Meet the New Boss ...

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"MEET THE NEW BOSS . . . "*

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As my colleagues and I met during the early stages of planning the conference at which many of these papers were presented, the conversation turned toward the possibilities of a burgeoning jurisprudential movement or development loosely labeled "The New Private Law." The topic was derived from a series of discussions about the emerging contemporary political movement toward (or resurrection of) privatization, spurred in part by the 1994 congressional elections and the Republican Party's so-called "Contract With America."1 Perhaps, some argued, this political movement might reflect, or could be said to be the antecedent to, a broader, parallel transformation in jurisprudential thought.

Other topics were discussed, but with increasing enthusiasm, many of my colleagues began to see a pattern emerge that, at least for me, was not evident. As several of the contributors to this issue have acknowledged, the tendency to alternate between public and private provision and regulation of public goods (or some combination thereof) has enjoyed a long and cyclical history in our legal and political culture.2 Being one of the more cynical (or perhaps least imaginative) of the group, in the midst of an exchange on these issues I muttered, "Meet the new boss, same as the old boss,"3 a familiar line from a song

* PETE TOWNSHEND, Won't Get Fooled Again, on WHO'S NEXT (Decca 1971).
† Assistant Professor, University of Denver College of Law. B.A., Case Western Reserve University, 1982; J.D., Stanford University Law School, 1985. Thanks to all of the participants from other law schools who contributed so meaningfully to this Symposium: Mary Becker, Rick Collins, Dan Farber, Clayton Gillette, Gary Peller, Katherine Van Wezel Stone, Elaine Welle, and Sheryl Scheible-Wolf. Their creative and interesting ideas, both at the conference and in their papers, helped me immensely in formulating and clarifying my own thoughts on the New Private Law. I would especially like to thank my colleagues at the University of Denver, Fred Cheever, Roberto Corrada, Nancy Ehrenreich, Martha Ertman, Dennis Lynch, Julie Nice, and Celia Taylor, who conceived and put together a fascinating conference and symposium. Dean Lynch also deserves credit, along with the University of Denver College of Law, for the continuing support and encouragement for the Denver University Law Review Symposium. Many of the aforementioned also read and commented on a draft of this essay, as did David Barnes, George Martinez, Steve Pepper, and Bob Weisberg. Faculty Services Librarian Diane Burkhartd, my assistant Leslie Pagett, and research assistant Wendy Hess also helped me immeasurably in conducting research. Finally, the symposium would not have been possible without the superior effort of Law Review editors Sue Chrisman and Tracy Craige and their staff.

1. GOP's "Contract with America", STAR-TRIB. (Minneapolis-St. Paul), Nov. 9, 1994, at 14A. The Republican Party's Contract With America symbolizes a political commitment to decentralize power and to "end . . . government that is too big, too intrusive and too easy with the public's money." Id.


3. PETE TOWNSHEND, Won't Get Fooled Again, on WHO'S NEXT (Decca 1971) [hereinafter TOWNSHEND, Won't Get Fooled Again]. Another possibility, of course, is that I am simply our faculty's most dedicated fan of The Who.
by the rock group, The Who. My comment was meant not to be flippant, but
to reflect my initial impression that the topic we were examining was a recy-
cled version or aspect of the public/private distinction, which has been
exhaustively and insightfully explored by adherents of existing jurisprudential
schools.

Over the course of several months, I began to understand more of what
my colleagues saw. The prospect of a new jurisprudential framework was
seductive. Yet I remained skeptical about what we were actually examining,
often invoking The Who’s lyrics as shorthand for my doubt.

This essay raises a few challenges for the believers in the New Private
Law and questions what defining characteristics this new school of legal
thought might be said to bear. It draws in large part from the lyrics of Won’t
Get Fooled Again, The Who’s anthem of youthful dissatisfaction from which
I initially drew my cynical comments. The selection of this theme is not face-
tious (and only partly humorous). That song has long sounded the tones of
dissillusionment and was released at a time in our political culture when many
on the political left were soured by the unfulfilled, yet seductive, promises of
meaningful political change. Now, as substantial changes in the political cli-
mate toward the right have emerged, while those on the left simultaneously
begin to embrace context-specific forms of private governance, it seems appro-
appropriate to return to the wisdom the song’s lyrics offer to intellectual inquiry. Its
critical tone is surely appropriate for exploring, with some skepticism, a
symposium dedicated to the proposition that a new jurisprudential movement
is afoot.

To be sure, none of the papers published here unequivocally contends that
a new jurisprudential movement has arisen. Yet this important conceptual
question is implicit in the work produced here. While each of the papers in

4. Cf. MICK JAGGER & KEITH RICHARD, Satisfaction, on OUT OF OUR HEADS (London
1965).
assembling, in a humorous fashion, various rock lyrics to demonstrate their explanatory power
regarding multiple constitutional law doctrines).
Townshend’s Won’t Get Fooled Again “warned people not to follow the new revolutionary leaders
and the rhetoric of the movement because everyone got fooled by those leaders and gurus in the
1960’s”).
7. For a different view, see Chen, supra note 5, at 318 (arguing that “Pete Townshend
might be able to see for miles, but not when it comes to constitutional law”) (footnotes omitted).
8. Our collective thought process is explained in somewhat more detail by Julie Nice. Julie
cent trends toward privatization are described as a political trend, a legal development, or a juris-
prudential movement, it is incumbent upon those who identify it as “new” to describe exactly
what it is. In my view, it was at least implicit that a new school of legal thought could be associ-
ated with the various modes of private governance examined here. Indeed, our topic was self-
consciously modeled, at least in part, on the exploration of jurisprudential change surrounding the
L. REV. 707 (1991). Martha Ertman and Roberto Corrada argue that there is at least a possibility
that the New Private Law is associated with a transformation in legal thought. Martha M. Ertman,
Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either, 73 DENV. U. L.
REV. 1107, 1161-67 (1996); Roberto L. Corrada, Claiming Private Law for the Left: Exploring
this Symposium represents an important, creative contribution to the scholarly literature and to the discourse on privatization, I argue in this essay that collectively they do not represent and are not characterized by any new jurisprudential framework or perspective. Rather, they can easily be fit into existing modes of legal thought and intellectual discourse. Drawing from some of these papers, I explore three possibilities of how the New Private Law could conceivably be characterized as a new jurisprudential movement, but conclude that none of these characteristics makes the New Private Law new.

I. LINER NOTES

A natural starting point for any serious inquiry along these lines should be an examination of what constitutes a jurisprudential movement or school of thought. While this is a daunting task whose scope far exceeds the ambition of this essay, I must at least stake out some basic ground rules for my arguments.

Several identifying characteristics come to mind. First, we could characterize a jurisprudential movement as an analytical tool or set of tools for the comprehensive examination or critique of a system of law that contributes meaningfully to our understanding of that system. Another necessary characteristic of a new jurisprudential framework is that it should probably offer some explanatory power, either as a descriptive or normative matter. That is, it should be useful in identifying in some systematic way why legal problems are, or should be, resolved in a particular manner. A jurisprudential school must also offer a distinctive analytical approach to looking at legal problems and differ in important respects from existing schools of thought.

Both traditional and contemporary schools of legal thought share these basic characteristics. Early classical Formalist and Conceptualist traditions in that in the conservation easements context, the unique blending of public and private mechanisms of land use regulation creates some sort of "magic." Federico Cheever, Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future, 73 DENV. U. L. REV. 1077, 1078 (1996). Nancy Ehrenreich, however, limits her observations to the possibilities that a traditionally conservative tool might be used not only to achieve progressive ends, but also to undermine conventional discourse about the social construction of "choice," thus generating a more substantive public policy discourse. Nancy Ehrenreich, The Progressive Potential in Privatization, 73 DENV. U. L. REV. 1235, 1251 (1996)


10. HAYMAN & LEVIT, supra note 9, at 6 (arguing that the "essential questions" of jurisprudence "can be of a positive or descriptive nature or of a suggestive or normative nature").

11. Id. at 7 (describing a "contemporary" school of jurisprudence as "one which can meaningful be differentiated both from the schools that dominated an earlier age and from the other schools of today").
American legal thought sought to characterize law and adjudication in categorical, quasi-scientific terms, promising that deductive reasoning from basic principles would lead to determinate outcomes.\textsuperscript{12} The hallmarks of this classical school were the embracing of formal logic to derive legal decisions from broad, general principles or truths.\textsuperscript{13} The Legal Realists reacted to the classical tradition, creating a distinct conceptual framework that questioned the existence of "right" answers to hard legal questions, undermined assumptions of judicial objectivity, and called for the introduction of social science and other sources of knowledge external to law to create a better understanding of law.\textsuperscript{14} The Realists also viewed law as an instrumental or utilitarian device, an appropriate vehicle for social change.\textsuperscript{15} Some of them sought to question the fundamental dividing line between law and politics.

The Legal Process school, in turn, rejected many of the Realists' conceptions, looking back to a more hopeful vision of "neutral principles."\textsuperscript{16} Process theorists emphasized the ideals of the legal decisionmaking process and the confinement of legal institutions (courts, legislatures, agencies) to roles within their competence, rather than normative outcomes.\textsuperscript{17} As one description offers:

The legal process synthesis was a brilliant achievement, for it transcended the realist/formalist debate in a way that fit well with the relativist theory of democracy. The scholars were able to marginalize \textit{Lochner}-style constitutional law as impermissible value-imposition by unelected judges while simultaneously moving mainstream American jurisprudence into the modern era by acknowledging and legitimating the inescapably political character of the common law, statutory interpretation, and administrative law. In short, legal process asserted the illegitimacy of activist judicial review while asserting activism in virtually all other institutional settings.\textsuperscript{18}

\begin{itemize}
  \item \textsuperscript{12} See, e.g., William N. Eskridge, Jr. & Gary Peller, \textit{The New Public Law Movement: Moderation as a Postmodern Cultural Form}, 89 Mich. L. Rev. 707, 711-12 & n.5 (1991) (providing a slightly broader definition of formalism); Minda, \textit{supra} note 9, at 633-34 (describing Realist reaction to mechanical jurisprudence of the Formalist and Conceptualist schools). The descriptions of jurisprudential schools in this section are necessarily abbreviated and incomplete, yet in providing them I seek to capture some of the characteristics that allow us to view them as distinct.
  \item \textsuperscript{13} HAYMAN \& LEVITT, \textit{supra} note 9, at 11-12.
  \item \textsuperscript{14} See generally JEROME FRANK, \textit{Law and the Modern Mind} (1949); Karl N. Llewelyn, \textit{A Realistic Jurisprudence—The Next Step}, 30 Colum. L. Rev. 431 (1930).
  \item \textsuperscript{15} LAWRENCE M. FRIEDMAN, \textit{A History of American Law} 688-89 (2d ed. 1985) ("Realist judges and writers were openly instrumental; they asked: what use is this doctrine or rule? . . . Law had to be a working social tool; and it had to be \textit{seen} in that light.").
  \item \textsuperscript{16} See, e.g., Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 Harv. L. Rev. 1, 19-20 (1959) (arguing that the courts' interpretation of the Constitution must rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved"). The foremost Legal Process thinkers were, of course, Professors Hart and Sacks. HENRY M. HART, JR. \& ALBERT M. SACKS, \textit{The Legal Process: Basic Problems in the Making and Application of Law} (tent. ed. 1958).
  \item \textsuperscript{17} Eskridge & Peller, \textit{supra} note 12, at 746 (noting that the legal process school "celebrated the neutrality of law"); Minda, \textit{supra} note 9, at 642 ("A major tenet of [Legal Process] school was to provide an objective 'process' determined by legitimate procedures and proper institutions for resolving subjective questions of 'public policy,'").
  \item \textsuperscript{18} Eskridge & Peller, \textit{supra} note 12, at 723.
\end{itemize}
Three of the widely-acknowledged contemporary legal schools—Law and Economics, Critical Legal Studies, and Feminist Jurisprudence—also offer distinctive and different analytical approaches to the system of law. The Law and Economics school, for example, can be viewed as a systematic approach to describing or prescribing legal rulemaking as a means of achieving individual and social wealth maximization. Through the lens of classical economic theory, Law and Economics proponents seek to understand law as reliant on the rational behavior of individuals to maximize their personal utility. The aggregation of these preferences, in turn, is seen as maximizing societal welfare. On this understanding, legal rules can be described or criticized with reference to their success in promoting these economic objectives.

The Critical Legal Studies (CLS) movement, in contrast, has attempted to develop "a totalistic critique of legal doctrine." CLS scholars focus on the indeterminacy of legal doctrine and on the ways in which doctrine masks ideological forces that perpetuate hierarchical social structures. From this perspective, law and legal doctrine are viewed as obfuscating forces, hiding the ideological and socially and historically contingent forces that truly underlie law. In pursuing this enterprise, CLS seeks to import perspectives from other disciplines, using "different nonlegal methodologies and insights."

Feminist legal theorists, too, take critical perspectives, but examine law and the legal system from the perspective of exposing its historically male orientation. On one account, the objective of Feminist Legal Theory "is to explain how the law subordinates women by relying upon theoretical distinctions which are both reified and ordered to favor male interests and values over those of women."

While these modern jurisprudential movements are surely diverse, they share the common feature of promoting comprehensive analytical or critical approaches to law that are distinct from the Formalist, Realist, and Process traditions.

Moreover, when groups of legal scholars have attempted to define a break from the past toward a new jurisprudential vision, they have sought to identify the characteristics or perspectives that mark the new "school's" territory.

20. HAYMAN & LEVIT, supra note 9, at 95.
21. Id. at 96.
23. See HAYMAN & LEVIT, supra note 9, at 213-14.
24. Id. at 214-15.
25. Minda, supra note 9, at 614; see also HAYMAN & LEVIT, supra note 9, at 215 (describing CLS as "a significantly interdisciplinary enterprise").
27. Minda, supra note 9, at 625.
28. See Id. at 638-41.
Several years ago, the *Michigan Law Review* published a symposium attempting to classify a new school labeled "The New Public Law." While commentators differed over the precise definition of New Public Law, the appellation can be loosely defined as an amalgam of widely diverse post-Legal Process scholarship advanced during the 1970s and 1980s, with a decided centrist bent away from the ideologically polar Law and Economics and CLS movements.

In their essay on the New Public Law, William Eskridge and Gary Peller placed the New Public Law in the context of the intellectual history of American legal thought. Their contribution to the Michigan symposium described three different accounts of the emergence of New Public Law scholarship. From one view, the New Public Law could be seen as an improvement on or refinement of the basic structures of the Legal Process tradition—a sort of "new legal process." From this perspective, contemporary scholarship refined Legal Process thought by shaping it to respond to new problems, to new theories and information, and to the attacks from Law and Economics and the CLS movement. It did so by engaging extralegal sources and other academic disciplines, such as civic republicanism, theology, feminism, hermeneutics, pragmatism, and public choice theory.

A second account of the New Public Law was the "conscious rejection of the pluralist political features of legal process theory." On this view, the New Public Law was a reaction to the concerns of an increasingly diverse group among left-leaning scholars who viewed the legitimacy of law as relating to its normative content, considered law to be a powerful transformative force that creates, more than it responds to, society, and understood the process of law to be a practical, dialogic discourse that seeks to reconcile, rather than to impose, public values.

Finally, Eskridge and Peller argued that the New Public Law could be viewed as a contemporary response to the critiques of Legal Process launched by the Law and Economics movement on the right, and CLS on the left. In this sense, it can be seen as a mediating force to reconcile the polarization of academic discourse in the 1970s and 1980s.

In that same symposium, Dan Farber and Phillip Frickey attempted to characterize the New Public Law as a noteworthy departure from mainstream legal theory. They maintained that "[o]ne of [the] most distinctive attributes [of this school] . . . is the much more careful and explicit attention granted to political theory." The New Public Law scholarship, they maintained, can be

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29. Supra note 8.
31. Id. at 709-37.
32. Id. at 727.
33. Id.
34. Id. at 737.
35. Id. at 737-61.
36. Id. at 726-28.
37. Id. at 709.
characterized by its attention to informing legal discourse by reference to two distinct, but arguably adverse, political theories—public choice theory and neo-republicanism. Peter Shane played the skeptic’s role in the New Public Law symposium, thoughtfully articulating some important points about the essentially interpretive nature of assessing paradigm shifts in legal thought. He identified several reference points for the task of interpreting what is new. First, he claimed that an initial task in assessing change is identifying an appropriate baseline from which the law had moved. Second, Professor Shane proposed that identifiable jurisprudential movements might entail “a theory of the state” that differs from the theory of the state during the baseline period. A theory of the state is a “widespread understanding of the relationship of the state to its citizens, of official institutions to one another, or of the core purposes of government activity.” While debatable, application of this standard allows for distinction between long-term jurisprudential transformation and short-term political shifts that may not have an enduring impact. Professor Shane ultimately concluded that the New Public Law, while feeling new, represented continuity rather than innovation.

Again, the common feature of these descriptions is that they attempted to locate a potentially new movement in historical and political context and define how it both inherits and departs from existing or recognized intellectual traditions. In contrast, none of the work in this Symposium successfully attempts to situate the New Private Law in this manner; moreover, it is difficult to infer comprehensive analytical approaches from the interesting doctrinal issues generated by these articles.

II. "THE CHANGE, IT HAD TO COME, WE KNEW IT ALL ALONG"

The New Private Law, as described to differing degrees in the essays in this Symposium, is an attempt to describe the possibilities of, and concerns with, new forms of private governance—i.e., of regulating and promoting the conduct of individuals in the acquisition and distribution of public goods. Capturing the traditional rhetoric of the “market,” the contemporary privatization movement suggests that market-driven behavior may be preferable to

39. Id.
40. Shane, supra note 9, at 837-38.
41. Id. at 838-39.
42. Id. at 839-40.
43. Id. at 840.
44. Id.
45. Id. at 873-74.
46. It is noteworthy that throughout the historical shifts in broader legal thought, the public/private distinction has enjoyed a dubious history. Indeed, one could invert Martha Ertman’s horseshoe arc from public rights to public condemnation to form a pendulum, symbolizing the alternating visions of public and private spheres of governance as “good” or “bad” for left or right. Ertman, supra note 8, at 1111. The private sphere was viewed as privileged under classical legal thought, subordinate in Realist and Process theory, and indistinct from the public sphere in the modern movements. Eskridge & Peller, supra note 12, at 717 & Table 1.
47. TOWNSHEND, Won’t Get Fooled Again, supra note 3.
48. Where I refer to "public goods," I mean also to include public services and public rights.
traditional distribution of scarce resources through the ordinary political process. Privileging individual autonomy and choice in particular contexts may constitute a superior mode of delivering public goods and protecting them from encroachment.

Of course, private governance can have many different meanings. An earlier view of private law arose from the classical legal Formalist conception of private economic ordering, symbolized both historically and conceptually by the Supreme Court's decision in *Lochner v. New York.*[^49] On this view, private decisionmakers, governed by market forces, allocate resources free from state intrusion, while public institutions represent a sort of backstop to protect personal liberty only to the extent that the market has been distorted or altered in some unnatural way.[^50] In this sense, private acquisition and allocation of resources is privileged because contract and property rights are "natural" or prepolitical.[^51]

This view reflected the Formalist conception of the public/private distinction, under which the private sphere could be conceptually separated from the public because of this natural rights based conception of property and contract as a fundamental liberty.[^52] Beginning with the Realists, however, legal observers attacked the sharp division between public and private spheres, noting that all property-based rights were themselves the product of public choices made by the state at an earlier time.[^53] This conception challenged the idea that any right existed except by virtue of the state. Scholars from the CLS movement took the critique further, arguing that not only was the public/private distinction conceptually indefensible, but also that it was an obscuring mechanism through which the state could permit individuals to believe that their choices were private, when in fact all choices are the product of some previous state action.[^54]

What are the "new" forms of private governance that have emerged in late twentieth century legal and political thought, and how do they differ from the more traditional conceptions of private ordering described above? Three general models come to mind, each reflected to some degree by essays in this Symposium.[^55]

[^49]: 198 U.S. 45, 62 (1905) (holding that state law regulating wages and working conditions of bakery employees constituted unconstitutional deprivation of due process of law by interfering with liberty of contract).

[^50]: Eskridge & Peller, *supra* note 12, at 711-12.

[^51]: For a critical view of this understanding, see Cass R. Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689, 1697, 1718 (1984) (arguing that the theoretical basis for the *Lochner* decision is undermined when one recognizes that the market status quo is itself the product of previous governmental choices).


[^54]: Professor Ehrenreich summarizes this position in her essay. Ehrenreich, *supra* note 8, at 1239-40.

[^55]: Cf. JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 7-8 (1989) (establishing four models for the delivery of services, depending upon two vari-
First, there is a contractual delegation model, under which a private group maintains power by virtue of delegation from the state. An early and traditional focus of privatization has been a system under which the government merely enters into a contract with a private business entity to perform a function traditionally performed in the past exclusively, or predominantly, by the government. Under this model, the private actors are likely to take on the essential attributes of the traditional state, but private entrepreneurship is said to provide a better vehicle for delivery of traditionally government-provided services. This model relies upon a faith in economic incentives to create and benefit both private and public welfare. Two typical examples involve contracting with private entities to operate schools or prisons, but there are countless others.

In the educational context, private entrepreneurs have undertaken a national movement to develop alternatives to public schools. The most high profile of these endeavors, The Edison Project, has recently taken hold in some jurisdictions. The federal government is, at the same time, encouraging state and local governments to experiment with school privatization. In the case of correctional institutions, a common political response to the increasing costs and problems associated with state-run prisons and jails has been to turn their operation over to the private sector.

Government agencies have a long tradition of contracting or subcontracting out certain aspects of their public functions to the private sector. In both the educational and correctional contexts, however, it is difficult to ascertain what is exactly new about such approaches. The idea of privatizing schools, in one form or another, has existed for as long as the public school system has been a predominant societal presence. And, of course, private schools have always existed as alternatives to public school systems. Moreover, the

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56. The government may delegate a previously public function to a private entity in the form of statutory authorization or contract, or some combination thereof. See, e.g., COLO. REV. STAT. § 17-1-104.4 (1996 Cum. Supp.) (authorizing state department of corrections to consider proposals for provision of minimum security beds through contracts at facilities operated by nonstate entities); COLO. REV. STAT. § 17-1-202 (1996 Cum. Supp.) (authorizing state department of corrections to entertain proposals from private contractors for construction and operation of prison facilities).


common rhetorical contentions that contemporary school privatization advocates have asserted are remarkably similar to the school privatization arguments that emerged at the beginning of this century.\textsuperscript{61} Similar rhetorical choruses are sounded in the private prison movement, which is also not a particularly new idea.\textsuperscript{62} In that context, the increasing contractualization of prison services has raised relatively mundane issues about agency principles, albeit agency principles in the context of state action.\textsuperscript{63} Moreover, critics of the privatization of traditional government services raise comparably conventional critiques.\textsuperscript{64}

Gary Peller's essay\textsuperscript{65} reflects the New Private Law contractual delegation model, which is somewhat analogous to the "public function" model of the state action doctrine.\textsuperscript{66} Professor Peller contends that there might exist in the New Private Law movement a potential for a progressive vision that facilitates the recapture of popular control over institutions such as schools now run by elite, unresponsive bureaucrats.\textsuperscript{67} Under one privatization scheme, school districts could subcontract out the administration of their school systems to private corporations. Under this fairly conventional view, corporate entities might be more responsive to parents and students than public school administrators because the former must react to market concerns or go out of business.\textsuperscript{68} A more radical proposal would be to turn schools over to the private market. Providing for "auctioning" of public schools to private community groups that might advance their particularized interests or emphases could generate opportunities for institutions that would not, or perhaps could not, exist under the traditional, top-down public management of education.\textsuperscript{69} For example, in an

\textsuperscript{61.} Id.
\textsuperscript{62.} Ward M. McAfee, Tennesee’s Private Prison Act of 1986: An Historical Perspective with Special Attention to California’s Experience, 40 VAND. L. REV. 851, 852 & n.6 (1987) (discussing nineteenth century experience of several states in allowing private companies to operate state prisons).
\textsuperscript{63.} See, e.g., West v. Atkins, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the state’s prisoners of the means to vindicate their Eighth Amendment rights."). Perhaps it is overstating the case to contend that the issues are mundane, as the Court continues to take cases to clarify these issues. See Richardson v. McKnight, 117 S. Ct. 504 (1996) (order granting certiorari on whether employees of private corporations that operate prisons under government contract are entitled to qualified immunity from constitutional tort claims under 42 U.S.C. § 1983).
\textsuperscript{64.} MOLNAR, supra note 60, at 178-79, 184 (arguing that private, profit-driven corporations are not intended to further the public good).
\textsuperscript{67.} Peller, supra note 65, at 1005 ("American public schools by and large represent the paradigm of alienating, unresponsive, often corrupt, inefficient, and culturally repressive social institutions.").
\textsuperscript{68.} Id. at 1007.
\textsuperscript{69.} Id. at 1008.
African-American community, commonly interested residents could band together to purchase and operate an Afro-centric school.  

A second model of private governance might involve joint or cooperative endeavors by public and private entities. In some circumstances, for example, the state and private parties have expressly agreed to act jointly or are so intertwined that the law may not view them as legally distinct. None of the articles in this Symposium suggest a conventional joint enterprise or conspiracy model. Perhaps this should not be surprising, since the forms of New Private Law explored here seem to value the formal separation of public and private rather than their explicit merger.

Several pieces do, however, suggest a sort of hybrid enterprise model that signals more than some sort of public/private cooperation. These hybrid proposals envision a third model of privatization under which government may create, through public law, a scheme that facilitates allocation and distribution of public goods by a system of private individual transactions. In this category, I place the work of Clayton Gillette, Martha Ertman, and Fred Cheever. Somewhat like the government encouragement/approval model of state action, under this model the state is more of a background player that consciously makes private transactions possible. The hybrid model suggests that the concepts of public and private governance lie on a continuum, rather than at two extreme poles.

Clayton Gillette examines in great detail the notion that private individuals and groups might be offered the opportunity to “opt out” of the public provision of many public goods. Using the analogy of contractual default rules, he proposes that public decisions about the distribution of public goods may serve as a background against which individuals might choose to opt for a private supplier to either replace or supplement the state’s delivery of that good. In this manner, Professor Gillette envisions a system in which private entities compete with, rather than replace, public institutions. He observes that the selection of public or private delivery of various public goods

70. Professor Peller offered this example in his oral remarks at the New Private Law conference.

71. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-25 (1961) (holding that privately-owned coffee shop in a publicly-owned building on publicly-owned land was so closely intertwined with the public that it engaged in state action for purposes of the Equal Protection Clause). But see Rendell-Baker v. Kohn, 457 U.S. 830, 840-42 (1982) (private school that receives 90% of its funding from government and is closely regulated is not state actor bound by procedural due process clause).

72. Gillette, supra note 2.

73. Ertman, supra note 8.

74. Cheever, supra note 8.

75. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 18-20 (1948) (holding that private party’s enforcement in public courts of racially restrictive covenant was state action governed by the equal protection clause).

76. See Kennedy, supra note 53, at 1352-53 (describing “continuumization” as one stage in the decline of the public/private distinction).

77. Gillette, supra note 2.

78. Id. at 1188-92. He also suggests that some people might even choose to opt for less than the default level of public goods. Id. at 1216-18.
implicates complex social choices and costs not accurately depicted by simplistic rhetorical attacks that celebrate the public and demonize the private.\footnote{80}{Id. at 1193-1216.}

Professors Ertman and Cheever have contributed provocative articles exploring whether the New Private Law may suggest that progressive alternatives to the advancement of public rights may be accomplished in a second-best form through private ordering and enforcement of private contractual choices about families and land use, respectively. Martha Ertman argues that if the law (or politics) will not permit us to achieve full recognition of public rights for, say, gay marriage, perhaps the New Private Law provides a "subversive" doctrinal opportunity to accomplish politically progressive goals.\footnote{81}{Ertman, supra note 8, at 1144-53, 1156-58.} She proposes that a contractual model may promote individual choice for sexual minorities in the same way that traditional contract doctrine is said to reify economic liberty.\footnote{82}{Id. at 1109.} Fred Cheever's essay on conservation easements offers similar possibilities for devotees of open space.\footnote{83}{Cheever, supra note 8, at 1078-87.} He maintains that the creation of an elaborate scheme of public incentives to encourage private land transactions that constrain the development of land provides an opportunity to accomplish environmental protection that public law does not.\footnote{84}{Id. at 1086.} Both of their proposals are set against the background of the state, as judicial enforcer of private contractual obligations and, in Professor Cheever's case, as creator of the "private" conservation easements interest.

The critical commentaries in this Symposium, in turn, track traditional concerns about turning government functions over to the private sector. Professors Becker, Stone, and Welle, for example, sound the cautions of the old boss. Their contributions to this Symposium reflect a profound skepticism about the private realm. Mary Becker cautions that private contractual regimes may not always be beneficial for have-nots, and that a more complete analysis requires the examination of the relative power of the parties to whom the state allocates the bargaining.\footnote{85}{Mary Becker, Problems with the Privatization of Heterosexuality, 73 Denv. U. L. Rev. 1169, 1173-75 (1996).} Katherine Van Wezel Stone's article highlights the dangers of allocating dispute resolution in the labor and employment law context to private arbitrators.\footnote{86}{Stone, supra note 2, at 1036-43. As Professor Stone's piece underscores, at least you could sue the old boss in a public and accountable forum.} She raises important concerns about undermining and obscuring public rights under the private regime. Elaine Welle acutely observes the necessity for consideration of broader public values in establishing a baseline for a "default" level of public services as well as in setting limits on Professor Gillette's proposal for opting out of public provision of goods.\footnote{87}{Elaine A. Welle, Opting Out of Public Provision: Constraints and Policy Considerations, 73 Denv. U. L. Rev. 1221, 1226-33 (1996).}
III. "... SAME AS THE OLD BOSS[?]"

Without acknowledging the existence of a distinct jurisprudential movement, one can surely see something "new" in the papers described above. The task of identifying a movement, however, must involve more. There must be deliberation about what it is that makes the analysis new, and how it can be distinguished from existing analytical frameworks.

What is new about modern incarnations of private law? Is it the marriage or partnership of the public and private, and if so, where is the "magic" of which Fred Cheever speaks? Is it new simply because it "feels" different? Will New Private Law be the miracle cure for the postmodern blues?

The various authors' intriguing discussions of the possibilities of New Private Law offer some insights into what might be "new." First, a common feature of New Private Law seems to be a preference for decentralized, relatively autonomous decisionmaking over issues that previously were the conventional subject of public regulation and public discourse. The decentralization of the New Private Law suggests a regime under which goods and resources are allocated and protected in a highly atomistic manner, with "communities" of decreasing size (and, presumably, increasing homogeneity). Thus, these models each reflect a desire to reallocate power not only by privatizing it, but also by decentralizing its exercise. Indeed, as I discuss below, it is not clear to me which is the more important move, privatization or decentralization.

Another connecting feature of the New Private Law is that it is manifested in ways that reject the left's romanticization of government as the heroic protector of public rights and values. On this view, private governance may offer the proponents of left-leaning social agendas an opportunity to promote "public" values, rather than to undermine them. As a number of the papers argue, the "New" Private Law need not have a political valence.

Finally, another element that one could draw from the New Private Law is that it reflects a new understanding of private law as a liberating or transformative concept that promotes progressive values in a subversive way. On this understanding, the New Private Law operates as a tool through which substantive policy goals can be reached; the newness is reflected in the use of what might be considered to be the historically "conservative" mechanism of

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88. TOWNSHEND, Won't Get Fooled Again, supra note 3.
89. See Shane, supra note 9, at 838-42 (describing factors to be considered in evaluating new movements in legal thought).
90. Cheever, supra note 8, at 1078.
91. PETE TOWNSHEND, Miracle Cure, on TOMMY (Decca 1969).
92. Cheever, supra note 8, at 1085-86; Ertman, supra note 8, at 1156-58; Peller, supra note 65, at 1001-03.
93. Corrada, supra note 8, at 1056-57; Ehrenreich, supra note 8, at 1236-37; Ertman, supra note 8, at 1144-53; Peller, supra note 65, at 1002.
94. See, e.g., Corrada, supra note 8, at 1054-55. Nancy Ehrenreich discusses this point as well, but not in the context of arguing that it is indicative of any broader change in legal thought. Ehrenreich, supra note 8, at 1242-48.
privatization.  

In this manner, the very concept of private governance is itself transformed through its cooptation by the left.

In the following discussion, I address and critique each of these possibilities.

A. "And a Shotgun Sings the Song"

It could be that the New Private Law represents a different way of looking at institutional power relationships. On this view, the allocation to the private realm of not only the authority to create and define substantive interests, but also to carry out the procedures that give life to those interests, may require a new way of looking at these quasi-legal institutions. Traditional understandings of the public and private, or even of their non-distinctness, may not capture or reflect the underlying transformation of legal institutions that is occurring.

When commentators speak of private forms of governance, they generally mean the transfer of decisionmaking authority away from deliberative, theoretically accountable public institutions toward private institutions or individuals. This requires faith in the market, however defined, to encourage private property and contractual agreements that advance the welfare of the individual parties and, on some accounts, society itself. To a greater or lesser degree, the New Private Law, as illustrated in various contexts, suggests that the traditional realms of private transactional law offer superior mechanisms for achieving socially desirable outcomes.

Under the New Private Law regime, then, private transactional choices replace, in whole or part, governmental decisions. This conceptualization of the New Private Law centers on the redistribution of power from government to private lawmakers to allocate goods. It also requires the decentralization of decisionmaking authority to autonomous “private” decisionmakers who act through individualized “market” transactions. By definition, then, this angle on the New Private Law requires a conceptual acceptance of at least some meaningful difference between public and private realms of governance. I offer here two general critiques of this aspect of the New Private Law as a jurisprudential shift.

First, it seems that the New Private Law, as reflected in this Symposium, could be better understood as a simple redistribution of existing power or a shift toward shared power among existing institutions, both public and private. To the extent this is an accurate characterization, it signals not a jurisprudential transformation, but yet another move in the continual historical alternation of public and private as the privileged sphere. Accordingly, it is difficult to see how this differs from the old private law, the classical conception of private rights as privileged that was one hallmark of Formalist legal thought. Nothing distinguishes the New Private Law from “old” views of privileging individual choice through private market ordering.

95. Ertman, supra note 8, at 1165-67.
96. TOWNSHEND, Won't Get Fooled Again, supra note 3.
97. Brest, supra note 52, at 1299-1300 (describing natural rights regime under which indi-
universe of authority to allocate public goods, that authority must be distributed among public actors, private actors, or some combination thereof. This has always been, and always will be, the case. Moreover, it will remain so even as the institutions themselves are blended or "married" in previously unforeseen ways.  

That does not, however, alter the notion that the private law realm exists only as a product of a public regime. The conception of contract and property law as "private" has long been criticized. One fundamental argument that obliterates the distinction arises from the fact that private law enforcement must come through the force of the state. The boundaries of "private" law are governed largely by common law rules, which are themselves developed through paradigmatic state agents, the courts. Moreover, the private realm of society is inherently governed by broader public choices. One of the critical aspects that forms the debate on the public/private distinction is the conception of what limits, in a liberal state, may be placed on government interference with "private" conduct.

These arguments translate quite smoothly to the New Private Law as conceived here. Professors Ertman and Cheever argue that private forms of governance may advance public goals in manners that avoid or, more precisely, circumvent formal government institutions. Clever though it is, Professor Ertman's model relies upon state involvement to a substantial degree. Private ordering is only accomplished in a system that permits public enforcement of these contractual arrangements. Unless there were some purely private enforcement mechanism, it is the coercive power of the state that makes possible...
the benefits under the contract. Ultimately, then, the state must still recognize
the rights as enforceable. What is more, whether or not a judge decides to in-
volve the public policy exception to a contract designed to protect the choices
of autonomous sexual marginorities is also ultimately a public choice. I am
unconvinced that the imprimatur of the “private,” through classical contract
document, will necessarily supersede moral judgments in this context.103
Accordingly, Professor Ertman’s jurisprudential move is inherently subject to the
existence of public law as a promoter (through recognition of a public right)
or destroyer (through public policy exception refusals to enforce such con-
tracts) of her way station.

Professor Cheever’s model, too, relies on a system of state enforced con-
tractual rights to empower his conservation easements scheme. Moreover, as
he concedes, this scheme is even more reliant on the state as the source of the
“private” right. His substantial reliance on statutory creation of the conserva-
tion easement interest and, more importantly, on a government-created market
for open space lends great weight to the obliteration of the public and private,
not their “marriage.”104 Similarly, Professor Gillette’s proposal requires a
collective public decision to enable opting out in the first instance while Pro-
fessor Peller’s private school model relies on the state’s authorization to sell
off public schools under legislatively controlled conditions.

Furthermore, it is interesting that both Roberto Corrada’s and Dennis
Lynch’s comments on Professor Stone’s paper seem to be directed at the po-
tential social problems associated with allocation of labor and employment
disputes to private decisionmakers. The problem, they suggest, can be alleviat-
ed by adopting notions of due process, ensuring impartial decisionmaking
bodies, etc.105 In other words, the problems can be addressed by making
these private institutions more like public ones! And how would that be
achieved? Presumably, this would occur through legislative action setting the
parameters of “private” labor arbitration.

Professor Corrada attempts a broader argument that the newness of the
New Private Law is reflected in that it “expressly mistrusts public fora and
seeks to enforce private law in private venues.”106 He argues that this
disavowment not only of public law, but of public institutions to enforce pri-
ivate law, is a noteworthy departure from the old (i.e., Lochner era) private
law. This account of the New Private Law does not, on reflection, offer any-
thing new. First, Professor Corrada ignores the fact that the private labor arbi-
tration model he explores is itself the product of public choice, federal arbitra-
tion law. Second, his attempt to distinguish the New Private Law with refer-
ence to the dispute resolution forum seems to be a nod to a conceptual distinc-
tion that has proved as unhelpful as the public/private distinction—the sub-
stance/procedure distinction. What is happening still represents a reallocation

103. Ertman, supra note 8, at 1158-59 (navigating around morality section).
104. Cheever, supra note 8, at 1091-92.
105. Corrada, supra note 8, at 1065-68; Dennis O. Lynch, Conceptualizing Forum Selection
106. Corrada, supra note 8, at 1056.
of existing power from public forums to private forums, and that reallocation is always subject to change through the public law system. Indeed, the Federal Arbitration Act even includes an exemption for employment agreements, though that provision has sometimes been ignored.107

Moreover, the cautionary moves of the New Private Lawmakers reveal that the real concerns here are the underlying social and political values that are being pursued, and not the particular form of governance. While the proponents are willing to wade into the privatization waters, they are not willing to dive in. Some of the authors, even the ones who subscribe to privatization as a progressive tool, envision public law as a backstop against a private world gone awry.108 Professor Cheever’s proposal, for example, includes an express recognition that the state must always be in a position to reenter the picture should the land use restrictions imposed by private ordering become obsolete, outmoded, or no longer feasible.109 Thus, the New Private Law contends that while the public is not necessarily good for progressive interests, public law should probably always exist to protect society from the potential evils of private ordering. It is the outcome, rather than the nature of the forum, that is most important.110

Once these issues are acknowledged, it seems that there is nothing quintessentially private about the choices made under any of these proposals. Both the rulemakers and the rule appliers are public. Each of the proposals necessitates reliance on the coercive power of the state to accomplish these goals directly, or at least to ensure that private actors facilitate their achievement.

Collectively these critiques fit within existing traditions of legal thought, and reflect the fact that public and private realms of governance cannot, in the end, be distinguished. They reveal the New Private Law more as private law guided by the not-so-invisible hand of state-created regulation and constructs, rather than as a new theoretical perspective or movement. Moreover, these critiques are not new. Building upon the Realists, the CLS movement has largely undermined the public/private distinction as a conceptual matter.111 The New Private Law has not resurrected the distinction.

A second foundational way of addressing the power relationships thesis is to examine how it mirrors a long-standing traditional jurisprudential problem—countermajoritarian judicial review in a democratic society. In some ways, the New Private Law may be viewed as the “New Judicial Review” and

107. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991) (refusing to apply § 1 of the Federal Arbitration Act, 9 U.S.C. § 1 (1994), which exempts employment contracts). A final rebuttal of Professor Corrada’s argument arises from the existence of the Gilmer case itself. Surely it must be recognized that the actual enforcement of the private arbitral process in that context came from a paradigmatic public institution, the Supreme Court.
108. Cheever, supra note 8, at 1101-02.
109. Id.
111. For an excellent collection of CLS scholarship on this matter, see Symposium, The Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982).
may therefore be viewed through the same analytical lens. The point of this discussion is not to critique the New Private Law substantively, but to demonstrate that the reallocation of institutional power it represents is subject to ready examination using existing analytical tools.

The argument goes like this. The American constitutional scheme necessitates a delicate balance of simultaneously facilitating majoritarian rule and protecting minority rights. To accomplish this, it is sometimes necessary for a politically independent legal institution—the courts—to disregard and override the will of the majority in order to assure faith in basic constitutional principles in a pluralistic society. But this presents an inherent conflict with the concept of majority will and creates tensions in the institutional relationship between the courts and the so-called political branches of government. Hence, we are cursed with the “countermajoritarian difficulty.”

Judicial review, in turn, is both celebrated and assailed for its countermajoritarian elements. To its proponents, judicial review fulfills the promise of a constitutional democracy by ensuring a mechanism to protect against the excesses, and sometimes prejudices, of majoritarian will. To its critics, judicial review is anathema to democratic self-governance, and is the product of arrogant, elitist decisionmakers, probably influenced by the leftist academy, overriding populist sentiment on what are essentially political value choices.

The New Private Law, in comparison, establishes a landscape under which private decisionmaking bodies take on the institutional role of the judiciary under constitutional judicial review. Professor Ertman’s model, for example, consciously advocates that small family units will be able to accomplish what the majority will not permit—legal recognition of alternative family structures and sexual autonomy. These private decisionmaking bodies can be said to accomplish similar goals by protecting the rights or will of political minorities in a manner that balances out public decisions about the allocation of public goods in most circumstances. But this makes private lawmakers similarly “countermajoritarian,” and implicates concerns about creating an atomistic society under which the very concept of community decisions and “public good” are subsumed by the decentralization of decisionmaking.

112. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (2d ed. 1986) (describing tension between democratic rule and judicial review); see also JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4-9 (1980).


114. See, e.g., Karst, supra note 113, at 287.

115. BORK, supra note 113, at 7 (“[T]he heresy of political judging is systemic. A great many judges subscribe to it, a large number of left-wing activist groups promote it, many senators insist upon it, and in the legal academy this heresy is dominant.”).

116. Ertman, supra note 8, at 1156-58.

117. Gillette, supra note 2, at 1193-98.
Moreover, the countermajoritarian element of privatization makes it vulnerable to the same attacks that are directed at activist judicial review, and these concerns can surely be seen in the essays in this Symposium. First, the New Private Law could be viewed as an elitist form of governance that circumvents "real" people. Professor Peller's model, for example, arguably promotes opportunities, even in disadvantaged communities, for the intellectual elite to counteract the dulling forces of public bureaucrats' decisionmaking about schools. Professor Ertman's contractual model for sexual marginories is likely to be available to a class of marginories that is relatively wealthy and well educated, positioning them to take full advantage of a sophisticated contractual regime. And Professor Cheever's model, which requires significant wealth such that the tax advantages of conservation easements make sense and access to legal counsel to structure such transactions is possible, can surely be branded with the elitism label.

Furthermore, ideas of private governance could arguably lead to isolated, insular, homogeneous communities (e.g., Peller's Afro-centric schools). While these private lawmakers may serve the ends of individual autonomy, they also raise Madisonian concerns about insular decisionmaking, factional control, and the deprivation of choice for others. These concerns exist, moreover, whether these decisions are made in a town meeting, a corporate board meeting, or a family meeting.

They also, in the privatization context, raise an additional concern not present in the judicial review discourse. While federal courts are formally insulated from the electoral process, they remain accountable to the public in ways that private lawmakers do not. Accordingly, progressives who view privatization with optimism should be concerned about privatization, even on their issues. For example, the relative autonomy for family structuring that might permit sexual marginories to protect and gain legal recognition for their relationships may also mean the relative autonomy for parents to "direct and control the upbringing, education, values and discipline of their children" to the exclusion of broader public concerns about matters such as child abuse.

118. For a fascinating account of the contemporary cultural tendency of homogeneous groups to form isolated communities, see FRANCES FITZGERALD, CITIES ON A HILL (1986).
119. THE FEDERALIST No. 10 (James Madison).
120. Proposed Amendment 17 to the Colorado Constitution. In 1996, some Colorado voters proposed Amendment 17 to the Colorado Constitution through the state initiative process. See COLO. CONST. art. V, § 1(2). The amendment would have made parental control of issues such as education and discipline an "inalienable" state constitutional right. Michelle D. Johnston, Hidden Agenda in Amend. 17?, DENV. POST, Nov. 3, 1996, at A01. Colorado voters defeated the measure 58% to 42%. Michelle D. Johnston, Of the People Faces Hearing on Election Law, DENV. POST, Nov. 14, 1996, at B01. As Professor Ertman herself points out, child sexual abuse does not involve victimless sexual activity, and therefore has moved from public right to criminalization, consistent with the progressive trend she identifies. Ertman, supra note 8, at 1131-34. Protection of such activity would accordingly not fit her model. Moreover, the comparison I draw may not be entirely fair given the clearly unequal legal status of children in a bargaining context as well as their lack of formal political power. Cf. EDDIE COCHRAN & JERRY CAPEHART, Summertime Blues, [performed by The Who] on LIVE AT LEEDS (MCA 1970) ("Well I went to my congressman, He said: 'I'd like to help you son, but you're too young to vote.'").
To the extent that we divorce private decisionmaking from majoritarian public forces, we also insulate them from constitutional constraint, public accountability, and public discourse. If the public and private are treated as formally different, those differences may obscure issues or background principles that are more critical to assessing law and its outcomes. I return to the point about accountability and public discourse when I address the "subversive" nature of the New Private Law below.

Like activist judicial interference with democratic choice, then, the move toward privatization for progressive purposes can be seen as a reflection of dissatisfaction with pluralistic decisionmaking. The criticism of public versus private allocation of goods is likely to turn, as with assaults on activist judicial review, on whose ox is being gored. These critiques are not new, and to some extent reflect a Realist acknowledgement of the subjective nature of legal decisionmaking.

B. The Parting on the Right, Is Now a Parting on the Left

As illustrated through the articles in this Symposium, the New Private Law does not explicitly draw on a particular political theory. Thus, another manner in which the New Private Law could be said to be "new" is in its lack of political valence. That is, depending on the context, new forms of private governance may be used to advance objectives of any ideological color. The political leanings of the New Private Law’s advocates may vary, as with the public/private distinction arguments, depending upon the policy outcomes sought.

On this view, the New Private Law establishes an analytical framework that challenges traditional conceptions of the privileging of private institutions. Contemporary understanding suggests that protection of the private realm advanced conservative agendas by protecting the status quo. In contrast, several of the commentators here argue that the newness of the New Private Law is in the idea that private governance may possibly lead to progressive outcomes.

123. See ELY, supra note 112, at 1 (observing that terms such as activism and self-restraint are not indigenous to either interpretivist or noninterpretivist methodologies of constitutional interpretation). Moreover, both liberal and conservative constitutional theorists sometimes seek to legitimate their conceptions of judicial review with reference to external principles. See generally George A. Martinez, The New Wittgensteinians and the End of Jurisprudence, 29 LOY. L.A. L. REV. 545, 556-57 (1996) (describing theoretical approaches of both Ronald Dworkin and Robert Bork as bearing common characteristic of constraining constitutional inquiry by reference to external principles).
124. In keeping with making this essay reflect contemporary political transformation, the original phrase has been reversed. The actual line is, “The parting on the left, is now a parting on the right.” TOWNSEND, Won’t Get Fooled Again, supra note 3.
125. Eskridge & Peller, supra note 12, at 712.
Under the New Private Law, moreover, private is not inherently bad, and public is not inherently good (or, at least, not inherently better). Professor Peller sees in privatization new educational opportunities for traditionally disempowered constituencies.\(^{126}\) Professors Ertman and Cheever adopt private contractual models for the achievement of what may be said to be left-leaning substantive agendas—the securing of autonomy for victimless sexual activity and alternative family structures and the preservation of open space, respectively.\(^{127}\) Roberto Corrada argues that there is no political valence to the New Private Law, that the theoretical frameworks that it provides can be used to the advantage of the left or the right.\(^{128}\) Under this view, the progressive scholars of the New Private Law may have some sympathy for the Devil\(^ {129} \) —i.e., for the private ordering of goods. In contrast to these authors, Professor Stone and, to a lesser extent Professor Welle, identify sound reasons to be skeptical about private law and its ability to protect broader public interests.\(^ {129} \) Their essays capture the traditional concerns about private law as obscuring or impairing rights, or at least having the strong potential to do so.

But surely the lack of a singular political ideology cannot be the source of this jurisprudential movement’s newness. Again, this is old boss stuff. A conventional understanding of other recognized jurisprudential schools of legal thought is that they provide similar “big tents” that accommodate radically different political/ideological visions, yet share a common, unifying analytical approach. For example, extreme differences as to normative outcomes exist among Law and Economics scholars, depending upon how the particular scholar assigns utility to various interests. The fact that Law and Economics theory suggests that legal rules should be designed to further social utility or wealth maximization, doesn’t mean that uniformity exists about the definition of wealth.\(^ {131} \) More progressive economic theorists could say, and have, that the normative goals of legal rules should include the maximization of non-financial utilities as well.\(^ {132} \)

Similarly, feminist theory also encompasses perspectives arguably as variant as the differing experiences of individual women.\(^ {133} \) As Gary Minda has

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\(^{126}\) Peller, supra note 65, at 1008-09. In her thoughtful essay, Nancy Ehrenreich identifies the “progressive” potential of privatization on a number of different levels. Ehrenreich, supra note 8, at 1240-51. She does not, however, contend that this potential might constitute an element of a new jurisprudential movement.

\(^{127}\) Cheever, supra note 8, at 1087-92; Ertman, supra note 8, at 1137-44.

\(^{128}\) Corrada, supra note 8, at 1054-55.

\(^{129}\) MICK JAGGER & KEITH RICHARD, Sympathy for the Devil, on BEGGARS BANQUET (London 1968).

\(^{130}\) Stone, supra note 2, at 1036-43; Welle, supra note 87, at 1225-29.

\(^{131}\) See, e.g., DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 9 (1992) (explaining that gross domestic product may be too narrow a measure of social well-being because it does not account for valued “goods” such as clean air, privacy, and leisure time).

\(^{132}\) See, e.g., Kenneth G. Dau-Schmidt, Relaxing Traditional Economic Assumptions and Values: Toward a New Multi-Disciplinary Discourse on Law, 42 SYRACUSE L. REV. 181 (1991). Moreover, this reflects the highly utilitarian and pragmatic nature of law and economics theory. See, e.g., David W. Barnes, Economics 2001: A Carpenter’s Odyssey, 42 SYRACUSE L. REV. 197 (1991) (arguing that law and economics is a “hammer” that can be used to build any kind of house).

\(^{133}\) Minda, supra note 9, at 624 (noting that “[l]ike CLS, there may be no single ‘feminist
observed, "Today there are feminist legal scholars who could be characterized as conservative, liberal-center, or left-radical." Furthermore, New Public Law scholarship represents a broad range of approaches to legal problems, rather than a unified analytical construct. Indeed, one of its defining characteristics, to those who have identified it as a movement, is that it incorporates a multi-faceted analytical approach that encourages discourse among traditionally opposed disciplines.

Finally, the fact that the New Private Law shares the characteristic of "no inherent political valence" with recognized jurisprudential movements does not itself make the New Private Law an independent perspective. While this may be a characteristic of jurisprudential movements, it is certainly not a defining characteristic.

Perhaps the confusion surrounding the argument that privatization can serve progressive as well as conservative ends stems from a basic element of the politics of privatization. During the 1980s, a political slogan often invoked by political leaders on the left was that the increasingly conservative Republican Party sought to "get government out of the boardroom, and into the bedroom." The point, of course, was that a political party whose rallying cry was filled with small government rhetoric and the notion of reducing government's role in the regulation of private business, was also made up of people who endorsed state interference with private conduct in the personal and social realm. A reverse criticism could naturally be employed to attack the liberal/progressive politicians, who (arguably) desired the reverse.

It may well be that if the privatization movement has no political valence, it is because directly competing visions of the (broadly defined) private do. That is, conservative politicians wish to protect the private decisionmaking realm of commercial and financial activities, while relatively progressive politicians wish to privilege private decisionmaking in the social and personal realm. It should not be surprising, therefore, to come to understand that the same vision of private ordering—reduction of government involvement and allocation to transaction-oriented individuals—might protect either political vision of privacy.

method' or 'feminist epistemology' which can be identified to characterize feminist legal theory').

134. Id.
135. Eskridge & Peller, supra note 12, at 784-87.
136. Id. at 787-90; Farber & Frickey, supra note 38, at 905-06.
137. The origins of this slogan have eluded me. For a useful general reference, see J. M. Balkin, The Hohfeldian Approach to Law and Semiotics, 44 U. MIAMI L. REV. 1119, 1138 (1990) ("Conservatives have pressed for deregulation of business interests while simultaneously advocating regulation of reproductive interests. The systematic difference in conservative arguments regarding the sanctity of freedoms in the boardroom and the bedroom is a helpful insight into the sources of traditional conservative ideology, just as the opposing orientations in liberal thought allow us to understand its characteristic ideological features."). For a thoughtful discussion of the same political dichotomy, see Mnookin, supra note 101, at 1430-34 (describing competing conservative and liberal political visions of the private).
138. Admittedly, this observation does not translate as well to the work of Professors Cheever and Peller, which does not emphasize the private realm for the purpose of protecting personal privacy.
C. "You Can't Always Get What You Want, but . . .

You Just Might Find You Get What You Need" 139

Finally, the New Private Law could be said to be the possibility of achieving progressive goals through subversive mechanisms, of transforming legal thought by changing our fundamental understanding of legal institutions—of, as has been said, using the master's tools to destroy the master's house. 140 But I take issue with this aspect of private law's newness as well. First, the notion of using historically "conservative" tools to accomplish more liberal agendas seems fundamentally more like an application of utilitarianism than a new mode of legal thought. Second, the subversive nature of the New Private Law resurrects for me concerns about the false obfuscation of the public/private distinction and the nature of political and jurisprudential discourse.

As an illustration of the "subversive" potential of the New Private Law, let us examine Professor Ertman's and Professor Cheever's innovative approaches to addressing critical social issues through alternative legal structures. Martha Ertman argues that contractual freedom may offer liberty to sexual marginalities who are otherwise unable to obtain public rights in the ordinary political process. Her ideal, of course, would be a regime under which alternative family structures could be recognized and protected as a public right. The functional aspect of her approach is in identifying a system under which private ordering could achieve many, but not all, of the benefits the public right would provide. Private ordering is, for her, a way station on the road to full public recognition of rights. Or, stated differently, her proposal could be characterized as a step-by-step approach to the ultimate "heaven" of public rights. 141

Fred Cheever's conservation easements proposal is similarly pragmatic. In a world where political efforts to protect broader "public" rights compete with the moneyed interests of land developers, a coherent plan for preservation of open space may seem like an unattainable goal. Through the magic of conservation easements and tax breaks, however, the state's role in ensuring environmental protection becomes obscured. Even the participants think they are pulling off something private! 142

These essays provide an interesting and insightful way to approach these particular issues, but somehow do not rise to the level of new jurisprudential theory. Rather, they suggest utilitarian structures that operate within the law to accomplish identified social benefits. In other words, while Professors Ertman

139. MICK JAGGER & KEITH RICHARD, You Can't Always Get What You Want, on LET IT BLEED (London 1969). For different legal interpretations of these lyrics, see Chen, supra note 5, at 321 n.67 (listing uses of this song in legal literature).
140. Ehrenreich, supra note 8, at 1233 (citing Audre Lorde, The Master's Tools Will Never Dismantle the Master's House, in SISTER OUTSIDER 112 (1984)); Ertman, supra note 8, at 1165 (same).
141. Cf. ROBERT PLANT & JIMMY PAGE, Stairway to Heaven, on (UNTITLED) (Atlantic 1971).
142. Cheever, supra note 8, at 1090-92. While this is consistent with Professor Cheever's characterization of magic as "sleight of hand," id. at 1078, it also provides my arguments about the utilitarian nature of the New Private Law with greater force.
and Cheever offer creative and exciting scenarios for social change, their approaches reflect and apply a long-standing tradition in legal thought. Their proposals are strongly reminiscent of the concept of legal functionalism, which incorporates to some degree the idea that the legal system may be examined in light of its ability to adapt to changing social needs. Moreover, the utilitarian elements of the New Private Law are strongly reminiscent of the Realist tradition of law as a tool for social change. Similarly, in his remarks, Dan Farber pointed out a connection between the New Private Law and pragmatism.

Beyond the utilitarianism issue, the subversive potential of the New Private Law, recognized by Martha Ertman, Nancy Ehrenreich, and Roberto Corrada, is surely a fascinating element of the discussion. In their papers, they maintain that it could be the notion that the left could coopt a traditionally conservative tool that provides the new or unconventional jurisprudential perspective I have been seeking. Through this lens, the law itself is transformed by the radical and surreptitious subversion of the master’s tools.

One wonders, however, about the ramifications of this subversiveness. For the subversiveness my colleagues propose is not simply derived from the coopting of conservative rhetoric for leftist causes. The subversiveness they celebrate derives directly from the lack of public attention and accountability for the policies generated by the New Private Law. While majoritarian moral opposition might preclude recognition of a public right of gay marriage, cloistering the legal recognition of gay and lesbian relationships in the rhetoric of contract evades that political problem. While developers’ lobbyists may torpedo comprehensive federal land use regulation in the halls of Congress, the New Private Lawyers will be carrying out similar, if disconnected, policies in the halls of county recorders’ offices.

These new rights will be recognized because hiding them in the private realm will ensure that public objection to their existence or recognition will be obscured. But this attraction to the subversive, as Katherine Van Wezel Stone shows in the labor law context, may as easily result in the diminishment of rights rather than their expansion. If the New Private Law has no political valence, neither does the subversive achievement of atomistic private interests outside of the public eye.

The subversiveness of New Private Law, moreover, may in the long run be more of a concern for the left than for the right. Subversiveness in the context of private governance means that no accountability will exist for privatized decisions affecting broader public interests. Public dialogue is likewise obscured if decisions on what collectively are important matters of public


144. Id.

145. FRIEDMAN, supra note 15, at 688-89.

146. Farber, supra note 121, at 1012-13.

147. PETE TOWNSHEND, The Seeker, on MEATY, BEATY, BIG AND Bouncy (Decca 1972).

148. This point is made quite nicely by Elaine Welle. Welle, supra note 87, at 1233.
concern are made in decentralized private realms. Such obfuscation historically has not been a positive element for the left.

What this means is that the New Private Law, like the old private law, likely obscures the fundamental substantive decisions that most affect society and misdirects attention toward the public or private institutions that implement those decisions. More to the point, whether or not subversiveness should be valued, we can view the New Private Law through an old jurisprudential lens.

Thus, the New Private Law is likely to raise concerns already reflected in the existing legal thought on private law and the public/private distinction. It will provoke continued discussion of what makes the public and private realms different, and of the role of discourse and accountability in the contemporary privatization movement. Furthermore, as Dan Farber points out, an important element of exploring the New Private Law is identifying the background legal principles against which it must operate, particularly regarding constitutional law. But all this was true of the old private law as well.

IV. “I’LL TIP MY HAT TO THE NEW CONSTITUTION, TAKE A BOW FOR THE NEW REVOLUTION”

Before concluding, I must acknowledge that there exist sound critiques of my own critique. I place these potential weaknesses in my own position in three broad categories.

First, none of the papers here expressly takes on the role of constructing the broader jurisprudential arguments I attempt to dismantle. Rather, I have set up three rather weak straw persons in order to prove my point. A deeper, more reflective examination of the New Private Law might reveal differences that I have overlooked.

Moreover, there is a good reason for the absence of a sort of comprehensive examination of the markers of New Private Law. One of the hallmarks of the Denver University Law Review Symposia has been the examination of broad problems of legal theory by contextualizing the examination. By disaggregating theory across various legal contexts, we have hoped that a more satisfying comprehensive analysis can be produced or reconstructed. The contextual format of the Symposium does not lend itself to unifying approaches to legal theory, although that is the ultimate goal. But that is not a response to the lack of a unifying theory for New Private Law. If transformations occur

149. Farber, supra note 121, at 1014-15. Indeed, the examination is already beginning. See, e.g., Daphne Barak-Erez, A State Action Doctrine for an Age of Privatization, 45 SYRACUSE L. REV. 1169 (1995).

150. TOWNSHEND, Won’t Get Fooled Again, supra note 3.

151. I owe this particular idea to Julie Nice from conversations we have had about this Symposium. For a description of the contextual format of the Denver University Law Review Symposium, see Julie A. Nice, Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine, 72 DENV. U. L. REV. 971, 971-72 (1995).
within subsets of doctrine, they do not necessarily identify a movement, which should be a way of approaching law universally across contexts.\textsuperscript{152}

Another possible limitation on my analysis is that it may simply be too early to identify a distinct jurisprudential movement. It may be that the New Private Law is not new yet, because the innovative ideas described in the essays presented here are simply too new. That is, these ideas may be at the forefront of a movement in legal thought that is still emerging. The New Public Law Symposium had the luxury of looking back on a generation of scholarship. Perhaps my generation\textsuperscript{153} of legal scholars, or the next, will one day look back upon the scholarship of the next thirty years and discover that, indeed, this was the beginning of something. I remain skeptical that this will occur, but surely cannot Foreclose its possibility.

Finally, I am vulnerable to an argument that it may not be useful or meaningful to attempt to identify entire “schools” of legal thought. One might challenge the legitimacy of this enterprise, particularly in a postmodern world. The idea of attempting to classify the legal theory underlying these essays into a taxonomy of legal thought may be an ultimately fruitless task. Intellectual thought cannot be so easily divided into neat categories, but discourse is part of a “seamless web” of ideas that are continuously evolving.\textsuperscript{154}

Perhaps legal scholars would be expending their time and energy more productively by examining trends and ideas in legal thought and how they relate to broader schools, rather than worrying about whether they fit into a new school. There are new aspects to the New Private Law essays, although they build (as do all theories) on existing schools. It may be more useful to draw from this work general theoretical assumptions that will help us better understand the system of law.\textsuperscript{155} Moreover, if a new strand of thought emerges from New Private Law, it is possible in the course of its evolution that its important ideas will be absorbed into existing schools.\textsuperscript{156} Thus, I must at least qualify my arguments to reflect the idea that transformation of legal thought is an ongoing, evolutionary process.

\textsuperscript{152} Shane, supra note 9, at 840-41.

\textsuperscript{153} PETE TOWNSHEND, My Generation, on THE WHO SINGS MY GENERATION (Decca 1966). Unlike the Who, however, we simply hope to get published before we get old. Cf. id. (“I hope I die before I get old.”).

\textsuperscript{154} Professors Eskridge and Peller made a similar point in their discussion of the New Public Law. They stated that perhaps a “more interesting inquiry” than examining whether a new school existed, was how the trends it reflected related to the politicization of jurisprudence. Eskridge & Peller, supra note 12, at 707, 761-90. They observed that the New Public Law movement could be characterized as “an attempt to mediate the ideological polarization of legal discourse” and in that respect represented centrism as a sort of postmodern cultural form. Id. at 764, 787-90.

\textsuperscript{155} For example, rather than attempt to fit the New Private Law into a broader jurisprudential framework, Nancy Ehrenreich takes a different approach. She argues that, even acknowledging the validity of the conventional critique of the public/private distinction, contemporary privatization reforms may peel away the veneer of that distinction by forcing the right to acknowledge that private choice is ultimately the product of public decisionmaking. As such, new forms of private governance may provoke the subversion of socially-constructed cultural categories in a manner that encourages a more honest discourse about public policy. Ehrenreich, supra note 8, at 1251.

\textsuperscript{156} Minda, supra note 9, at 599 (describing trend of new idea being incorporated into existing modes of legal thought).
While all this may be true, I believe that it is surely also worthwhile to attempt to fit these theories into an organized body of knowledge about broader categories of legal thought. The same arguments could be made about the well-recognized schools of legal thought, which themselves hardly represent a monolithic or unitary vision of law even within the broader systemic views that make them distinct.

I have been unable to identify the precise characteristics that differentiate this movement in any significant way that would justify its designation as a new jurisprudential school, and have been unable to infer this from the other work in this issue. Long live law, be it public or private.\footnote{Karl Llewelyn, meet Pete Townshend. As legal scholars, we must examine ideas with appropriate levels of critique and skepticism—the only way to ensure we Won’t Get Fooled Again.\footnote{Cf. PETE TOWNSHEND, Long Live Rock, on ODDS & SODS (MCA 1974) (“Long live rock, be it dead or alive.”).}} Karl Llewelyn, meet Pete Townshend. As legal scholars, we must examine ideas with appropriate levels of critique and skepticism—the only way to ensure we Won’t Get Fooled Again.\footnote{TOWNSHEND, Won’t Get Fooled Again, supra note 3.}