

# CRISIS, COMMUNITY, AND COURTS IN NETWORK GOVERNANCE: A RESPONSE TO LIEBMAN AND SABEL'S APPROACH TO REFORM OF PUBLIC EDUCATION

HELEN HERSHKOFF & BENEDICT KINGSBURY\*

In their provocative article, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*,<sup>1</sup> Professors James S. Liebman and Charles F. Sabel explain, chronicle, and advocate a shift to polyarchic network governance as a way to improve public schools throughout the United States. The authors suggest that networks, seen as a “new form of participatory collaboration between citizens and the agencies of government,” can also help to improve the quality of public education by introducing flexible, best-practice approaches into the classroom.<sup>2</sup> In their most hopeful moments, they consider whether such networks, with their emphasis on monitoring, benchmarking, and reflective practice, can reshape democratic institutions by encouraging pragmatic experimentalism and creating neo-Madisonian forms of accountability.

Crisis is key to Liebman and Sabel's explanation of how such networks come to be formed by otherwise unconnected groups with divergent interests. As they tell it, education professionals, politicians, and parents are increasingly coming to reject dominant educational models that depend either on centralized bureaucratic control or on wholesale privatization. This rejection, converging with demands from all quarters for educational innovation, unglues established power structures and creates public space for stakeholder networks to appear. In this response, we focus on the crucial role of crisis in Liebman and Sabel's diagnostics and in their prescription for educational policy.

Ever since the USSR launched the Sputnik satellite in 1957, commentators have used the language of crisis to urge reform of America's schools. “[W]ithout mathematics,” the *Saturday Review* warned that year, “democracy cannot hope to survive.”<sup>3</sup> A generation later, officials spoke of “a nation at risk,” pointing to the “rising tide of mediocrity that threatens our very future as a Nation and a

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\* Professors of Law, New York University School of Law. Thanks to Clayton Gillette, Kirsty Gover, and Stephen Loffredo for comments on an earlier version of this response.

1. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

2. *Id.* at 271.

3. See Louis Menand, *Cat People: What Dr. Seuss Really Taught Us*, THE NEW YORKER 148, 150 (Dec. 23 & 30, 2002).

people.”<sup>4</sup> Liebman and Sabel continue this tradition, but utilize the notion of educational crisis to underpin a different political theory of social change. In Part I, we point to some of the limits of crisis-driven network governance for the formation of community, inclusion of the disadvantaged, and durable realization of high-quality public education for all. In Part II, we turn to the role of courts, arguing that evolving forms of rights-based public interest litigation, particularly in state courts, is critical in encouraging local, countervailing sources of power that can compel and sustain education reforms in public schools outside the temporary and narrow context of crisis-driven convergence. We share the authors’ view that stakeholder networks offer possibilities for innovative policy development. But insofar as the network polyarchy model depends for its vitality on a unifying sense of crisis, and is unmoored from a strong sense of rights and enforcement, Liebman and Sabel risk leaving public education a loser from the buffeting of ordinary politics once the evanescent unity of crisis disappears.

### I.

#### NETWORKS, POLITICAL COMMUNITY, AND RIGHTS PROTECTION

How should we as a collectivity live our lives? For Liebman and Sabel, this basic political question defies definitive answer: their article instead assumes a post-modern condition in which all answers are provisional and subject to change. Rather than posit a false sense of certainty, Liebman and Sabel argue for a politics of experimentalism, advocating for stakeholder networks as a governance structure that overcomes the failings of a liberal theory of representation and of its particular goal of political community. The liberal theory they reject is one in which the formation of a “body politic” unifies the “multitude” that exists in the state of nature into a community or set of communities aimed at promoting the public good.<sup>5</sup> Carried over to the language of constitutionalism, representation mediates between constituting power and constituted power: constituted power is understood as a “re-presentation” of constituent power, such that the assertion and exercise of power by the constituted body politic is always also a statement of the existence and powers of the unified political community, the people.<sup>6</sup> Through the process of representation, the private interests of individual members are transformed into the power of an interdependent political community, harnessed by legislative structures to do the work of the world on behalf of all.

The liberal ideal of representation often is poorly realized in practice—liberal polities struggle to generate both true communities of interest around

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4. NATIONAL COMM’N ON EXCELLENCE IN EDUCATION, *A NATION AT RISK* 5 (1983).

5. See, e.g., THOMAS HOBBS, *LEVIATHAN* 114 (Richard Tuck ed., Cambridge Univ. Press, 1996) (“A Multitude of men, are made One Person, when they are by one man, or one Person, Represented, that maketh the Person [the body politic] One.”).

6. See Hans Lindahl, *Acquiring a Community: The Acquisition and the Institution of European Legal Order*, 9 EUR. L. J. 433, 436 (2003).

policy issues, and locally-informed solutions to pressing policy problems. Liebman and Sabel believe that networks can do better on both fronts. In their enthusiastic account of education reform in Kentucky and Texas, the authors suggest that a multitude of stakeholders—education professionals estranged by the failings of existing approaches, concerned parents, grandstanding local officials—come together and exercise a constituent power as a form of collective revolt at a time of crisis and disaffection. Anticipating that checking and scrutiny mechanisms within networks and between networks and other state agencies will constrain special interest factions, Liebman and Sabel posit that networks will encourage the reciprocal trust that collective action requires in order to achieve meaningful reform.

Network governance is well-theorized in situations where the participants have one or two strong points of commonality that dominate the concerns and ethos of the network; commentators thus press its use in industrial and managerial contexts.<sup>7</sup> The theory, however, is strikingly abstemious in its formal engagement with community. In some variants, the network is a form of Hayekian spontaneous order in the same way markets are theorized, and the community is little more than the community of the market. In other variants, people who work together and have shared interests in improving conditions in an area of practice form a network aimed at innovation and information sharing. But the existing literature does not yet show that networks can work well as motors for political community in the sense of identity-maintenance or the transmission of distinct cultures or the protection of disadvantaged groups. Indeed, it seems difficult to design network-type processes and markets in ways that will not intensify the erosion of conventional identity markers.

The reform of public education thus differs from areas in which network governance was first theorized: social policy requires not only the technical identification of best practices, but also shared understandings about the normative role of education in democratic life. The authors' account of network governance, however, suggests that the multitude that merges into the network remains just that—a multitude, replicating and even exacerbating the power imbalances that generate the crisis that the emerging education network is meant to resolve. Corporate investors, for example, deciding whether to relocate to a region, may want state-of-the-art public schools for the children of top management, yet insist on tax abatements that block any but the most modest improvements in the schools for the children of factory floor workers.<sup>8</sup> Indeed, the crisis of education owes its genesis, in part, to the compromises and bargains of elites and professionals who dominate state legislatures as well as local school

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7. See, e.g., MICHAEL PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* (1984); see also Christopher L. Erickson & Sanford M. Jacoby, *The Effect of Employer Networks on Workplace Innovation and Training*, 56 *INDUS. & LAB. REL. REV.* 203 (2003).

8. See generally Greg LeRoy, Kate Davis, Sara Hinkley & Rebecca Heck, *Protecting Public Education from Tax Giveaways to Corporations: Property Tax Abatements, Tax Increment Financing, and Funding for Schools*, 27 *STATE TAX NOTES* 975 (March 17, 2003).

boards and who are well-positioned to capture network processes for their own agendas. Although stakeholders share an interest in improving education, their motivation for reform thus differs in significant ways.

This transposition of network governance theory into social policy raises at least five concern. First, it is far from certain that networks can be relied upon to offer an open door to all those interested. In liberal representation theory, rights provide standard protection for individuals and groups during the ordinary moments of politics when the rhetoric of crisis is not at play. These rights ensure access to political processes and make credible demands to have political actors' ideas taken seriously. Network governance, however, like many 'third way' approaches, gives little attention to rights. Even the rights to participation, to access, or to information, all of which seem essential to encourage entry into the network or to promote respect for differing points of view, are not emphasized in the authors' account. Without such rights, networks may ossify into governance structures that are even more exclusive and less transparent than the public/private hybrids that characterize so much of local decision-making: the licensing boards, zoning commissions, and business improvement districts that concentrate public power in private hands.<sup>9</sup>

Second, repeated dialogues within the network suggest the need for groups to be structured in ways that maximize their ability to speak through such processes. The guarantee that any group can enter the process, while democratic-sounding, favors a kind of First Amendment freedom of association that prefers voluntary to ascriptive groups, and even encourages secession from groups in order to form fractionated entities that receive the instant privileges of participation.<sup>10</sup> To the extent that diffusion of best practices inevitably promotes mimicry, network deliberation may tend toward a homogenization of culture and the privileging of professionally-credentialed rationality and dominant-group values.

Third, the theory does not specify how, if at all, networks are able to incorporate insights and best practices that exist outside the network itself. Educational networks are likely to be shaped and limited by the jurisdictional boundaries of pre-existing school districts and educational regions. Moreover, it is not clear how the network can obtain material resources that exist outside the network and cannot be created internally.<sup>11</sup>

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9. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1896 (2001) (discussing the place of "unelected, quasi-private, special-function units" in local governance).

10. See Benedict Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. OF INT'L L. 183 (2002).

11. Liebman and Sabel believe that networks can build capacity for change "on the fly" in a wide range of different contexts. Liebman & Sabel, *supra* note 1, at 293. Resources may not be the complete answer to the problem of inadequate schools, but without them, the network's ability to promote changes in school culture can go only so far in motivating student achievement. As one Texas educator puts it, "People may think that the charm of the teacher will compensate for the

Fourth, network governance, with its emphasis on measuring network success in terms of quantifiable outcomes, may leave little public space for participatory processes that are intrinsically, rather than instrumentally, valuable in terms of self-expression, identity formation, and community support. If we assume that participation is valuable in itself, the problem arises of how to measure different processes for participation with a single metric—a concern relevant to a policy objective of increasing local community involvement in education, where participation in the process of making policy about inclusion is itself a form of inclusion.

Finally, structural factors make us question whether the network approach inevitably produces either rational or optimal results in the area of social policy. Participation can run amok;<sup>12</sup> too much talk can produce inaction; individual speakers may impose a heckler's veto over even the best practices.<sup>13</sup> Representation theory at least admits the possibility that legislatures can act on the basis of multiple, divergent and sometimes inconsistent reasons held by different legislators.<sup>14</sup> Cacophony and coherence in public reasoning both have their places, but the emphasis network governance places on participation and outcomes threatens to strike a balance that undervalues the importance of coherent public reason-giving.

These concerns suggest that the network the multitude helps to establish may not actually unify the multitude or represent a constituting popular power that is accountable to all.<sup>15</sup> The problematic implications of this limitation for inclusive political community are heightened by the absence from the article of any proposal to ally network governance with substantive constitutional rights or other durable claims to education. In liberal constitutionalism, rights provide energy for social commitments when other political institutions and processes lose enthusiasm for some legitimate claims. Within a network, efforts to improve public schooling are propelled forward by the shared concerns of stakeholders

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fact that the roof is falling in." *Professor Decries Sorry State of U.S. School Buildings*, AGGIE DAILY ¶ 4 (Aug. 29, 1996), at <http://rev.tamu.edu/stories/archive/082996-2.html> (reporting interview with Jonathan King, visiting professor at Texas A & M University College of Architecture).

12. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

13. See, e.g., Helen Hershkoff, *School Finance Reform and the Alabama Experience*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 25, 34 (Marilyn J. Gittell ed., 1998) (discussing the uneven effects of participation on school reform in Alabama).

14. See, e.g., JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999). Sabel elsewhere incorporates an extension of this idea and a response to the problem of irrationality by drawing on Frank Michelman's notion of the agglomerated rationality of sets of institutions, which can simultaneously embrace a multitude of inconsistent reasons. See Charles F. Sabel & Jonathan Zeitlin, *Networked Governance and Pragmatic Constitutionalism: The New Transformation of Europe* (unpublished manuscript, on file with authors).

15. See Emiliios Christodoulidis, *Constitutional Irresolution: Law and the Framing of Civil Society*, 9 EUR. L. J. 401 (2003).

working together to secure necessary reforms. When impelled by crisis, the network may generate forms of social capital—reciprocal trust and solidarity—that will endure to motivate educational reform. But once the perceived crisis is under control, it is likely that legal rights will be essential to ensure that professionals and elites continue to attend to the on-going needs of public school students.

## II.

### NETWORK GOVERNANCE AND THE ROLE OF COURTS

Liebman and Sabel use network polyarchy theory to argue that educational accountability standards, set forth in the federal No Child Left Behind Act of 2001,<sup>16</sup> will allow concerned citizens to compare “rates of [school] improvement against locally defined goals,” and so afford the courts manageable standards, the absence of which has been a barrier to justiciability and relief.<sup>17</sup> They offer a strategic program of non-court-centric review as a way to engage communities in ongoing efforts to secure continuous improvements in public schools.

The authors contend that their emerging litigation model does not seek “statutory or constitutional protection . . . against various, precisely delimited forms of discrimination.”<sup>18</sup> But their major stories of success, Kentucky and Texas, both saw stakeholder networks develop as part of state-court litigation that was shaped and given public space by state constitutional provisions that guarantee equal protection, due process, or public schooling. Absent such formal protection, it is not clear that the stakeholder networks on which they base their strategy will be able to take root as progenitors of reform, particularly among the most disadvantaged.

Indeed, we fear that the forms of action that Liebman and Sabel offer may provide only illusory protection for those students who are left behind. Because the standards are adaptive and self-improving, they avoid the risk of ossification associated with conventional administrative regulation. However, the contingent nature of the new education standards—open to question, open to change—leaves them vulnerable to the charge of indeterminacy and hence nonenforceability. Although solid arguments can be mounted in favor of their justiciability,<sup>19</sup> it is far from certain whether under existing doctrine these provisional standards lay the basis for a private right of action to enforce the federal statute. Moreover, it is notable that the proposal does not seem expressly to encompass individual rights of action on behalf of specific children who will

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16. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

17. Liebman & Sabel, *supra* note 1, at 230. Of course, the lack of manageable standards argument may be no more than a convenient smokescreen for a court’s purposeful refusal to remedy problems for reasons quite unrelated to institutional capacity.

18. *Id.* at 271.

19. See generally Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

otherwise continue to find themselves shortchanged even as schools improve.

Alternatively, it might be possible to enforce evolving standards indirectly, through a “process” right, akin to review under an arbitrary-and-capricious standard that compels an agency to consider all relevant options, but this standard has proved less than robust in recent case law. Translating the Liebman and Sabel proposal into the basis for a federal due process claim likewise carries difficulty. Current federal due process doctrine looks to “professional standards” as a measure of substantive norms;<sup>20</sup> reliance on the federal approach may tend to exacerbate concerns that technocrats and plutocrats will capture the new governance structures. These are not intrinsic criticisms of a strategy based on network-derived, evolving standards. They do, however, suggest caution about its strategic viability in the context of current legal doctrine.

Liebman and Sabel distance their non-court-centric model from what they see as the civil rights movement’s earlier, failed efforts to enlist “the courts . . . as an Archimedean point from which to transform the American school system.”<sup>21</sup> As such, their account offers an implicit indictment of Abram Chayes’ classic account of structural reform litigation, which emphasizes the role of the federal court judge in supervising processes of social change.<sup>22</sup> Public interest lawsuits have certainly been associated with a hierarchical approach that Liebman and Sabel rightly put into question. But they have also been associated with expressive, mobilizing, and radiating effects that may transcend hierarchy by fomenting popular action and facilitating alliances.<sup>23</sup> Moreover, at least some of these earlier structural reform cases display the continuous problem-solving pragmatism that the authors place at the core of the new reformist effort.<sup>24</sup> In

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20. See *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

21. Liebman & Sabel, *supra* note 1, at 266.

22. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

23. See generally Helen Hershkoff, *Public Interest Litigation: Selected Examples*, at <http://www1.worldbank.org/publicsector/legal/PublicInterestLitigation.doc> (last visited Nov. 18, 2003). School finance litigation in Alabama offers a case in point. Liebman and Sabel observe that entrenched interests blocked litigation aimed at school reform in this state. See Liebman & Sabel, *supra* note 1, at 268. However, the lawsuit, building on collaborations that took shape in connection with court activity, galvanized a stakeholder network of concerned citizens that has focused resources on broad questions of state constitutional reform that may, over time, promote greater structural reform of governance and taxation than any single lawsuit could do. See *Alabama Commission Report Released*, 5 SUBNAT’L CONST. CHRON. 1 (Winter 2003). As an associate legal director of the American Civil Liberties Union, Hershkoff served as a member of the team of lawyers representing the plaintiff student class in the Alabama litigation until 1995.

24. An example is that of the landmark case known as *Willowbrook*, which aimed at securing humane treatment for mentally retarded individuals institutionalized in New York State facilities. See *New York State Assoc. of Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). Like efforts in Texas and Kentucky, the *Willowbrook* litigation was community grounded; dependent on private orderings of concerned stakeholders for the development of day-to-day, as well as long term, solutions; framed by exogenous accountability norms that reflected evolving professional standards; and subject to judicial enforcement, in part, through a process of continuous information-gathering, reporting, monitoring, and evaluation emanating from a specially created Review Panel. See *id.* Hershkoff served as co-counsel to the *Willowbrook* class

addition, although Liebman and Sabel express excitement that state court education cases are helping to lay the foundation for new institutions—public/private hybrids that the authors say are hard to survey and harder still to comprehend<sup>25</sup>—the professional and community groupings that emerged in Kentucky and Texas fit comfortably within the practice of state and local governance, even if they seem odd within a federal model of separation of powers.<sup>26</sup>

Liebman and Sabel applaud the new judicial reliance on monitoring, information-pooling, and adaptation—"continuous improvement strategies"—as key to long-term success. But they express "disappointment" with the "evolution of litigation efforts" from desegregation, to school finance equalization, to fiscal equity, and to educational adequacy, as if the lawyers' changing approaches signify failure rather than adaptation and growth.<sup>27</sup> Public interest law, however, is itself a network of Dewyesque "social interactive learners," in which lawyers learn from each other, from communities, and from shared experiences (through conferences, informal gatherings, newsletters, web sites, co-counsel relationships, interdisciplinary workshops, and conversation) in the manner of the "reflective practitioner" central to the authors' story of success.<sup>28</sup> Rather than presenting current reforms as wholly discontinuous from past practice, we urge consideration of commonalities between these earlier efforts and the model Liebman and Sabel put forward, in order to evaluate more precisely the conditions under which courts can best support networks in promoting sustained innovation.

### CONCLUSION

Liebman and Sabel make a convincing case that network theory contributes to understanding processes of social change. Their article also reveals some of the limits of network theory when applied to a contentious area of social policy such as reform of public education. The fluxes of energy and commitment that produce a sense of crisis and give rise to networks are not sufficient to ensure that public education is better over the long term. Nor do they guarantee that the persistently disadvantaged are empowered in durable ways. However, by incorporating networks into an evolving strategy of public interest law, Liebman and Sabel open a way toward a more nuanced theory of social change and so toward greater possibilities for social reform.

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from 1979–87, first as a lawyer at Paul, Weiss, Rifkind, Wharton & Garrison working pro bono and then as a staff attorney at The Legal Aid Society of New York, Civil Appeals & Law Reform Unit.

25. Liebman & Sabel, *supra* note 1, at 266–300.

26. See Hershkoff, *supra* note 9, at 1896.

27. Liebman & Sabel, *supra* note 1, at 204.

28. See Liebman & Sabel, *supra* note 1, at 224.