

Innovation Policy Pluralism, or Innovation Policy Hybridism?

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Daniel J. Hemel and Lisa Larrimore Ouellette, *Innovation Policy Pluralism*, 128 *Yale L. J.* (forthcoming), available at [SSRN](#).

In previous work, [Daniel J. Hemel](#) and [Lisa Larrimore Ouellette](#) explored the range of tools available to regulators interested in promoting innovation. (See [Ted Sichelman's jot](#).) While legal scholars addressing innovation policy frequently focus solely on patent law—in fact, the term “intellectual property” is often employed as a synecdoche to refer to the broader scholarly field of innovation policy—Hemel and Ouellette argued that viewing patents, prizes, grants, and tax credits as imperfect substitutes allows the public goods problem that underlies innovation policy to be solved in a variety of different ways, each with its own advantages and disadvantages.

In their most recent work, *Innovation Policy Pluralism*, Hemel and Ouellette push their earlier argument one step further. They again increase the number of tools in the innovation-policy toolkit by developing a divide-and-recombine approach to intellectual property and its quasi-substitutes. They argue that any given tool for promoting innovation has two “separate and separable” components. First, it has an innovation incentive or a “payoff structure for the producers of knowledge goods.” Second, it has an allocation mechanism that “establish[es] the conditions under which consumers can use knowledge goods.” Hemel and Ouellette provide a thorough, clearly argued, and convincing analysis of the combinatorial possibilities that arise from this finer-grained analysis of the components of innovation-policy regimes.

More specifically, Hemel and Ouellette identify three conceptually distinct types of combinatorial possibilities. First, matching combines components of different types: it allows the innovation-incentive component from one conventional innovation-policy tool to be coupled to the allocation-mechanism component from another. For example, if the government were to buy patents from innovation producers upon issuance at the market price and make the innovation freely available to the public, the innovation incentive would resemble the innovation incentive created by patent law (because it rewards producers with a fraction of the social value that their innovation generates, as measured by consumers’ willingness to pay) but the allocation mechanism would resemble the open-access regime conventionally associated with prizes and grants. Second, mixing treats each of the components as continuous rather than binary variables and allows amalgams of distinct components of the same type. For example, focusing on the innovation-incentive component, an upfront grant that does not cover the full expense of research and development expenses may be combined with patent exclusivity that is weaker than conventional patent law provides. Third, layering recognizes that different types of innovation incentives and allocation mechanisms can be deployed at the national and international levels.

While they do produce and analyze the pros and cons of an array of specific proposals, Hemel and Ouellette view their primary contribution as a conceptual framework for talking about innovation policy in a more precise and nuanced manner. The framework helps us to both conceive new innovation-policy proposals and evaluate their normative merits. Just as importantly, it also helps us to understand the jumble of laws that currently promote innovation in the United States. To prove this latter point, Hemel and Ouellette use their framework in a final section to describe the innovation-policy regime that already exists in the pharmaceutical industry more succinctly and accurately than would be possible if taxes, grants, and patents were conceived of as siloed innovation-policy regimes.

To my mind, the article’s title is a bit misleading. (This is akin to praising with faint damnation, I know.) Hemel and Ouellette’s earlier work was about innovation-policy pluralism. There is no one-size-fits-all optimal solution to a public

goods problem; different circumstances may call for different tools from the toolkit; there is value in recognizing the diversity of tools available for remedying an innovation-policy problem. Taking the argument to the next level, *Innovation Policy Pluralism* embraces what I think could more tellingly be labeled innovation-policy “hybridism.” Here, the very notion that there is a finite set of discrete tools in the toolkit becomes a contingent artifact of the conceptual framework conventionally used to think about innovation policy. By breaking these tools down into the components that they all share, the conceptual framework developed by Hemel and Ouellette reveals that we can match, mix and layer our way to hybrid tools that are more perfectly crafted to the specifications of any given innovation-policy problem.

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