse body of regulatory and social science scholarship that describes, and sometimes advocates for, the decoupling and de-centering of regulation from the state and from government. Governance as a theoretical model applied to problems of global labor regulation can be very helpful to the extent that it helps scholars describe and conceptualize new forms of regulation that have emerged in response to expanding global supply chains and weak domestic and international regulatory capacity. In this Article, however, I argue that without careful modification and adaptation, the prominent governance theories that have been applied to TLR are ill equipped to address the normative goals of labor regulation and industrial relations in developing countries and global supply chains.

To support this claim, in Part I of this Article I explain the rise of systems of transnational private labor regulation (TPLR) along global supply chains as a political and market response to failed domestic and international public regulatory regimes. The emergence of these institutionally determined, non-state systems of labor governance has taken place, as I describe in Part II, contemporaneously with the rise of "governance" in political and legal thought. I specifically examine and critique at some length three prominent governance theories drawn from the regulatory literature that have been applied in various forms to the problem of labor regulation in global supply chains and developing countries. These regulatory schools are systems theory, responsive regulation, and new governance. I argue that these theories, which have been forged in the context of developed country regulatory systems in non-labor fields, provide radical post-statist accounts of law, international relations, and politics that without careful modification are ill-suited to the normative and empirical circumstances of labor regulation in developing regulatory environments.

2 See JIM ATLESON ET AL., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY 38-39 (2008); David Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187 (2000).

3 HEPPLE, *supra* note 1.

4 Trubek et al., *supra* note 2, at 1187.

5 See *infra* Part II.

To help shape a new direction in governance and to help form a new research agenda, I present in Part III a brief sketch of what I term an "integrative" approach to TLR. Such an approach draws upon the important insights of governance theory, but seeks to adapt and more finely tailor governance theory to the specificities of TLR. An integrative approach has both empirical and normative goals. Empirically, it seeks to understand and describe the ways private and public labor regulatory regimes engage with each other in weak regulatory environments. Normatively, in contrast to the dominant trend in governance theory, an integrative approach re-centers the state as an important actor in transnational and domestic labor governance, while at the same time recognizes and leverages the important function that private regulation plays. It actively looks to develop state capacity where it is lacking and where there are compelling normative and conceptual reasons for the state to play a regulatory function.

An integrative approach thus seeks to empirically identify the various private and public elements that constitute a regulatory system in a given country, and then seeks to create discursive mechanisms and institutions that effectively communicate with each other with the explicit goal of increasing state regulatory capacity where there are compelling pragmatic or social justice reasons for doing so. Its goal is to develop and deploy non-state, hybrid, and traditional regulatory institutions in ways that identify, target, and remedy salient deficiencies in domestic labor regulatory capacity on a context and fact specific basis.⁶

I. TRANSNATIONAL PRIVATE LABOR REGULATION

As developing countries have entered the global market, and as multinational corporations (MNCs) have increasingly relied on international supply chains, a gap has emerged between public regulatory supply and demand at the transnational and domestic levels. Gary Gereffi and Frederick Mayer have termed this a "governance deficit."⁷ The governance deficit exists,

6 For an articulation of the concept of integrative linkage as applied to the context of international trade, see Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 225-26 (2007).

7 GARY GEREFFI & FREDERICK MAYER, *Globalization and the Demand for Governance*, in THE NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT 39, 48-49 (2005). Gereffi and Mayer's notion of governance is broader than, but inclusive of, what they call "regulation." They recognize three modes of governance: facilitative, regulatory, and distributive. Public labor law, as well as private modes

according to Gereffi and Mayer, in three domains. First, there is a home-country governance deficit, whereby the home-countries of MNCs do not have adequate regulatory tools to address the new forms of international production and supply chains. That is, while MNCs might be incorporated and headquartered in a particular jurisdiction, a great deal, if not most, of their economic activities occur abroad in areas that are beyond the regulatory reach of the home-country.⁸ The second deficit is the limited scope and regulatory capacity of international and intergovernmental institutions.⁹ The limited regulatory reach and powers of the International Labor Organization (ILO) is an illustrative example of this problem. The ILO is a tripartite organization whose "enforcement" capability by and large functions through its so-called "supervisory mechanisms," which primarily act as reporting institutions on member-state action.¹⁰ The third deficit, and the one that is the primary focus of this Article, is the limited capacity of developing countries to regulate their social and economic realms that have expanded along with their economies. There are few areas in which this deficit is as acutely felt as in the realm of

of labor governance, is what they term the regulatory mode of governance which is designed to mitigate the negative externalities of the market. Collective bargaining, however, is categorized as a form of private distributive governance, which is designed to "mitigat[e] the unequal impacts of markets and enabl[e] societies to adjust to economic change." *Id.* at 42.

8 Katherine Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1011-19 (1996) (discussing extraterritorial application of U.S. labor law).

9 See GEREFFI & MAYER, *supra* note 7, at 48.

10 A notable exception to this is Article 33 of the ILO constitution, which allows for the ILO Governing Body to request its members to take action that "it may deem wise and expedient to secure compliance therewith." This has only been used once in the case of Burma, in which the ILO requested its members to impose economic sanctions for violations of core labor rights. See International Labour Organization Constitution art. 33, 49 Stat. 2712, 15 UNTS 35 (June 28, 1919). See generally Robert Howse et al., *The World Trade Organization and Labor Rights: Man Bites Dog*, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS LABOUR RIGHTS AND THE EU, ILO, OECD AND WTO 157 (Virginia A. Leary & Daniel Warner eds., 2006). The limits of the ILO have been widely discussed in the literature. It is worth emphasizing, however, that the ILO is almost uniquely focused on the conduct of states, and as such lacks the capacity or mandate to focus on or sanction private economic actors, such as MNCs. While a number of scholars and activists have sought to supplement the ILO's norm generation and soft law strategies by granting a larger role to the World Trade Organization (WTO) and other trade regimes to address labor issues, the WTO route has been notably closed. See, e.g., Kevin Kolben, *The WTO Distraction*, 21 STAN. J.L. & POL'Y 461 (2010).

labor and employment law. We will term this third deficit the domestic labor governance deficit.

While Gereffi and Mayer nominally give all three deficits equal weight, it is the domestic labor governance deficit that is most noteworthy, for labor regulation has for a variety of reasons historically been a matter of domestic law and control,¹¹ and labor movements have largely operated and been defined within national borders.¹² Extraterritorial application of labor laws (deficit one) and the use of intergovernmental organizations (deficit two) have heretofore never played, and are unlikely to ever play, an equal role to domestic governance in the regulation of work.

To address this governance deficit, MNCs and even governments have turned to various forms of private regulation that effectively assume what had been the traditional regulatory role of the state. Building on governance conceptions of regulatory authority, I thus define TPLR to be constituted by a broad range of practices generally outside of the strict purview of the state that serve to regulate working conditions and the employer-employee relationships across jurisdictions.¹³ It is private because it primarily operates externally from the traditional institutions and instruments of *government*. It is transnational because it involves MNCs and other transnational actors in the effective regulation of the workplace in various domestic spaces. The emphasis in this definition is on "practice," because TPLR intentionally de-centers state institutions of coercion and control and traditional forms of legality. Instead, it emphasizes more diffuse forms of social control, power, and action.

TPLR entails a number of different practices by a range of non-state actors, most often independent of the state but sometimes in coordination with it. TPLR includes "self-regulation" by corporate actors who have created their own codes of conduct and inspection and monitoring regimes, multi-stakeholder initiatives, and a wide range of other practices and institutions implemented by various actors in civil society, sometimes in cooperation with businesses and governments. An important driver of TPLR is the work of transnational activist networks that mobilize pressure on MNCs and governments to improve labor rights protections.¹⁴ These disparate private regulatory regimes resemble traditional public law in the sense that they generally include a set of rules as reflected in a code of conduct, and a

11 GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM* 23 (2007).

12 *Id.* at 20.

13 See Kolben, *supra* note 6, at 225-26.

14 *Id.* at 227-28.

mode of enforcement of those rules, usually through a system of monitoring and clearly stated consequences in the event of a violation of those rules.

TPLR is one form of a larger field of non-state law that has received increasing attention in contemporary legal scholarship.¹⁵ There are two important ways in which TPLR distinguishes itself from other fields of non-state legal practice and theory, however. First, TPLR generally concerns a very specific set of global economic processes — international supply chains and the manufacture of products made for international markets. Second, as Marc Hertogh has noted, non-state law can operate both within and without the sphere of a state.¹⁶ TPLR usually operates in a context where a domestic state labor regulatory regime exists, but it is inadequate to address the demands of MNCs or other stakeholders that are engaged with global supply chains.¹⁷

Critics of TPLR have argued that there are important reasons why TPLR is either an insufficient, or perhaps even a destructive, response to the domestic labor law enforcement gap.¹⁸ First, some argue that TPLR suffers from legitimacy and democratic deficits. Unlike public law and enforcement mechanisms in democratic polities, the norms and application of TPLR are largely unresponsive to political and democratic processes and pressures. TPLR, it is argued, is a top-down, managerialist and privatized form of governance in which the regulated subjects, i.e., workers, have little input into its content or application. Second, unlike state-generated law, the drivers of TPLR are international consumers and civil society. While consumer demand for products made in socially acceptable processes might have become somewhat mainstreamed into consumer preferences and business practices, workers in global supply chains are dependent on that demand for the enforcement of their rights. Rights, however, are by definition grounded in universal human claims upon governments and society, and should not be dependent on the vagaries of market-based consumer demand. Third, the quality of these various systems is highly variable, and some would claim

15 For an early articulation of non-state elements of law, see EUGEN EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 23 (1936). For a contemporary discussion and mapping of non-state law, see Marc Hertogh, *What is Non-State Law? Mapping the Other Side of the Legal Hemisphere*, in *INTERNATIONAL GOVERNANCE AND LAW* 11 (Hanneke van Schooten & Jonathan Verschuuren eds., 2008).

16 Hertogh, *supra* note 15, at 24 (conceptualizing and describing fields of non-state legal norms and enforcement mechanisms as sometimes occurring within the context of the state, and sometimes without).

17 See GEREFFI & MAYER, *supra* note 7.

18 SEIDMAN, *supra* note 11, at 28-33.

that by their nature TPLR regimes prioritize the protection of certain labor standards, such as wage and hour and health and safety standards, over others, such as freedom of association and collective bargaining.¹⁹ We will revisit some of these critiques in Part II.

In Gereffi and Mayer's conception, TPLR is a market response by MNCs to pressure from consumers and other stakeholders that have interests in production and labor processes that conform to their consumption preferences.²⁰ When these processes do not conform, these stakeholders, through the mobilization of transnational networks and in some cases boycotts, have the capacity to inflict economic and reputational harm on the corporation.²¹ To mitigate these risks, many MNCs in vulnerable industries have created regulatory regimes along their supply chains to address these concerns and protect their brand reputation.²² The rise of TPLR has thus in this account been a market driven, supply-side response by business, civil society, and even governments to the governance deficits described by Gereffi and Mayer.

While Gereffi and Mayer's market account is surely one part of the picture, it is also important to emphasize that TPLR and the particular institutional forms it takes is not only the result of a market demand for regulation in weak regulatory environments. New institutional accounts of the emergence of private regulatory regimes have helped explain their creation as the result of political conflict between various actors, including NGOs, states, and companies, over the regulation of the global economy.²³ According to this account, "political action occurring in neo-liberal institutional arrangements in association with globalization shape[s] the action of states, social movement groups, and NGOs in such a way as to

19 *Id.* at 36-37.

20 For a discussion of the market based account of the rise of transnational private labor regulation, see Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 306-09 (2007).

21 See SEIDMAN, *supra* note 11, at 28.

22 Others have claimed that MNCs also have other interests in regulating suppliers' workplace practices, such as in order to ensure stable industrial relations in suppliers' factories and a stable supply of goods and services. See IVANKA MAMIC, IMPLEMENTING CODES OF CONDUCT: HOW BUSINESSES MANAGE SOCIAL PERFORMANCE IN GLOBAL SUPPLY CHAINS 26 (2004).

23 See Bartley, *supra* note 20, at 336 ("From this perspective, building certification systems is an inherently political project, driven in particular by institutional entrepreneurship *around* the market (not merely in it), strategic negotiation of a complex set of policy arenas, and a neoliberal context").

help shift their efforts and resources towards private forms of regulation, as opposed to governmental or intergovernmental regulatory systems."²⁴ Further, in the institutional account, TPLR and the specific forms that it takes are not a natural or necessary solution to the regulatory deficit. Rather, they are a particular response that occurs because, in part, other forms of coordinated governance, such as stronger forms of intergovernmental labor regulation, are closed off.²⁵ Moreover, the emergence of private regulatory regimes is due to choices and actions not only of businesses, or of NGOs and other civil society actors, but also of governments.²⁶ States have been and continue to be important agents in a number of cases in developing private regulatory regimes as alternatives or sometimes complements to state action.²⁷

TPLR is thus politically and socially embedded, and it is a response to market demands as well as policy choices made by various actors with heterogeneous agendas. In other words, there is nothing natural or inevitable about the rise of private regimes and the forms they take, and they should be understood to be the result of multiple forces, both political and market-generated. Such an understanding, I believe, opens up space to craft TPLR regimes in more complex and responsive ways.

II. THE LIMITS OF GOVERNANCE

A. Governance

The emergence of transnational private labor regulatory regimes has occurred simultaneously with the ascendance of a heterogeneous field of academic literature in fields such as political science,²⁸ international

24 Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Product Fields*, 31 *POL. & SOC'Y* 433, 447 (2003).

25 Bartley points to the lack of effective labor protections in international trade law as an example. *Id.* at 451.

26 *Id.*

27 Bartley describes, for example, U.S. initiatives to devolve monitoring duties to manufacturers as part of "compliance agreements" forged in the context of the Fair Labor Standards Act's Hot Goods provision, and the U.S. role in establishing the Fair Labor Association. *Id.* at 448-51.

28 See, e.g., *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* (Jacint Jordana & David Levi Faur eds., 2004).

relations,²⁹ law,³⁰ and sociology.³¹ This school of scholarship might be loosely termed "governance." In governance theory, the centrality and capacity of the nation-state to effectively regulate society and the market are questioned and reexamined.³² Governance scholarship argues that what is often referred to as "command and control" regulation has given way to new non-state regulatory forms, and that regulatory authority and its administrative instruments are and should be increasingly decentralized.³³

While governance has a number of definitions and describes a broad and variable body of research,³⁴ at its core it defines a process in which regulatory authority and legitimacy have become de-centered from the state and from *government*. Instead, authority and legitimacy are now conceptualized as being dispersed, diffused, and dislocated among multiple actors, private and public, domestic and international. Separations between public and private become much less clear, and "public and private ordering both overlap and become exchangeable."³⁵ Reflecting the diffuse nature of the phenomenon it describes, governance employs definitions and conceptualizations that are intentionally expansive. Two prominent political scientists have defined governance to mean

all processes and institutions, both formal and informal, that guide and restrain the collective activities of a group Governance need not necessarily be conducted exclusively by governments and the international organizations to which they delegate authority. Private firms, associations of firms, nongovernmental organizations (NGOs), and associations of NGOs all engage in it, often in association

29 See, e.g., THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

30 See, e.g., FROM GOVERNMENT TO GOVERNANCE: THE GROWING IMPACT OF NON-STATE ACTORS ON THE INTERNATIONAL AND EUROPEAN LEGAL SYSTEM (Wyobe P. Heere ed., 2003).

31 See, e.g., MICHEL FOUCAULT, *Governmentality*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY (Graham Burchell, Colin Gordon & Peter Miller eds., 1991).

32 See, e.g., Jon Pierre, *Introduction: Understanding Governance*, in DEBATING GOVERNANCE: AUTHORITY, STEERING AND DEMOCRACY (Jon Pierre ed., 2000). But see LINDA WEISS, *THE MYTH OF THE POWERLESS STATE* (1998).

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

34 See Paul Hirst, *Democracy and Governance*, in DEBATING GOVERNANCE: AUTHORITY, STEERING, AND DEMOCRACY 13 (Jon Pierre ed., 2000).

35 Karl-Heinz Ladeur, *Globalization and Public Governance — A Contradiction?*, in PUBLIC GOVERNANCE IN AN AGE OF GLOBALIZATION 1, 17 (Karl-Heinz Ladeur ed., 2004).

with governmental bodies, to create governance, *sometimes without governmental authority*.³⁶

The notion of governance existing without government means that "the state is no longer the sole, or in some instances even the principal source of authority, in either the domestic arena or in the international system."³⁷ The formal authority of the "state" and legal institutions is no longer considered necessary for legitimacy or regulatory authority, which are now, according to James Roseneau, dependent on the "inter-subjective meanings" of the regulated.³⁸ Thus unlike government, governance only succeeds as a mechanism of control if a majority of those subjected to it accedes.³⁹ In this sense, governance reconsiders some of the very foundations of democratic theory, allowing for the rise and legitimacy of private authority,⁴⁰ and replacing principle agent accountability with non-state forms of authority, such as, at least in one conception, benchmarking and peer review.⁴¹

In governance theory, therefore, responsibilities and boundaries become more fragmented and less distinct, and the nation-state as traditionally constituted is no longer understood to be the primary or central agent in addressing social and economic issues.⁴² Instead, market regulation, which

36 ROBERT O. KEOHANE & JOSEPH S. NYE JR., GOVERNANCE IN A GLOBALIZING WORLD 12 (2000) (emphasis added).

37 Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3, 5 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) ("Our conception of 'private authority' is intended to allow for the possibility that private sector markets, market actors, NGOs, transnational actors, and other institutions can exercise forms of legitimate authority").

38 See James Roseneau, *Governance, Order and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT 4 (James N. Roseneau & Ernst Otto Czempel eds., 1992).

39 *Id.* at 6. For a related notion applied to transnational labor regulation, see Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 477 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2004) ("For workers and consumers, managers, and government officials to be persuaded to accept voluntary codes as the equivalent of legal protections, all must acquiesce in roughly similar values and assumptions").

40 Hall & Biersteker, *supra* note 37.

41 Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 778 (2004-2005).

42 See Gerry Stoker, *Governance as Theory: Five Propositions*, 50 INT'L SOC. SCI. J. 21 (1998).

has been traditionally considered to be the exclusive regulatory domain of the state, has now become, according to some scholars, the legitimate regulatory domain of private actors.⁴³

Legal scholarship has also seen a turn towards governance, particularly in the field of regulatory theory.⁴⁴ Legal scholars have begun to re-conceptualize the role of the state, how law is generated, and reconsider the legitimate sources of law and regulatory authority.⁴⁵ In the field of international law, for example, scholars have extensively examined the processes whereby networks of trans-governmental actors, both formal and informal, create international networks to resolve global regulatory issues.⁴⁶ Legal pluralist literature has argued that norm generation takes place through a number of overlapping normative orders.⁴⁷ "Private ordering" scholarship has examined the ways in which groups of commercial actors self-regulate and settle disputes through private means outside of the law and public legal institutions.⁴⁸ Administrative law scholarship has developed a new literature on global administrative law, arguing that a new administrative legal space exists outside of the boundaries of the traditional nation-state, in which not just public, but also public/private or just purely private actors carry out regulatory functions formally undertaken by public bodies.⁴⁹

Much of the literature describes a transformation of the regulatory state and the limits of its capacity, and even that of law itself, to effectively regulate certain spheres of economic and social activity. One of the leading analysts of this scholarly development, Orly Lobel, has claimed that the

43 Other discussions of governance and its relation to the state focus on the increasingly fragmented and dispersed responsibilities among a range of international specialty organizations, such as, for example, the World Trade Organization.

44 For a broad overview and survey of the literature, see Lobel, *supra* note 33.

45 Hertogh, *supra* note 15.

46 See ANNE-MARIE SLAUGHTER, *NEW WORLD ORDER* (2004). For Slaughter, transgovernmental networks address what she calls a "governance trilemma" which is that we need global rules without centralized power, but with government actors who can be held to account through a variety of political mechanisms. *Id.* at 10; see also Anne Marie-Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2002).

47 See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1557-58 (2007).

48 See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994); Lisa Bernstein, *Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

49 See, e.g., Nicko Kricksn & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 3 (2006).

move to governance represents a much broader shift in regulatory theory, reflecting a move from centralized command and control regulation to a more "dynamic, reflexive, and flexible regime,"⁵⁰ where "the exercise of normative authority is pluralized."⁵¹

Other scholars have used governance to emphasize and promote a notion of fluidity between the public and private. Nan Hunter, for example, uses governance as a conceptual tool because "it permits us to move easily back and forth across public-private boundaries."⁵² Building on Foucault's power-focused concept of "governmentality," she highlights the power exchanges that cross the borders between government, the market, civil society, and private life.⁵³

B. Governance in Transnational Labor Regulation

Governance as a conceptual framework has thus become prominent in a number of academic fields. In legal scholarship, however, three distinct governance schools of regulatory theory have become highly influential and have drawn upon and been explicitly applied to transnational labor regulatory issues both by their leading proponents, and by others seeking to apply the theories to questions of transnational labor. I now turn to an examination of these three schools of thought.

1. Systems Theory

The first body of literature, systems theory, is grounded in the law and society movement. Gunther Teubner, a leading thinker in this school, has questioned the capacity of law to effectively regulate what he describes as socially autonomous social spheres in the economic, political, and cultural arenas.⁵⁴ The ineffectiveness of law to functionally regulate these spheres is, according to Teubner, fundamentally a matter of communication.⁵⁵

50 Lobel, *supra* note 33, at 365.

51 *Id.* at 373.

52 Nan Hunter, *Risk Governance and Deliberative Democracy in Health Care*, 97 GEO. L.J. 1, 6 (2008).

53 *Id.*

54 See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993) [hereinafter TEUBNER, *AUTOPOIETIC SYSTEM*]; Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983) [hereinafter Teubner, *Substantive and Reflexive*].

55 See GUNTHER TEUBNER, *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 2 (1988); Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State?*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY*

Each subsystem is autonomous and self-referential and, because of that, law, which constitutes its own self-referential and autonomous system, is not sufficiently "structurally coupled" with those other systems. What emerges is a so-called "regulatory trilemma"⁵⁶ in which regulatory interventions are either "irrelevant or produce disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself."⁵⁷ In this conception, law is not only insufficient to resolve conflicts within those systems, but also has the potential to "destroy valued patterns of social life" within them.⁵⁸ This is because, according to Teubner, these systems, while cognitively open are normatively closed, meaning that while they are capable of responding to external stimuli of different facts and circumstances, they are only able to conceptualize and process outside norms within their own language and terms.

It is not surprising then that, given the weak capacity of state law to regulate society, the state in Teubner's conception has no monopoly on law and law making. Instead there exists a pluralized set of legal orders within society that function largely independently of the state.⁵⁹ Society is understood to be constituted by self-regulating systems of communication, within which state law is just one of those systems.

In response to the limitations of traditional regulation and to the regulatory trilemma, Teubner and others have developed and promoted the notion of "reflexive law," which conceptualizes law primarily as a mechanism of regulating the self-regulating processes of other social spheres. This notion is particularly resonant for some scholars, including Teubner, in collective bargaining and in labor law, which is premised on regulating the self-regulating processes of the bargaining parties.⁶⁰ For Teubner and other proponents, reflexive law's "principles promote the internal self-regulatory capacities of other social fields (or subsystems) with which it interacts. Unlike the regulatory model, it is not self-destructive but self-sustaining."⁶¹

Scholars drawing upon Teubner and systems theory argue that some private law systems such as TPLR can potentially constitute complete and

REFORMS FOR THE AGE OF GOVERNANCE 145 (Jacint Jordana & David Levi Faur eds., 2004).

56 Gunther Teubner, *Juridification — Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES* 3, 21 (Gunther Teubner ed., 1987).

57 *Id.*

58 Teubner, *Substantive and Reflexive*, *supra* note 54, at 274.

59 TEUBNER, *AUTOPOIETIC SYSTEM*, *supra* note 54, at 111.

60 Teubner, *Substantive and Reflexive*, *supra* note 54, at 276.

61 Lobel, *supra* note 33, at 365.

self-contained systems of law.⁶² Larry Catá Backer, for example, argues that Wal-Mart is an example of a system of global private law, and he classifies the primary actors in this private law system as: (i) multinational corporations as legislator and enforcer of norms; (ii) civil society organizations (principally human rights NGOs) as system monitors and intermediaries; (iii) the media (as the vehicle through which monitoring efforts are legitimated and communicated to consumers, investors, the financial community and government); (iv) consumers, investors and the financial markets as the target audience for all this activity (acting as a proxy for a democratic publicity in a political community); and (v) national and international political communities providing baseline standards from which multinationals and civil society elements derive their more focused rules of conduct.⁶³ For Catá Backer, private law systems "mimi[c] the forms of public law in remarkable ways," and in doing so relegate the state to "a role as a marginal player — passive and reactive at best, a tool of powerful local forces at worst."⁶⁴

Yet Catá Backer and other scholars who draw on systems theory do not necessarily take strong normative or critical stands on the implications of the diminution of state regulatory power that they describe. In fact, although Catá Backer expresses some concern about the implications of increased regulatory power of corporations, he is otherwise somewhat hopeful that in the long run individuals, as well as all the actors in the system such as workers in global supply chains, might fare better in these systems of fragmented power.⁶⁵

International labor law scholars have also found a basis in Teubner's theories of reflexivity, to argue for transnational labor regulatory approaches that force MNCs to reveal information that will be useful to actors in civil society, thus releasing a set of "self-regulatory" processes through the supply chain. David Doorey, for example, has argued in this vein for national laws that force MNCs to release the names of their supplier factories in order to enable civil society to mobilize and exert non-state regulatory pressure on the MNCs and their supplier factories.⁶⁶ Doorey does not explicitly

62 Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1748 (2007).

63 *Id.* at 1751.

64 *Id.* at 1762.

65 *Id.* at 1777 (arguing that individuals may fare better in a system where there is a "functionally differentiated system in which alternative sources of law making compete" rather than one in which there is monopoly power).

66 See David Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. J. TRANSNAT'L L. 953 (2010); David J. Doorey, *Who Made That?: Influencing*

reject state-building as a goal, nor does he explicitly seek to completely abandon developing states as a source of regulatory authority. But like Catá Backer and others who promote governance regulatory approaches, he places a diminished emphasis on the delineation or promotion of the function of states in exporting countries.

2. *Responsive Regulation*

A second branch of thought is centered on the writings of regulation scholar John Braithwaite, who has attempted to re-conceptualize the role of traditional law and of regulation, arguing for an approach to regulation called "responsive regulation."⁶⁷ In this theory, policymakers set policy goals, but leave it to the regulated to craft solutions in order realize them. Regulators are to be "responsive" to the degree to which actors effectively regulate themselves. Thus, at a base level, there should be deliberations by the regulated over policy matters and methods. If they fail to engage in debate, or to repair and reform, they are subject to increasing scrutiny and punishment by the state.⁶⁸

For Braithwaite, responsive regulation is more than just a regulatory methodology — it also argues for a new democratic form. Braithwaite argues that, "restorative and responsive regulatory theory has evolved into a deliberative, circular theory of democratic accountability, as opposed to a hierarchical theory where the ultimate guardians of the guardians are part of the state."⁶⁹ Responsive regulation's notion of democratic accountability is thus grounded in a deliberative democratic framework in which communication and discursive acts are the key drivers and instruments. In this conception when accountability is weak, the circles can widen out in response in order to bring in other actors who will provide accountability.⁷⁰ An important idea underlying this deliberative theory is that the more "dialogic" the engagement with regulation and regulators, the more the regulated will come to accept the legitimacy of "coercion."⁷¹ This is a particularly important

Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation, 43 OSGOODE HALL L.J. 353 (2005) (advocating factory location disclosure laws for multinational corporations).

⁶⁷ For a major explication of this theory, see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1995).

⁶⁸ *Id.* at 19-20.

⁶⁹ John Braithwaite, *Responsive Regulation and Developing Countries*, 34 *WORLD DEV.* 884, 885 (2006).

⁷⁰ *Id.*

⁷¹ *Id.* at 887.

point in the regulatory context of developing countries and particularly in labor law, where the legitimacy and acceptance of the state and of law is often weaker than it is in developed countries.

Braithwaite, however, recognizes that the responsive regulation model, with its reliance on the "stick," is potentially ill suited to the contexts of many developing countries. Poorly functioning regulatory states and weak civil societies make it difficult to actualize the punishment threat that underlies the first-level dialogic processes.⁷² Braithwaite attempts to address this problem by making a rather radical proposal:

I have become persuaded that we live in an era of networked governance. An implication of this is that developing countries might jump over their regulatory state era and move straight to the regulatory society era of networked governance. Developing states might therefore cope with their capacity problem for making responsive regulation work by escalating less in terms of state intervention and more in terms of escalating state networking with non-state regulators.⁷³

Braithwaite's idea, and perhaps ideal, is that where there is a regulatory matter that the state cannot adequately address, people and organizations will network with governments and private actors who share similar goals to achieve the policy objective. Using an example from labor law and labor relations, he suggests that "[w]hen fundamental labor rights are being crushed, the local trade union can escalate up to networked support from a state ministry of labor, the International Confederation of Free Trade Unions, the labor attaché at the US Embassy, the Campaign for Labor Rights, the Clean Clothes Campaign, or Oxfam International."⁷⁴ Likewise, Braithwaite suggests, if an employer is subject to unreasonable demands from a trade union, it can network with other pro-business entities to counter those unreasonable demands.⁷⁵

A second solution that Braithwaite proposes, in addition to using NGOs and networks as state substitutes, is to rely on *qui tam* actions, whereby "whistleblowers" would be incentivized to bring legal actions against violators by receiving a portion of the court-imposed penalty. So, for example, according to Braithwaite if a trade union sued a company for

⁷² *Id.* at 885.

⁷³ *Id.* at 890.

⁷⁴ *Id.* at 893.

⁷⁵ *Id.*

non-payment of wages, it would collect thirty percent of the payment. Unions or other groups could network with lawyers around the world to also bring suits in foreign jurisdictions, "thereby obviating the need to rely on courts in the poor country."⁷⁶

There are at least several serious problems with this theory, however, as applied to labor regulation in developing countries. First, it explicitly accepts and promotes, even if from a purely pragmatic standpoint, the complete bypass of public regulatory institutions and does little to actively develop them. Indeed, there is little normative value given to the presence of a functioning and effective regulatory state — in the context of developing countries its absence is assumed, and the proffered solution is to find an alternative that can substitute for it.

Second, it is highly contestable that NGOs and civil society, particularly labor organizations, are sufficiently developed and ubiquitous to adequately substitute for the state. Reliance on private parties as regulators and enforcers, particularly in the labor context, is contingent upon there being an adequate number of interested domestic and international actors. As some scholars have shown, however, the level of international interest in labor rights issues is highly contingent on the substance of the issue in question.⁷⁷ Freedom of association, for example, receives far less attention from transnational actors than does child labor.⁷⁸

Third, turning to the *qui tam* theory, as Braithwaite concedes, his theory depends on judicial systems in developing countries being functional and operative, which in many developing countries is not necessarily the case. He does acknowledge this potential problem, however, and suggests that if courts are dysfunctional then perhaps the creation of some system of transparency could empower private actors to improve them. But this idea is not fleshed out, and Braithwaite's solution to the judicial capacity deficit is not to assert an intrinsic value to a well-functioning judiciary system and thus work to develop one, but rather once again to network around the deficiencies.

Fourth, Braithwaite seeks, as do many other governance theorists, to decouple democracy from the state, arguing that democracy is best achieved through circles of deliberation. Democratic functioning, he argues, can be actualized through organizations that we join, by companies that engage in corporate social responsibility in response to consumer social demands,

⁷⁶ *Id.* at 896.

⁷⁷ SEIDMAN, *supra* note 11, at 32-37.

⁷⁸ *Id.* at 36.

or when workers engage in deliberation with their employers.⁷⁹ But this strongly non-statist, global deliberative vision of democracy, while somewhat compelling on the one hand as a solution to non-democratic national regimes, is problematic on the other hand, particularly as it is applied to labor regulation. This is because to completely de-center the state from democracy elides the fact that democracy, particularly *workplace democracy*, has been and will likely remain a largely domestically bounded matter. As Gay Seidman has argued from a labor citizenship perspective, labor rights are arguably best enforced in the context of democratically responsive states that have a dynamic regulatory apparatus that can ensure that workers' rights to freedom of association and collective bargaining are guaranteed, and that basic workplace labor standards are protected.⁸⁰

Fifth, Braithwaite assumes that organizations in developing countries that claim to be representative are in fact so. In his essay, Braithwaite uses the example of trade unions that mobilize to represent the interests of their members to demonstrate an instance of how developing country actors can potentially network around state capacity deficits.⁸¹ Unions are assumed to be representative institutions that represent their members' interests, or perhaps the interests of workers more broadly. This in turn supports Braithwaite's claim that responsive regulation is a democratic form of non-state regulation. But in many developing countries, unions are often unrepresentative of their members, weak, and/or represent an extremely small segment of the workforce that is centered in the formal sector. He thus implicitly assumes a far greater degree of representation than often actually exists. If in fact these organizations are not representative, then the democratic legitimacy of those actors is weak.

Finally, Braithwaite's theory lacks a satisfying conception of power. It suggests that there are enough organizations in global civil society that have shared interests with each other, and with other governments and private actors, such that they can network sufficiently to address power differentials in the local political environments of developing countries. But *particularly* in developing countries, this is often not the case. There are, for example, few if any labor organizations that can come close to matching the power of organized business interests. Moreover, it is a strong assumption that trade unions have a large number of shared interests with human rights and development organizations. In fact often their goals and interests

79 Braithwaite, *supra* note 69, at 886.

80 See SEIDMAN, *supra* note 11, at 138-44.

81 See Braithwaite, *supra* note 69, at 893.

are quite divergent.⁸² On the other hand, the level of interconnectedness between industrialists and the state is often so high in many contexts, that they might almost be indistinguishable.⁸³ Accordingly, Braithwaite's adaptation of responsive regulation to the context of developing countries, particularly to the labor context, is left wanting.

The foregoing is not intended to nullify the value or potential of responsive regulation for labor regulation in developing countries. In fact, Braithwaite's application of his own general theory to developing countries is not the only possible one. Marshall, Howe, and Fenwick, for example, argue for a responsive regulatory approach to labor law in developing countries with high levels of informalization that takes into account the regulatory capacity and context of a given state, and that draws upon the tools of responsive regulation to achieve prescribed regulatory objectives.⁸⁴ In their proposal, the state is not to be jumped over, but rather something that is taken into account and utilized strategically, even given its limited capacity to implement sanctions. Their application of responsive regulation explicitly highlights the important function of the state, although it perhaps does not go far enough in discussing how to develop the capacity of the state where capacity is weak.⁸⁵ Nevertheless, it is state-based governance approaches such as these that bear the seeds of progress in imbuing governance regulatory theory with the normative goals of labor regulation and development.

3. *New Governance*

A third grouping of legal thought in the governance school is what is often termed "new governance."⁸⁶ New governance refers to a loosely associated

82 See Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. INT'L L. 449, 474-83 (2010).

83 See John Hall, *Human Rights and the Garment Industry in Contemporary Cambodia*, 36 STAN. J. INT'L L. 119, 133 (2000); Kevin Kolben, *Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories*, 7 YALE HUM. RTS. & DEV. L.J. 79, 85-88 (2004).

84 Colin Fenwick et al., *Innovative Labour Regulation in Less Developed Countries: Creating an Enabling Environment for Development* (2010) (unpublished manuscript) (on file with author).

85 *Id.* at 27.

86 The boundaries delineating various governance schools of thought from each other can be fuzzy, and some scholars might group responsive regulation as a branch of new governance more generally. See Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 596. I treat them separately here to help analyze some of their distinct characteristics as they are applied to TLR.

body of legal scholarship that, like responsive regulation, has been said to mark a move "away from the familiar mode of command and control, fixed rule regulation towards multi-level, collaborative, multi-tier, adaptive, problem solving."⁸⁷ It is said to entail

new processes emerging which range from informal consultation to highly formalized systems that seek to affect behavior but differ in many ways from traditional command and control regulation. These processes . . . may encourage experimentation; employ stakeholder participation to devise solutions; rely on broad framework agreements, flexible norms and revisable standards; and use benchmarks, indicators and peer review to ensure accountability.⁸⁸

While new governance scholarship is itself heterogeneous,⁸⁹ one body of scholarship has been particularly influential and has produced at least one prominent paper on the subject of TLR. Its primary intellectual driver is Charles Sabel, who argues in a prolific body of writing that post-New Deal regulatory institutions are ill suited to achieve optimal regulatory and political outcomes, because they are unresponsive to the needs of the regulated and are unable to engage in creative solutions to key regulatory problems. Instead, he argues for democratic and regulatory experimentation⁹⁰ through deliberative structures and institutions.⁹¹ In one such approach to regulation that he terms "rolling rules regulation,"⁹² multiple decentralized groups of regulated parties deliberate over desired regulatory goals, outcomes, and methods. Information and solutions are to be drawn from direct experience and then pooled and shared. Best practices are identified, and new regulatory solutions are devised through deliberation. This, according to Sabel and other proponents sets the foundation for new radical forms of democracy that are de-centered from

87 See Bradley Karkainnean, *New Governance in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 82 MINN. L. REV. 471, 473 (2004).

88 Louise Trubek & David Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 541 (2007).

89 See Karkainnean, *supra* note 87, at 496.

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

91 See Joshua Cohen & Charles F. Sabel, *Directly-Deliberative Polyarchy*, 3 Eur. L.J. 313 (1997).

92 Charles F. Sabel, *Rolling Rules Labor Standards: Why Their Time has Come and Why We Should Be Glad of it*, in PROTECTING LABOUR RIGHTS AS HUMAN RIGHTS: PRESENT AND FUTURE OF INTERNATIONAL SUPERVISION 257 (2006).

the traditional agency model of democratic representation,⁹³ and for better regulatory outcomes that encourage innovative practices and deliberation over desirable regulatory outcomes.

Sabel's theories are also notable, in part, because of the particular interest that Sabel has taken in labor regulation, particularly along international supply chains. His most notable scholarship on the issue, co-authored with Archon Fung and Dara O'Rourke, proposes a system of "ratcheting labor standards" (RLS).⁹⁴ Consistent with the principles of new governance, RLS relies on private monitoring of firms, information sharing, and ranking as its regulatory methodology. Monitors would be hired by individual companies to monitor facilities and rank those facilities based on performance. Those monitors would in turn report the results to the firms and to a certifying body to which they belong. A central monitoring body or a "super umpire" constituted by a number of different stakeholders would then monitor those monitors, verify their results, rank them, and make the results public.⁹⁵ The theory is that global public pressure and consumer demand will be a sufficient driver to compel a ratcheting up of standards for companies vying for business from corporate customers sensitive to such pressures. Importantly, the specific standards would not come from predetermined universal rights, international law, or a central administrative body, but would rather be generated from the bottom up through deliberative institutions and processes. Accordingly, the authors suggest that the primary function of public law and regulation is not to set standards or be the primary enforcement mechanism, but rather to require participation in the RLS system and to sanction firms that refuse to participate.

RLS hints at, but does not fully flesh out, Sabel's grander vision of labor and employment regulation that he elaborates on in other writing in which he argues for a labor regime that is responsive to the new era of post-contractual labor relations.⁹⁶ Sabel argues that what he terms "contractualism," which describes both pluralist collective bargaining and administrative regimes such as that found in France, is an outmoded form of labor governance that has been largely replaced in practice by new forms of cooperative workplace arrangements. The old contractualist regime of "fixed rule," "command and control" regulation and collective bargaining, Sabel argues, is embedded in the turn of the previous century, Industrial Revolution period "sweatshop" model of production, whereby extraction of maximal

93 See Cohen & Sabel, *supra* note 41.

94 See Archon Fung et al., *Realizing Labor Standards*, in *CAN WE PUT AN END TO SWEATSHOPS?* 3 (Dara O'Rourke et al. eds., 2001).

95 *Id.* at 5-6.

96 See Sabel, *supra* note 92.

productivity at lowest labor cost was the organizing principle. But the new model of production, according to Sabel, is not grounded in such a model, but rather in one of flexibility, speed, and adaptation.

According to Sabel, transnational private regulatory regimes that rely on fixed rules via codes of conduct and monitoring thereof to ensure compliance are also grounded in the contractualist model. These monitoring regimes, he argues, have largely failed to achieve what they set out to do, which is to improve labor conditions in any sustainable way — a claim that has recently received support from a series of empirical studies.⁹⁷ Sabel largely attributes this failure to the fixed rule nature of codes and the impossibility of adequately adapting workplace rules to the realities of global production patterns and practices.

Instead, Sabel proposes a new labor law regime that he calls rolling rule labor regulation (RRLR) and that is complementary to what he sees as new forms of cooperation and co-development that require continuous rather than periodic adjustment and renegotiation of rules.⁹⁸ He thus proposes a collaborative, two-tiered system of information pooling and sharing. At the first level, groups of workers would collaborate and deliberate over how to solve workplace labor problems such as, for example, why there is a necessity for excessive overtime, and how pay systems can reflect fair distribution of the gains from productivity innovation. These first-tier solutions would be pooled and shared across plants and industries by a second-level institution in order to create benchmarks for standards and improvement rates.⁹⁹ That second-level institution would then pool information generated locally and 1) compare different local solutions to given labor problems in order to establish benchmarks based on best practices; and 2) engage in diagnostic reviews of the local level institutions that are doing root-cause analysis of problems. This process would also help inform the establishment of the benchmarks themselves.¹⁰⁰

97 Sabel's proposals are consistent with the observations of Locke et al. who have shown that compliance model private monitoring regimes have been ineffective in themselves in resolving workplace problems. See Richard Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 *INDUS. & LAB. REL. REV.* 3 (2007); see also Richard Locke & Monica Romis, *The Promise and Perils of Private Voluntary Regulation: Labor Standards and Work Organization in Two Mexican Garment Factories*, 17 *REV. INT'L ECON.* 45 (2010).

98 Sabel, *supra* note 92, at 270.

99 Sabel describes these second-tier institutions as similar to quality service reviews (QSRs) which are more centralized regulatory entities that conduct reviews of the lower level institutions. *Id.* at 265, 271.

100 *Id.* at 271.

RLS and RRLR have a number of problems, both in the context of the broader objectives of labor regulation,¹⁰¹ and such that are specific to the context of developing countries. Because I believe that they are cut from the same cloth, I will address both of them together. First, the replacement of collective bargaining and traditional structures of union-based worker representation with workplace teams is highly controversial. One serious critique of workplace team systems is that, barring highly specified safeguards, they risk becoming vehicles for employer domination in the context of workplaces with highly asymmetric power relationships.¹⁰² The risk is perhaps even more acute in developing countries, especially in low-skill industries where power asymmetries between employers (often male and foreign) and employees (often young, female, and poorly educated) are even more pronounced.

Second, Sabel's proposed labor law regime is not only post-contractual, but also arguably post-statist — at least post-administrative statist. Jill Murray and Adelle Blackett have both suggested that RLS radically rethinks the role of the state in labor governance, placing rule-making authority into the hands of Western MNCs and consumers.¹⁰³ Indeed, Sabel and his coauthors' approach to labor regulation, articulated both through RLS and through Sabel's rolling rule labor regulatory theory, seemingly relegates the state to be at *most* an information compiler, and perhaps not even that, suggesting at one point that an NGO such as the Fair Labor Association could potentially serve the function of second-tier information pooler.¹⁰⁴

Third, Sabel's theory assumes that many problems in the workplace can be solved using managerialist, productivity-oriented techniques. But to assume that the key economic and sociological dynamics underlying labor law have

101 For salient critiques in this vein, see, for example, Adelle Blackett, *Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 121 (John J. Kirton & Michael J. Trebilcock eds., 2004); Jill Murray, *The Sound of One Hand Clapping? The "Ratcheting Labour Standards" Proposal and International Labour Law*, 14 *AUSTL. J. LAB. L.* 26 (2001).

102 Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *COLUM. L. REV.* 753, 904 (1994) ("The very features of team-based organization that promise to enhance efficiency and self-governance also generate new potential for management illegitimately to coerce workers, distort their communication, and manipulate their subjective experience").

103 See Blackett, *supra* note 101, at 128-9; Murray, *supra* note 101, at 63.

104 Sabel, *supra* note 92, at 271-72.

evolved in the new era of "lean production" is exaggerated at best, and pernicious at worst. Relationships between employer and employees remain conflict-ridden and are imbued with power asymmetries that can perhaps only be remedied through the intervention of a centralized legal regime that is democratically responsive and not just responsive to the market. As Mark Barenberg has argued, there need to be carefully articulated rules and direction given to any regime of workplace team collaboration to ensure that those inequalities are properly remedied, and that one of the primary objectives of industrial regulation — industrial democracy — is realized.¹⁰⁵

Finally, RRLR and RLS, in their desire to be rid of centralized fixed rules, provide for almost no conception or place for rights. In its stead, deliberation and collaboration, benchmarking and transparency are understood to provide the primary vehicles through which workers' interests are realized and protected. They are post-conflict, post-rights, post-state, and technocratic theories. Workplace regulation and industrial relations are understood to be a matter of "getting it right" through deliberation, benchmarking, and mutual learning.¹⁰⁶

It is perhaps true that some of the challenges facing workers in developing countries, particularly those in low-skill industries, are a matter of getting it right. But surely many are also a function of the deeply entrenched relationships of power articulated through class, gender, ethnicity, and other cleavages in society that in part require rights discourse and concrete rights protections backed by an effective state apparatus and rule of law to ensure their respect and enforcement.¹⁰⁷

105 Barenberg, *supra* note 102, at 896. Barenberg argues that in the context of U.S. labor law, the

government's primary role should be to facilitate the decentralized, private ordering of the workplace — particular, to safeguard workers' free communication and choice over modes of workplace governance. The second is that the legal regime should concurrently *encourage*, through instrumental incentives and normative symbols, the emergence of *democratic, labor empowering*, forms of workplace governance — both to serve the ideals of undominated self-governance and to enhance consultative trust and collaboration in productive efficiency.

Id. at 947.

106 For an attempt to reconcile the perceived conflict between a human rights model and new governance models as applied to racial discrimination, see Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US 97* (Joanne Scott & Gráinne De Búrca eds., 2006).

107 Gráinne De Búrca has commented that new governance literature has been critiqued for being too "totalizing" in its approach, and that in some areas clear hierarchical

C. Critiques of Governance

Governance theory has described and argued for a transfer of authority away from the state to non-state actors, normative plurality, and a shift from "command and control" regulatory methodologies towards more disaggregated and experimentalist ones. In discussing these theories I have made specific critiques of each, but at least two important meta-critiques emerge from these theories that are worth emphasizing.

First, although some scholars such as those we have examined above have argued that governance approaches to regulation could be applicable to developing countries, most extant governance scholarship investigates and discusses regulatory phenomena that take place in developed countries.¹⁰⁸ There is perhaps good reason for this. Governance theories of regulation have particular intellectual and policy resonance in the context of the highly juridified and activist legal systems that are found in *developed* regulatory jurisdictions, such as the United States or the European Union. But in *developing* countries, the role and power of the administrative state is quite different and requires a different analysis.¹⁰⁹ There, the primary issues do not concern over-juridification or unresponsive regulation. Rather, the primary issues are the failure of rule of law and underdeveloped regulatory regimes. These systems face serious challenges both in generating rules and norms and in enforcing them.¹¹⁰

Labor ministries in developing legal and economic regimes are often the most neglected ministries and face serious staffing and resource shortages, creating environments in which corruption and non-action are rampant. Employers thus operate in a regulatory field in which states lack sufficient power or will to enforce their domestic labor laws, even if those laws are on their face compliant with international standards. The response of some

rules are necessary. Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227, 236.

108 Some literature has recently attempted to specifically address the regulatory deficits present in developing countries. See, e.g., DANA BROWN & NGAIRE WOODS, MAKING SELF REGULATION MORE EFFECTIVE IN DEVELOPING COUNTRIES (2007) (analyzing the effectiveness of "self-regulation" in developing country contexts).

109 At least one scholar has recognized the difficulty of adopting these theories to the developing country context, and has attempted to modify his own approach to the developing country context by using transnational networks. See Braithwaite, *supra* note 69.

110 *But see* Lobel, *supra* note 33, at 390 (arguing that governance regulatory models could be well matched to "circumstances in which the gap between the aspired norm and the existing reality is so large that hard regulatory provisions are meaningless," such as in developed countries).

governance scholars is not to reflect on and to help remedy the causes and solutions to the public regulatory deficit, but rather to leapfrog dysfunctional states and move to a post-statist regime of labor regulation that relies on global society to provide the norm-generating and coercive functions. If, in fact, a normative goal of governance scholars is to rethink the proper relationship with the state rather than simply argue for deregulation, then governance scholarship as applied to developing countries needs to engage seriously with capacity and institution-building.¹¹¹

A second important meta-critique of these highlighted theories is that they are not adequately tailored to the traditional goals and values of labor law.¹¹² Instead of furthering, for example, industrial democracy, redistribution, or core labor rights such as freedom of association, they are agnostic about labor law's core objectives and prioritize deliberative processes and technocratic solutions to regulatory deficits and dysfunction. But, as I have already noted above, there are important reasons why such technocratic and deliberative mechanisms might be inadequate to address the central problems facing the workplace.

Instead of completely bypassing or skipping over the development of the regulatory state, as some of the more radical governance theories or applications thereof might propose, what transnational labor regulation requires is an approach to regulation that is sensitive to the limits of private labor regulation and to the importance of the state in a regulatory field that has important linkages with public law and institutions.

III. TOWARDS AN INTEGRATIVE APPROACH

We have thus far examined the evolution of transnational private regulatory regimes in developing countries as a response to failed domestic and international regulatory capacity. Market pressures on MNCs and mobilized civil society have led to the development of heterogeneous private regulatory regimes that seek to substitute or supplement what the state is unable to provide for a range of institutional and structural reasons — adequate enforcement of domestic and international labor law. This development has coincided with the rise of several prominent schools of legal and regulatory theory that seek to move away from command and control regulation and

111 De Búrca, *supra* note 107, at 237 (acknowledging the critique that new governance literature is possibly open to being used in a "neo-liberal deregulatory agenda").

112 *Id.* at 236.

from state-centric solutions to regulatory problems. These theories have been forged, however, in the context of developed countries, and often in regulatory areas that are materially different than labor regulation. While they might be helpful in addressing problems in that particular regulatory context, these theories are potentially less helpful in the context of transnational labor regulation, where a fundamental problem is the insufficient capacity of the regulatory state to meet the regulatory demands of various stakeholders.

This does not mean, however, that governance scholarship is irrelevant to labor regulation and development, and to global supply chains. To the contrary, governance's insights and tools are, I believe, quite applicable and helpful *if* they are imbued with the development goals of state-building, and if they are responsive to the goals and objectives of labor regulation. However, many of the applications of governance theory to the problem of transnational labor regulation fall short of this and have been oriented towards working around poor regulatory capacity rather than developing it, or thinking empirically and normatively about the proper distribution of responsibilities between public and private labor regulatory regimes. I have suggested that this is perhaps because the theories themselves have been forged in very different regulatory and political contexts than the situations often found in labor law in states with less developed regulatory capacity.

What is needed instead is an approach to TLR that differentiates itself from the assumptions upon which the most prominent governance regulatory theories have been founded, and that is grounded in empirical research on the functioning and dynamics of public and private labor regulatory regimes in developing countries. This will require new conceptual and empirical work that is sensitive to the values and goals of labor law and of developing states. It also requires a more subtle and complex understanding of the nature of both the failures and the successes of domestic governance in a given state.

Research on the relationship between private and public labor regulatory regimes is a nascent field. But there are, nevertheless, some clear relationships and dynamics that are worth highlighting and that are in need of further study. The most evident relationship between private and public regimes is the flow of norms from public to private regimes. Both in the labor and environmental arenas, private codes are often based on applicable domestic state law,¹¹³ and private codes of conduct often reference

¹¹³ See Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 *EURO. J. INT'L L.* 47, 59 (2006) (noting in the environmental context that in supra-governmental organizations "[i]ndividual certification programs generally define their policies in terms of existing state

both domestic and international labor law as the regulatory floor upon which suppliers must operate.¹¹⁴ An important area of empirical study, however, is whether there might be a reverse flow, where substantive labor norms and enforcement practices found in private regulatory regimes are absorbed into public regimes when those norms and practices differ. That is, are there instances where soft law can harden into hard labor law norms and practice?¹¹⁵

A second and potentially more important question is not concerned with the norms themselves, but rather with how private and public enforcement regimes engage with and impact each other on the ground. Mathew Amengual has found evidence in his study of an MNC sourcing from the Dominican Republic of what he terms "complementary regulation," whereby rather than displace public regulation, the MNC's private inspection regime works in complementary ways with the state, improving the overall labor regulatory system and in some cases increasing the demand for state regulatory services.¹¹⁶ For example, Amengual found an increase in demand for state labor inspection services by workers and employers who were required by private regulators to provide signed work contracts, even though they were not required to do so by law.¹¹⁷

Amengual also found in his study that private and public regulatory institutions in the Dominican Republic worked in uncoordinated but complementary ways on issues in which they had a comparative advantage, or on which they were more inclined to focus given their constituencies

regulatory frameworks and often consciously serve the purposes of states by requiring, at a minimum, compliance with state law").

114 See MAMIC, *supra* note 22, at 48-49.

115 See Michael J. Trebilcock & James J. Kirton, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE*, *supra* note 101, at 3, 12 ("[M]uch of the value of soft law might be in its role as pioneer or stimulus of hard law"); David M. Trubek et al., *Soft Law, Hard Law and EU Integration*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 106, at 65, 74.

116 See Matthew Amengual, *Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic*, 38 *WORLD DEV.* 405 (2010). See also Dara O'Rourke, *Multi-Stakeholder Regulation: Privatizing or Socializing Global Labor Standards?*, *WORLD DEV.* 899, 912 (2006) (arguing that an evaluation criteria of non-regulatory regimes should be based on legitimacy, rigor, accountability, and complementarity).

117 Amengual, *supra* note 116, at 411. Because workers, however, were skeptical of signing such contracts without the imprimatur of the state inspectorate, they demanded that the state inspectorate intervene and certify the validity of the contract because the state was perceived to have more legitimacy than did the private actors.

and stakeholders. For example, the Dominican labor ministry was more liable to be responsive to issues of freedom of association and individual conflicts, while private regulators prioritized health and safety and overtime issues.¹¹⁸ In another example, Amengual found that the high intensity of private regulation in free-trade zones that are export-oriented freed up public inspectors to spend more time in non-privately supervised areas of the labor market, such as agriculture, and to spend time on more serious labor rights violations than those found in export processing zones.¹¹⁹ He concludes that scholars should conceptualize how "policies can be designed so that the rise of private regulation will more likely result in the strengthening of social protection than in the undermining of what little regulation currently exists."¹²⁰

While Amengual argues in his case study that the MNC and its auditors were less committed to politically charged labor rights matters such as freedom of association than were government inspectors, other private non-corporate actors such as NGOs might be more committed to freedom of association rights and state capacity development. Barenberg, for example, draws a distinction between what he terms "managerialist" models of monitoring and "democratic" models.¹²¹ In managerialist models, which is how Barenberg would describe most private regulatory regimes, the governance system is top-down and not designed to foster worker participation. In democratic models, however, worker voice and participation is prioritized, and there is an explicit goal of opening up space for government action. Barenberg argues that one particular NGO, the Workers Rights Consortium (WRC), exemplifies the democratic model. Using several investigations by the WRC as case studies, he claims that it is seeking to develop an intensive model of private monitoring, but that

it opposes the displacement of legitimate sovereign authorities and workers' organizations by private organizations. It therefore seeks to cooperate with and build the capacity of local labour ministries and tribunals, just as it and other private monitors attempt to build the capacity of local NGOs. Unlike managerialist monitors, the WRC assesses workplace grievances in contexts where local workforces are "in motion" — that is where workers are in fact attempting to address

118 *Id.* at 408, 412.

119 *Id.* at 411.

120 *Id.* at 413.

121 Mark Barenberg, *Toward a Democratic Model of Labor Monitoring*, in *REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS* 37, 41 (Cynthia Estlund & Brian Bercusson eds., 2008).

factory non-compliance through their own associational activities. The WRC attempts to engage in robust enforcement of labour rights and thereby open political space for legitimate public authorities, workers organizations, and other collective actors to engage in long-term, self sustained monitoring.¹²²

In another example, Seidman describes COVERCO, the well-known monitoring organization in Guatemala, as an organization that self-consciously aims through private regulation to develop state capacity and democratic institutions. COVERCO's focus on monitoring is understood not as "an alternative to oversight by state institutions but rather as a key part of trying to strengthen and democratize them."¹²³ She claims that this strategic and philosophical commitment allowed COVERCO to shift the focus of attention away from the conduct of MNCs and towards local concerns and issues, and even to conduct trainings for the Guatemalan labor inspectorate to improve its capacity.¹²⁴

Barenberg and Seidman, accordingly, both argue for conceptualizations of private regulation that are more state-focused and democratic: Barenberg for a democratic model of monitoring, and Seidman for an approach to transnational labor activism that aims to "expand citizenship." Labor citizenship, in her conception, is historically local and national. Thus, activists should "focus their efforts on shoring up weak states, reinforcing national institutions rather than trying to replace them with even weaker NGOs."¹²⁵ She argues that, "instead of focusing on employers alone, [transnational advocates] should focus on strengthening institutions of citizenship, and increase power of workers voice, and channels of articulation through collective bargaining."¹²⁶

What we see here are richer accounts of TLR that ask empirically how public and private labor regimes interact in developing country contexts, and argue normatively what that interaction ought to entail and what the role of the state ought to be. In that vein, I thus ask whether it is possible to build on the regulatory insights of governance theory and its applications to transnational labor regulation, and to augment them with the insights of the literature just described in order to craft regulatory solutions and approaches that are development-oriented and that further the traditional goals of

122 *Id.*

123 SEIDMAN, *supra* note 11, at 124.

124 *Id.* at 129.

125 *Id.* at 139.

126 *Id.* at 143.

labor law. What is needed, therefore, is an approach to the new private developments in global labor governance that, rather than leapfrogging over dysfunctional states as some governance theories seek to do, aims instead to develop state capacity and calls for state action in realms where private regulation lacks legitimacy, or where it is likely to fail in the longer term.

I call such an approach an "integrative approach" to transnational labor governance. While governance literature approaches regulatory questions by questioning ineffective command and control regulatory strategies and the effectiveness of law in regulating various social spheres, an integrative approach as applied to developing countries has a different starting assumption and at least one *additional* central objective — to develop the labor regulatory capacity of states and to achieve important development goals such as democracy and rule of law in the realm of labor. It recognizes that labor is not merely an economic sphere of regulation, but rather a social and political arena that is deeply related to and integrated with broader political, social, and developmental issues.¹²⁷

An integrative approach, which I only begin to sketch out here and will be developed in future work, is thus grounded on several premises that distinguish itself from other governance theories. First, an integrative regulatory approach is case by case and context specific in its effort to describe regulatory dynamics and prescribe regulatory solutions. While there might be generalized legal and political principles that are broadly applicable, there are no one-size-fits-all solutions to problems of labor governance. Law and legal culture operates differently in different milieus, and theories that over-generalize are limited in their ability to provide legal and policy prescriptions. Amengual acknowledges, for example, that the complementary dynamics that he describes in the Dominican Republic between the MNC and the government's ministry of labor might not

127 This somewhat differs from, but is related to, the conception of integration or transformation proffered by Trubek & Trubek, *supra* note 88, at 543, whereby transformation, hybridity, and integration are synonymous terms, indicating a condition whereby "new governance and traditional law are not only complementary; they are also integrated into a single system in which the functioning of each element is necessary for the successful operation of the other." My goal is not complete integration of private and public regimes such that they are interdependent, but rather a hardnosed analysis of the proper functioning of each, depending on the particular regulatory and issue area. For a discussion of the different notions of hybridity in new governance scholarship, see Joanne Scott & Gráinne De Búrca, *Introduction*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 106, at 1, 6-8 (differentiating between fundamental/baseline hybridity, instrumental/developmental hybridity, and default hybridity).

exist where there are extremely weak public or private labor regimes.¹²⁸ In countries where the labor ministry is weaker than in the Dominican Republic, scholars and policymakers might need to be more proactive in designing programs to bolster the inherent capacity. Regulatory solutions must therefore be carved out based on the facts on the ground, including an analysis of the relative strengths and comparative advantages of extant regulatory institutions.

Second, an integrative approach takes account of the fact that the workplace, particularly in developing countries, is often pregnant with power imbalances and conflict. The recognition of this fact means that "managerialist" private regulatory regimes, and technocratic approaches to labor regulation that rely completely on deliberation and benchmarking at the expense of rights and citizenship, are unsatisfying. Third, the role and development of state capacity in labor law is given central consideration. This puts the focus on capacity building and making links between labor regulation and other developmental goals, such as democracy building and human rights is emphasized. An integrative approach normatively commits to the development of public regulatory regimes in targeted areas where those regimes are excessively weak, and/or where public regulation might have political and practical advantages over private regulatory forms.¹²⁹

Finally, an integrative approach understands private regulatory forms to operate not independently, but dynamically with public regulation and public institutions in uncoordinated as well as coordinated ways. Its empirical task is to understand and map patterns of communication and coordination between public and private regulatory regimes. The first task in this mapping project is to empirically determine where the points of communication and coordination exist in a given regulatory environment. I would suggest that communication and coordination could be intentional or unintentional, and formal or informal. By intentional, I mean that communication/coordination

¹²⁸ Amengual, *supra* note 116, at 413.

¹²⁹ The idea of communication and interaction between private and public actors in administrative theory has been examined in other regulatory contexts, but is an under-examined area of research in TLR. Jody Freeman, for example, in her seminal studies of U.S. administrative law, has argued that it should be understood as a collaborative "process of negotiation" between private and public actors, in which private authority acts "symbiotically with public authority," creating a relationship of interdependence in the design and enforcement of an administrative legal regime. Importantly, she argues, "the relationship between public and private actors in administrative law cannot properly be understood in zero sum terms, as if augmenting one necessarily depletes the other." Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 547 (2000).

is willingly and self-consciously engaged in as part of an intentional regulatory strategy. Unintentional means that the actors either did not intend to, or actively desire to, engage in communication/coordination. Formal and informal communication/coordination refers to the context in which the communication/coordination occurs such as whether or not it takes place as part of a formalized deliberative process, or takes place spontaneously at the factory or, for example, in social settings.

One form of communication/coordination might, for example, be unintentional and informal, such as in Amengual's examples of complementary regulation. Here, although the private and public regulators had no intention of communicating or coordinating and in fact had no formal mechanism of doing so, there was nevertheless an unintended communication/coordination between the two regimes. Communication/coordination could also be intentional and informal, such as through casual professional interactions regarding a particular issue. Barenberg's description of the work of the WRC, for example, might be understood as such because while Barenberg argues that the WRC intentionally reflected on its actions in relation to the state, any communication and coordination with the state was at an informal level. Alternatively, communication/coordination could be intentional and formal. This is the highest form of communication coordination whereby where states intentionally incorporate private regimes into their regulatory frameworks,¹³⁰ and where agents of the state and of private regulatory actors have formal meetings to discuss regulatory matters or formal coordinating mechanisms. This might take the form of joint meetings in a hybrid regulatory regime that actively engages private and public bodies, or in inspectorate trainings that are run by private actors, such as those described by Seidman in the work of COVERCO.

Finally, one could imagine a case, albeit less common, where there is unintentional but formal communication and interaction, for example when in the course of conflict and competition between non-coordinated and non-cooperating state and private actors, they should find themselves engaging with each other in a formal structure, although they had no intention of doing so. This is admittedly the least likely scenario, but one could imagine such a situation in a country where there is a high level of distrust between the state regulatory body and the private regulatory actors,

¹³⁰ For an example of this in Bangladesh, see KEVIN KOLBEN & BORANY PENH, *BANGLADESH LABOR ASSESSMENT: USAID COMMISSIONED REPORT ON THE LABOR ENVIRONMENT IN BANGLADESH* (2008).

but where an outside actor such as the ILO might pressure the different actors to engage with each other in a formal meeting, or to work out ways to resolve the conflict despite reluctance to do so.

In addition, there are other important questions regarding how the introduction of private regimes into a given regulatory environment affects different actors. For example, might the presence of a private regulatory regime affect the psychic relationship between the regulated and the regulator? If there is weak rule of law and low levels of respect for public law in a given state or regulatory field, might the presence of a private regime increase respect for the public law by employers and employees, particularly in regard to labor regulation?

Using these empirical findings, an integrative framework for TLR thus attempts to create a regulatory framework that retains the fluidity and negotiation between the private and public. But while the current conceptualization of governance emphasizes a de-centering and a movement away from the state, an integrative approach seeks to recapture the importance of the state in industrial relations in developing countries. It therefore looks specifically at how private regulatory regimes might serve to not just *statically complement*, but *dynamically strengthen* public regulatory capacity in given areas of strength and competence.

CONCLUSION

The primary aim of this Article has been to examine the limits of governance theories of regulation in their application to transnational labor regulation. While my primary approach has been critical, my secondary objective has been to outline an agenda for empirical study, and to outline an alternative normative approach to transnational labor regulation. Such an approach takes into account the insights of governance theory, but also asserts an important role for the state in labor regulation and in the development of democratic governance in developing countries. My goal here has not been to prescribe or envision an idealized, universal system of labor regulation at either the domestic or transnational levels. Instead, I have argued that governance is in need of careful adaptation to the specificities and concerns of labor regulation in developing countries, particularly along global supply chains that reach into complex public regulatory and political environments. Rather than completely cede the regulatory ground to private regulatory regimes and democracy beyond the state, I have argued that a more fruitful approach would be to better

understand the dynamics and relationships that exist between public and private labor regulatory regimes, and to embrace and develop state regulatory capacity where there are compelling practical and normative arguments in its favor.

