

Negotiation, Meet New Governance: Interests, Skills, and Selves

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Review of Andrea Kupfer Schneider and Christopher Honeyman, eds. 2006. *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator*. Washington, DC: American Bar Association Section on Dispute Resolution. Pp. xxi + 768. \$79.95 paper.

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ABSTRACT:

In this article, I critically examine two bodies of scholarship: negotiation literature and new governance literature. To that end, I consider The Negotiator's Fieldbook (2006), an ambitious survey of negotiation theory and practice edited by Andrea Kupfer Schneider and Christopher Honeyman, and key works by U.S. new governance architects, Michael Dorf, Charles Sabel, and William Simon. This comparison may surprise readers since negotiation literature largely focuses on interpersonal dynamics and new governance literature aims at institutional change. I argue that these two literatures share similar assumptions about subjectivity that drive their sense of political hopefulness. In short, both envision a flexible problem-solving subject -- shaped in negotiation by a discourse of skills and in new governance by a discourse of institutional design. Based on this descriptive claim, I illustrate how reading these literatures together suggests alternative perspectives from which to consider questions of power, inequality, and distribution relevant to both fields.

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When no firm and lasting ties any longer unite men, it is impossible to obtain the cooperation of any great number of them unless you can persuade every man whose help is required that he serves his private interests by voluntarily uniting his efforts to those of all the others.

Alexis de Tocqueville (1969, 517).

INTRODUCTION

It is an old but endlessly compelling dream: ordinary people affected by social, economic, and political inequalities might -- through dialogue, creativity, nonviolence, and hope -- collectively find ways to transform these problems into possibilities for change, and possibilities that we have only begun to imagine. Today, a powerful iteration of this dream is driven less by high ideals of morality, religion, or right than by a Tocquevillian insistence that, metaphorically, we all live downstream and, as a result, the "private interests" of any one of us are not fully achievable or, for that matter, fully knowable except in relation to "those of all the others" (Tocqueville 1969, 517).

In this article, I weave together and critically examine two bodies of scholarship whose oneiric ambitions intersect with the pragmatic version of this dream: negotiation literature and new governance literature. Each offers techniques, innovations, and normative arguments that set out to address, and more specifically to preserve, democratic values such as collaboration, self-determination, and popular deliberation when the demands of the current political moment call these values into question. But although both these literatures engage a similar subject, to date they have paid only minimal attention to one another. As a platform from which to initiate a comparative analysis, I consider *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (2006), a compilation of eighty exemplary essays on negotiation theory and practice, edited by Andrea Kupfer Schneider and Christopher Honeyman.

Some readers -- at least those toiling in these two fields -- may be surprised by the comparison. New governance, in important respects, is macro in its orientation. Typically thought of as a regulatory project, its proponents suggest "a third way between state-based, top-down regulation," on the one hand, "and a single-minded reliance on market-based norms," on the other (Lobel 2004, 443), by means of public-private networks, multiparty negotiation, and decentered, collaborative institutional design. By contrast, negotiation literature, in important respects, is micro in its orientation. Typically thought of as part of a broader "dispute resolution" project, negotiation literature comprises theory and prescriptions about the skills, techniques, and interpersonal interactions involved in voluntary instances of problem solving, dispute resolution, and deal making.

Yet when placed in conversation with one another, each literature reveals a set of assumptions on which the other relies. New governance literature theorizes the political and institutional contexts in which collaborative negotiation techniques increasingly play a pivotal role. In this sense, new governance presents many negotiation theorists with a real-time unfolding of their own horizon -- a scaling up of the principles and techniques of collaborative problem solving to matters of national and global concern in which negotiation's values of voluntarism, participation, and horizontal dialogue stand ready to become dominant, rather than simply alternatives to top-down and state-promulgated legal frameworks.

Contrariwise, negotiation literature presents new governance theorists with a well-developed body of ideas about the microworkings of individual and group bargainers who are

always imagined to be in interdependent yet voluntary relations with fellow bargainers or, now, as in new governance paradigms, fellow citizens. New governance theorists, however, are at best elusive about the mechanics of participatory negotiation on which their institutional schema depend. In this respect, negotiation literature offers a great deal. In the form of broadly accessible self-help manuals and training materials -- which I suspect many negotiation proponents would describe among the field's greatest analytical and practical assets -- negotiation literature offers to remake citizens into problem solvers by imparting the skills of self-reflexivity and self-management and an ethic of enlightened self-interest.

Fruitful, even generative, as it thus is to bring these fields into contact with one another, few scholars really have, at least in any sustained way. Negotiation theorists are largely failing to notice that many of their processes and techniques are now traveling to new social and large-scale domains. As a result, they are equally failing to consider the social and distributional effects of these techniques as they get articulated and deployed in new and various contexts. Or, at least, they are deferring to others to articulate the institutional and macropolitical contexts in which their tools are applied. I suspect this oversight reflects more than disciplinary blinders. Negotiation and dispute resolution scholars are unaccustomed to seeing tools of collaborative (read: alternative) problem solving as centrist tools of governance.

New governance theorists, in turn, are failing to carefully consider the set of assumptions they hold about how microprocesses of negotiation work. As a result, they are failing to consider the ways in which they are foundationally committed to a particular set of ends -- that is, the production of individual citizens who possess the pragmatic and collaborative skills and capabilities that many negotiation theorists wish to instill. At one level, this point is obvious: in order to produce an alternative to the top-down logic of the state and the free enterprise logic of the market, new governance proponents must aim not only for a new set of institutional arrangements, but also for the constitution of a particular sort of person within those institutional arrangements. As others have argued, institutionalized practices of governance never simply track the interests of the governed; they simultaneously shape individual and collective interests, desires, strategies, and entitlements (Hayward 2006; Cruikshank 1999). But this constitutive process is hard to illustrate in practice, at least in any concrete or specific way, which perhaps accounts for its lack of explicit attention in new governance literature. Turning to negotiation literature renders more visible an image of the problem-solving citizen -- who she looks like, how she operates -- that new governance theorists not only envision, but also actually aim to produce.

Taken together, these two points geared alternatively at negotiation and new governance scholars also clear some space to reconsider familiar charges of power asymmetries in collaborative processes of negotiation. Critics of both fields argue that, for various reasons, dialogic processes favor the strong over the weak. In response to these arguments, both negotiation and new governance theorists suggest that individual interest-bearers, instilled with the proper configuration of dialogic and problem-solving skills, can, through negotiation, combine their interests with the interests of others in ways that reconfigure extant power hierarchies.

By exploring the interrelations among interests, selves, skills, and structural inequalities at play in microprocesses of negotiation, I aim to reveal what this theory of interest production as a strategy to neutralize power, on its own terms, misses. First, I argue that processes and skills aimed at turning people into problem solvers are *themselves* practices of power that are not innocent of distributional effects. These processes not only help people achieve, but also shape

the interests that individuals experience as serving their good. Second, I argue that the interests people hold both prior to and after dialogue are already shot through by preexisting power hierarchies embedded in social contexts, resources, and relations of status, authority, and exclusion. To be sure, neither of these arguments is fatal to a theory of interest production designed to reconfigure power relations, but as I argue in this article, both points are strikingly undertheorized in negotiation and new governance literature.

I begin in Part I with an overview of negotiation literature. To that end, I rely on -- and review -- *The Negotiator's Fieldbook* (hereafter, *Fieldbook*). The *Fieldbook* professes to offer the most comprehensive and cutting edge compilation of negotiation scholarship available today. And law professor Andrea Kupfer Schneider and independent scholar practitioner Christopher Honeyman indeed assemble a stunning cross-section of negotiation scholarship. However, rather than offer a traditional analysis of the *Fieldbook's* strengths and weaknesses which, in light of its ambition and scope, are varied, I instead draw on the *Fieldbook* throughout this article to index current examples of negotiation literature and to describe and assess important scholarly strands within the field of negotiation more broadly.

I also offer in Part I a modest overview of new governance literature in order to orient negotiation scholars to this burgeoning body of work. To that end, I rely primarily on the scholarship of Michael Dorf, Charles Sabel, and William Simon, not only as exemplary architects of the field, but also because their scholarship offers crisp articulations of new governance principles that span substantive applications. I conclude Part I by outlining how new governance and negotiation are in a mutually constitutive relationship: if new governance promises to transform problem-solving techniques of negotiation into democratic governance, then negotiation promises to transform individuals into problem-solving citizens.

In Part II, drawing on the *Fieldbook*, I argue that the relationship between negotiation and new governance literature is hardly coincidental. Many of the historical antecedents, methods, and normative commitments that underlie contemporary negotiation literature are shared jointly by proponents of new governance, even though their applications differ in scale and scope. In Part III, I place this relationship into conversation with critiques of both fields that raise familiar questions of power and inequality. I suggest a more nuanced and ambivalent inquiry about how negotiation skills and processes -- as practices of private bargaining and now as a political rationality -- both enable and constrain the sorts of self and social changes we think possible. I conclude with an example of actual efforts to negotiate the conditions of living, quite literally, downstream.

I. AN OVERVIEW OF NEGOTIATION AND NEW GOVERNANCE LITERATURES

By way of introduction, both negotiation and new governance scholarship resist an easy or clear divide between theory and practice. This refusal flows from their shared commitment to developing theory and prescription from the bottom up through practice-based observation and experimental hypotheses. Schneider and Honeyman (2006, 3), for example, describe negotiation knowledge as “hard-won” from practice. New governance scholar Orly Lobel (2004, 442) similarly affirms that new governance paradigms intentionally disrespect “the obsessive maintenance of traditional boundaries” such as those between theory and practice because, like many other new governance scholars, she argues that it is precisely newly evolving innovations and changes on the ground that demand a new form of legal and regulatory theory (404-42; see also Sabel and Simon 2004).

One consequence, however, of this refusal to sharply distinguish between practice and theory is that both negotiation and new governance literatures span multiple layers of description and analysis that at times can be hard to disentangle. One layer comprises descriptions of actual practices in the world. Within negotiation literature these are typically descriptions of bilateral or multilateral negotiations in a variety of settings; within new governance literature these are typically descriptions of recent developments, innovations, and policies that involve public and private coordination and ongoing stakeholder negotiations, and are oriented around concrete problems. A second layer comprises a form of evaluative theorizing/hypothesizing, that is, efforts on the part of negotiation or new governance scholars to figure out by means of academic study how these practices work, and how and why they work well or work poorly. A third level comprises normative projects, that is, efforts on the part of negotiation or new governance scholars to induce change in a prescriptive direction. Sometimes these layers neatly overlap; at other times they appear disconnected.

In this article, I predominantly engage with negotiation and new governance in their third form as normative projects in order to understand, theorize, and critique their normative ambitions. I will therefore indicate expressly when I intend instead to refer to negotiation or new governance as actual practices in the world or as objects of academic study.

Problem-Solving Negotiation Literature via the *Fieldbook*

In their contribution to the *Fieldbook*, Scott Peppet and Michael Moffitt (2006) outline the overarching message for how to become a good negotiator taught in today's negotiation classes. In so doing, they aptly characterize the predominant problem-solving orientation of negotiation literature that the *Fieldbook* reflects and hence that I consider in this article.¹ "Aspiring students of negotiation," they write, should:

¹ By relying on the *Fieldbook* (Schneider and Honeyman 2006) to set the contours (and limits) of my description of negotiation literature, I do not mean to characterize the range of prescriptive and analytical scholarship that might legitimately fall under the label "negotiation theory and practice." Instead, I aim specifically to consider a highly influential and prescriptive problem-solving approach to negotiation associated with scholars such as Roger Fisher (and others at the Program on Negotiation at Harvard Law School), and which Carrie Menkel-Meadow credits for "revolutioniz[ing] the way negotiation is taught in law schools, business, public policy and planning" (2006c, 485). Hence I intend references to "negotiation" skills, scholars, literature, etc. to be read within this circumscribed context. This caveat is important not least because detractors from this problem-solving orientation remain. For instance, Robert Condlin (forthcoming) criticizes the ways in which "communitarian bargaining theory [has] conquered the world (of bargaining theory)." Moreover, within prescriptive problem-solving literature, I focus primarily on scholarly efforts to impart intra and interpersonal skills and orientations rather than, for example, on what David Lax and James Sebenius (2006, 2-3) have recently called "moves...away from the table" or techniques that aim to enable individual negotiators to design conditions (e.g., timing, sequencing, parties, and other process choices) in ways that maximize negotiated results.

search for underlying interests and potentially value-creating trades rather than take arbitrary haggling positions; explore the other side's perspective through listening and empathy even if you discover you disagree with it; build a working relationship with the other side; manage your emotions to engage productively in the conversation rather than suppressing or ignoring feelings, etc. The message in most negotiation courses today is that learning to negotiate requires learning to collaborate and problem-solve with others, despite severe differences. (616)

What Peppet and Moffitt describe as negotiation's core problem-solving prescriptions owe a good deal of their popularity to the work of negotiation giant Roger Fisher. Nearly two decades prior to the publication of his international bestseller, *Getting to Yes* (with William Ury), Fisher (1964) published an essay titled "Fractionating Conflict." In it, he put forth his central and now famous thesis advocating for the transformation of large disputes into multiple, even competing, smaller elements. Fisher was then concerned with major ideological cleavages among nations -- "communism" versus "democracy" -- that, in his view, made prospects for settling disputes peacefully through adjudication or negotiation unlikely (920-922). Against these meta-narratives, Fisher argued that nations can make choices about how to size and frame their disputes (922). As a critical technique for conflict management, he proposed decentering and, in important respects, privatizing social conflict by, for example, moving the locus of disagreement from governments to individuals, from ideology to economics, from comprehensive solutions to incremental steps (922-23).²

Although he did not frame his argument in quite these terms, Fisher made the crux of his collaborative problem-solving advice the schooled willingness of individuals to take what they consider an end (e.g., democracy or communism) and to turn or "fractionate" that end into a set of smaller and more incremental means; preferably a set of means that could be traded against or enhanced by other ends-turned-means.³ In the decades following Fisher's essay, negotiation scholars developed a core body of work that offers pragmatic and context-oriented microskills designed to enable individuals and groups to discover and articulate the "interests" underlying their ends in ways that allow them to combine or trade these interests with those of others for maximally satisfying gains. These scholars steer clear of any grand, meta, or end-game theorizing; their most influential works discuss the emphasis and timing of cooperative versus competitive and integrative versus distributive strategies and styles, popularize the concept of Pareto optimal agreements, discuss the role of emotions and empathy in effective bargaining, and

² In this essay, Fisher also argued his equally famous counterthesis: even discrete disputes must be sized broadly enough to allow a sufficient scope for bargaining that "benefits each [side]." But "as a general rule," he reasoned "enlargement of the issue beyond that point is unwise" (1964, 927).

³ For students of Fisher or of negotiation theory more generally this advice will sound more familiar in the register of "focus[ing] on interests, not positions" (Fisher and Ury 1981, 41-57).

consider psychological and behavior barriers to economically rational action.⁴ I do not mean to suggest that these scholars have no broader social or political goals in mind (autonomy, cooperation, and nonviolence rank high on most negotiation scholars' agendas), but rather that a core body of negotiation scholarship is oriented around enabling individuals to strike autonomous yet collaborative and mutually advantageous bargains at the level of interpersonal exchange.

This very brief sketch helps explain some of the scholarly ambition that motivated Schneider and Honeyman in their four-year effort to compile the *Fieldbook*. Pushing against negotiation's micro or interpersonal tendencies, Schneider and Honeyman desire to transpose theories of private bargaining into a *social* theory of problem solving and "peacemaking...at many levels" (Schneider and Honeyman 2006, 1). They refer to the *Fieldbook* as an effort to create a "canon of negotiation" that includes both canonical works and new works that instantiate their ideas. Although they state their aim as providing "the most comprehensive available reference work on negotiation" (1), beyond simply surveying existing literature, they argue for the substantive transformation of negotiation into a fully integrated approach to solving problems made visible by a "sea change in how our culture" (5) conceptualizes disputing and problem solving.⁵ Moreover, against what they see as the field's disciplinary tendency towards "fractionation" (2), they hope to reorder a theory of negotiation whose techniques all cohere around a central body of knowledge.

But I should be careful not to overstate these points. Despite Schneider and Honeyman's choice of metaphors (a canon is presumably framed by the apocrypha that it excludes), they are also relentless in their quest for what they call, in the *Fieldbook's* concluding sentences, "truly new contributions to our field" (Schneider and Honeyman 2006, 727). The *Fieldbook* itself comprises nearly eight hundred pages of loosely organized essays by leading negotiation scholars and practitioners. Contributions span procedural essays on negotiation that engage questions of fairness, informed consent, trust, ethics, professionalism, reputation, communication, identity, emotions, cognitive and social psychology, biology, law, organizational theory, gender, and culture, and substantive areas of negotiation practice including business negotiations, hostage negotiations, land negotiations, religion, the military, and family conflict.

And despite Schneider and Honeyman's aim to invigorate a large-scale and social orientation towards collaborative problem solving, a majority of *Fieldbook* chapters maintain negotiation literature's characteristic emphasis on examining the microskills, dynamics, and interpersonal interactions associated with individuated and often private instances of dispute resolution, problem solving, and deal making. To be sure, within the field of negotiation more broadly, Lawrence Susskind propelled the concept of "consensus building" processes among large groups of public and private actors into academic discourse (Susskind and Cruikshank 1987; Susskind, McKearnen, and Thomas-Larmer 1999). Philip Harter (1982) encouraged

⁴ Key works in this tradition include Walton and McKersie (1965); Fisher and Ury (1981); Raiffa (1982); Williams (1983); Menkel-Meadow (1984); Lax and Sebenius (1986); Shell (1999); Stone, Patton, and Heen (1999); Mnookin, Peppet, and Tulumello (2000).

⁵ In an earlier article, Honeyman and Schneider (2004) similarly suggest that "negotiation as subject matter...forms the core of a larger social change in how human beings relate to each other" and therefore is a "meaning-making enterprise" (639).

federal agencies to engage citizens in horizontal processes of negotiated rule making.⁶ Carrie Menkel-Meadow and Richard Reuben recently proposed explicit links between dispute resolution/negotiation theory and democratic practice (Menkel-Meadow 2006a, 2004/05, 2002; Reuben 2005).⁷ And in the *Fieldbook* itself, Charles Hauss (2006, 643) calls for “a metanegotiation of our political life” and Bernard Mayer (2006, 612-13) proposes “negotiation allies” to enable parties to negotiate more effectively on all sides of public and private disputes.⁸ Yet even among this pioneering group there is little worked-out justificatory consensus about what, if any, normative or instrumental bases might compel the state to induce, coordinate, and fund public problem-solving processes writ large.

Thus, in the spirit of what may be described as Schneider and Honeyman’s borderless canon, let me observe that a range of theory and practice that has a great deal of synergy with Schneider and Honeyman’s social and meta aims is missing from their annals. Largely unnoticed by negotiation scholars is the emergent field of new governance -- a macroregulatory project that applies principles of pragmatic problem solving to create decentralized, participatory, and collaborative models of dispute resolution and decision making at all levels of social life. In fact, as the following section illustrates, what Schneider and Honeyman share most intimately with new governance proponents is their normative ambition for an integrative and harmonizing theory of social problem solving (see Lobel 2004, 446-459;⁹ but see Karkkainen 2004) and their simultaneous methodological commitment to decentered, fragmented, and incrementalist design and techniques.

⁶ The Negotiated Rulemaking Act of 1990, 5 U.S.C. subsec. 561-570 provides an alternative to traditional rulemaking in federal agencies by enabling a committee of interested and affected stakeholders to reach a negotiated consensus about a proposed agency rule. There is a significant amount of scholarly debate about the effectiveness, costs, and benefits of negotiated rulemaking. For two important critical evaluations see Funk (1997) and Coglianese (1997); for two important defenses, see Freeman and Langbein (2000) and Harter (2000); for a recent overview of scholarly debates and empirical assessments see Selmi (2005, 417-19).

⁷ Another good example is the Public Conversations Project comprising a group of dispute resolution theorists and practitioners dedicated to “foster[ing] a more inclusive, empathic and collaborative society by promoting constructive conversations and relationships among those who have differing values, world views, and positions about divisive public issues,” (see www.publicconversations.org, accessed Oct. 8, 2007).

⁸ For other chapters in the *Fieldbook* that theorize a positive relationship between negotiation practices and social/structural change, see Coleman et al. (2006); Docherty (2006); McDonald (2006); Menkel-Meadow (2006b); Ricigliano (2006).

⁹ Lobel (2004) writes that new governance scholarship “aims for an appreciative positive stance, pulling together disparate ingredients and synthesizing elements from opposing schools of thought.... The theory itself is thus reflexive, in the sense that it calls for integration in legal practice and correspondingly exemplifies hybridization in the academic field” (449).

New Governance Literature

In contrast to negotiation literature, new governance literature is explicitly concerned with conceptions of the social or public good that might be achieved through private-public associations and networks compelled by a host of new regulatory frameworks and forms. In its boldest (and idealized) prescriptive formulation, new governance would rewrite the functions of courts, administrative and legislative agencies, and the very idea of democracy itself. For example, rather than enact explicit rules and regulations, legislators would instead establish “explicitly provisional and incomplete legislative frameworks” that would “induce and facilitate problem solving by diffuse constituencies” (Sabel and Simon 2006, 399). Similarly, rather than policing the application and enforcement of clearly enacted law, courts would instead monitor and incentivize participatory, deliberative, and transparent efforts at legislative implementation (e.g., Scott and Sturm forthcoming). Judicial review would thus become “procedural in the sense that it asks what the entities, jurisdictions, and agencies did to look for solutions, rather than whether the solutions were the right ones” (Dorf and Sabel 1998, 397).

In a similar fashion, theorists have reimagined the functions of a host of other regulatory practices and institutions under the sign of new governance¹⁰ in areas such as healthcare (Trubek 2006), the environment (Karkkainen 2002, 2001/02; Sabel, Fung, and Karkkainen 2000), occupational safety (Lobel 2006), corporate social responsibility (Fung, O’Rourke, and Sabel 2001), education (Liebman and Sabel 2003), antidiscrimination (Sturm 2001), and criminal justice (Dorf and Sabel 2000). Although by no means univocal, proponents typically describe their visions in distinction to “traditional” top-down conceptions of governance and in relation to “‘regulatory’ approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature” (Búrca and Scott 2006, 2). Again, this work typically combines a normative effort to reconceive governance as a series of networked or “negotiated relationships” that involve both public and private actors (Freeman 2000, 571) with efforts to identify, describe, and theorize actual, if discrete and disparate, instances of negotiated self-governance within and across state boundaries that are unfolding on the ground.¹¹

Drawing on the scholarship of its most ambitious U.S. architects Michael Dorf, Charles Sabel, and William Simon among others,¹² a rough sketch of new governance literature’s

¹⁰ The term “new governance” now increasingly refers to a diverse array of scholarship that broadly shares an emphasis on governance as a set of collaborative problem-solving processes rather than on government as a specific set of institutions. For a detailed overview of some of approaches that fit in this camp, see Lobel (2004); for background on the term “new governance” itself see Karkkainen (2004, 472-73).

¹¹ For examples of this theory-practice intersection in the fields of education, labor, and the environment, see Public Innovations: A Public Policy Research Group, www.publicinnovations.org/index.html (accessed Oct. 8, 2007).

¹² Other important new governance theorists and collaborators that I rely on include Gráinne De Búrca, Joshua Cohen, Jody Freeman, Archon Fung, Brandon Garrett, Bradley Karkkainen, James Liebman, Orly Lobel, Dara O’Rourke, Joel Rogers, Joanne Scott, Susan Sturm, Louise Trubek, and Erik Wright. Many of these theorists also raise, in different forms, questions of power and inequality that I grapple with in this article.

prescriptive features include the following salient characteristics. The first characteristic is a professional commitment to broad stakeholder participation, encapsulated in the idea that the interests of affected parties -- and their forms of knowledge and expertise -- can and should be incorporated in public decision making through institutional design. The second characteristic is an emphasis on learning and monitoring made possible through processual commitments to transparency, information-sharing, and benchmarking (or the comparative evaluation of best practices), and by limiting substantive commitments to goals that are general, provisional, revisable, and often nonbinding to enable conditions for prospective experimentation and change. Third, new governance casts the state not as a central and coercive power, but rather as a convener, funder, catalyst, coordinator, and supervisor, and also a participant in public, localized, and deliberative processes.

As one brief illustration of all three points, consider Dorf and Sabel's (1998) proposal that the U.S. Congress should be charged not with legislating, but rather with authorizing, financing, and monitoring "state and local experimentation" about the distribution and improvement of "citizenship goods" (341). These are goods, like education, that enable individuals to act as citizens, yet which may not be supplied adequately without some state regulation, and also goods, again like education, "whose means and ends [must be] continuously adjusted to account for the diversity and volatility of the needs of citizen users" (341). Within this experimentalist regime, not only decisions about how to achieve the maximally desirable provisions of these goods, but also decisions about what goods meet these criteria, and decisions about the relevant bodies tasked with making these choices are *all* the proper subjects of local deliberation. Here is how Dorf and Sabel explain it:

There will be, of course, disagreements as to whether particular goods meet these tests, and how to frame experiments when they do. As in the case of disputes at the local level of governance councils, the freedom of action provided by experimentalism itself will often clear the way to resolve such disagreements. Some jurisdictions may believe, for instance, that...provision of goods in the form of social welfare may lead to behavior that subverts their ultimate purpose of securing economic self-sufficiency. A showing that economic self-sufficiency, as measured in publicly agreed ways, was increased more through training in workplace skills or through public employment or...by doing nothing at all than by any form of direct assistance, would count strongly for their views. In an experimentalist regime, these jurisdictions could pursue such alternatives on condition that they meet certain procedural requirements. (341)

And:

The dimensions of effective government will change according to the particulars of the problem of governance; "local" actors, whatever their limitations, know best when "local" is improperly sized. Hence, the experimentalist Congress defers to local government in defining the jurisdictions that will be the protagonists of particular experimentalist programs. (343)

Thus by engaging the people closest to the problem in public processes of negotiation to articulate their own needs and deliberate about new solutions to meet these needs, new governance proponents aim to design a wide-scale problem-solving praxis that is both maximally

efficient and normatively (democratically) legitimate. They envisage myriad individual stakeholders grouped into “problem-solving ‘publics’” (Sabel and Simon 2006, 402) that negotiate about issues of social concern and that openly compare their learning with and against other problem-solving publics. By coordinating and monitoring (but not defining or driving) these horizontal processes from above, moreover, new governance proponents aim to ensure that these local deliberations are inclusive, transparent, justified by a record of demonstrable reason, and progressively evolve towards maximally informed, collaborative, and efficient solutions.

The Intersection of Negotiation and New Governance Literatures

What should thus far be clear is how neatly these two literatures invert each other, or complement each other (or both). Negotiation proponents should recognize in new governance literature a vision of institutional design that places their problem-solving techniques into a macropolitical context; new governance proponents should see in negotiation literature a theory and a set of prescriptions for dealing with microinteractions that they currently lack.

Beyond a descriptive point, this reciprocal relation holds important implications for both fields. Turning first to negotiation scholars, I have suggested that it is within the contours of the new governance project that negotiation scholars such as Schneider and Honeyman should recognize their own vision of the future: a scaling up of the principles and techniques of pragmatic problem solving and collaborative dialogue into an integrative and social praxis of local, regional, national, and global conflict resolution, decision making, and resource distribution. What I believe this should in turn signal to all negotiation scholars -- whether or not they find this particular sociopolitical vision a welcome extension of their field¹³ -- is that they can no longer (if they ever could) theorize about the techniques of problem solving and negotiation without also theorizing how these techniques now constitute modes of de/re-regulatory governance.

What does this relation suggest for new governance scholars? It is tempting here to position negotiation functionally -- as new governance’s foot soldiers, down in the trenches, developing applied strategies to coordinate among real people and their messy complex lives so that they may ably participate in processes of government. To that end, dispute resolution theorist Lisa Blomgren Bingham recently argued that new governance tools and institutions aimed at “build[ing] the voice of citizens back into governance” (2006b, 819) are insufficient without on-the-ground processes and skills such as negotiation and mediation that “empower citizens and stakeholders to exercise their voice and become more engaged in their communities” (819, 816; see also Bingham, Nabatchi and O’Leary 2005). Carrie Menkel-Meadow (2004/05) similarly proposed that Michael Dorf and Charles Sabel (among others):

¹³ Although Schneider and Honeyman’s (2006) social ambitions share a good deal in common with new governance aims, it is certainly true that other negotiation scholars could make different choices about “scaling up” their tools. For example, Arthur Pearlstein, Director of the Werner Institute for Negotiation and Dispute Resolution at Creighton University School of Law, argues for a social vision of dispute resolution grounded in “private ordering through market and community mechanisms” with minimal recourse to government oversight (2007, 739).

[need] to learn from dispute resolution theory, that positions and parties may be multiple, that processes of deliberation may range from principled argument to interest-based bargaining and coalitional behavior, to appeals based on emotions, faith and belief, as well as fact. These different levels of “discourse” must be “coordinated” and understood if deliberative democracy is not to be manipulated or used strategically, rather than authentically. (359)

On one level, these arguments are reasonable. If many negotiation scholars have yet to consider how negotiation techniques might constitute practices of governance, new governance scholars have paid far less attention to microquestions of how citizens might capably engage in decentralized and participatory models of governance than they have to macroquestions of public institutional design. In fact, new governance accounts are elusive about the complex mechanics of local participation (a problem that, to their credit, several new governance theorists concede).¹⁴ Scanning new governance accounts of local participation, a negotiation theorist would struggle to see who the people are, how they are represented in dialogue, how they make demands of others, what responses these demands might trigger from low-level bureaucrats. Thus seasoned negotiation theorists like Bingham and Menkel-Meadow propose that dispute resolution theory and practice -- and its detailed prescriptions of the processes, traits, and affects that facilitate successful problem solving -- might provide a bit of expertise to explain what *really* happens down there in actual practices of negotiations, and, optimally, some concrete advice to make things work better.

But let me suggest what these challenges to new governance from within negotiation literature miss. What new governance scholars stand to benefit from reading the pithy articles about the microworkings and limitations of individual bargainers comprising the *Fieldbook* is not simply a set of processes and techniques they can use to understand and manage real-life positions that are multiple, complex, and compound, nor is it simply a set of processes and techniques that citizens can use to express their interests in new yet “authentic” ways. (Though there is, yes, that.) Negotiation literature as exemplified by the *Fieldbook* promotes a particular conception of the self as its overarching aim. And, as I will hypothesize in Part II, new governance literature -- at least to the extent that we can read it as a large-scale, institutionalized, or macroiteration of the problem-solving negotiation project -- envisions a strikingly similar end.

¹⁴ As Sabel and Simon write: “Who, in view of any particular problem, is to be included in the process of directly deliberative problem solving? Who decides on the criteria of inclusion? What is the relation of these particular problem-solving ‘publics’ . . . to each other? To a public sphere that includes them all? To the self rule of the polity?” (2006, 402-03). Cohen and Sabel similarly suggest that “the basic standard is that directly-deliberative arenas are to be open to providers and parties affected by the extent and manner of provision. . . . Very little can be said in general terms about the requisite representational form: how many members of different groups, affected parties, and so forth” (1997, 332-33).

II. SHAPING SELVES

Whoever dares undertake to establish a people's institution must feel himself capable of *changing*, as it were, *human nature* itself, of *transforming* each individual who, in isolation, is a complete but solitary whole, into a *part* of something greater than himself, from which in a sense, he derives his life and his being.... His task, in short, is to take from *a man his own powers*, and to give him in exchange alien powers which he can only employ with the help of other men.

Karl Marx (1843, 46)¹⁵

What if it is too simple, even Pollyannaish, to suggest that by utilizing negotiation techniques, new governance practitioners can help connect citizens to government? The new governance is, after all, not a static, but a dynamic set of social relations; it aims to connect citizens to government not as an end in itself, but so that citizens may, as they should, properly govern themselves. And if new governance succeeds by its own terms, it will be because in reconstituting the government, it will reconstitute the governed. But this also works the other way around: to reconstitute the government, the governed -- the citizenry, hence individual citizens and their needs, interests, and desires -- will have to be reconstituted in ways that achieve new governance ends.

How might we begin to conceptualize these citizens? In this part, I argue that attention to the microskills and techniques set forth in the *Fieldbook* helps to index processes of subject production that lie at the heart of the normative new governance paradigm. However, prior to outlining these skills, I first illustrate how my argument -- that the macrovisions promoted by new governance scholars envision similar microprocesses of self-transformation as those promoted by negotiation scholars -- is informed by an analysis of some of the historical antecedents these two fields hold in common.

New governance and negotiation scholars broadly share methodological and normative commitments to purposive human development, to an expansive imagination of human possibilities, to the idea that these possibilities are expansive because human desires are dynamic and produced through social interaction, and to the conviction that collaboration and economic efficiency can be mutually reinforcing values. Others have drawn links between negotiation or new governance and variously American Legal Process, sociological, and pragmatic approaches to law and social organization.¹⁶ A careful genealogy weaving together the conceptual antecedents of both negotiation and new governance scholarship in a single text, revealing points of divergence and convergence, would be a useful contribution for both fields. My aim in this article, however, is only part of that larger project: to map the ways in which negotiation and new governance proponents draw on literatures that are engaged in shaping the self.

¹⁵ Quoting Rousseau; emphasis by Marx.

¹⁶ On negotiation, see generally Menkel-Meadow (2000) and Alberstein (2002); see also Sanchez (2003). On new governance, see generally Dorf (2003); Garrett and Liebman (2004); Simon (2004).

Making Selves in Negotiation and New Governance Literatures

Underlying much of negotiation and new governance's social imagination is Tocqueville's (1969) imperative to persuade individuals to voluntarily place themselves into interdependent and mutually beneficial social relations. With continuing influence on both negotiation and new governance scholars, post-war Legal Process scholars Henry Hart and Albert Sacks made Tocqueville's imperative a descriptive basis of their theorizing. "In the satisfaction of all their wants," Hart and Sacks reason, "people are continuously and inescapably dependent upon one another" (Hart and Sacks 1994, 1). For Hart and Sacks the "great *desideratum*...maximize[ing] the total satisfactions of valid human wants" (104) involves "human awareness that the desires are in some measure attainable" (105) and interdependent and cooperative norms within and among groups to protect and advance individual and collective interests.¹⁷

Hart and Sacks ground their efforts to maximize the satisfactions of human wants in the "logic of institutions" (105). And both dispute resolution scholars and new governance scholars have variously positioned themselves as offspring of the Legal Process emphasis on specialized "processes of institutional settlement" ("private, judicial, legislative, administrative, and constitutional") to mediate among conflicting social interests (107).¹⁸ But it is also the case that Hart and Sacks describe the capabilities of human beings as "overwhelmingly the most significant of any society's resources for the satisfaction of human wants" (106). "How to get

¹⁷ Thus elsewhere Hart and Sacks argue that "people who are living together under conditions of interdependence...need understandings about the kinds of conduct which must be avoided if cooperation is to be maintained. Even more importantly, they need understandings about the kinds of affirmative conduct which is required if each member of the community is to make his due contribution to the common interest" (1994, 3).

¹⁸ In fact, dispute resolution theorists can easily see the evolution of alternative dispute resolution, and paradigmatically Frank Sander's innovation of a multidoor courthouse, as a conceptual extension of the Legal Process specialized institutional approach to social-legal problem solving (e.g., Menkel-Meadow 2000, 25-29). New governance scholars similarly embrace the Legal Process emphasis on the interaction and coordination among institutions and private actors, but they also distance themselves from what they see as the early Legal Process "assumption of institutional inviolability" (Dorf and Sabel 1998, 283) or Hart and Sacks's imagination of a "a fixed menu of institutions" (Dorf 2003, 882) that each hold "distinctive, fixed" capacities (940). This is because new governance scholars wish to make institutions themselves the subject of ongoing deliberation and contingent change. Dorf, for example, aligns himself with Hart and Sacks in calling for legal scholars and practitioners to adopt an interactive institutional matrix to respond to the difficulties presented by the twin challenges of legal indeterminacy and judicial discretion. "But where the Legal Process approach to other institutions was to defer to their processes," he argues, new governance "experimentalism is more activist in the sense that it asks those institutions to justify the deference they demand by producing a record of performance that can withstand comparative assessments" (Dorf 2003, 981).

people to develop their abilities and to exercise them in ways that are socially beneficial,” they write, “is thus the core of the social problem” (106).

Hart and Sacks’s pivotal emphasis on developing human capabilities rests on their conviction that the resources available to satisfy human wants are dynamic and, through purposive human action, can be expanded. As they famously state:

In particular, many people have rejected the whole notion of purpose in social organization. At bottom, they have argued, the social problem is a problem simply of deciding who gets what. This view starts with the obvious fact that there is not enough in the world of all the things that people want to go around among the people who want them. The gist of the social situation is then seen baldly, as no more than a continuing struggle among conflicting claimants to get what they can.... These materials proceed upon the conviction that this is a fallacy -- “the fallacy of the static pie.” The fact -- the entirely objective fact -- seems to be that the pie -- that is, the total of actually and potentially available satisfactions of human wants -- is not static but dynamic. How to make the pie larger, not how to divide the existing pie, is the crux of the long-range and primarily significant problem.¹⁹ (102-03)

In accord with this thesis, neither negotiation nor new governance theorists aim simply to satisfy extant human wants as best as possible by way of existing means. New governance theorists juxtapose a “traditional regulatory model” that allocates resources between “haves [and] have-nots strugg[ling] for a share of the static pie,” with a “new governance model” that enlists law in the purposive task of “enlarg[ing] the pie” within a “win-win framework” (Lobel 2004, 405-06).²⁰

Negotiation literature similarly revives the Legal Process emphasis on individual interest-bearers whose desires can only be fulfilled by means of social interaction (see Alberstein 2002, 258). But unlike Legal Process scholars, “negotiation people,” as Michal Alberstein observes, “do not speak of ‘the social problem,’ but rather of the private problem of the bargaining situation” (257) (hence, both my point about the field’s microwork and also the distinction I suggested Schneider and Honeyman appear bent on erasing). Yet at the level of individual interactions, negotiation theorists have made an individual’s ability to challenge, through voluntary interpersonal dialogue, “the assumption of a fixed pie” -- an assumption Fisher and Ury (1981, 73) insist is “rarely if ever” true -- one of the most important and serious themes in contemporary problem-solving discourse.²¹

¹⁹ Hart and Sacks contribute to the origins of the phrase “the fallacy of the static pie” to conversations between Hart and Lon Fuller (1994, 102, note 2).

²⁰ Lobel roots this “basic premise of the governance model...that participatory, collaborative, and flexible approaches can generate win-win situations” in Hart and Sacks’s Legal Process literature and “the fallacy of the static pie” (2004, 458).

²¹ The terms “win-win” or “expanding the pie” are routinely used in ways that do not describe integrative solutions that leave all parties better off than they would be in the absence of an agreement or a compromise. In fact, one new governance scholar, Bradley Karkkainen (2002) is careful to distinguish “collaborative decisionmaking processes [from] negotiated rule-

What negotiation and new governance scholars both add, however, to Hart and Sacks's thesis of "the fallacy of the static pie" is a clarification of the idea that the resources available to satisfy human wants are variable and expansive precisely because human wants are, in the first instance, produced and revealed to actors through their interactions with others. In other words, what appears to an actor as a fixed desire known in advance -- when placed in relation to others' desires -- can turn out to hold multiple and underlying latent interests, ambiguous priorities, and thus new undiscovered possibilities for its maximization.²² To return to the *Fieldbook*, Gabriella Blum and Robert Mnookin (2006) articulate this canonical conviction in problem-solving negotiation literature: "through the process of negotiation people's priorities and interests can sometimes change and evolve" but "*ex ante*, people may overlook or underestimate this possibility" (108). New governance theorist William Simon (2004) puts it nearly identically:

Once participants start to search for mutually beneficial solutions...the boundaries of self-interest and the distinction between distributive claims and policy responses are likely to blur. As long as there is any possibility of significant, mutually beneficial exchange, people cannot be sure what their interests are. If they cannot be sure what their interests are, they cannot be sure whether and to what extent it is in their interests to assert their rights.... [T]he parties find themselves forced into a kind of "original position" in which they have to decide on the basis of the common interests because they cannot figure out what their individual interests are. (182-83)

Moreover, as these quotations suggest, transforming interests through dialogue is presented as nearly a necessary and inevitable occurrence. Not that either negotiation or new governance theorists assume these sorts of transformation always "work" (in fact, neither are terribly invested in gauging how often or in what contexts these transformations actually occur²³), but rather when they do, they reflect the order of things when people engage with each other from a place of genuine dialogic inquiry.

For both fields, this constitutive account of interests finds some of its earliest citations in the sociological work of Mary Parker Follett and her theory of "integration" through which diverse interests combine in dialogic fashion to create "something new" and oriented towards a

making and other forms of alternative dispute resolution (ADR)...[which] involve one-time bargaining from fixed interests toward fixed, split-the-difference outcomes" (572). Although Karkkainen's criticism of negotiation and ADR in practice is not unfair, it is also worth noting that negotiation theorists well represented in the *Fieldbook* equally aspire, where possible, to surmount fixed interest and compromise bargaining with integrative negotiation.

²² This emphasis on the social and dynamic nature of human interests no doubt contributes to Dorf's (2003) proposal "to return to Hart and Sacks's commitment to a legal decisionmaking process that is deeply informed about the institutions with which legal actors interact, while at the same time jettisoning the Legal Process view that the ends and means of governmental institutions are largely static" (882).

²³ For an example of an actual effort to study interest-convergence through dialogue in specific and comparative community-based contexts with varying degrees of background wealth and homogeneity, see Fung (2004).

common goal (Fox and Urwick 1973, 6, 1-20). (For more detailed accounts of how Follett's work influenced contemporary negotiation literature, see Davis 1989; Menkel-Meadow 2000, 7-10; Sanchez 2003, 684-88; on links between Follett's work and new governance theories, see Dorf and Sabel 1998, 415-416, note 468). But Follett, writing in the early twentieth century, casts this process explicitly as a practice of power. She reasons that integration -- or the coordination and stabilization of social behavior towards mutually reinforcing goals -- is a more productive form of power than top-down domination. Domination, she argues, although seductive, remains vulnerable to bottom-up revolt because it suppresses rather than reconstitutes its subjects (Fox and Urwick 1973, xxviii, 16). Conversely, through integration "various desires get oriented toward one another and take on different values in the process of orientation" (10). Follett was thus very interested in how actors constitute themselves through the interstitial spaces of relations. "I can never fight you," she declares. "I am always fighting you plus me. I have put it this way: that response is always to a relation" (16). She thus concludes that learning the "'art' of cooperative thinking" or "the technique of integration" (19) is a matter of understanding the "interactive behavior between the situation and ourselves," which in turns involves "a *change* in both the situation and ourselves" (20, emphasis added).

Follett's ideas of integration through social interaction informed the private negotiation theories popularized by Richard Walton and Robert McKersie in *A Behavioral Theory of Labor Negotiation* (1965, 7, 128, 148) and by Roger Fisher and William Ury in their bestselling *Getting to Yes* (1981, vii). These ideas also informed the distinction that Dorf and Sabel rely on in new governance literature "between bargaining as the compromise of antagonistic interests and deliberative decisionmaking as the discovery of new possibilities through consideration of diverse viewpoints" (Dorf and Sabel 1998, 322, note 127).²⁴ Follett herself linked practices of negotiation and integration to a vision of "The New State" (1918) that prefigures core new governance ideas. She proposed devolving power from "dead-wood" (4) forms of representative governance to citizens who would learn to evolve democratic practices and techniques in groups (154-55) -- neighborhood associations, district, regional and state-wide networks -- that all function in coordination with the others (245-57). Yet as Follett promoted decentered forms of governance, she repeatedly argued that both the social will and the citizens required to achieve these forms of participatory governance must be created as much as expressed (220, 9).²⁵

²⁴ In fact, what in negotiation literature is the Follett-inspired distinction between fixed- and dynamic-pie negotiation strategies is more analogous in new governance literature to the distinction between aggregative and deliberative theories of democracy. To briefly summarize this distinction, in aggregative models, citizens articulate their interests "as they understand them" and democratic institutions provide mechanisms to aggregate these interests in a procedurally fair and equal manner (J. Cohen 1998, 1). Conversely, according to deliberative models, the interests that people hold about what "serves their good can -- and that in some nontrivial subset of cases, they do -- change in response to the reasoned exchange of opinion and arguments" (Hayward 2006). Thus democratic institutions must provide the conditions for open and equal reason-giving and public debate (J. Cohen 1998; Hayward 2006). For an exploration of competing theories of democracies and how they inform new governance scholarship, see Cohen and Sabel (1997).

²⁵ For example, Follett writes: "We are told that we must elevate the 'people.' There are no 'people.' We have to create a people" (1918, 220). And elsewhere she writes, "it is not only

In sum, new governance and negotiation scholars share common commitments to developing human capacity to achieve mutually beneficial ends and to the idea that these ends are dynamic and expansive precisely because of the incomplete and social constitution of human interests. Thus, far from simply including more existing selves in processes of governance, new governance theorists envision the need to shape a very large number of individuals who share these interests and the capacities to achieve them.

Skills and Selves in Negotiation Literature via the *Fieldbook*

If you are persuaded by my argument that both new governance theorists and a core group of negotiation theorists share a historical and present commitment to shaping selves for problem-solving ends, the question remains how to describe these selves. As a start, let me suggest that they are most readily, if also a bit colloquially, described as pragmatic: purposive, iteratively constituted, and always liable to change in the course of social discourse. And although new governance scholars depend on the presence of these pragmatic people in their problem-solving initiatives, it is the negotiation theorists who have labored -- in the field, out there in the actual world of real people -- for decades to produce them. But as I illustrate in this section, negotiation theorists have not done so through discourses of power or even integration, but rather through a discourse of *skills*. The image of the negotiating agent that emerges from a review of the *Fieldbook* is perhaps best described as a flexible “bundle of skills” (Urciuoli forthcoming) that can be managed and improved reflexively through self-awareness, self-discipline, and progressive learning.

But fleshing out this “self” in negotiation literature requires a few words about pragmatism. Pragmatism, a diverse tradition in social and legal thought, whose genealogy is mercifully beyond the scope of this article,²⁶ is aptly summarized for my purposes as an account of problem solving marked by “the reciprocal determination of means and ends” (Dorf and Sabel 1998, 284). Pragmatism also stands here for the macroinsight that conditions of uncertainty and complexity shape the social environments in which most people exist. Thus, according to pragmatic accounts, knowledge is contextual and instrumental -- it can only be meaningful in particular contexts for particular purposes. Truth, not an absolute, is an “argument -- perhaps a good one, perhaps not -- for dealing with difference” (Fisher and Ury 1981, 23). Notions of fairness are similarly made intelligible to actors through their relations with others. To take two examples from the *Fieldbook*, Cheyney Ryan (2006), following political philosopher John Rawls, explores notions of justice as the dialogic process of negotiating one’s interests in light of the interests of others (77-78), and Nancy Welsh (2006) describes fairness as determined less by material allocation than by the social processes through which material allocations occur; “fairness -- whether distributive or procedural -- is largely a matter of perception” (171).

that we must invent machinery to get a social will expressed, we must invent machinery that will get a social will created” (9).

²⁶ For an excellent and historically informed account of pragmatism’s relationship to negotiation, see Alberstein (2002). For a careful rooting of new governance theory in the pragmatism of John Dewey, see Garrett and Liebman (2004); see also Simon (2004).

What is most important to grasp here is that this incompleteness of facts, circumstances, priorities, and normative benchmarks is not necessarily a challenge to overcome or even a source of conceptual trouble. To the contrary, it provides the basis (in both fields) for great optimism. It is precisely because interests and priorities are multiple and shifting rather than fixed and known to parties in advance of dialogue, that there are vast opportunities for individuals to innovate, collaborate, and solve very hard problems. And if interests, positions, and perceptions are in nontrivial ways indeterminate, what emerges as “real” for problem-solving negotiation scholars -- i.e., stable and responsible for successes and failures in dialogic processes -- is one’s *skill* as a negotiating agent. And although these scholars certainly vary in their problem-solving advice, virtually all believe in the possibility, along with the value, of making individuals into self-managers: purposive, self-reflexive, and able to think clearly and act creatively in conditions of uncertainty. Here, for example, is how *Fieldbook* author Peter Adler (2006) describes “skilled negotiators”:

They have agile minds and ecumenical temperaments. In an instant, they can undertake some kind of emotional and intellectual diagnostic, recalibrate expectations, and reflexively adjust their approach. Paradox is neither distasteful nor uncomfortable for these people. In fact, the ambiguity and tension created by paradox becomes the spawning ground of artistry. (24)

In order to transform individuals into these self-reflexive agents, negotiation scholars and practitioners aim to impart particular sets of skills. One set of skills involves enabling individuals to learn to *see* how their choices, expectations, and beliefs reflect contingent and subjective social preferences rather than stable or objective realities (or to recognize, in Dorf and Sabel’s (1998, 284) terms, “the reciprocal determination of means and ends”). For example, *Fieldbook* authors Sheila Heen and Douglas Stone (2006) have created popular negotiation training material aimed at enlisting individuals to recognize how the stories we tell ourselves about “what happens” (344) in the world are, in fact, constructed through perceptual feedback loops and informed by our prior experiences, affects, and expectations. *Fieldbook* author I. William Zartman (2006) describes his famous concept of “ripeness” or the various “perceptual event[s]” (145) through which actors come to perceive external conditions in ways that make negotiation, rather than the status quo, serve their interests.

Transforming individuals into negotiators also involves a second set of skills designed to enable individuals to instrumentally manage and exploit the subjective nature of their preferences, desires, and situations for problem-solving ends. *Fieldbook* author and psychologist Daniel Shapiro (2006), for example, argues that because “who we are” is not fixed but produced through relations, temporality, and surroundings, one’s conscious and narrating self can and should act in some distance from one’s experiential self to choose, manage, and orient one’s behaviors, affects, and desires towards improving collaborative negotiation processes and outcomes. Leonard Riskin (2006, 239), in his *Fieldbook* chapter on “mindfulness,” offers skills for self-discipline and self-regulation through conscious awareness and modulation of “impulses, fears, passions, thoughts, and habitual assumptions and behaviors” to improve decision making and negotiation. And to help people overcome the behavioral barriers that make it hard for them to internalize these and other microskills, Peppet and Moffitt (2006), in their *Fieldbook* chapter, recommend gathering high-quality data and engaging in rigorous self-exploration about our performances and experiences.

None of this is dissimilar to what Follett more generally calls gaining “a [conscious and] responsible attitude toward our experience” (Fox and Urwick 1973, 21) or what Dorf and Sabel (1998, 414) refer to as their “view of identity as mutual self-clarification.” But the distinction I want to make clear is that negotiation experts and *Fieldbook* authors offer ways of fabricating these social imperatives into discrete techniques that can be internalized first “as skills” and then as social attitudes and ways of being. First one does, then one is; practice becomes ontology.

Even the concept of rationality, once an important conceptual anchor in negotiation scholarship, now features in the *Fieldbook* primarily as a matter of skill. A quick historical summation of the role of rationality in the academic literature on negotiation demonstrates what I mean. Early negotiation proponents tried to deduce the conditions and norms of conduct that would make collective cooperation the maximally rational thing for any one individual to do. They tested the concept of rationality against interests in the short and long-term and against conditions of imperfect information, often by using game theoretic models.²⁷ A second generation of literature, well represented in the *Fieldbook*, now more commonly imports insights from social and cognitive psychology to highlight typical deviations from rational behavior. Individuals might “fall prey to the zero-sum, or fixed pie fallacy” (Blum and Mnookin 2006, 108) and resist collaboration even when it serves their interests because, for example, of cognitive biases such as overconfidence or attribution errors. These and other cognitive, behavioral, and psychological biases, however, are presented as predictable, generalizable, repetitive, and therefore, vulnerable to skills aimed at defeating (or enhancing) them in oneself and in others (in the *Fieldbook* see Guthrie 2006; Guthrie and Sally 2006; Korobkin and Guthrie 2006; Sally and Jones 2006; Shestowsky 2006).

In fact, all the usual suspects (emotion, values, culture) that threaten rationality’s explanatory power are similarly described by *Fieldbook* authors as predictable, generalizable, and therefore susceptible to specific techniques of self-management. Emotion, a potential barrier to problem solving, when carefully understood and revealed is vulnerable to a set of strategies designed to enhance productive self-expression (see Shapiro 2006b). Culture appears as a resource, or as a set of usable traits and perspectives possessed by an individual (Gershon n.d.), which can be an obstacle to reaching agreement, but if managed through skillful practice can also produce fruitful exchange (see Goh 2006; Abramson 2006). Values are cast as incentives to compete (when cooperation better serves individuals’ material interests) that can be bracketed to allow for more productive strategies to integrate interests: thus even individuals with morally diverse worldviews can acquire the skills to problem solve around matters of “common” concern (see Blum and Mnookin 2006; Deutsch 2006).²⁸

²⁷ They examined what is colloquially known as the “Negotiator’s Dilemma” (adapted from the bargaining game known as the “Prisoner’s Dilemma,” see Lax and Sebenius (1986, 38-42, 181-82)) or the conundrum presented when one-shot bargaining interactions and uncertain conditions make competitive strategies rational, but long-term relationships and conditions of full information produce rational incentives for mutual cooperation and thus joint gains. For an account of various analyses of this dilemma within negotiation literature, see generally Sanchez (2003, 697-15). For an empirically informed meta-analysis of numerous Prisoner’s Dilemma experiments, see Sally (1995).

²⁸ Here is how Blum and Mnookin (2006) put it: “We are not claiming that the tendency to accentuate issues of morality or legitimacy is necessarily wrong, irrational, or ‘biased,’

To put all this a bit differently, the self that negotiation scholars envision is clearly not that of *Homo economicus* -- or the rational actor hardwired to achieve maximum gain at minimum cost -- but rather one that comprises a far more complicated psychological pastiche. In order to coherently engage this complex pastiche, negotiation scholars have, in their prescriptive problem-solving projects, transformed rationality from a prior state of being into a set of learnable skills. Ideally, these skills enable individuals to achieve their interests by instrumentalizing or, where that is not possible, strategically bracketing their psyches, emotions, cultures, and values. Recasting rationality as skills in this way, moreover, fuels the field's general optimism that individuals are able (and desirous) to engage in a disciplined pursuit of self and social interests through negotiation. In fact, questioning this concept of rationality would alternatively admit a far less emancipatory imagination of the self, perhaps one that experiences an incommensurable divide between (or complete conflation of) interests and values (someone, for example, who is abject, inner-oriented, god-orientated, and nonreciprocating), or perhaps a self with an alternate moral economy (someone, for example, who is desirous simply of losing or winning, or nondesirous of any social agreement at all).

I am thus proposing that we understand negotiation skills not as objective or neutral constructs but rather as particular, normative, and didactic technologies aimed at facilitating the instrumentalization of the self by, if you will, oneself. More specifically, integrative negotiation skills seek to instill in individuals the learned ability and desire to make their ends socially achievable by transforming their ends into means that can then be achieved by another set of means. To take two simple examples, an individual who desires to keep a specific piece of land should, through a process of collaborative negotiation, develop the ability and willingness to transform that desire or end into an underlying interest or means; for example, securing a livelihood through agriculture. That individual should moreover become able and willing to transform his secondary desire (to secure a livelihood) into some secondary set of means; for example, alternate land suited for farming, monetary compensation, or job training for an urban

although our intuition is that often disputants have not carefully considered alternative ways of framing their conflicts or the issues at hand. Our own anecdotal experience suggests that this may well be the case" (110). In Deutsch's (2006) view "most [non-negotiable] issues *are* negotiable even though the underlying basic differences between the conflicting parties may not be reconcilable" (237). This can happen when "parties can be shown that their vital interests will be protected or enhanced by negotiation.... The positions of the conflicting parties may be irreconcilable, but their interests may be concordant" (238). New governance scholar Michael Dorf (2003) takes a similar approach when he calls for "practical problem solving around value-laden issues" (972). Dorf argues that this model of problem solving will not wholly or always solve the problems of moral diversity, but nonetheless is a more expansive and productive (juridical) approach than typically acknowledged (972-75); "practical deliberation...can work around value differences, and in the long run, even change them" (975). All these authors thus appear to assert that within value-laden conflict, pragmatic problem solving is possible more often than people realize. There are, however, some negotiation scholars and *Fieldbook* authors who contest not the possibility but the probability of this assertion -- their analysis of deep and enduring values and disparate worldviews leads them to reason that this sort of pragmatic problem solving within value-laden conflict may, in practice, be the exception rather than rule (see Campbell and Docherty 2006, 40, 43-44; see also Avruch 2006a; 2006b).

vocation. Or an individual who desires to increase funding for local education should become willing to translate that desire into an interest such as maximizing opportunities for one's child, which might then be achieved through a combination of resources, alternative learning strategies, and parent volunteers. And through internalizing negotiation skills in this way, individuals should come to see these processes of self-transformation as not only possible, but as true, natural, necessary, and empowering.

Selves in New Governance

New governance scholars hold similar conceptualizations of the individual as a flexible problem solver with provisional and social understandings of what serves her good, as do the theorists of negotiation described above. Most paradigmatically, these are individuals who, against background conditions of diversity and uncertainty, are capable and desirous of changing, combining, and integrating their interests with those of others to produce new, expansive possibilities that are greater than the sum of their parts. In fact, more so than negotiation theorists (who are often concerned with enabling individuals to reach discrete points of agreement), new governance theorists view constant change as not only possible but also often normatively desirable (e.g., Simon 2006, 49-53). Thus the new governance conception of self-interest explicitly assumes iteration and surprise; as Dorf and Sabel (1998, 322) write: “‘self’-interest assumes as the starting point for subsequent calculations the surprises of practical deliberation that formerly confounded it.” And like negotiation theorists, new governance theorists see indeterminacy and complexity as the background social conditions that make negotiation maximally plausible. As Orly Lobel (2004) explains:

the incomplete and ambiguous character of the initial specification of means and ends, and the use of the lack of specificity [is] a prod to inquiry and discovery.... [L]ack of clarity about appropriate solutions can benefit complex governance domains, because it enables conflicting parties to come together in multistakeholder negotiations, moving away from, at least tentatively, entrenched positions about each party's particular interests. (396)²⁹

In the previous section, I suggested that negotiation scholars are far more practically engaged than new governance scholars in efforts to instill within individuals the capacities that make pragmatic problem solving maximally likely to happen. But new governance scholars, by virtue of their own projects, are equally invested in the idea that flexible problem-solving people can be created if they do not already, on a wide scale, exist. However, rather than make recourse to skills training, new governance scholars more commonly reason that principles of institutional or processual design can help enable people's “preferences, even ideas of the possible, [to] change in the course of decision making” (Sabel and Simon 2006, 402). As Simon (2004, 179) writes: “if the process is properly designed, neither the individual nor the community can know what their interests are before entering it. Each party's conception of her own goals may change in the course of the process because each may learn things in the process about the possibilities for realizing them.”

²⁹ Describing Dorf and Sabel (1998, 363-64) and Sabel and Simon (2004, 1099).

To take another example, Sabel (2004) reasons that it is precisely a combination of “organizational innovations” (175) and background conditions of diversity and uncertainty that can induce within citizens the changes necessary to make pragmatic problem solving a sustainable and large-scale political reality (191). More specifically, he reasons that innovations “such as benchmarking, simultaneous engineering, continuous monitoring, error detection and root cause analysis” (182) make it possible to devolve decision making control to “civil society actors” (175) in ways that promote “social learning about the effective pursuit of the broad, imprecise goals” (175) and accordingly allow for routine questioning and correction of ends and means (182). In Sabel’s words:

The mutual learning that grows out of and fosters problem solving in pragmatist institutions brings the actors to change their view of possibilities even as they put their identities at risk by reorienting their goals, their ideas of potential collaborations, and their understanding of fruitful problem-solving strategies. If this is too good to be true -- because it assumes inhuman plasticity of the all-too-habit-bound human self -- consider that individuals and groups only turn to pragmatist problem solving when pervasive uncertainty has thoroughly undermined their confidence in their inveterate problem-solving strategies (the market, more government) and the ideologies that articulate them. (191)

New governance scholars only sporadically address the individuals constituted by or reformed within their institutional schemes. Yet judging by what these scholars are calling for, driving new governance’s political hopefulness is something clearly approximating negotiation’s conception of the self. And albeit articulated through a discourse of institutions and structures rather than intra and interpersonal skills and techniques, this conception of the self encourages individuals to evolve within themselves the integrative, reasonable, and pragmatic capacities and attitudes that negotiation theorists would (through skills) impart.

Let me conclude this part by drawing an explicit link between my argument and what Michel Foucault calls “technologies of the self” (1988). Foucault defines these as technologies “which permit individuals to effect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality” (18). Of particular relevance here is Foucault’s thesis that these technologies of self function in relation to “technologies of power, which determine the conduct of individuals and submit them to certain ends or domination, an objectivizing of the subject” (18). The points of contact, moreover, between technologies of self and technologies of power -- or between the ways in which individuals act upon themselves to acquire particular self-understandings and act upon and are acted upon by others -- contribute to an overarching social matrix Foucault refers to as “governmentality” (19).

What I have argued in this part is that negotiation’s discourse of skills and new governance’s discourse of institutions, to borrow from Bonnie Urciuoli (forthcoming), “[nest] technologies of self in technologies of power.” That is, if understood the way I am describing, taken together, negotiation and new governance do not aim simply to enable agentic citizens to articulate their interests so that they can participate in governance. Instead, these projects aim to produce a diffuse but (historically and ideologically) particular array of self-understandings, self-interests, and social practices through which citizens come actively to govern themselves. A

Foucauldian idea of governmentality thus anchors two claims central to my argument. First, democratic governance invariably involves efforts to shape human conduct -- not by means of direct coercion or control, but rather through what Barbara Cruikshank (1991, 1, 39) calls the “will to empower” or “work[ing] upon the capacities of citizens to act on their own behalf” (see also Dean 1999). And, second, in order to be intelligible, an analysis of new forms of governance requires an examination of those practices that seek to mobilize the desires and capacities of individual citizens towards particular ideologies, objects, and ends.

III. CRITICAL PERSPECTIVES ON NEGOTIATION AS PRACTICES OF GOVERNANCE

Let me first suggest that there is practical import to my argument that the *Fieldbook*'s microprescriptions make visible the contours of the self-governing citizen that new governance proponents envision and, in practice, may aim to produce. Decentered, flexible, and responsive institutions are only as effective as the people comprising them. We might expect, for example, that to the extent that existing individuals are apathetic, fundamentalist, or desirous of their own alienation, these institutions will falter. Returning then to points made by Bingham (2006b) and Menkel-Meadow (2004/05), reading negotiation literature reveals practical limitations in the new governance paradigm because it allows us to consider the people that may -- or rather, may not -- participate ably in new problem-solving governance initiatives.

To that end, new governance proponents might welcome prescriptive negotiation scholarship on learning, affect, self-reflexivity, and psychological and behavioral barriers to problem solving. Susan Sturm (2006), for example, recently proposed that “an important area for future inquiry involves whether and how new governance methods can develop the infrastructure and culture needed to produce effective collaborative problem solving” (328). In her assessment, “new governance scholarship is at best vague about the processes for developing a group’s capacity to engage effectively and enabling them to participate as ‘equals’ in the deliberative process” (331). Reciprocally, Sturm’s concerns may create new opportunities for negotiation trainers and *Fieldbook* contributors to design and facilitate something that sounds like democracy or governance training.³⁰

But let me make clear that my aim in describing the sorts of negotiating subjectivities that emerge from a close reading of the *Fieldbook* is less about hypothesizing why some new governance projects may fail (that is, the people they require, at least at the scale they require them, do not exist) or in prescribing techniques to make these projects (and people) work better.

³⁰ Training in “democracy skills” particularly in developing and transitional countries is a trend long underway. For examples, see Bianchi (1997); Matchavariani (1997); and the work of Partners for Democratic Change more generally, www.partnersglobal.org (accessed Oct. 8, 2007). Whether people can learn to become collaborative problem solvers strikes me as beyond clear empirical verification. A search nonetheless of social science literature on negotiation training reveals some affirmative links between collaborative negotiation/conflict resolution training and individual orientations and capabilities. See Coleman and Lim (2001); Stevahn et al. (2000); Stevahn et al. (1996); Johnson and Johnson (1996); Johnson et al. (1994); for more mixed results see Bendersky (2007); Gauvin et al. (1990).

Instead, in reading negotiation and new governance in tandem, I want to propose in this part that their relation sheds some critical light on questions of power within new governance schemes.

The final layer I add in this part is that negotiation scholars and new governance scholars also share an idea that individual interest-bearers can reconfigure and achieve their interests through social interaction in ways that collectively chip away at extant power hierarchies. In fact, new governance scholars place greater faith than many negotiation scholars in the potential for new negotiated configurations of individual and collective interests to neutralize entrenched power hierarchies. I thus begin by setting forth some basic criticisms and defenses of the claim that negotiated processes can be equality enhancing. I then reinsert the idea that institutional processes themselves influence people's interests and self-understandings in an effort to resist what easily emerges as a debate among process choices alternatively more or less suited to advancing the interests of particular disadvantaged groups. Building on this idea, I suggest that a focus on subjectivities as they are shaped by new governance institutions enables alternate perspectives from which to consider the ways in which making people into problem solvers -- even with an intention of challenging power -- is itself a practice of power that is not innocent of distributional effects. I thus propose a more ambivalent and more micro inquiry.

Common Distributivist Criticisms and Defenses of Negotiated Processes

Negotiation Literature

One basic distributivist challenge to negotiation is the claim that rights protect the weak over the strong, while negotiation exposes the weak to the power of the strong. Most succinctly put, critics argue that strong parties come to the negotiation table armed with greater resources, information, and thus willingness to hold out for a settlement that maximally serves their interests (e.g., Fiss 1984, 1076). Critics also argue that weak parties may generally feel less entitled to make claims on their own behalves (Grillo 1991, 1564-65). Moreover, critics submit that on balance rights-based, formal, and adversarial processes provide fewer systemic opportunities than extralegal collaborative processes for material and social inequalities to distort outcomes in favor of the strong (see generally Fiss 1984; Delgado et al. 1985; Abel 1985; Nader 1995; Nader and Grande 2002).³¹

When faced with this (quite complex) claim, negotiation theorists, as represented in the *Fieldbook*, typically offer a twofold response. The first part might be described as "internal": negotiation theorists will often suggest that what appears to be an inequality of interests, options,

³¹ In fact, with marked parallels to contemporary new governance debates, the alternative dispute resolution movement in the 1970 and 1980s, of which negotiation was an integral and evolving part, was framed by proponents in terms of extra-legal activism and citizen empowerment, and by critics in terms of a scaling back of hard-won civil rights, decreasing state responsibility, and reinforcing the status quo through an illusion of voluntary action. For an overview of this history and a far more detailed account of the criticisms levied at alternative dispute resolution and negotiation theorists see A. Cohen (2006, 301-309). New governance theorist Susan Sturm notices some of these parallels. In a footnote, she writes: "another way of posing the question [what keeps problem-solving processes from replicating power dynamics] is to ask how this more dynamic approach avoids the valid criticisms of alternative dispute resolution and negotiated rulemaking" (2001, 490, note 97).

or alternatives is not, in fact, fatal to producing mutually beneficial outcomes through dialogue. This is because, as I have illustrated, many negotiation theorists centrally hold that an individual's interests are not necessarily fixed prior to a negotiation, to which I would now add, including by her or her negotiation opponent's location in a social hierarchy; individuals can and do reconstitute their interests through social interaction and exchange. Accordingly, many negotiation theorists and *Fieldbook* authors reason that an individual's capacities to draw stronger counterparts into mutually beneficial agreements can be significantly bolstered through technique (Korobkin 2006; see also Lax and Sebenius 1986)³² and through procedural interventions such as third-party facilitators who provide bargainers with information (cf. Sally and Jones 2006, 92) and encourage bargainers to use reasonable and defensible criteria (Honeyman 2006, 587). Hence, these negotiation theorists hold that *ex ante* bargaining inequalities may be transformed through the bargaining process itself.

Within this internal frame, law functions as a knowable, normative, but not terribly important, default around which negotiators construct their agreements as well as the outer limits of permissible negotiation behavior (in the *Fieldbook* see Korobkin, Moffitt, and Welsh 2006). Legal rules, in other words, here are, or should be, minima; things that one aspires to move beyond in order to engage in creative and dialogic problem solving that draws on expansive forms of social knowledge to satisfy human needs and desires at multiple levels (e.g., Menkel-Meadow 1984). In this sense, as Alberstein (2002, 301) puts it, "the negotiation people could be considered radical, anti-foundational, leading a revolution in the legal discourse."

Negotiation theorists also offer a second response to the distributivist challenge that I will refer to as "external." Negotiation theorists generally argue that in the event that inequalities of interests or capacities really are insurmountable, or if parties persistently perceive their interests as fixed, incommensurable, and thus nonnegotiable, then the lower-power party is better off engaging legal and even court-centered processes.³³ Thus although several *Fieldbook*

³² More specifically, *Fieldbook* author Korobkin (2006), and earlier Lax and Sebenius (1986), reject attempts to conflate "power" in negotiation with social goods like resources, prestige, and hierarchy. These authors emphasize potentially independent strategies to persuade one's opponent to prefer a concession rather than risk forfeiting an agreement (Korobkin 2006) and to influence the range of possible agreements to advantage one's interests (Lax and Sebenius 1986, 249-258).

³³ In addition to the "internal" and "external" responses I have sketched here, negotiation theorists also challenge the claim that rights-based, adversarial, and/or legal processes benefit the strong over the weak and the comparative claim that they do so more often than negotiation (or than facilitated processes of negotiation such as mediation). In the *Fieldbook* see Bernard (2006, 257-58); see also Kelly (2006, 307). For the most part, these debates are cast at high levels of prediction and abstraction. There are, however, some systematic efforts to test these claims in the context of court-annexed mediation processes. A comparative study by Craig McEwen and Richard Maiman (1981, 257) reports that parties are somewhat more likely to evaluate outcomes as fair in small claims court mediation than in adjudication. For an overview of several other studies finding that parties prefer mediation or alternatively prefer litigation/arbitration on various grounds, see Welsh (2002, 179, note 1, 185, note 32). A small number of studies compare actual monetary outcomes in mediation versus litigation. Two studies (LaFree and Rack 1996, 788-94; Bohmer and Ray 1994, 232) present some qualified and context-specific

contributors recommend a considered presumption in favor of negotiation (Menkel-Meadow, Blum and Mnookin, Bingham, and Bernard, for instance), many negotiation theorists hold that if power cannot be diffused through dialogue, then forums in which law is made explicit (rather than as the background rules against which parties bargain) provide important safeguards to the limits of pragmatic problem solving. For example, *Fieldbook* author Phyllis Bernard (2006, 259) calls upon other negotiation scholars “to question the idea that negotiations operate -- or ideally should operate -- outside the ambit of law.” “Negotiated agreements,” she argues “between parties of grossly unequal bargaining power must track established legal principle” (259). To take an earlier example, in an article responding to claims of substantive unfairness in divorce mediations, dispute resolution scholars Craig McEwen, Nancy Rogers, and Richard Maiman (1995) advocate for the presence of lawyers in divorce mediations in order, as they argue, to increase the likelihood of fair processes and outcomes. Other negotiation theorists broadly interpret conflicts that involve differences of value, morality, and ideology (whether or not these also track bargaining inequalities) as amenable to adversarial and rights-based paradigms (Thompson 2001, 100-101; Ury, Brett, and Goldberg 1988, 16-18).³⁴ Thus some negotiation theorists aim to defuse their critics by representing negotiation itself pragmatically -- as one among many techniques rather than a consistently privileged methodology.

New Governance Literature

New governance theorists, who typically take large-scale and ongoing instances of deliberative policy making as the basis of their theorizing, face strikingly similar critiques; for example, that “the governance paradigm tends to bracket power asymmetries and to view the public sphere as a rather depoliticized arena of collaboration among generic ‘stakeholders’” (Rodríguez-Garavito 2005a, 209).³⁵ One standard new governance response closely approximates the “internal” position in negotiation literature and is similarly rooted in a pragmatist conception of subjectivity; namely, that against background conditions of uncertainty and complexity individual and social interests become disoriented and “‘strong’ actors cannot rule out the possibility that they will come to depend on solutions discovered by ‘weak’ ones” (Gerstenberg and Sabel 2002, 293, quoted in Lobel 2004, 461), nor can strong actors rule out the emergence of unexpected alliances among “haves with the have-nots against another faction of the elite” (Dorf and Sabel 1998, 409). Moreover, as in negotiation literature, this internal position is bolstered by arguments about procedure. New governance theorists, for example, call for “procedures that ensure that parties’ interests and externalities are taken into account, negotiation processes are adequately structured, and the bargaining power of stakeholders is

evidence suggesting that women and minorities may far less well in mediation than litigation. One (Hermann et al. 1993, 116-17) finds that minority claimants and respondents reported higher satisfaction with mediation than adjudication, yet received less favorable monetary outcomes in mediation than in adjudication.

³⁴ For a detailed exploration of negotiation’s limitations and applications to conflicts involving ideology and values, see Avruch (2006b).

³⁵ Other distributivist challenges to new governance paradigms emerge from literature critical of deliberative democracy. For citations to this literature, see Cohen and Rogers (2003, 255, note 16).

addressed” (Lobel 2004, 379). Dorf puts it similarly: one “answer to the problem of power imbalances is, frankly, to attempt to remedy them through procedural rules” (2003, 958).³⁶

Mapping an “external” response in new governance literature is more complex. New governance proponents minimize law’s ability to serve as an external and substantive check on bargaining inequalities insofar as they desire to conflate law enactment and law enforcement and cast both in a procedural light (Sabel and Simon 2006, 398, 400).³⁷ What this means “in practice” is that law in new governance schemes would cease to circumscribe behavior by setting specific standards in advance (law enactment) and measuring deviation from these standards (law enforcement). Instead, law would organize the environment, incentives, and criteria to evaluate ongoing and reciprocal deliberative processes. New governance proponents thus eschew arguments that privilege law’s formal and trump-like qualities as a means of preventing law’s disintegration into “politics.” In proto-legal realist fashion, Sabel and Simon, for example, argue that this rule-following view fantastically overstates the completeness, coherence, and democratic accountability of law. Rather than perpetuate this fiction, they argue that a more appealing model of social problem solving involves enlisting creative exercises of regulatory discretion, provided these exercises are produced through rigorous deliberative processes, which are in turn circumscribed within procedural legal frameworks (400-407; see also Dorf 2003).

Be that as it may, some new governance theorists nonetheless propose external responses to problems of power asymmetries analogous to that of negotiation theorists. Briefly summarized, this view holds that by leaving certain forms of law stable (e.g., entrenched, substantive, binding, and justiciable in advance), law can both complement and serve as a minima against which experimentalist governance projects take shape. Law’s constraining force (real or perceived) features in these accounts as both a positive incentive for new governance innovation and experimentation and a negative check on unprincipled exercises of power within these processes.³⁸

³⁶ Like negotiation theorists, new governance theorists also question the claim that rights-based, formal, or adversarial processes necessarily benefit the strong over the weak and the comparative claim that they do so more often than negotiation or other horizontal and informal processes. See Dorf (2003, 957); see also generally Simon (2004, 145-173; 1985, 388).

³⁷ Thus Sabel and Simon write: “new governance repudiates the rule of law...mostly fundamentally by disrespecting the distinction between enforcement and enactment” (2006, 400).

³⁸ The relationship between law and new governance is an increasingly important area of inquiry within new governance scholarship and, as such, is far more complex, dynamic, and evolving than I am representing here. First, scholars appear split on whether new governance approaches work for some problems but not others or whether they comprise “a global competitor [to legal liberalism] that could occupy the entire field” (Simon 2004, 206). Relatedly, some scholars appear to suggest that “law” might retain a substantive function as a prior directive to settle contested questions where, as Garrett and Liebman appear to propose, “experimentalist remedies exist alongside [a rights-centered approach] so nothing is lost” (2004, 320-21). Conversely, other scholars would restrict law to operating as procedural mechanisms of review or as enforceable incentives to engage in and/or penalties to police deliberative processes. As Búrca and Scott explain: “On these accounts, law may play a crucial role in shaping the institutional

Other new governance theorists, however, and most prominently Sabel and Simon, find this split position conceptually troubling. Stressing law's ambiguities, limitations, and discretionary capaciousness in the first instance, they argue that a more plausible account, normatively and empirically, is the mutual transformation of law and governance in an "ex ante unknowable world" (398-402, 404). Hence, Sabel and Simon propose legal rules and rights whose meanings and applications are not fixed *ex ante* but rather both depend on and are held accountable by processes of peer review. Processes of peer review are in turn legitimate, not because their results conform to "prior legislative decision," but because they are transparent and open "to directly deliberative participation by affected stakeholders" (402).

What is important to make clear is that this sort of transformation brings us full circle in terms of confronting the problems of inequality. When new governance theorists apply the legal realist insight that law is indeterminate in order to transform law itself, the external becomes internal -- that is, liberal legal models give way to decentered, flexible, dialogic, and pragmatic models of problem solving as society's default mode of dispute resolution. Deploying law as a substantive check on power thus becomes not only a second-best but perhaps also a conceptually incoherent strategy as new governance theorists aim to subject law itself to citizen-driven and dialogic processes. This ambition makes the resources, capacities, skills, and strategies of those who participate in these dialogic processes a critically predictive source of influence.

How then do "strong" new governance proponents respond to the distributivist concern that preexisting inequalities shape the outcomes of deliberative processes if, as sociologist Boaventura De Sousa Santos (2005, 37) suggestively writes, "all the power there is derives from belonging to the governance circle"? Dorf and Sabel (1998) make the following start. With clear parallels to negotiation literature, they distinguish between criticisms they label the "bargaining disadvantage of inequality" and those they label the "disenfranchisement effect of inequality" (409). Bargaining disadvantages are situational; these refer, for example, to the fact that wealthy parties can hold out longer than poor parties for preferable outcomes and, as a result, are consistently advantaged in negotiation processes. Their practical response to bargaining disadvantages is the already familiar negotiation technique of encouraging individuals to reorient their self-interests and build unexpected alliances around these new configurations of interests, aided, where possible, by background conditions of diversity and uncertainty (409-10).³⁹

environment in which decisions are reached, but it does not specify the need to achieve specific, pre-conceived goals. And even the procedures established by law may themselves be seen as self-consciously provisional and imbued with the logic of reflexive adaptation. Even if proceduralisation is understood to operate against a backdrop of existing principles and standards, these are not necessarily conceived of as fixed or rigid standards, but rather are themselves open to interpretative evolution. Thus the transformative nature of law is built into its design" (2006, 10). For more nuanced descriptions of the various typologies of new governance approaches to law, see Búrca and Scott (2006); Sabel and Simon (2006).

³⁹ Dorf and Sabel write: "The pursuit of new alliances can reveal novel solutions to complex problems, just as the exploration of novel solutions can give rise to new constellations of harmonious interests.... These possibilities are likely to be especially salient in periods of disorientation.... Alliances and confusion do not nullify the bargaining disadvantage of

Disenfranchisement effects are different. These refer to a theory that individuals or groups worn down by poverty and disadvantage become desperately self-interested, suspicious, and short-sighted and therefore lack the capacity and imagination to capitalize on opportunities for their own material and political improvement (409, 410). This is perhaps what *Fieldbook* author Kelly (2006) describes when she discusses how historically disenfranchised native title claimants in Australian land negotiations “come to the negotiation with a mindset of disempowerment” (305). Or, in more extreme form, what Dorf and Sabel (1998) describe as the argument that the “degradation of slavery...reduce[s], even eliminate[s], the capacity of the slave to revolt or even to seize the advantages of manumission” (409). Dorf and Sabel respond that the presence of such effects, at least in terms of their impact on negotiations, are more speculative than real (“the facts repeatedly find against this effect”) given ample historical evidence to the contrary: serfs, slaves, and peasants maximizing opportunities to make themselves better off (410-11).⁴⁰ In Dorf and Sabel’s words, “there is strong counterevidence to the claim that one of the consequences of oppression is to make it impossibly difficult for the oppressed to take advantage of new opportunities, including experimentalist ones that might be thought especially demanding” (411). They pose no explicit corrective for disenfranchisement effects and elsewhere state one of their aims as “fostering participation (and the learning it occasions) by those usually held incapable of it” (328).

Towards an Alternative Critique: Interests, Skills, and Selves

But *how* exactly might one do the work of fostering participation “by those usually held incapable of it?” (328). In this section, I propose that reading new governance as an institutionalized or structural iteration of the negotiation project not only makes visible the ways in which new governance scholars are engaging in pedagogical processes of self-transformation, but also illustrates how attention to subjectivities as they are shaped by institutions suggests an alternative set of perspectives from which to consider questions of distribution and inequality that critics once leveled at negotiation and dispute resolution scholars, and now may more pressingly aim at new governance scholars. Building on Dorf and Sabel’s distinction between “disenfranchisement effects” and “bargaining disadvantages,” I argue that making people into problem solvers (at least from the perspective of undermining entrenched hierarchies) is not assuredly a win-win proposition; the reason why, I suggest, has a lot to do with the logic of negotiation skills themselves.

Turning first to disenfranchisement effects, Dorf and Sabel’s analysis elides inquiry into the ways in which conditions of oppression *do* intersect with new governance’s self-governing

inequality, but they can transform what might appear to be an insurmountable obstacle to any but radically redistributive reforms into one of the many considerations that would need to be addressed by experimentalist means in making participation in experimentalist deliberation as fair and comprehensive as it can be” (1998, 409-10).

⁴⁰ Dorf and Sabel’s examples include English serfs in the aftermath of the Black Death, U.S. slaves during the Civil War, twentieth-century peasants in Mexico, Vietnam, and Peru, and poor neighborhoods in Chicago that in recent years successfully managed new community policing institutions (1998, 410-11).

aims *and* the ways in which new governance scholars themselves hold particular ideas about how individuals are disenfranchised and therefore susceptible to particular efforts at self-transformation and change. To demonstrate how both these factors are present yet occluded within new governance literature, let me briefly foreground some examples embedded in the background of Dorf and Sabel's text.

First, although it is surely correct, as Dorf and Sabel assert, that desperately impoverished people can and do self-imagine and instrumentally achieve better lives, this assertion offers little by way to suggest incidence, prevalence, or rate, or more basically any definition of knowing when resistance happens or how to evaluate it when it does. In fact, where Dorf and Sabel see instances of oppressed people (serfs, slaves, peasants) acting with autonomy, it is equally possible to see acts of resistance that are far more ambiguous and difficult to decipher. Take, for example, slaves. For the point that during the Civil War "many slaves fled the plantations, often to the amazement of masters who sincerely believed them incapable of imagining autonomy," Dorf and Sabel cite historian's Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (410-411, note 453). More specifically, they reference Genovese's insights "on the interdependence of masters and slaves, and especially the possibilities for autonomy of the latter at the time of the Civil War" (411, note 453).

But among the complex aims of his eight hundred page history, Genovese (1974) is engaged in a comparative project to explain why "the slaves of the Old South, unlike those of the Caribbean and Brazil, did not take up arms often enough or in large enough numbers to forge a revolutionary tradition" (587). In place of either rebellion or acquiescence, Genovese describes a far more complex (and quite controversial) "dialectic of accommodation and resistance" (587). I proceed with caution in describing Genovese's thesis, which is the subject of decades of acclaim, debate, and critique. But at minimum it appears that he is theorizing how a particular kind of disenfranchisement -- one he argues was produced by slaveholders who transformed "a system of class rule" (3) into a form of cultural hegemony through the justificatory logic of paternalism -- made particular forms of resistance (everyday, individuated, defensive) more possible and made other forms of resistance (revolutionary, political, class-based, libratory) less possible.⁴¹ Or as Genovese explains, "despite [the] will and considerable ability [of black leaders and preachers], they could not lead their people over to the attack against the paternalist ideology itself" (6). In other words, Genovese, far from demonstrating slave "autonomy" or resistance in any straightforward way, is theorizing how dominant ideologies constrain and enable resistance in forms that, although significant, are also often incomplete and *adaptive* precisely to these ideologies.⁴² This reading of Genovese does not dispute Dorf and Sabel's minimalist claim that oppression does not "make it impossibly difficult for the oppressed to take advantage of new opportunities" (Dorf and Sabel 1998, 411), but it does illustrate some real problems with any quick or easy analysis.

⁴¹ As Genovese writes (on the pages that Dorf and Sabel reference in 1998), "the attitudes of the slaves grew out of the adjustment they had made to a paternalistic relationship, *within which* they had defined their role in their own way" (1974, 132, emphasis added).

⁴² This is perhaps why, according to historian Steven Hahn, "more than a few [leftist historians] felt that *Roll, Jordan, Roll*, [Genovese's] book on 'the world the slaves made,' was too much about the world the slaveholders made for them" (2006, 29).

Second, stating, as Dorf and Sabel do, that oppressed people are not forever circumscribed by structural inequalities (perhaps because they have clever and creative tools to achieve better ends) is not the same as a project designed to give people rather particular tools and self-understandings to achieve their ends through collaborative and experimental means. In fact, where Dorf and Sabel proffer evidence of self-possessed change, they could just as easily have proffered evidence of top-down, didactic influences shaping the methods and directions of such change. Take, for example, peasants. For the argument that peasants “responded to land reforms offering secure tenancies by making effective use of the new opportunities,” they cite political scientist Cynthia McClintock, *Peasant, Cooperatives and Political Change in Peru* (411, note 455). But McClintock (1981) offers an account of government strategies to *induce* new behavioral and attitudinal orientations among peasants. She examines efforts by the left Velasco government in Peru between 1968 and 1975 to promote an ethos of “self-management” and new participatory and collaborative orientations among Peruvian peasants (3, 14). Adopting an unabashedly disenfranchised (“cowed and atomized”) (319) description of peasants as a baseline for analysis, McClintock describes complex (and partially successful) processes of self-transformation.⁴³

Like the Peruvian government’s intentional efforts to forge a ““new man”” (20), new governance scholars also envision a particular sort of person: one who flourishes through surprise, finding possibilities in alternate conceptions of one’s interests and ends and thus forging unexpected alliances across differences. Against this pragmatic ideal, it becomes hard to think of everyday citizens as anything but somehow ideationally disenfranchised—if not to be bypassed then somehow to be improved and their interests reoriented. In fact, despite Dorf and Sabel’s assertion that oppressed people are, in significant ways, *not* disenfranchised in terms of their abilities to negotiate better lives, it is precisely the pragmatic and collaborative negotiation capacities that Dorf and Sabel describe as foundational for the weak to counteract bargaining disadvantages that other new governance scholars find missing in ordinary individuals.

This is perhaps why new governance collaborators Archon Fung and Erik Wright (2003c) resort to a discourse of pedagogy and skills in their case study analyses widely cited in new governance literature. Here is how Fung and Wright describe three actual local democracy experiments: participatory budgeting in Porto Alegre, Brazil, school reform in Chicago, and decentralized planning in Kerala, India:

Each of these experiments contributes to the political development of individuals by providing specialized, para-professional training. Leading reformers in each of our experiments realized, or learned through disappointment, that most non-professionals

⁴³ What McClintock (1981) learns by comparing three Peruvian agrarian cooperatives over time and with a fourth unorganized village (16-17) supports her thesis that peasants can transform their attitudes and behaviors in response to new incentives (20). But her data equally reveals the limitations of the Peruvian government’s efforts to make a ““new man”” (20). McClintock describes how the same peasants who transformed hierarchical and deferential orientations into more collaborative and assertive ones within their cooperative “did not seem to worry whether or not satisfaction of their needs would hurt other peasants in the area [outside of the cooperative], or whether or not their action would damage the cooperative movement as a whole and thus potentially the Velasco government as well” (18).

lack the capacities to participate effectively in functionally specific and empowered groups. Rather than retrenching into technocratic professionalization, however, some have established procedures to impart the necessary foundational capacities to participants who lack them. (29)

We learn about these foundational capacities in mostly general terms -- skills in “democratic process,” for example (29). Yet if, as Lucie White reminds us, “ordinary people are [neither] passive consumers of dominant ideology, [nor] self-possessed masters of their fates” (2000, 147), then as new governance professionals consider ways to enhance the capacity of marginalized citizens to participate effectively in participatory democratic projects -- not through redistribution or regulation but rather through the acquisition of skills -- these professionals are already making normative decisions about which individual self-capacities should become more enfranchised.

Taking *these* disenfranchisement effects seriously -- that is, all the implications that flow from the fact that not all existing people are already the sorts of pragmatic, democratic, collaborative negotiators that new governance projects envision -- involves less a blanket theory of oppression or victimization than a critical assessment of how new governance efforts to empower citizens to instrumentalize their interests and achieve their ends are also themselves practices of power intended to shape and constrain these interests and ends. And here is why. Collaborative negotiation skills have their own internal logic: the interests people should hold are those interests maximally likely to seduce the collaboration of others because they serve a mutually advantageous good within and across extant power hierarchies. Or to frame this another way, one of the greatest benefits -- but simultaneously greatest costs -- of these skills is that they are purposefully designed to shape individual interests in ways that are strategically adaptive to existing social and power relations.

Turning now to Dorf and Sabel’s response to the criticism they label “bargaining disadvantages” allows me to illustrate this point. Recall that like negotiation proponents, new governance proponents reason that bargaining disadvantages can be minimized by the fact that people’s conception of what serves their good can and does change through the course of dialogue, reason-giving, and public debate. Why would those in power welcome these shifts? Shifts happen when those with more power come to see mutual collaboration with those with less power as serving their interests. This may reflect a preference for altruism or intersubjectivity, but what negotiation and new governance theorists bank on as the more likely explanation is a Tocquevillian insistence that “economic efficiency and democratic legitimacy can be mutually reinforcing” (Lobel 2004, 344; in the *Fieldbook* see Rose 2006). Surely, the argument goes, developers building a dam in an impoverished country should want to create decent living and working conditions for local populations through participatory collaboration rather than face negative publicity and other uncertain impediments to production. Just as surely, the argument continues, local villagers should want to relocate with jobs and compensation provided they capture an equitable share of the distributive surplus rather than face an uphill battle against goliath multinational corporations and continue to live in conditions of economic poverty.

Negotiation and new governance literature is, in this fashion, peppered with examples where the deontologically “right” thing *and* the maximally inclusive thing is also the most efficient and self-serving course of action. For example, describing suboptimal construction that “endangers workers and reduces the value of the finished building,” Dorf and Sabel argue that

“in experimentalist administration, the search for efficiency is incidentally a search for regulatory improvements and vice versa” (1998, 350). This is also Follett’s (1918) driving point (and the driving point of integrative negotiation more generally, see, e.g., Fisher and Ury 1981). To take one of Follett’s many examples, she asks her readers to consider “real estate men” in New York City who are coming to see that their “particularistic building” (111) without consideration for air, light, and the access of others has hurt rather than enhanced real estate values.

Moralists used to tell us that the only path of progress was to make people willing to give up their own interests for the sake of others. But this is not what our real estate men are doing. They are coming to see that their interests are in the long run coincident with the interests of *all the other* members of the city. (111-12, emphasis added)

And as Dorf and Sabel (1998) explain it, the assumption that manifold interests (and interests-bearers) can converge “is but a paraphrase of the liberal credo that freedom is the handmaiden, slavery the mortal enemy, of progress, for self-determination is a precondition of cooperation, and cooperation the condition of joint advance” (405).

In this sense, both new governance and negotiation proponents reason that people’s conception of their interests *should* be inflected with liberal economic logic. And collaborative negotiation skills, again far from objective or neutral constructs, work to reproduce this conviction that collaboration and efficiency are mutually reinforcing values at the level of individual consciousness. In fact, what these skills foundationally teach lower-power parties are techniques to transform their desires and ends into interests (that is, to turn desires for land into desires for jobs and compensation) that, if achieved, can also mutually serve the desires and ends of higher-power parties (and vice versa) better than any other set of alternatives. This is how “joint gains” across power asymmetries become possible.

To return now to Fung and Wright (2003c), when trainers suggest that local people lack capacity to participate in experimentalist forms of governance, I suspect these trainers do not mean (as the disenfranchisement thesis might suggest) that local or oppressed people lack the assertiveness to make demands on their own behalves.⁴⁴ To the contrary, I suspect what they at least in part see as missing is the capacity that Dorf and Sabel (1998) appear to theorize as most crucial to counteract bargaining disadvantages—the self-possessed ability to orient oneself away from fixed, zero-sum, foundational, rigid or sacred/moral demands, and to instrumentalize one’s understanding of a problem (and of one’s opponents) for flexible, creative, long-term, collective economic and social gain.⁴⁵ In this problem-solving paradigm, the interests and ends with the

⁴⁴ For example, in his study of participatory governance initiatives to improve community policing in Chicago, Fung finds that “residents from poor neighborhoods participate at *greater* rates than those from wealthy ones” (2003, 129).

⁴⁵ Fung and Wright, for instance, suggest that in contrast to adversarial techniques and perspectives: “participatory collaboration...requires much less rigid diagnostic, prognostic, and therefore motivational cognitive frames. Decentralized governance activities...aim in large measure to discover and test hypotheses about the complex causes of public problems and create, on the fly, locally tailored solutions to those problems. Rigid diagnoses and prognostications inhibit this flexible problem-solving” (2003b, 282). In a later work, Fung highlights training

least utility are those that refuse to transform themselves into forms of capital that can be traded, supplanted, or enhanced by other interests and ends. And the most skillful players in these pragmatic games (especially those who cannot make use of law or force to achieve their ends outside of negotiation) are players who are persistently and strategically willing to turn what they thought was an end into a set of far more manageable interests or means. Negotiation skills, to put it baldly, hold a particular and centripetal effect on the sorts and range of self and social change we think possible.

To be sure, the diffusion of problem-solving negotiation skills opens up new kinds of possibilities and forms of power for those who possess these skills to reconceptualize and actively, even subversively, achieve their ends (cf. Dominguez 2005). My point here, however, is that negotiation and new governance theorists pay insufficient attention to the ways in which these skills aim to enable individuals to hold certain kinds of ends (those ends that can be turned into means to seduce the collaboration of others across power hierarchies) and, at the same time, aim to discourage them from holding others.

The potential consequences of this occlusion become particularly salient when the background conditions against which individuals negotiate are at the outset unequal. This may be because, to return to Genovese's Gramscian argument, material and social inequalities shape the ways in which people conceptualize their desires and their ends. To take an example from the *Fieldbook*, Nancy Welsh (2006, 170) reports that people in a negotiation "who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, even if it is unfavorable [to their distributive interests]." Yet Welsh also proffers evidence to suggest that in negotiations between parties of unequal status, "the lower-status negotiator is more likely to be satisfied with an unfavorable outcome, as long as she is treated in a procedurally just manner," whereas the higher-status negotiator is "less likely to allow process fairness to soften the blow of an unfavorable outcome" (171). Although Welsh does not draw conclusions in regards to this data, it is not unreasonable to hypothesize that subordinated people place greater value on dignitary goods like procedural fairness than powerful people because they are less likely than powerful people routinely to receive them -- a valuation that, in turn, might not always serve their distributional good.⁴⁶

Or this may be because structural inequalities and long-enduring rules, even if they do not shape individual interests and desires on a deep or intrinsic level, tend nonetheless to inform what interests and ends are sensible for pragmatic people to hold -- that is, the sorts of interests and ends that when instrumentalized stand a persuasive chance of producing actual material change. Consider, to draw on work by political theorist Clarissa Hayward (2006), how

programs for Chicago citizens and police professionals in "communication, problem solving, alliances, goal setting and ethics" (2004, 73). Dispute resolution scholar-practitioners Lawrence Susskind and Merrick Hoben (2004) draw on their experience to make a similar point: "unfortunately, most stakeholders in growth management dialogues [about metropolitan growth and development] enter with little previous negotiation experience. As a result, they expend most of their energy defending their own turf...we have found it helpful to provide stakeholders with some negotiation training before they begin" (133-34).

⁴⁶ See, for example, Jon Elster's exploration of the ways in which "one's possibilities" may "shape one's wants" (1983, 118) or Amartya Sen's rejection of desire-fulfillment as a primary measurement of individual well-being (1999). My thanks to Liz Emens for pointing me to these sources.

differently citizens' negotiation strategies might look to increase the amount of public expenditures devoted to education in the United States depending on how local jurisdictional lines are drawn and whether local rules about residency requirements and property taxes are fixed as bargaining defaults or suspended at the outset of dialogue. In the context of local government, Hayward argues that current institutional arrangements make interests in "managing" the status quo the most practicable, intelligible, and achievable interests for lower-power parties to hold. She argues persuasively that alternate institutional arrangements might enable lower-power parties to formulate practicable and intelligible interests in eradicating status quo inequalities.⁴⁷

Thus a collaborative social project that aims to challenge extant power hierarchies by enhancing the capacities of stakeholders to act on their own behalf may evade a critical assessment of the ways in which negotiation skills and strategies (and the interests they produce) are already inflected with the effects of inequality. To that end, consider Fung and Wright's (2003b) proposal to develop a local praxis of "collaborative countervailing power" (261) within new governance schemes; *collaborative* because they aim to arm local groups with "skills, sources of support, and bases of solidarity" (266) oriented around an effort "to solve problems

⁴⁷ That there is a relationship between background rules and bargaining asymmetries (if not interests themselves) is hardly news to new governance proponents. Many, in fact, favor limited measures to manipulate background rules. One common example, what Karkkainen (2006, 295-6) calls the "regulatory penalty default," aims to induce parties to disclose information. Depending on how information asymmetries cut, these penalty defaults can have predictable effects in ameliorating some social inequalities among negotiating parties. Other measures aim to induce stronger parties to negotiate. Simon (2004, 185) offers instances of rules giving disadvantaged groups "strong rights to block settlements negotiated in their absence." New governance scholars, however, tend to leave opaque the question of more substantive reallocations of bargaining endowments. For example, Simon (2004) supposes that a policy maker, considering whether to support negotiated governance initiatives, could first enhance the weaker party's alternatives to a negotiated agreement or directly transfer "resources or organizing assistance" to that party (207-08). He then proceeds to suggest that the "Pragmatist tends to respond to...the policymaker by emphasizing the indeterminacy of the situation...and more often than not, it is impossible to reliably assess [the] relative magnitude [of the risks and potential benefits of negotiating] in advance of entering into the negotiation" (208). Dorf and Sabel (1998) caution that to the extent a redistribution of resources is, in fact, a viable means of producing social change, it is only as effective as experimental and efficient capacities of its beneficiaries to put it to good social use; "resources only count (and attract additional resources) if effectively applied, and democratic experimentalism, we have been arguing, is the way to determine how best to apply them" (412). Illustrating the point, Liebman and Sabel (2003) offer examples of intrastate efforts to equalize school financing across school districts through litigation where "even in poor districts where finance equity suits increased per pupil spending, no or disappointingly little educational improvement occurred" (204). Others such as Cohen and Rogers (2003) make a stronger claim: when background conditions of uncertainty appear unlikely to unravel power differentials, and when deliberation is aimed at matters of "distributive or redistributive politics," then, they argue, "gaining the benefits of deliberation may well require direct efforts to address inequalities of power" (251-53).

rather than to win victories” (261); *countervailing* because Fung and Wright desire these groups to nonetheless undermine the potential for dialogic processes “to favor entrenched, previously organized, or concentrated interests” (263).

As a blueprint for social action, compare Fung and Wright’s proposal with what democratic theorists and new governance critics, Boaventura de Sousa Santos and César Rodríguez-Garavito describe as projects of “counter-hegemonic globalization” (2005b, 3). Their legal realist bent tends more towards politicizing than proceduralizing law. As a result, their participatory projects appear driven by the conviction that the interests of excluded populations must be sufficiently politicized through (if necessary, contentious) collective action *before* they can become subject to legal/problem-solving processes (8-9, 15-16). Santos and Rodríguez-Garavito are thus largely eclectic about strategies. In the context of antisweatshop struggles, for example, Rodríguez-Garavito (2005b) presses social movements to shift pragmatically among legal, extralegal, confrontational, and collaborative strategies as nimbly as those on top, he argues, continue to shift among harder (e.g., property rights) and softer (e.g., labor standards) legal regimes as it serves their interests (77-85).

Fung and Wright, by contrast, who call for “the slow transformation of traditional adversarial organizations” (2003b, 284), are less optimistic about developing social movements with hybrid adversarial and collaborative capacity. They fear that this split orientation may be beyond the receptive capacity of many (although certainly not all) social organizations. But if negotiation skills that empower individuals to destabilize their ends and “discover the broadest commonality of interests” (261) are themselves practices of power, then even Fung and Wright, who aim to correct power asymmetries within new governance schemes, may pay too little attention to the dangers embedded in encouraging individuals to do what Follett calls “*breaking up wholes*” (Fox and Urwick 1973, 11, emphasis in original), Fisher calls “fractionating” (1964, 920), and Sabel describes as placing “identities at risk” to change one’s view of what is possible (2004, 21).

Let me conclude this section by observing that new governance theorist William Simon (2004) notices a very different problem with Fung and Wright’s proposal to develop collaborative countervailing power: “that that task would seem to require something like the weighing of interests that Legal Pragmatism sought to avoid through deliberation. How can we decide which underorganized groups and interests should be given support and how much support they should be given without some weighing of interests?” (210). Although Fung and Wright have many allies within new governance circles, Simon is right that their thesis is at best a conceptually uneasy fit: Fung and Wright prioritize the production of particular and “fixed” ends prior to dialogue -- namely, undermining entrenched power hierarchies. But what I have argued here is that *all* new governance theorists prioritize the production of particular ends *ex ante* -- namely, the self-transformations of individuals with pragmatic, collaborative, instrumental, and self-managing conceptions of their desires and interests. These ends are produced (1) through negotiation’s technologies of self and (2) through the agentless but not powerless dialogic processes that deploy these technologies. Thus the Legal Pragmatist’s aversion to weighing interests by recourse to deliberation appears implicated long before any explicit decision is made to support any underorganized group.

Towards an Ambivalent Inquiry

One final way of framing my argument is that interests, structures, skills, and selves all interpenetrate each other. The interests individuals hold are not simply, as negotiation and new governance theorists correctly observe, a function of social interaction and dialogue. The interests we hold may also be products of structural inequalities and hierarchies; moreover they may also be products of negotiating skills (and the institutions that diffuse them) insofar as these skills encourage us to prioritize interests that are purposefully adaptive to existing social hierarchies. Thus the negotiation/new governance conviction that individuals can reconfigure their interests through dialogue in ways that undermine structural inequalities, while surely possible, also appears to assume a more complete relationship between interests and dialogue than may, in practice, be the case.

There is some irony here: new governance scholars typically see the interpenetration of traditionally distinct and bounded things (public/private, state/market, legal/extra-legal) as a source of emancipatory hope -- a means to surmount binary relations and to produce new expansive social possibilities (Lobel 2007, 982-83; 2004, 442-49; see also Cohen and Sabel 1997, 315). Yet I believe that it is precisely this failure to theorize the mutually constitutive relations among interests and structures, skills, and selves that prompts concern in relation to new governance projects. In light of current devolutionary state policies, Left voices -- equally committed to promoting participatory democracy -- nonetheless worry that collaborative and pragmatic processes of governance, invariably inflected with the forces of market rationality, may reproduce adaptive and/or self-serving and factional interests at the level of the individual and, as a result, even greater shrinking accountability and responsibility at the level of the state (see, e.g., Santos and Rodríguez-Garavito 2005b, 6-9; Hershkoff and Kingsbury 2003, 321-23; Scheuerman 2004, 125-26; powell and Spencer 2003, 348-49).⁴⁸

And as others have noted, the techniques and skills of self-management and personal transformations are now quite similar on the left and the right. As Santos (2005, 43) puts it, “strikingly, the main features of the neoliberal governance matrix are also present in the insurgent governance matrix: voluntary participation, horizontality, autonomy, coordination,

⁴⁸ Or, to put this point a bit differently, Left analysts appear troubled by the confluence of conceptions of selfhood put forth by negotiation/new governance proponents and the flexible, pragmatic, entrepreneurial self engendered by the demands of the new global economy. For example, William Scheuerman (2004) challenges Dorf and Sabel’s (1998, 313) optimistic endorsement of Japanese techniques of flexible specialization, which they claim are “introducing a kind of workplace democracy” (Scheuerman 2004, 125). Against an account of the progressive development of workers’ skills and talents within these firms, Scheuerman draws on Richard Sennett’s *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (1998), and provides an alternative description of flexible specialization as “a mainland of power” and surveillance in which employees “are decreasingly able to develop long-term temporal commitments and attachments, a sense of trust or loyalty, or even coherent personal narratives or interpretations of the self” (Scheuerman 2004, 125-26). Helen Hershkoff and Benedict Kingsbury similarly apprehend a homogenization of identity and an over-emphasis on instrumental self-expression if theories of “network governance” that evolve in industrial/managerial contexts are transposed to communal/social contexts (2003, 321-23).

partnership, self-regulation, etc.” Let me therefore suggest to both negotiation and new governance theorists that the scaling up of the techniques of pragmatic problem solving into the domain of governance deserves a more openly critical inquiry. This inquiry, I believe, is pressing not because there is anything intrinsically negative about working on subjects to help them reimagine themselves or to instrumentalize their desires, or, for that matter, in negotiation skills themselves. It is pressing because there is nothing intrinsically positive about these things, either.

To that end, I am suggesting that negotiation theorists break the habit of presenting the expansion and wide-scale dispersal of negotiation skills as a win-win proposition, and instead consider how, as tools of governance (which is what new governance has shown they are), negotiation produces winners and losers. And by this I do not simply mean, as nearly all negotiation scholars are willing to concede, that not all disputes should be subject to integrative processes of negotiation. I also mean affirmatively to convey something beyond Blum and Mnookin’s (2006) illustration in the *Fieldbook* of the “relevant considerations, both benefits and costs, that a party should appropriately take into account in thinking whether or not to enter a negotiation process” -- a “decision-making framework” that, as they themselves note, already surpasses a bulk of negotiation literature that “has often ignored the possible *costs* of entering into and conducting negotiations” (101, emphasis in original; see also Bingham 2006a).

Rather I mean to suggest that negotiation theorists shift their attention “up” just as Schneider and Honeyman propose. But unlike Schneider and Honeyman, my suggestion includes a challenge to our field to engage in a far more systemic and effects-oriented inquiry of the macropolitical contexts in which negotiation’s technologies of self are being applied. This is an inquiry that I hope will cast some critical (even empirical) light on Schneider and Honeyman’s optimistic assertion that in “many...settings, there is a growing understanding that negotiation can help achieve the maximum results with the minimum long-term cost” (Schneider and Honeyman 2006, 1) -- an assertion that, despite its manifest generalities, is so deeply ingrained within a community of negotiation scholars, that one reviewer of the *Fieldbook* hails it as the *Fieldbook*’s “main message” and “the *raison d’être* of the value of negotiation research in general and of this academic discipline in particular” (Cede 2007, 27).

Evolving a perspective that is at once more macro-oriented *and* more grounded in actual practice would, by contrast, induce us to justify our techniques not simply in terms of theory and prediction but through present and systemic data about effects. This might require, for example, a more careful look at the many settings in which Schneider and Honeyman suggest that gains from negotiations outweigh costs, with the aim of learning, as best as possible, what losses and inefficiencies are being registered, and what losses and inefficiencies -- and for whom -- are getting glossed. Developing this perspective might also spark new insights at the level of practice that enable individuals to link interpersonal negotiations to questions of structural change (see, e.g., Sturm and Gadlin 2007). But beyond producing more robust scholarship (and, potentially, practice), this sort of inquiry is, in my view, also a pressing social obligation. It is far too easy to imagine scenarios in which the more discursive practices such as communication, problem solving, and collaboration are recast into skills, *and* the more these skills become conditions for securing interests, entitlements, and benefits in today’s uncertain regulatory environments, the more responsibility those “who ‘have’ those skills” might be asked to bear for the costs of their own lives (Urciuoli forthcoming).

In parallel but opposite direction, I am suggesting that new governance scholars consider shifting their attention “down” and more explicitly and carefully theorize the ways in which their

normative ambitions involve rather particular, didactic, and substantive processes of self-transformation. In describing negotiation's logic of structural adaptation, I have argued that these didactic processes of self-transformation are in no way guaranteed to lead towards structural change. And although (unlike many negotiation proponents) new governance proponents are expressly political and social in their aims, by casting their vision at the level of institutional design they risk evading a deep engagement with the complex and embedded effects of inequality as these intersect with individual interests, self-understandings, and negotiation strategies. By evolving a microperspective that makes more transparent the norms, subjectivities, and technologies of self that I have argued undergird new governance institutions, the promises and dangers of participatory self-governance may become less occluded.

Of course, it is impossible to *know* in advance of negotiations whether large-scale projects of participatory governance will, as critics fear, precipitate greater inequality and deregulation by co-opting, defusing, or excluding oppositional forces, or will, as proponents hope, instigate a more egalitarian and informed distribution of resources through broad-based, state-supported, and public-private social policies than the current status quo. Yet to the extent that examining the microprocesses of negotiation through which ordinary citizens come to participate in governance offers some insight into the factors that might contribute to the difference between oppressive and emancipatory results, the question, even if unanswerable, is nonetheless worthy of consideration in new governance contexts -- even, or perhaps especially, as new governance theorists aim to evade and collapse Left-Right binaries (Lobel 2004).⁴⁹ Thus, in the spirit of both negotiation and new governance pioneers, let me conclude with an example that recognizes, yet in the spirit of my own ambivalence does not aim to resolve, some of these interpenetrating tensions.

LIVING DOWNSTREAM: A CONCLUSION BY WAY OF EXAMPLE

Here is a brief illustration of the intersection of negotiation and new governance ideas in the applied context of disputes surrounding large dams. In 2000, at a ceremony launched by Nelson Mandela, the World Commission on Dams (WCD) (an independent commission convened and funded by the World Bank and the World Conservation Union) released a report titled: *Dams and Development: A New Framework for Decision-Making*.⁵⁰ The WCD Report—

⁴⁹ Lobel writes: “the obsessive maintenance of traditional boundaries -- including those of public and private, profit and nonprofit, formal and informal, theory and practice, secular and religious, left and right -- is no longer a major concern with the shift to the [new governance] paradigm” (2004, 442).

⁵⁰ The factors that created the conditions for the creation of the Commission and its consensus-based processes are themselves a fascinating story of interpenetrating tensions that reflect power, pressure, and economics. The first major factor is the international antidam movement: an assembly of grassroots and international nongovernment organizations (NGOs). In 1997, the international NGO, International Rivers Network (IRN), along with forty-four other NGOs petitioned the World Bank for a “comprehensive, unbiased and authoritative review of past World Bank lending for large dams” (McCulley 2001, 1460). This appeal came in the wake of several successful campaigns to expose the social and environmental costs of dams the Bank was funding. A second factor, however, may be an effect of privatization. In the 1990s, a

itself a product of consensus-based negotiations among twelve diverse individuals representing industry, government, academia, and environmental and social movements-- announced its aim as “improving the way...decisions are made” (WCD 2000, xxx). The Report confirms many of the claims vigorously argued by antidam activists: that large dams are prone to cost and time overruns; that ecological impacts of large dams “are more negative than positive”; and that the social impacts include the physical displacement of potentially as many as forty to eighty million individuals worldwide (xxxi, 104). The Report then proceeds to propose a blueprint of negotiation and new governance ideas in action: in short, it seeks to resolve contentious and complex development disputes by emphasizing procedure, and requires that decisions about whether and how dams should be built depend (among other things) on context-specific and rolling information about alternatives forms of energy and water management and the careful solicitation of local needs (e.g., 215-224).

The cornerstone of the Report is a participatory and transparent process of negotiation based on “rights and risk” (206). Negotiation-based-on-*risk* is shorthand for the Report’s insistence that not only developers who negotiate about capital risks and returns, but all those who have (social, cultural, economic, environmental) risks imposed on them involuntarily are entitled to participate in decision-making processes (207). Negotiation-based-on-*rights* is harder to decipher. The Report first offers a traditional conception of rights as categorical prohibitions: justiciable, apolitical, grounded in text and that thus provide “a principled basis for mediating development choices among competing interests” (200).⁵¹ It therefore cautions “that a decision to build a dam...must not, at the outset, sacrifice the rights of any citizen or group of affected people” (204). This sort of language makes rights sound like trumps or content-full, hard priors that preempt conflicting public or private interests (see Baxi 2001, 1516). At the same time, however, the Report goes on to state: “where rights compete or conflict, negotiations conducted in good faith, offer the only process through which various interests can be legitimately reconciled” (WCD 2000, 206).⁵² Here, in proto-new governance fashion, rights are a way into the conversation, but once at the negotiation table, rights, like interests, are incomplete and

combination of “shrinking government budgets” (1461) and privatization of state-owned infrastructure meant that more dams were being financed by private investors. Private financing, in turn, placed new pressure on the dam industry to justify its economic profitability (1461-62). Patrick McCully of the International Rivers Network thus argues that as the antidam movement lobbied for an independent review, the dam industry hoped that such a review would provide “justification for new public subsidies” by highlighting ancillary social benefits of dams, purportedly things like “flood control, water supply, and reservoir recreation” (1462), and technology that would not emit greenhouse gases.

⁵¹ These rights “are expressed in law, allowing for their attainment or redress through the justice system” (WCD 2000, 200) and include an “internationally accepted framework of norms” comprising the Universal Declaration of Human Rights, the Declaration on the Right to Development, and the Rio Declaration on Environment and Development (202).

⁵² In the absence of negotiated consensus the report also provides for “independent dispute resolutions mechanisms” agreed upon by stakeholders (such as mediation, conciliation, and arbitration) with the state acting as “the final arbitrator, subject to judicial review” (WCD 2002, 281).

become a constant product of conversation, dialogue, information, balancing, and experimentation.⁵³

In the seven years since its publication, the WCD Report has received some important positive attention. Germany, Nepal, South Africa, and Sweden have each hosted multistakeholder dialogues about large dams (Schneider 2005, 7). The private HSBC Bank adopted WCD guidelines as a predicate for project lending, and the European Union created incentives for Member States to follow WCD procedures to achieve their emission reduction targets under the Kyoto Protocol (8).⁵⁴ These and other developments have prompted the US-based International Rivers Network (IRN)⁵⁵ -- a nongovernment organization (NGO) that helped catalyze the creation of the Commission -- to describe the WCD recommendations as “a kind of soft law against which all new [dam] projects are being measured” (Bosshard 2005).

Yet there are few, if any, indicators to suggest that the WCD framework is having outcome determinative effects -- for example, that power is being shared among developers, financiers, and project-affected people, that the benefits of large dams are being distributed to “stakeholders” in clear, immediate, and materially meaningful ways, and that profit-driven goals are relenting in the face of competing human considerations. According to IRN, “very few concrete goals and commitments have emerged” from country-wide multistakeholder dialogues (Schneider 2005, 7).⁵⁶ Tellingly, in the final meeting of the South African process, issues that remained controversial were “that of financial reparations for communities affected by past dams, and the issue of legally binding contracts between developers and affected communities” (Hathaway 2004, 8).

⁵³ In a sourcebook published by the World Bank, the idea is explained like this: “by incorporating the views of stakeholders into major planning decisions, governments *are applying* the global normative framework for governance as recorded in the U.N. Declarations on Human Rights and on Environment and Development” (Blok, Hass, and Davis 2003b, 18, emphasis added).

⁵⁴ Specifically, in a “Linking Directive” (linking the EU’s greenhouse gas emission trading scheme to the Kyoto Protocol’s “clean development mechanism”), the EU required that “Member States shall, when approving [large hydroelectric power] project activities, ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams... will be respected during the development of such project activities” (Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_338/l_33820041113en00180023.pdf). In response to these incentives, in 2005 two large public European banks verbally announced that they would consider WCD guidelines in funding hydro projects (Schneider 2005, 8).

⁵⁵ In November 2007, International Rivers Network (IRN) changed its name to International Rivers.

⁵⁶ Worse, as IRN reports, the institutions and governments “that build the most dams or have the greatest impact on global dam policies, are still reluctant to subscribe to standards that demand... a greater say for affected communities” (Schneider 2005, 9).

Moreover, there are troubling gaps between participatory negotiations described as exemplary by international financial institutions and data revealed by NGO research on the ground. For instance, a 2003 World Bank executive guide promoting the value of stakeholder participation refers to the Bujagali Hydropower project in Uganda for “examples of how project-level agreements on resettlement and compensation were reached, and how this was placed in a framework for conflict resolution” (Blok, Hass, and Davis 2003a, 13).⁵⁷ Suspended in 2002 due to concerns about corruption, in 2007, the Bujagali dam was revived with the help of \$360 million in World Bank loans and guarantees. But an NGO paper published that same year assessing Bujagali’s compliance with the WCD Report raises serious and detailed concerns about the equities of stakeholder negotiations both prior to 2002 and those that are ongoing, and presents evidence that suggests that the outcomes of these negotiations include a decline in the material well-being of resettled communities (Pottinger 2007).⁵⁸

Evidence that participatory processes of negotiation routinely fail to produce concrete benefits for dam-affected peoples suggests we take seriously the limitations and costs of negotiation as techniques of resource distribution and decision making on a global scale. But in the spirit of my own ambivalence, I also offer this example because I see in it instances of real people who believe that they can transcend these costs and use negotiation techniques for “counter-hegemonic” ends (Santos 2002; Santos and Rodríguez-Garavito 2005b). Activists, many of whom embrace rather than reject the Report (see McCully 2001, 1453-54), regularly

⁵⁷ The Guide also explains that “appropriately involving stakeholders in the decisions that affect them can lead to a higher degree of acceptance of the preferred options for meeting water and energy needs, even from interest groups who do not fully benefit from the options. This better acceptance occurs when people believe they have participated in a fair decision making procedure. It is termed ‘procedural justice’” (Blok, Hass, and Davis 2003a, 4-5). Moreover, the Guide submits that when “given a voice in decisions,” stakeholders act reasonably and that “stakeholder compensation has been a relatively small fraction of overall project costs” (6). On the potential “costs” of procedural justice for lower-power parties, see *supra* note 46 and surrounding text.

⁵⁸ Researcher Lori Pottinger writes: “Previous [pre-2002] dealings with project-affected communities were extensive, but suffered from unequal power relationships, with too little support for vulnerable groups in the negotiating process. The Panel of Experts on the first project [assessing WCD compliance] states that [the developer] shared ‘a lot of information [with] affected people and other stakeholders,’ and followed Ugandan law in negotiating compensation packages. It is a matter of some debate whether affected communities at that time were actually informed of their rights and risks by the dam-building company representatives tasked with the consultation process. Rather, it appears they were ‘sold’ the project based on promises for compensation and benefits that, in the end, failed to materialize. People who were moved in 2002 were not given legal title to their new lands, which caused great uncertainty” (2007, 2). Pottinger continues: “The problems of the affected people have not been resolved. Thus far, there has been no commitment by the developer to address either outstanding or new issues. Affected people report that buildings at the resettlement site are in poor condition, just five years after construction....The community reports that it lacks adequate health and education services, and that it is harder to make a living than before” (10).

admonish governments and institutions for failing to uphold its core processual prescriptions. As one press release asserts: “NGOs are determined to maintain pressure on the Bank to act on the WCD report.... It will, as usual, require constant outside pressure from NGOs, dam-affected people and concerned governments to force the Bank to change its ways.”⁵⁹ It bears noting that this pressure, which not uncommonly takes the form of antidam and antidevelopment interests with no means of satisfaction in “bureaucratically cognisable terms” (Lustig and Kingsbury 2006, 415), played a critical role in catalyzing the consensus-based WCD Report in the first instance.⁶⁰

In 2006, I worked with activists in northern Thailand concerned about the construction of large dams on the Mekong River. The NGO that founded the school where I volunteered is principally engaged in large-scale (and often successful) litigation campaigns against multinational corporations. Many of the teachers and students I met hold beliefs about land, ecological and human integrity, and human flourishing that they in no way desire to trade off against hydro-power, economic profit, or other ideas of development and progress. But I was there because these teachers expect that some of their student activists might one day find themselves invited to participate in the sort of stakeholder negotiations that the Report imagines and, to that end, they want these students to be maximally prepared. Moreover, I believe, and I think these activists do as well, that skills that enable individuals to reorient their interests in ways that enable creative and nonconfrontational opportunities to capitalize on the economic interest of opposing parties can, if used carefully, critically, and in combination with legal, extra-legal, and confrontational strategies, produce equitable social change.⁶¹ The negotiation skills that I had to offer owe their force, accessibility, and refinement to many, many of the authors who contributed to the *Fieldbook* -- many who are also my teachers, colleagues, and friends.⁶² These strategies also appear particularly viable in certain contexts. Because the relevant parties to disputes about dams include transnational public and private actors that span geographical and

⁵⁹ Development GAP and IRN. 2001. Critics’ Attempts at Constructive Dialogue Find World Bank Less than Engaging. <http://www.irn.org/programs/finance/pdf/011113.DGAP-IRN-release.PDF> (accessed Oct. 9, 2007).

⁶⁰ For more background on the creation of the World Commission on Dams and a description of the role played by the international antidam movement, see McCully (2001).

⁶¹ And I think it is equally the case that creative, pragmatic, and expansive problem-solving orientations do not necessarily lose their character of what Janet Halley calls “being in the problem” (2006, 7), that is, of working through a problem by learning, surprise, and openness to unexpected possibilities. It is possible to retain this orientation while simultaneously maintaining prior allegiances to concrete, material, and, at times, incommensurable perspectives and distributional commitments.

⁶² I currently co-chair with Chris Honeyman the American Bar Association’s Section of Dispute Resolution Committee on Negotiation.

spatial legal domains,⁶³ and because the relevant individual and collective experiences of harm are not always easily translated into existing legal terms, the limits of adjudicatory institutions and of rights discourse more generally to produce equitable resolutions are apparent.

As analysts we often constrain ourselves to thinking about people's choices as they interact with systems of power in terms of coherent (even binary) categories, even though we know these categories lose much of their descriptive force as they make contact with the ground. The activists I met in Thailand are eclectic in their strategies and committed in their goals. And although they use all of these things, I doubt that many find that a choice of rights, negotiation, or a WCD processual amalgam fully captures their imaginations or, for that matter, their struggles. As leading Indian antidam activist Medha Patkar -- whose strategies of engagement include national legal activism, international advocacy, hunger strikes, protest marches, courting drowning on the Narmada River, *and* service on the WCD⁶⁴ -- emphatically states, there is a "gap, which is still to be filled" (Patkar 2006, 12). As she wrote in a comment attached to the WCD Report:

An inclusive, transparent process of decision-making with equal status to all the stakeholders... would be a great advance, but does not go far enough. Even with rights recognised, risks assessed and stakeholders identified, existing iniquitous power relations would too easily allow developers to dominate and distort such processes.... Understanding this takes us beyond a faith in negotiations to emphasize *certain priorities and primacies*. (WCD 2000, 321-322, emphasis added)

These are the "priorities and primacies" that negotiation and new governance proponents seek, where possible, to evade by deferring to local and pragmatic deliberation. At the same time, and much like the WCD Report itself, even the most committed of new governance theorists holds fast to a practical faith in the centrality of rights that, in turn, is rooted in what Dorf and Sabel (1998) call "the pragmatist idea of the joint determination of individuality and sociability" or their belief in an enduring social constitution of human beings (448). Hence Sabel and Simon (2006) assure us that "to say that rights are open ended, and that their determination is dependent on a (disciplined and accountable) evaluation of social possibilities is not to say that they are hostage to shifting social preferences, or at the mercy of...utilitarian calculations" (406-07).

In this article, I have tried to reveal various assumptions about subjectivity at work in negotiation and new governance paradigms that, I have argued, drive both projects' sense of political hopefulness. In turn, I have questioned the distributional consequences of privileging a flexible-subject-with-interests as the basis of a new vision of governance, both because the interests this self holds, prior to and after dialogue, may be constrained by the effects of inequality and because the very process of empowering a subject to reduce her ends to interests can itself be a cause of human suffering. These are serious questions: when reformers prioritize

⁶³ These actors often include local and international NGOs, state governments, international financial institutions, national export credit agencies, private corporations, and "project affected people."

⁶⁴ For a breathtaking journalistic account, see Leslie (2005).

particular constitutions of selfhood they seek to shape (intrinsically, perhaps) the ways in which individuals engage legitimately with the world.

Let me draw one final analogy. Law professor and antidam activist Upendra Baxi (2001) describes the WCD Report as postmodern in its proposition “that there is not a singular solution to address one problem” (1512) yet momentarily essentialist in its suggestion “that all large dams raise typical problems and create large inequities by enforcing typical modes of violent social exclusion of impoverished peoples” (1513). He then proceeds to read the Report’s prescriptions “urging authentic, democratic control over project decisions” as grounded in “the possibility of an unchanging democratic essentialism” that, in turn, is constitutive of individual citizens (1513). In Baxi’s words:

Participation, accountability, sustainability, and transparency provide a range of public virtues informing every citizen of the world, having the potency of rolling back the unilateralism of governance.... The art of the possible assumes an abundant proliferation of these public virtues among those who govern and those that stand governed. (1513)

The art of the possible inspires all of the reformers I have studied in this article -- a form that evolves by mobilizing uncertainty, contingency, surprise, learning, creativity, participation, collaboration, and dialogue in the pursuit of solutions to hard problems. Others have argued that by placing means and ends into continuous interaction, these reformers relinquish too many distributional priorities and primacies *ex ante*. I have argued a different point: in all of their problem-solving projects, negotiation and new governance scholars prioritize prior ideals of selfhood -- people who are flexible rather than inflexible, emergent rather than fixed, social rather than essentialized, agentic rather abject, purposive rather than defiant -- that constrain as much as enable our imagination of what’s possible.

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suggests