

Law and the Theory of Fields

*Frank Partnoy**

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INTRODUCTION

Law does not play much of an explicit role in *A Theory of Fields*,¹ the pathbreaking book by Neil Fligstein and Doug McAdam about collective action in society. The authors focus on the notion of a “strategic action field,” defined as a social order in which actors are attuned to and interact based on several important sociological factors, including shared understandings about purpose, relationships to others in the field, and “rules” governing legitimate action.² Thus framed, “rules” in the abstract sense are present in a limited sense in the theory. However, the authors do not distinguish among rules governing legitimate action in a field, nor do they describe the extent to which rules are private or public; instead, they group together all collective actors—“organizations, clans, supply chains, social movements, and governmental systems”³—and describe

* George E. Barrett Professor of Law and Finance, University of San Diego School of Law. I would like to thank Chuck O’Kelley for his encouragement and thoughtful comments.

1. NEIL FLIGSTEIN & DOUG MCADAM, *A THEORY OF FIELDS* (reprt. ed. 2015).

2. *See id.* at 9. The authors discuss both the impact of state strategic action fields on nonstate strategic action fields and the dependence of states and state strategic action fields on nonstate strategic action fields, but this discussion is more about the role of the state in society than it is about law and legal rules. *See id.* at 71–77.

3. *Id.* at 9.

the strategic action fields associated with these actors without particular reference to the role of law.

One of the most provocative ways in which Fligstein and McAdam distinguish among strategic action fields—without respect to the role of rules—is the extent to which such fields are focused on “material” as opposed to “existential” concerns. The authors hypothesize that “[p]eople do what they do both to achieve instrumental advantage and to fashion meaningful worlds for themselves and others.”⁴ Accordingly, one can imagine strategic action fields as arrayed along a continuum with purely “material” as the extreme at one pole and purely “existential” as the extreme at the other.

Material _____ Existential

The distinction between “material” and “existential” plays a prominent role in *A Theory of Fields*, and it played a prominent role in discussions at the Berle VII Symposium. In general, the authors advocated the importance of the ongoing use of social skills and the collaborative efforts to seek meaning, particularly in ways beyond the merely “material.”⁵ However, the extent to which rules might matter in these efforts was less clear.

Overall, Fligstein and McAdam seek to use the concept of a strategic action field to develop a theory of social change and stability.⁶ Yet social change and stability are inextricably linked to law, legal regimes, and regulatory structures. During the Berle VII Symposium, I raised the point about the absence of law and regulation from the theory of strategic action fields. I attempted to demonstrate that law and regulation matter, substantially, in the application of Fligstein and McAdam’s theory. The two authors seemed open during our discussions to the notion that law might be added as a theoretical “friendly amendment” to their theory. With their openness as a motivation, I attempt in this brief Article to sketch how one might make such an addition to their theory.

Specifically, I suggest here that the theory of “meso-level” (or middle-level) social orders advanced by Fligstein and McAdam might profitably be expanded to include two continua, rather than one.⁷ The first continuum, the primary “x-axis” of the theory posited in *A Theory of Fields*,

4. *Id.* at 43.

5. *See id.* at 46–47 (arguing that fields are created and sustained by the ongoing use of social skills); *id.* at 49 (“[F]or us, the essence of human sociability is collaborative meaning making.”).

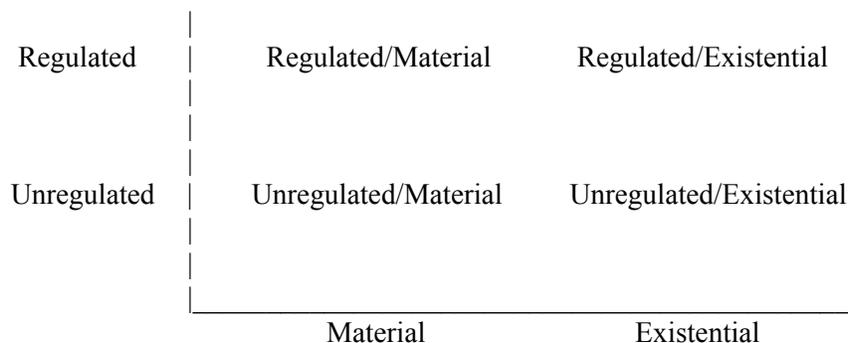
6. *See generally id.*

7. *Id.*

is the notion that strategic action fields can be described as “material” or “existential,” or some combination of the two, as I suggest above.⁸ The second continuum, the secondary “y-axis” of the theory and my “friendly amendment,” is the notion that the description of strategic action fields varies based on the application of law.

My primary argument is that the theory of strategic action fields can be expanded to include this second continuum, based on the degree of law applicable to a particular field. Specifically, at one end of this second axis is the notion of an entirely unregulated strategic action field, which is largely governed by private ordering. At the other end of this second axis is the notion of a highly regulated strategic action field, which is largely governed by state action and intervention. My claim is that strategic action fields can more usefully be described by expanding *A Theory of Fields* to include this additional law/regulation axis.

Thus, in graphical terms, although Fligstein and McAdam’s theory can be visualized as one horizontal axis, running from material to existential, as amended, the theory also would include a vertical axis based on the degree of applicability of law/regulation. To simplify the analysis, one might imagine four quadrants of strategic action fields, as depicted below:



In the upper left quadrant are regulated/material fields, where examples might include financial institutions, such as banks and insurance companies, which generally are subject to a complex web of regulations and multiple regulators and are focused primarily on monetary concerns. In contrast, in the lower left quadrant are unregulated/material fields, examples of which might include hedge funds or offshore investment vehicles that (at least until recently) generally have been outside the pur-

8. *See id.* at 15.

view of the most onerous regulations but also are focused primarily on monetary concerns. As noted below, the types of strategic action fields vary considerably between these two quadrants.

In the upper right quadrant are regulated/existential fields, which might include educational institutions and hospitals that generally are subject to a complex web of regulations and multiple regulators but (generally, or perhaps hopefully?) are focused less on monetary concerns than their central missions (e.g., educating students or attending to patients' health). In the lower right quadrant are unregulated/existential fields, examples of which might include Super PACs or private philanthropic organizations that generally are outside the purview of the most onerous regulations but are focused less on monetary concerns than on their central missions (e.g., supporting a political party or candidate, or pressing a particular social objective). My claim in Part I is that adding law/regulation to the analysis can enrich our understanding of the role of strategic action fields.

I further support my claim that strategic action fields are more usefully described using this expanded law-inclusive rubric in Part II by applying the new framework to analyze research by Bruce Carruthers on credit rating agencies.⁹ The expanded version of the theory suggests that Professor Carruthers is actually telling two very different stories about credit rating agencies, depending on the applicable time periods and degree of regulation. The first story, which is firmly situated in the unregulated/material quadrant, is focused on the reputational capital of rating agencies and their ability to generate valuable information. The second story, which occupies the regulated/material quadrant, is focused on the exploitation of regulation, with reputation acting as only a minimal constraint and valuable information being a secondary consideration. Some of the normative implications of Carruthers's work are that the role of the credit ratings in strategic action fields might better serve society if they shifted away from the material side of the continuum and—in some meaningful ways—away from the regulated side of the continuum. Similar conclusions hold for Fligstein and McAdam's discussion of the mortgage markets, including an analysis of the degree of regulation that can enrich their discussion of the recent financial crisis.

Overall, my hope is to offer a way to integrate *A Theory of Fields* into legal scholarship. In this vein, I conclude the Article by offering some thoughts about how Fligstein and McAdam's points about academ-

9. See *infra* Part II.

ia might also be expanded to apply to legal scholarship as well as academic work in sociology.

I. STRATEGIC ACTION FIELDS AND LAW/REGULATION

To repeat, my central claim is that strategic action fields vary considerably depending on the degree of applicable law/regulation. I now consider in greater detail the extent to which strategic action fields depend on law.

Fligstein and McAdam distinguish between a strategic action field and an unorganized social space, the central difference being the degree to which the various qualities of a field are well-defined.¹⁰ They argue that the strategic action field is the fundamental unit of collective action, sitting at the “meso-level” among social orders (as contrasted with micro- or macro-level social orders).¹¹ Thus, the strategic action field is the crucial agent of social change and stability, given its shifting boundaries over time.¹²

Strategic action fields include incumbents, challengers, and governance units.¹³ Obviously, power occupies a central role in the tension between incumbents and challengers. In the theory, governance units are said to aid incumbents, though the precise mechanism is not apparent.¹⁴ Moreover, during times of social change, governance units presumably shift their degree of aid to various parties, as challengers come to occupy power.¹⁵

However, it would be misleading to characterize strategic action fields as rotating exclusively, or even substantially, based on power. Instead, Fligstein and McAdam describe the importance of “social skill” in the fluctuations and advancement of strategic action fields.¹⁶ Some actors develop social skill and use that skill to advocate among other participants in the strategic action field.¹⁷ Social skill crucially incorporates what Fligstein and McAdam call the “existential functions of the social.”¹⁸ To the extent a strategic action field appeals to the “existential,”

10. See FLIGSTEIN & MCADAM, *supra* note 1, at 5.

11. *Id.* at 9.

12. *Id.* at 8.

13. *Id.* at 13.

14. *Id.*

15. *Id.*

16. *Id.* at 14–15.

17. *Id.* at 15.

18. *Id.* at 3–4.

social skill presumably plays an important role in deciding the direction and action within a strategic action field.¹⁹

Of course, external factors also are important to the theory of strategic action fields. Fligstein and McAdam recognize not only the broader field environment but also the importance of exogenous shocks, mobilization, and the onset of contention within the field.²⁰ The tension within a strategic action field is often generated from outside the field; then there are episodes of contention within the field. The resolution and settlement of such tension can be based on the degree of power among various actors, but they also depend crucially on social skill.

Fligstein and McAdam recognize that “[s]urely we are not social in the same sense that ants are.”²¹ As they posit, there are various characteristics of the uniquely human nature of strategic action fields, including not only tools and language, which animals also use in certain limited circumstances, but also existential fear and uncertainty.²² These are the behaviors that crucially emerge from the sense that we are not alone.²³

As noted above, Fligstein and McAdam allow for both the material and existential: “People do what they do both to achieve instrumental advantage and to fashion meaningful worlds for themselves and others.”²⁴ As they describe, “for us, the essence of human sociability is collaborative meaning making.”²⁵

In a strategic action field that is largely unregulated and outside the scope of legal rules, reputation is likely to operate as the primary constraint on the actors in the field. Fligstein and McAdam are, of course, correct that strategic action fields vary considerably, even when largely unregulated, in terms of the degree to which they represent material/existential concerns.

Legal scholars, including Robert Ellickson and Lisa Bernstein, have examined unregulated strategic action fields in numerous contexts, finding that groups develop extensive enforcement networks and norms to govern their conduct.²⁶ These developments occur even when the relevant enterprise is largely economic and the goals of the participants do

19. *Id.*

20. *Id.* at 19–21.

21. *Id.* at 34.

22. *Id.* at 41–42.

23. *Id.*

24. *Id.* at 43.

25. *Id.* at 49.

26. See, e.g., ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994); Lisa Bernstein, *Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

not include much “collaborative meaning making,”²⁷ apart from money making.

One might think about strategic action fields in the unregulated setting as involving primarily “horizontal” social skill, among the participants in the specific activity. Diamond merchants and lobster fisherman are interacting primarily with each other and others related directly to their endeavors. Accordingly, the description of strategic action fields is most usefully described by atomistic economic theories of rational actors and the theory of agency costs. Sociology generally occupies a less prominent role than economics in describing such actions.

However, to the extent unregulated strategic action fields exhibit existential characteristics, they are most usefully described using principles of sociology, and also behavioral economics. Indeed, much of what Fligstein and McAdam were discussing during the Symposium is best categorized by the unregulated/existential quadrant of the theory, where participants are not strictly behaving according to a rational economic actor agenda and where collaborative meaning making is more meaningful. Likewise, to the extent individuals are motivated by the “irrational,” behavioral economics offers insights into their behavior.²⁸

In contrast, in the regulated context, strategic action fields are better described as involving both horizontal interactions among participants and vertical interactions between participants and regulators. Again, the distinction between the material and the existential is important. To the extent strategic action fields are best described as focused on material concerns, public choice theory offers some persuasive analysis of the relationships in such fields. Individual economic actors and groups are rationally pursuing advantages associated with regulation. Actors and groups that face costs associated with collective action will do less well than actors and groups with concentrated interests.²⁹

To the extent regulated strategic action fields exhibit existential characteristics, they are most usefully described using the language of sociology and behavioral economics. Nonprofit organizations, such as universities and hospitals, can be highly regulated and therefore interact substantially in a vertical manner with a range of government entities and individuals. These interactions are not strictly material but are governed by the kinds of social skills that matter in a particular area. Public univer-

27. FLIGSTEIN & MCADAM, *supra* note 1, at 49.

28. See generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

29. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971).

sity presidents are skilled at demonstrating to legislators, and voters, why their missions deserve funds. Hospital administrators are skilled at demonstrating to regulators, or even prosecutors, why their practices are sound and in the best interests of patients and the community. The range of skills is social, yet vertical.

In highly regulated strategic action fields, regulatory arbitrage³⁰ can play a prominent role, in ways that are essentially irrelevant to unregulated fields. Regulatory arbitrage involves an array of transactions that are designed to achieve some favorable regulatory outcome, such as lower taxes, more favorable accounting treatment, lower regulatory costs (such as bank capital requirements), or—as I will discuss in Part II—a more favorable credit rating. There are unique social skills required in the implementation of regulatory arbitrage, and they are far more important in the context of regulated strategic action fields than for unregulated fields.

Each quadrant of the expanded theory presents unique challenges. I will not attempt to describe the details of the differences in each—that would require a book of the magnitude of *A Theory of Fields*. Instead, my goal is more modest. I simply want to introduce the notion that the application of Fligstein and McAdam's theory varies depending on the degree of regulation that a strategic action field faces.

The key point is that law matters. One can analyze a strategic action field as part of a purely private ordering system. Alternatively, one can analyze a strategic action field as part of a highly regulated environment.

II. STRATEGIC ACTION FIELDS, LAW, AND CREDIT RATING AGENCIES

Bruce Carruthers has written several interesting and insightful articles about the role of credit rating agencies in society.³¹ Professor Carruthers's contribution is particularly interesting in its discussion of Frank Knight's work: Carruthers argues that “Knightian uncertainty” plays a substantial role in the need for, and development of, credit ratings and credit rating agencies.³²

Carruthers documents an important shift in the role of credit rating agencies over time, from providing valuable and important information

30. See Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997); see also Jordan Barry, *On Regulatory Arbitrage*, 89 TEX. L. REV. SEE ALSO 69, 73 (2011); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010).

31. See e.g., Bruce G. Carruthers, *From Uncertainty Toward Risk: The Case of Credit Ratings*, 11 SOC.-ECON. REV. 525 (2013); Barry Cohen & Bruce G. Carruthers, *The Risk of Rating: Negotiating Trust and Responsibility in 19th Century Credit Information*, 93 SOCIÉTÉS CONTEMPORAINES 39 (2014).

32. Bruce G. Carruthers, Presentation at the Berle VII Symposium: Credit Rating Agencies: Triggers, Thresholds, and Transmission Belts (May 27, 2015).

during the nineteenth century to their more problematic role more recently. Carruthers does not explicitly note the potential effect of a difference in legal regimes, but he and Barry Cohen find, even with respect to nineteenth-century credit ratings, there is a mismatch between agencies' claims to expertise and their willingness to be held accountable and face legal consequences for the information they disseminated.³³

It is straightforward to apply the new regulated/unregulated strategic action field model to these insights. The nineteenth-century regime in which credit raters operated was largely unregulated. Indeed, one of the interesting findings from this era was that credit raters explicitly sought to avoid law and legal liability and were successful in doing so. Accordingly, the strategic action field in which credit raters operated during this time was largely governed by private ordering: these were primarily material-focused economic actors seeking to obtain a favorable reputation in order to make a profit from their ratings.

In contrast, when the raters became more highly regulated, the story changed in dramatic ways. Beginning in the mid-1970s, the regulation of credit ratings increased.³⁴ Regulators began explicitly incorporating references to credit ratings in their legal rules. The number of these references increased. At the same time, the business model of raters shifted, from charging investors on a subscription basis to charging issuers.³⁵ The nature of the strategic action field also changed dramatically. Over time, reputation came to play a less important role in the strategic action field. Instead, credit rating agencies survived and prospered by selling "regulatory licenses"³⁶—keys that unlock financial regulation through sufficiently high ratings—and earned sustainable profits even as their ratings came to include less valuable information.³⁷ The raters did not suffer horizontal reputation costs in the field because regulation had introduced the importance of verticality. Rating agency managers used social skill to take advantage of the new regulatory regime.

Carruthers demonstrates flaws in earlier rating algorithms, and finds that many ratings were bad predictors of failure. In a private, largely unregulated setting, one would expect that such ratings would not be valuable and therefore would command low prices in the market. In fact,

33. See Cohen & Carruthers, *supra* note 31, at 39.

34. See Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619, 690–92 (1999).

35. See *id.* at 703.

36. *Id.* at 698.

37. See John M. Griffin & Dragon Yongjun Tang, *Did Credit Rating Agencies Make Unbiased Assumptions on CDOs?*, 101 AM. ECON. REV. 125 (2011).

that was the case.³⁸ In contrast, when the regulatory regime was introduced, ratings became more expensive and rating agencies became far more profitable.³⁹

Thus, Carruthers's research is enriched by understanding his descriptions as bearing on strategic action fields in both an unregulated and regulated setting. As socially skilled actors, credit rating agencies ultimately embraced legal rules and their powerful effects. The agencies' social skills changed over time, as did the social order.

As amended, Fligstein and McAdam's theory applies nicely to the strategic action field related to credit ratings. There are a range of unique institutions and employees. They compete with each other in an oligopolistic setting. Their employees generate agency costs within the organizations and also begin to rotate vertically, into and out of government positions. Investors seize on the profitability of the top firms, as well as on highly rated, high-yielding bonds. Regulators exert power and influence, as do lawyers, academics, and the media. These interactions are clearly part of a meso-level social order, but they change markedly as the legal regime changes.

Importantly, the pressure to move from uncertainty to risk is social. As actors in the strategic action field attempt to transform uncertainty into risk, they give practical application to Frank Knight's theories.⁴⁰ Credit ratings create the perception that unspecifiable uncertainty really is specifiable risk. But the key insight is that "[a]s ratings became incorporated into formal regulations, starting in the 1930s, their use was bolstered even further by the coercive power of the state."⁴¹ In my view, Carruthers's research on credit ratings is illuminated by making this regulatory distinction explicit.

It is worth noting another way in which the regulatory distinction might help clarify some of the analysis in *A Theory of Fields*. Specifically, Chapter 5 might meaningfully be amended to distinguish among highly regulated and largely unregulated aspects of the relevant strategic action fields. For example, Fligstein and McAdam note that owning a house is the linchpin of the American dream,⁴² and write that "because of

38. Bruce G. Carruthers, Presentation at the Berle VII Symposium: Credit Rating Agencies: Triggers, Thresholds, and Transmission Belts (May 27, 2015).

39. For example, Moody's and Standard and Poor's were among the most profitable companies in the world after the mid-1970s. See Frank Partnoy, *How and Why Credit Rating Agencies Are Not Like Other Gatekeepers*, in FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? 59, 64 (Yasuyuki Fuchita & Robert E. Litan eds., 2006).

40. See Cohen & Carruthers, *supra* note 31.

41. Carruthers, *supra* note 31, at 541.

42. See FLIGSTEIN & MCADAM, *supra* note 1, at 140.

the quasi-governmental status of the GSE, it is a judgment call as to whether or not the mortgage strategic action field was really a field of the state.”⁴³ Here, they recognize the importance of law. But they also describe the rating agencies as “one of the principal [Internal Governance Units] in the mortgage field,” without reference to regulation.⁴⁴

Fligstein and McAdam conclude that there were two causes of the mortgage crisis: easy credit and not enough conventional mortgages. They discuss the growth of the subprime mortgage market and then the high rate of foreclosures. However, their description might be enriched by making explicit the influences of the regulated and unregulated aspects of the strategic action field. The important regulated aspects of the field include both the “regulatory licenses” discussed above and the role of the government-sponsored entities in the mortgage market.

However, the financial crisis was not centrally about the “cash” mortgage market. As Fligstein and McAdam note, the actual U.S. mortgage market peaked at approximately \$4 trillion in 2003, fell to \$3 trillion in 2004–2006 and then to \$2 trillion in 2007.⁴⁵ What this data illustrates is a crucial, striking aspect of the strategic action field: side-betting on subprime mortgages. As “cash” mortgages declined, the appetite for “synthetic” exposure to mortgages increased. There was tremendous growth in both synthetic collateralized debt obligations and credit default swaps based on so-called super-senior tranches of such vehicles. Ultimately, the near-failure of numerous large banks was tied importantly to this development in the strategic action field. At the same time, there were no explicit disclosure requirements related to such positions, there were no explicit margin requirements governing such positions, and there was only limited exposure to personal liability (either in civil or criminal cases, for both individuals and institutions).

There is a rich, fascinating story about the development of this side-betting in a largely unregulated context, but this story is largely missing from Fligstein and McAdam’s account. An expanded version of the theory of strategic action fields could accommodate both the perverse incentives associated with the highly regulated aspects of the field and the perverse incentives associated with the largely unregulated aspects of the field. The regulatory distinction is an important part of the social dynamic. Some analysis, particularly with respect to credit ratings, involves “more law”; other analysis, particularly with respect to derivatives based on the super-senior CDO tranches, involves “less law.” Both are useful

43. *See id.* at 143.

44. *See id.* at 144.

45. *See id.* at 155.

and important, and the application of the theory of fields depends on the degree of law/regulation.

CONCLUSION

I want to conclude with one tertiary point about the application of the theory of strategic action fields to academia. Fligstein and McAdam turn to academia in Chapter 7, near the end of their book. They apply their arguments about strategic action fields to academics, noting that the social sciences generally can be seen as a strategic action field.⁴⁶

Chapter 7 is a cynical and depressing chapter. Although in other parts of their book, and throughout the Symposium, Fligstein and McAdam eloquently described the role and importance of the existential, the role of the existential is notably muted in their discussion of academia in Chapter 7. For example, the authors note that competition in the social sciences is largely local, between disciplines, and not within a particular area, and they conclude that “this disciplinary myopia represents another significant impediment to the accumulation of knowledge in the social sciences.”⁴⁷ It is a bleak view.

According to Fligstein and McAdam, social science academia is largely material in focus, though perhaps not in the pecuniary sense. In their description, scholars are often narrow-minded and are driven by the search for professional status within their fields.⁴⁸ They are not primarily existential, in any meaningful way.

However, one of the messages of this Symposium, and one of the fascinating aspects of Fligstein and McAdam’s view of strategic action fields generally, is that academics have existential capacity. We care about the search for knowledge. We want to think big, and to bring big ideas to bear on policy. We want to influence.

I want to suggest here that in incorporating law into the theory of strategic action fields, we might recognize the extent to which social science academics have the capacity for and interest in influencing policy. Chapter 7 suggests that academics answer narrowly in response to the “we are not alone” realization. Yet some academics have the version of social skills described in Fligstein and McAdam’s work; they are primar-

46. *See id.* at 208–09.

47. *See id.* at 209. Fligstein and McAdam criticize social science scholars as inward-looking and turf-protecting: “Scholars have an interest in trying to grow their career by shutting what they are doing off from what others are doing in order to claim novelty.” *Id.*

48. There is a good contrary argument: that academics should worry about their professional status outside their field, and that the route to stardom (and high citation counts) involves broadening an academic message so that it reaches numerous disciplines.

ily existential in focus. Chapter 7 is skeptical about the extent to which the scholarly enterprise in the social sciences is about collaborative meaning making. But that is what we were doing at Berle VII.