

1. The politics of regulation in the age of governance

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Scholarly interest in regulation as a mode of governance – and of the regulatory state as its most characteristic feature – has increased substantially in the last decade. One of the most important driving forces of this interest is growing scholarly awareness of the global wave of regulatory reforms. Since the mid-1980s governance through regulation has ceased to be a peculiarity of the American administrative state but has become a central feature of reforms in the European Union (Majone, 1994, 1997), Latin America (Manzetti, 2000; Jordana and Levi-Faur, 2003), East Asia (Jayasuriya, 2001), and developing countries in general (Cook et al., 2004).¹ These recent developments have had a profound impact on our understanding of the regulatory state. While the studies of eminent scholars of regulation such as Marver Bernstein (1955), Theodore Lowi (1964, 1985) and James Wilson (1980) are still required reading, much has changed in the governance of the capitalist economy since the mid-1980s, hence in the degree of academic attention given to the politics of regulation. Regulation as an art and craft of governance, as an institutional reality, as a field of study, and as a public discourse is more salient and celebrated nowadays than ever before. However, the challenges are as great as the achievements. Not least, the degree of change in the ways governance through regulation is exercised can hardly be exaggerated.

Most intriguing is the expansion of regulatory modes of governance to more and more spheres of life and political arenas. Four issues are especially important here. First, the institutional advance of regulation in the context of privatization and the neo-liberal hegemony presents a paradox. In an era in which regulation has become synonymous with red tape, and deregulation has become a major electoral platform of the New Right, regulatory authorities have been created in unprecedented numbers and with unprecedented autonomy. Second, the development of proactive policies for the promotion of economic competition (regulation-for-competition) represents a departure from the past.² If the regulatory agencies that were established in the United States during the New Deal era legitimized monopolies, the new regulatory authorities that are now established all over the world are committed to active

promotion of competition, using modern regulatory techniques (more rules, more competition: see Vogel, 1996). This might lead to institutional structures and policies that are basically more mercantilist than liberal (Levi-Faur, 1998).³ Third, the incremental transfer of regulatory knowledge and institutions from economic to social spheres is encouraging to the extent that regulatory institutions have some clear advantages over ministries, and that the mere fact of reform opens new possibilities for effective governance. Yet it is also a cause for concern, since social regulation is advancing slower than economic regulation. Finally, while the American regulatory state that was created in four waves of institutional construction and deconstruction after the late nineteenth century availed of celebrated ‘prophets’ (McCraw, 1984) and had clear political affiliation (Vogel, 1989; Rose-Ackerman, 1992), the political forces that sustain, promote, and diffuse the regulatory state, and the benefits and costs that it imposes on business, are still unclear.

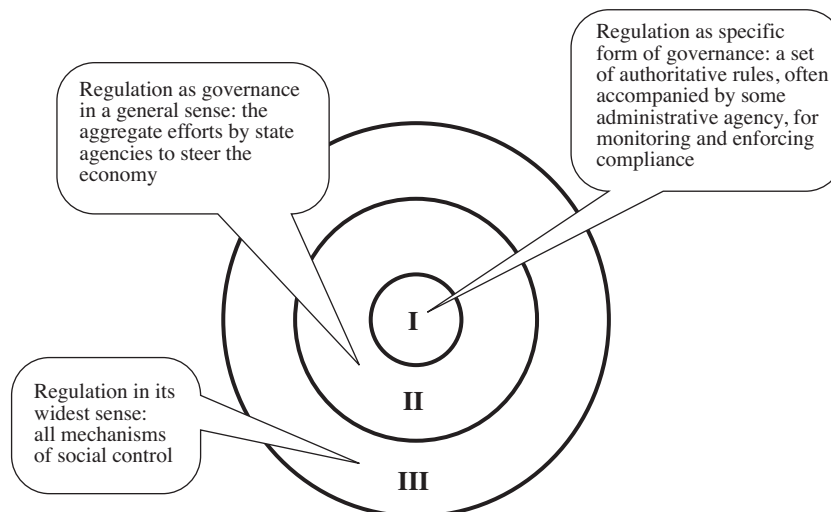
The sections of this chapter discuss four important implications of the recent advance of the regulatory state for the study of regulation. The first is the evolution and transformation of the notion of regulation, in particular the coexistence of multiple and sometimes fairly confusing meanings. The second is the changing relations between competition and regulation and their implications for the role of politics in general and the state in particular in the governance of the capitalist economy. The third is the political character (or colour) of the regulatory state, in particular the extent to which it is part of the neo-liberal order. The fourth issue is the political foundations of the regulatory state, considering the possibility that the changing social context of regulation has had a major impact on its rise. This aspect is captured through a discussion of the alleged decline in public trust in major political and social institutions in general and in the rise of the regulatory state in particular. One way to understand the relations between trust and the rise of the regulatory state is to suggest that ‘we audit, and we regulate, when we cease to trust’ (Moran, 2000, 10). Another way focuses on the changing patterns of trust allocation by the public rather than the alleged decline of trust (O’Neill, 2002, 9–10). Whatever the pattern of causality is, it might be valuable to discuss the relationship between the two. The major point that we advance, largely with the consent of the other contributors to this collection, is that the emergence of the regulatory state is much more than a by-product of neo-liberalism. To support this argument in this chapter we draw some *preliminary* outlines based on a trust-centred interpretation of the regulatory state.

THE VARIOUS MEANINGS OF REGULATION

Regulation is a popular subject of study in several disciplines across and

beyond the social sciences. It is studied by scholars who advance different theoretical perspectives, who use various research methodologies, and who hold different assumptions about the relations between regulation and the political process. Not surprisingly, the various definitions of regulation reflect specific disciplinary concerns, are oriented towards different research methods, and reflect to a significant extent the unique personal, national and historical experience of the formulator of the definition. In these circumstances it would be futile and somewhat nonsensical to offer one authoritative definition of the notion of regulation that holds across the divides. Still, some benefit may accrue from the exchange of ideas between these various approaches through a discussion of the various meanings and a clarification of how they reflect different research agendas and disciplinary concerns. To tackle this task we draw mainly on Baldwin et al. (1998), who identify three main meanings for the notion of regulation: (a) targeted rules; (b) all modes of state intervention in the economy; and (c) all mechanisms of social control, by whomsoever exercised (cf. Ogus, 1994, 1–3; Doern and Wilks, 1998, 6).

The three meanings of regulation are described in Figure 1.1 in three circles that expand from the narrowest meaning of regulation (I) to its broadest (III). In its narrowest and simplest sense, ‘regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a



Source: Baldwin et al. (1998).

Figure 1.1 The three meanings of regulation

public agency, for monitoring and promoting compliance with these rules' (Baldwin et al., 1998, 3). A second meaning of regulation refers to 'all the efforts of state agencies to steer the economy' (ibid.). This meaning is broader than the first since it includes, in addition to rule-making, measures such as taxation, subsidies, redistribution and public ownership. The third meaning of regulation is broader still, and encompasses all mechanisms of social control, including unintentional and non-state processes. According to Baldwin et al. (1998, 4), it extends

to mechanisms which are not the products of state activity, nor part of any institutional arrangement, such as the development of social norms and the effects of markets in modifying behaviour. Thus a notion of intentionality about the development of norms is dropped, and anything producing effects on behaviour is capable of being considered as regulatory. Furthermore a wide range of activities which may involve legal or quasi-legal norms, but without mechanisms for monitoring and enforcement, might come within the definition.

We suggest that the three meanings to some extent reflect the changes that we have identified in the economic and social context of regulation. In addition, they reflect different research agendas and different disciplinary concerns. Let us start with the pre-1990s transatlantic difference in the meaning of regulation. Until the end of the 1980s scholars outside the United States tended to employ the word 'regulation' to denote the general instruments of government for the control of the economy and society (meaning II). The notions of 'regulation' and 'intervention' were used almost interchangeably (Majone, 1994, 77). The situation was different in the United States, where the notion of regulation had acquired a narrower meaning in response to the rise in the number of independent regulatory institutions and the consequent crystallization of regulatory practices into a theory of governance (meaning I). The global spread of the wave of regulatory reforms, and especially the establishment of independent regulatory institutions in various sectors of the economy (especially in the utilities), led to some convergence in the meanings of regulation: towards the narrowest and away from the second, which had more general use. This movement was strengthened by a shift in the way some economists used the notion of regulation. As noted by Ogus (2001, ix), economists, unlike lawyers (and, we add, political scientists in the United States), used to employ the word 'regulation' in its broad sense. This meaning was acceptable and probably successful in conveying a widespread distaste for over-regulation, yet it was rather too broad, given the growth of institutional economics and law-and-economics scholarship. We therefore suggest that even in the economics profession the narrower meaning ('targeted rules') has grown increasingly popular.

At the same time, it seems that the third meaning of regulation (all mechanisms of social control) is making headway in the socio-legal and the constructivist literature. This seems to be driven by the growth of (semi-)consensual international regimes for the governance of 'global problems' such as weapons of mass destruction and climate change. We have referred to this development as the increasing multiplicity of the levels of governance. New regulatory regimes are at least partly established through voluntary agreements, without recourse to strong monitoring and enforcement mechanisms and with apparent disregard for values of 'national sovereignty'. The normative questions that arise from this definition, the problems of monitoring and enforcement mechanism, and the interests in supranational and international regulatory regimes make this notion of regulation especially attractive for lawyers, sociologists of law, and scholars of international relations and international political economy.

Many variations in these notions of regulation might be found in the literature, and it is not impossible that the popularity of these notions will decline at some time in the future and that others will make headway. We should not look for an exhaustive and consensual definition across different disciplines and research agendas, but for a specific context and goal that shape the particular meaning of the notion of regulation. Let us move on to the changing relations between regulation and competition.

THE CHANGING RELATIONS BETWEEN REGULATION AND COMPETITION

Not only the meaning of regulation but also the relations between regulation and competition have changed in the last two decades. It was only in the early 1970s that George Stigler could write with much conviction and force that 'regulation and competition are rhetorical friends and deadly enemies: over the doorway of every regulatory agency ... should be carved: Competition Not Admitted' (Stigler, 1975, 183). While this notion of the relations between regulation and competition is still part of public and political discourse, it hardly reflects any longer the relations between competition and regulation. Regulation and competition became aligned in a way that was inconceivable to Stigler, and is still difficult for many to appreciate. The regulatory toolbox has expanded and, most importantly, contains new techniques of 'regulation-for-competition'. These techniques refine the work of the regulators and thus represent a professional advance in regulatory techniques. With the help of new digital technology, these techniques facilitate much of the spread of freer markets alongside the consolidation of regulatory regimes. At a different level, they allow the regulators to align themselves

with the neo-liberal agenda and to regain legitimacy in an environment of 'regulatory flux'.⁴

It might be useful to start with a clarification of five notions that are used in the literature to capture the relations between competition and regulation. Deregulation, re-regulation, regulation-of-competition, regulation-*for*-competition and meta-regulation convey different and sometimes conflicting dimensions of the much wider phenomenon of regulatory reform and liberalization. Deregulation is the reduction of economic, political and social restrictions on the behaviour of social actors (in our context, mainly business). In the early 1970s, when Stigler wrote about the clash between regulation and competition, he implied that the elimination of regulation (that is, deregulation) was a necessary condition for competition. The notion of re-regulation is often used to imply that regulatory reforms and liberalization in general result in new settings of regulation rather than in deregulation. The notion of re-regulation is vague as to the nature and goals of the new regulation, and therefore has rather limited use in clarifying the relations between competition and regulation. The advantage of the notions of regulation-*of*-competition and regulation-*for*-competition over the notion of re-regulation is that they reflect 'positive' relations between regulation and competition and suggest that it may be possible to promote competition via administrative controls (see Table 1.1).⁵

Regulation-*of*-competition and regulation-*for*-competition differ in the degree of intervention by state authorities and in the capacities of the state to monitor and enforce competition. While both require the establishment and the strengthening of governance capacities, regulation-*for*-competition requires far more intrusive capacities. This is best indicated by the contrast between economy-wide responsibilities of national competition authorities in the case of regulation-*of*-competition, and sector-specific responsibilities of regulatory authorities in the case of regulation-*for*-competition. The broader responsibilities of national competition authorities allow them less influence on market actors who know their industry well. These broader responsibilities also imply that competition authorities adopt a reactive approach to anti-competitive measures. In regulation-*for*-competition, the responsibilities of regulatory authorities are narrowly confined to a sector or industry, but they usually give those authorities much more influence over market actors. Unlike the reactive approach of competition authorities, these sector-specific authorities are today proactive and involved in market design and market control to an unprecedented extent.

Finally, meta-regulation of competition implies that in addition to the direct regulation of the actions of individuals and corporations, the process of regulation itself becomes regulated. In our context of the promotion of competition via political power, it means that the government monitors

Table 1.1 Types of competition and types of regulation

Type of competition	Types of regulation	Regulatory authority	Examples
Deregulated	Self-regulating markets	No regulation (retreat of the state)	Moving from certification to liability laws in order to protect consumers
Regulated	Regulation- <i>of</i> -competition	National competition authorities	Prevention of concentration through the regulation of mergers, cross-ownership, etc.
Regulated	Regulation- <i>for</i> -competition	Sector-specific authorities and national competition authorities	Interconnection regimes in telecommunications, unbundling the network
Meta-regulated	Enforced self-regulation of competition rules	Sector-specific authorities and national competition authorities	Institutionalization of internal mechanisms of self-regulation that correspond with the legal requirements of competition law in general and the regulatory regime in particular.

Source: Partly based on Levi-Faur (1998).

the self-monitoring of corporations and other organizations as to the compliance of their employees with the rules of competition (see Morgan, 2003; Parker, 2002).⁶ Direct intervention and enforcement are replaced here with allegedly lighter demands on economic actors to institutionalize processes of self-regulation. Yet if the intrusiveness of the state is to be judged by how far it can change social and corporate behaviour, this type of regulation should be considered as intrusive as regulation-*for*-competition.

While regulatory reforms certainly involve some aspects of deregulation, they also involve regulation-*for*-competition, regulation-*of*-competition, and meta-regulation. These last three forms of regulation, which are often ignored

by neo-liberals, allow the relatively harmonious growth of the regulatory state in the context of pervasive regulation.

WHAT IS THE REGULATORY STATE?

It is often claimed that we live in the era of the ‘Regulatory State’ (Majone, 1994; 1997; Loughlin and Scott, 1997; McGowan and Wallace, 1996, Hood et al., 1999). Indeed, among a large number of candidates for a convincing label that captures the essence of recent changes in the governance of the capitalist economy, this one has proved especially popular (Moran, 2002, 391). Yet this notion raises several questions, of which some of the more significant are discussed here. What is the ‘regulatory state’? Is it a scholarly fiction or a political reality? To what extent is it a global rather than a national phenomenon? Is it a product of the neo-liberal project of liberal world economy? And, consequently, what are the political affiliations (or colours) of the regulatory state?⁷

First, then, what is the regulatory state? We suggest three possible answers – the minimal, the prudent, and the over-ambitious – each of which has some advantages for the study of regulation. A minimal answer would be that it is a fiction that provides ‘a sort of intellectual brazier around which [scholars of regulation] can all gather, to warm our hands and speak to each other, in a world of increasingly fragmented academic professionalism’ (Moran, 2002, 411–2). Who cares, asks Moran, about the shape of the brazier or what is the fuel for the flames, as long as it helps moderate the crisis of communication in the social sciences? This minimalism seems to have some advantages as it reminds us not only that we employ the notion of regulation differently across and even within different disciplines, but that the importance of regulation and regulatory institutions in the governance of the economy is a contested issue. The downside of this minimalism is that it may be counter-productive to the consolidation of cross-disciplinary research and to attracting more scholars to the study of regulation. Fictitious entities are rather less attractive to scholarly research (and to funding institutions) than real entities.

From another perspective the term regulatory state ‘suggests [that] modern states are placing more emphasis on the use of authority, rules and standard-setting, partially displacing an earlier emphasis on public ownership, public subsidies, and directly provided services. The expanding part of modern government, the argument goes, is *regulation* ...’ (Hood et al., 1999, 3; see also Majone, 1997). Unlike the first, this second answer points to tangible dimensions of the regulatory state. By using the notion of modernity so often, it also suggests the existence of intimate relations between new and refined instruments of regulation that did not exist before, or at least were not widely

used, and the development of regulatory institutions that operate them.⁸ Paradoxically, the tangible effects of the regulatory state might be apparent in the growth in the discourse of regulation in scholarly, media and policy-making circles. Yet beyond the instruments and the discourse, numerous new institutions have gained autonomy from ministerial control, are staffed by experts, and command considerable resources. Their proliferation around the globe supplies some tangible support for the view that the regulatory state is more than a scholarly fiction.

Some caution, however, is in order here. First, the advance of the regulatory state is conditioned by sectoral characteristics as it clearly advances in some sectors more than others. Second, multiple forms of control, not just one, are employed in the governance of the capitalist economy; several modes of regulation coexist even in heavily regulated sectors (Pagoulatos, 1999). Third, the regulatory state does not develop in a vacuum and is not meant to operate as a sole source of regulatory control. At best, it can be embedded successfully in older layers of governance that were created for different purposes and in different eras (see Jordana and Sancho, Chapter 13, this volume). Fourth, dependent on national institutions and state traditions, it may well be that there are several types of regulatory state rather than one (Lodge, 2002, 177). Finally, caution is also advised with regard to the 'locus' of the regulatory state. For some it is a global phenomenon, driven by the emergence of a new convention on the best practice in economic governance (or more critically, the effects of imitation: Levi-Faur, 2002). For some it is basically an aspect of regional integration, which occurs in the context of liberalization and the rise of technocratic forms of legitimacy (for example, Majone, 1994, 1997). For others regulation is mainly a political and administrative process that occurs and matters at the national level: hence studies of the 'Regulatory State in Germany' and 'The Regulatory State in Britain' (Muller, 2002; Moran, 2003). For others still the regulatory state is a sectoral phenomenon: hence studies of *The Politics of Banking* (Moran, 1984) and even *The Politics of Central Banks* (Elgie and Thompson, 1998). While each of these interpretations might have some validity, it is necessary to develop research designs that will capture the increasing 'multi-levelness' of the regulations and regulatory politics (see Levi-Faur, Chapter 8, this volume).

The over-ambitious answer sees the regulatory state as *the* major aspect in the transformation of the governance of capitalist economies since the 1980s. Rule-making, according to this answer, will marginalize if not replace war-making, taxing and spending – the three most visible functions of the modern state. Variations across sectors, nations and international regimes are temporary or minor aspects of the shift towards convergence on the regulatory state. This approach sees the rise of the regulatory state as only one dimension of historically and institutionally entrenched modes of governance such as the

welfare state, the developmental state and the stabilization state. Finally, the over-ambitious answer would analyse the regulatory state in an *ahistorical* manner. It ignores the effects of path-dependencies, sequencing of policy steps, and timing in general. While such an answer is hardly found in the scholarly literature in the full-fledged and somewhat caricatured form presented here, we hope that our discussion of the over-ambitious approach will serve as a warning rather than a viable answer to the question of what the regulatory state is.

We can now approach a second, no less important, issue that touches on the nature of the regulatory state. We have suggested that the term ‘regulatory state’ is one of the convincing labels that capture the essence of the transformation of the capitalist economy. This is all but paradoxical, since the rise of neo-liberalism was supposed to result in deregulation, the retreat of the state, and the triumph of markets and business interests (cf. Ayres and Braithwaite, 1992, 7–12). Could it be that the regulatory state is just a different expression of the same interests and policy goals? In other words, what is the political affiliation of the regulatory state? What are the political forces that support its expansion? Is it a product of the neo-liberal hegemony or is it a pink creature of the ‘third way’?

There were times when the regulatory state had very unambiguous colours and a clear political identity. In the United States, where independent regulatory institutions occupied centre stage in the administrative machinery of government, the regulatory state was a product of popular political struggles against entrenched business interests. True, as some were only too happy to point out, business interests supported some forms of regulation (especially at the federal level); but this support hardly contradicts our argument. The creation of the regulatory state in the United States from the end of the nineteenth century through the New Deal and the postwar periods is the hallmark achievement of the American left, and indeed, at least from the point of view of the American extreme right, its colours were all too red. But to the European left, where nationalization rather than regulation was the widespread response to the rise of big business and public social concerns, the American regulatory state seemed rather pink.⁹ What one sees, we learn again, depends (somewhat) on one’s viewpoint.

This becomes all the more clear when one considers the different views on the current nature of the changes in the governance of the capitalist economy and the role of regulatory institutions in them. Jill Hills (1993), for example, portrayed the reforms in British telecommunications as a move ‘back to the future’, that is, towards the nineteenth century Night Watchman state. A similar view is reflected in Dunleavy’s (1995) characterization of the change in the governance of the economy as the ‘hollowing out’ of the state. Indeed, even Majone’s (1997) description of the change in the governance of

European economy as moving ‘from the Positive State to the Regulatory State’ has similar echoes. The insinuation that the regulatory state is less positive and ‘less red’ than its predecessors seems to underestimate the capacities of regulatory authorities to promote social goals and to overestimate the social benefits of public ownership.

A more balanced account of the regulatory state, we suggest, is offered by Ayres and Braithwaite (1992), and the regulatory state and the process of reform are more open-ended than is generally assumed. Such a view is best reflected in Braithwaite’s (2000) recent conceptualization of the change in the political economy of the capitalist economy. A seafaring metaphor, borrowed from Osborne and Gaebler (1992), which distinguishes *steering* (leading, thinking, directing, guiding) from *rowing* (enterprise, service-provision), allowed Braithwaite to capture three different types of states across two centuries of capitalist economy, as presented in Table 1.2. While in the nineteenth century it was civil society that did the steering and rowing, the postwar State took over responsibility for both steering and rowing. The regulatory state that was born on a global scale in the 1980s represents a new division of labour. While the state is responsible for steering, civil society took over the functions of service provision and enterprise.¹⁰

Table 1.2 *The transformation of governance and the nature of the regulatory state*

	The Night Watchman State (nineteenth century)	The Postwar State (1945–1970s)	The Regulatory State (1980s–)
Steering	Civil society	State	State
Rowing	Civil society	State	Civil society

Source: Based on Braithwaite (2000).

The intriguing feature of Braithwaite’s use of this metaphor is the relative freedom that it grants the regulatory state. Steering is not confined to certain goals and destination, so the ‘policy boat’ is not confined to shallow water. The regulatory state may opt for a variety of social and economic goals. It can be market enforcer, social planner, night watchman, or any combination of the three. National and sector-specific choices are thus not limited: the regulatory state can be captured by any organized interest or act in a fashion relatively autonomous of social forces. In other words, the jury is still out and the true colours of the regulatory state are still to be determined.

TRUST AND THE REGULATORY STATE

While the jury in our previous section is still deliberating, one might speculate about the criteria that it will adopt when making its judgement on the political affiliation of the regulatory state. It seems safe to suggest that a decision will be taken with reference to the performance of the regulatory state (not an easy task for our juries). Yet the jury might also want to consider the motives and the context that shaped the rise of the regulatory state. It will probably consider three options. The first suggests that the regulatory state is a technocratic solution to the problem of (lack of) expertise of policy-makers and more generally their time constraints. The second assumes the supremacy of the 'structural' power of business (Poulantzas, 1969; Lindblom, 1977) and suggests that delegation solves the problem of political credibility by imposing constraints on policy change. Unlike the first interpretation, which emphasizes the technocratic nature of the regulatory state, the second perceives it as a solution to the inherent tension between the demands of the capitalist order and democracy. Let us present each of the two before suggesting a trust-centred perspective.

The advantages of delegation from politicians to experts were already recognized in the American context. In the mid-1950s Marver Bernstein could write:

In general, the commission form has been championed by those who believe that administrative regulation requires a high degree of expertness, a mastery of technical detail, and continuity and stability of policy. These requirements, it is alleged, can only be met by a board of commissioners functioning in a neutral environment, free from partisan political considerations. (Bernstein, 1955, 4)

Similarly, in the current European context, Majone emphasizes that 'regulation is not achieved simply by passing a law, but requires detailed knowledge of, and intimate involvement with, the regulated activity' (Majone, 1994, 81).¹¹ Intimate knowledge of the regulated activity is continuously raised as a reason for autonomous regulatory agencies and for granting wide discretion to regulators. At the same time it challenges the idea of democratic governance by elected officials by introducing an additional layer of decision-making, which is only indirectly accountable to the electorate.

The second interpretation of the rise of the regulatory state in general and delegation in particular is the credibility explanation. In their most basic form, these explanations suggest that governments delegate powers mainly in order to enhance the credibility of their policies to potential investors (Majone, 1999, 4; Franchino, 2002). Short-term electoral cycles, growing regulatory competition, and increasing international interdependence create the basic conditions for the delegation of authority to both domestic and international

institutions (Majone, 1999). The issue of credible commitment is therefore intimately connected with the change in the context of regulation. Governments that are entangled with growing regulatory competition are pushed to transfer control through institutionalized forms of delegation as a way to enhance their credentials in the eyes of transnational business. At the same time, delegation of authority to supranational institutions is used as a tool by governments to project their commitment to international cooperation (Majone, 1999).

Yet a third interpretation of the extensive use of delegation and of the rise of regulation as a major mode of governance focuses on the role of trust and the dynamics of trust-building. For some, the decline of trust is a major characteristic of modern life. For Putnam (1993) and Fukuyama (1995), for example, the distinction between low-trust and high-trust societies promises to shed light on central issues such as the causes of economic development. For others, the major issue is not necessarily a decline of trust but its distribution in interpersonal, communal and political settings. Trust is given to some institutions and actors and is withheld from others (again, the general trends of this dynamic process are still much debated). Specifically in the context of regulation, it was suggested that the trends of the alleged decline in the public's trust in social, economic and political institutions might have important implications for the rise of regulation as a mode of governance (Power, 1997; Moran, 2000; 2002). The decline of public trust in economic and political institutions is celebrated in the outbreak of public scandals in the mass media (Moran, 2000, 2001, 2002) as well as in growing attention to blame-shifting strategies of politicians (Hood, 2002). At the same time the decline of trust might be behind the rise of the 'audit society' (Power, 1997, 142–7), the decline in some forms of self-regulation (Moran, 2000, 5–6), and the rise of the regulatory state *within* the state (Hood et al., 1999). Yet even in the context of regulation the suggestion that trust is declining in modern societies is not universally shared. How else can we explain the promotion of high-trust strategies of self-regulation that are popular not only among scholars of regulation but also among practitioners (Morgan, 2003; Parker, 2002)?¹² Since the issues of the alleged decline of trust and its effects on social and economic performances are contested, and since we aim to sketch only preliminary outlines of its effects on the regulatory state, we will limit ourselves here to the demonstration of four advantages of the trust-centred perspective on explanations that emphasize the role of expertise and 'policy credibility' in the context of government business relations. These four advantages may encourage other scholars to discuss the issues of trust and regulation, which are only partially developed here, more thoroughly.

First, trust-centred explanations make better sense than the other two explanations in regard to related concepts of the 'audit explosion' (Power,

1997) and the 'Regulatory State inside the state' (Hood et al., 1999). The notions of 'audit explosion' and 'audit society' capture the increasing degree to which modern societies are committing themselves to various kinds of auditing practices. According to Michael Power, the 'audit explosion' represents more than functional needs and is a reflection of sociological currents and our attempts at social control in the face of uncertainties and risks. Auditing is an effort to enhance trust via the supply of information, yet it comes at a price: 'one needs to trust the auditor and the audit process itself' (Power, 1997, 136). Similarly, Hood and his colleagues shed light on the fact that regulation is not only a game played between society and state actors but is also done inside the state (Hood et al., 1999). Here is another explosion of regulation, which is not a product of the dependency of the capitalist order on private investment:

[T]he sum of regulation inside UK government amounted to a surprisingly large enterprise, approaching if not exceeding the scale of regulation of private business. It was an 'industry' which seemed to have grown topsy-like ... (Hood et al., 1999, 5)

The common denominator of observations on the 'audit explosion' and 'regulation inside the state' is that they place the process of regulation in its broader context. Regulation is increasing not only in sectors and arenas where expertise and capital are badly needed, but also far beyond. Observers suggest that the rise of the regulatory state is propelled by concerns of business investment and the role of expertise in the policy process, but also by the dynamic process of trust-building between social and political actors (for example, politicians and the electorate), which goes far beyond purely economic considerations.

A second good reason why one should consider the role of trust in the rise of the regulatory state is the 'retreat from self-regulation' and the growing vulnerability of experts to social and political criticism. According to Moran (2000, 8), the retreat from self-regulation is one of the paradoxes of the regulatory state since it clashes with the argument 'that we are witnessing the advance of reflexive modes of governance by self-steering systems'. If one also considers the decline of liberal forms of corporatism, the rising role of 'enforced self-regulation', that is, 'self-regulated, or else ...' (Ayres and Braithwaite, 1992, 15), and the decline of professional authority as reflected in the constraints on self-regulation by professional associations (Moran, 2000, 5–6), it seems even more plausible that trust is central to the rise of the regulatory state. We transform systems of self-regulation or make sure that they work properly in order to build or rebuild systems of trust.

Third, trust-centred explanations might be more persuasive than explanations centred on expertise and policy credibility when one considers

their applicability to social regulation (for example, health and safety, environmental issues and consumer protection) and especially the creation of autonomous agencies in these spheres. The progress of regulatory reform in these areas, following scandals, catastrophes and public pressure, may suggest that trust between politicians and the public might be an important factor in their consolidation. Once caveat is required, however. If, indeed, independent regulatory authorities in social arenas continued to lag behind the economic arenas, one might want to turn again to the politics of expertise and issues of policy credibility in order to account for the rise of the regulatory state. Yet if this gap between the popularity of independent regulatory authorities in social and economic spheres is only temporary, and similar levels of regulatory reform will be observable in the sphere of social regulation, it will be possible to argue even more forcefully for the importance of trust in understanding the institutional design of the regulatory state.

Finally, the problems of 'non-majoritarian institutions' in general and the demands for more transparency and accountability specifically are often portrayed as outcomes of the rise of the regulatory state (Majone, 1994, 1997). Yet the relationship between the demand for more transparency and accountability on the one hand and the rise of the regulatory state on the other might *not* be one of cause and effect. It might well be that the regulatory state and the demand for more transparency and accountability are both outcomes of the shift in the balance of trust between different professions and social groups. The regulatory state may itself be the solution to problems of transparency and accountability that are associated with the postwar state. Either way, there can be significant interactions between the nature of trust in society and the logic of regulation as a mode of governance. If this assertion gains some general acceptance, it will place the rise of the regulatory state in a context which is wider than what is offered in the current literature and will diminish still more the strength and explanatory power of neo-liberalism as the dominant perspective for explaining current changes in the governance of capitalism. All in all, we think that trust-centred explanations are interesting enough. While not in any way a substitute for political analysis, they may help us frame our analysis in broader terms, namely sociological, and thus somewhat challenge the dominance of the political-economy analysis in the study of regulation and the regulatory state.

THE CONTRIBUTIONS TO THIS VOLUME

The contributions to this volume are organized in two parts. The first part assembles chapters that explicitly discuss theoretical perspectives and their application to the study of regulation, combining different views and

approaches. The framing and the evolution of regulatory institutions, the relation between regulators and private interests, and the interrelation between multiple actors and levels of regulation are among the basic issues examined here, considering alternative theoretical approximations. The chapters in the second part present a more comparative focus, either addressing specific problem areas (for example, European governance) or proposing analytical and interpretative frameworks to manage the study of the politics of regulation and their institutional context. As a whole, they shed light on some of the most important developments in the diffusion of regulatory reforms and new institutional forms around the world from what might be best described as a European perspective on the changes in the governance of the capitalist economy.

Chapter 2, by Anthony Ogus, provides an assessment of the status of the economic theory of regulation. In the 1970s and 1980s the economic theory of regulation, with seminal contributions from Stigler and other members of the Chicago School, provided some major insights into the origins and nature of regulation. The principal hypothesis that regulation benefited, and was therefore sought by, the regulated industries rather than other interested groups was an important antidote to the familiar public interest models. This work was complemented by that of the Virginia School, with its focus on rent-seeking behaviour. Anthony Ogus examines how well the economic theory of regulation has survived in an era of deregulation and regulatory reform. His conclusions are that the revitalized public interest approach to economic analysis, sometimes associated with the Yale School of law-and-economics, provides necessary tools for the study of contemporary regulatory policy-making.

Chapter 3, by Iain McLean, examines three events in the history of British regulation that exemplify some key theoretical debates (some of which are also raised in Chapter 2 by Anthony Ogus). McLean compares three distinct theories: the so-called public interest models, the economic theories of regulatory capture, and the adaptation of the median-voter hypothesis as an explanation for regulatory decision-making. The first case is railway regulation from 1825 to 1872, with four notable railway regulation acts. Of these, the Railway Clauses Consolidation Act 1845 and the Regulation of Railways Act 1844 remained a huge influence on regulation in both the UK and the USA throughout the nineteenth century. In this case, regulation of safety arose from electoral pressure; regulation of price and quantity was a political initiative from an exceptionally determined minister (W.E. Gladstone). The second case is about the consequences of a colliery waste tip that slid down a mountain of waste into Aberfan, a mining village in South Wales. To explain this regulatory failure McLean analyses why risk was not assessed properly, invoking cultural factors and the existence of regulatory

capture. The third case refers to the wave of privatizations under Thatcher governments during the 1980s, without the prior establishment of new regulations; McLean analyses this as an example of policy guided by median-voter seeking. On the basis of these three cases, McLean argues that all three theories of regulation are viable, but not for all the cases: they are supported by different bodies of evidence, depending on each case. Information management, but also historical contingencies, seem to have an important role in explaining which theories best match which cases.

In Chapter 4 Fabrizio Gilardi focuses on explanations for the diffusion of independent regulatory agencies (IRAs) in Europe. The creation of such agencies can be observed in all West European countries and in a wide range of sectors, such as utilities, financial services, food safety, consumer protection and general competition. Why do governments delegate to agencies they can only partially control? Gilardi suggests that the most promising avenue for research is the new institutionalism in its three forms: rational choice, historical and sociological. Rational choice institutionalism has a long tradition in the US, where, in its principal-agent and transaction costs variants, it has been extensively used to analyse delegation to the executive and to bureaucracy. This constitutes an excellent starting-point for the study of delegation to IRAs, but more for the questions it raises than for the answers it offers. In effect, in the case of delegation to IRAs, what can be observed is that principals make agents purposely independent rather than, as predicted by principal-agent theory, designing control mechanisms that are as accurate as possible. This means that some powerful incentives must be present that lead governments to engage in this extreme form of delegation. Rational choice institutionalism identifies two such incentives. The first is the need to make credible commitments, and the second is the desire to mitigate the effects of the uncertainty of political property rights. In many regulatory settings, credible commitment capacity is a very valuable asset, as it is the only means for governments to achieve their goals. Delegation to IRAs is a way for governments to remove their future freedom of action, and thus to improve the credibility of their commitments. On the other hand, the problem of political uncertainty refers to the fact that elected politicians, by reason of the democratic process, are not able to exercise power for ever. This suggests that politicians should be expected to find a method to make their policy choices last well beyond the moment, which can be postponed but not avoided, when they lose their political property rights over a given policy area. This means that current politicians may wish to bind future politicians. Again, delegation to IRAs is a possible solution.

Historical institutionalism and sociological institutionalism, argues Gilardi, share many similarities, but it is useful to treat them separately. Beginning with historical institutionalism, the main argument is that 'functional

pressures' such as those highlighted by rational choice institutionalism are strongly mediated by national institutions, and in particular by state traditions and structures. For example, Britain has a long tradition of regulation through commissions, whereas France has been much more suspicious of independent agencies, seeing them as threatening the unity of the state. In the end, the argument refers to path dependency: change is possible only on a given path. Thus, national and sectoral paths are likely to have an impact on the design of IRAs.

Sociological institutionalism, on the other hand, strongly emphasizes institutional isomorphism. Social processes legitimize certain types of institutional choices rather than others. From this perspective the creation of IRAs is explained by the fact that governments seek legitimacy for their regulatory policies, which can be achieved by using socially valued institutional models such as IRAs. The three forms of institutional isomorphism – coercive, mimetic and normative – are thus likely to be at the origin of the diffusion of IRAs across Europe. The last part of the chapter is devoted to a discussion of the observable implications of the three theories, as well as of the available empirical evidence. The concluding section summarizes the main arguments and sketches a research agenda on IRAs in Western Europe.

Chapter 5, by Damien Geradin and Joe McCahery, critically examines the theory of regulatory competition. The departure point of this theory is that governments compete for factors of production – and also to attract habitants – when they regulate. Thus, regulation should satisfy citizen preferences if competition is effective. In general, it is argued that decentralized regulation produces more efficient results, because at the level of local government competition is greater (there are more governmental units competing). Damien Geradin and Joe McCahery summarize the main lines of this theoretical perspective and point to their normative implications. They then criticize the oversimplification of the theory and suggest an alternative approach, labelled 'regulatory co-opetition'. This approach considers three main dimensions of competition and cooperation, including 'extra-governmental', in which non-governmental actors also play a role. They argue that this multi-dimensional approach clarifies the complexity of actual regulatory strategies, in which different combinations of competition and cooperation are present in relationships between different actors involved in the regulatory arena. Each dimension influences the regulatory behaviour of actors, creating pressures and opportunities. If public interest theories and rent-seeking theories are based on hypotheses about the fundamental interest lying behind the actors' behaviour, regulatory competition theory, but also the alternative co-opetition model, are based primarily on some hypothesis about the aggregate effects of multiple actors with regulatory powers. Although this interpretative

framework is mostly inspired by economic reasoning on the functioning of markets, it appears clear that the politics of regulation has to be analysed somewhat to make sense of regulatory developments, in so far as too many options remain open.

The move towards the regulatory state has attracted much attention to issues of accountability and transparency. In Chapter 6 Martin Lodge highlights various perspectives on these problems. The 'traditional' legal literature centres on political-constitutional concerns, 'transaction cost' accounts point to the importance of 'slack' for 'other-regarding' actions, and a 'traditional public service'-oriented literature suggests changes in the public service ethos and accountability owing to perceived marketization via regulatory reform. This chapter advances beyond traditional subjects by underlining the doctrinal basis of the different criticisms and accounts of regulation. Martin Lodge's argument is advanced in three steps. First, he explains the diversity in accounts of accountability and transparency in the literature by locating them in distinct administrative doctrines. Second, he advances a 'transparency toolbox' to distinguish various 'value-free' instruments through which regulation can be made accountable and transparent. These instruments are then linked to the contrasting administrative doctrines of fiduciary trusteeship and consumer sovereignty to show the variety of potential instruments through which accountability and transparency may be incorporated into regulation. In the third part of the chapter Lodge discusses the factors that impact on the selection of instruments, drawing both on analytical concerns (based on the transaction-cost literature) and on empirical evidence, from the developed world as well as the developing world. Accountability and transparency are not just 'good things' that should be enhanced as much as possible, he concludes, but essentially are contested instruments. Any solution to these problems affects the distribution of power in any regulatory regime, involves trade-offs, and provokes responses that can be self-defeating. For this reason they are important instruments in the battlefields of the politics of regulation.

In Chapter 7 Colin Scott examines governance 'beyond' the regulatory state. Three core assumptions of the regulatory reforms are scrutinized: regulation is instrumental in character; the state is necessarily central to regulatory governance; and state law is a central instrument of regulatory governance. The chapter focuses on one aspect of the critique concerning the centrality of state law to regulation. It argues for shifting the focus of analysis from law to the wider range of norms and mechanisms through which control is asserted or achieved, however indirectly.

The issue at the heart of Scott's approach is the extent to which we can or should think of regulatory governance functioning in a manner not dependent on state law or within which state law is not central. Scott explores different theories in search of support for the notion of the post-regulatory state – in

which state law is not the key to regulation – such as the limits of control by the law, or the dimensions present in guaranteeing a basic social order. The theories reviewed focus on the relation between social order and state regulation and on the existence of multiple sources of social order (such as iterated cooperation and cohesive communities). This line of theoretical reasoning based on socially emergent properties represents the opposite extreme to the intentional perspectives based upon individual interests, but also addresses regulatory behaviour and regulatory institutions of all kinds, not only formal ones.

Together, these first six contributions shed light on some basic theoretical perspectives on the politics of regulation. They either explain regulatory results by reference to the conscious purposes of politicians and bureaucrats (Ogus, McLean), or explain regulatory landscapes by analysing the development of formal rules and institutions – by aggregate effects of competition and cooperation (Geradin and McCahery), or by strategic considerations, mimetic reactions, or cultural traditions of decision-makers (Gilardi). The two last chapters explain the discourse and notions of transparency and accountability as derivatives of different conceptions of democratic order (Lodge) and the interplay between formal and informal regulatory rules in the functioning of a regulatory order – the post-regulatory state (Scott).

The second part of the book addresses the analysis of the politics of regulation from a different methodological perspective. Instead of formulating an interpretative adaptation or model based on general theories, its analytical purpose takes as a departure point comparative perspectives aiming to derive non-obvious conclusions from the comparison of different cases. Chapter 8, by David Levi-Faur, deals with problems of comparative analysis in a global world where variations occur simultaneously in different arenas of political action. Levi-Faur identifies four popular comparative approaches to the study of politics and policy in general and regulation in particular. These are titled: the national patterns approach (NPA), the policy sector approach (PSA), the international regime approach (IRA), and the temporal patterns approach (TPA). While these approaches are not necessarily contradictory, they represent different assumptions about the determinants of political and regulatory change. Each of these approaches omits some important sources of variations and commonalities in the regulation of the economy and society. Levi-Faur presents a technique that could maximize their explanatory power in the context of medium-*N* comparative designs, especially those designs that combine two or more comparative approaches to the study of regulatory change. This technique complements the stepwise approach of Steven Vogel and further strengthens the ability of the researcher to increase the number of cases without compromising the strengths of the case-oriented approach.

Chapter 9, by Nicolas Jabko, discusses the political foundations of the regulatory state. Jabko takes issue with the approach that attributes the worldwide multiplication of independent regulatory authorities to the evolving functional requirements of a modern economy, namely the shift away from *dirigiste* policies and towards a more market-based model of public supervision of the economy. Based on a comparative analysis of new regulatory mechanisms recently set up in the European Union, Jabko argues that the emergence of the regulatory state at the European Union level is the result of political manoeuvring rather than evolving functional requirements. In sectors where market forces and technological modernization prevail, old-style regulators constantly have to adapt in order to defend their turf; therefore, would-be regulatory entrepreneurs are generally out-manoeuvred, and new regulatory agencies are rarely created. By contrast, regulatory innovation occurs often in policy sectors where technological evolution is so slow that significant increases in economic efficiency cannot come from incremental regulatory intervention; under certain conditions, the very inertia of this situation creates manoeuvring room for new regulatory–political initiatives. In sum, the chapter concludes that regulatory innovation is more a function of politics than of economic modernization.

Chapter 10, by Christoph Knill and Andrea Lenschow, focuses on two central issues: changes in the nature of the regulatory state and the emergence of multiple regulatory forms. However, the authors use the comparative method in a different way. Taking as a case study the European Union – which has witnessed not only the shift of regulatory activities to a new institutional centre, but with this shift also the evolution of new regulatory patterns – they identify and compare four different modes of regulation in the governance of the European Union. These are new instruments, regulatory standards, self-regulation and the open method of coordination. Then a discussion is developed about the different political dimensions to which they are linked. Thus, each mode of regulation is considered to be linked to a specific mechanism of steering. The authors present an evaluation of the problems of governance that each mode of regulation implies.

Chapter 11, by Marc Tenbücken and Volker Schneider, deals with regulatory reforms and institutional innovations in the field of telecommunications. Comparing the OECD countries, the authors observe that all Western industrial nations have opened their telecommunications markets, dismantled state monopolies, and established national regulatory authorities (NRAs). Liberalization measures starting in the United States in the early 1980s triggered a global chain-reaction that eventually reached every Western industrial nation. However, a closer look at the national level reveals that significant national differences prevail in the institutional transposition of the reform process. The authors demonstrate that despite convergence, consider-

able differences exist between the NRAs in terms of their organizational structure and regulatory competencies. The international diffusion process did not lead to the adoption of a unitary NRA model. Whereas the impact of the organizational structure on the level of independence is quite similar across countries, significant national differences exist in the delegation of regulatory functions to NRAs. The results obtained from the cross-national comparison enable the authors to create an index, ranking NRAs according to their degree of independence with respect to the government.

Chapter 12, by Patrick Schmidt, is devoted to the role of lawyers in regulatory processes. As a highly influential professional collective, lawyers play a central role in many aspects related to regulation, and often research in this area fails to take account of the overwhelmingly 'legal' character of regulatory politics. Patrick Schmidt analyses this issue by examining the significance of legal interactions in the networks of actors concerned with regulation in the US, taking as a case study the effective running of the Occupational Safety and Health Agency (OSHA) dealing with interest groups, courts and other governmental units. Drawing on extensive interviews and documentary evidence, the chapter explores the way agenda-setting and issues for decision are presented in legal language in the context of credible threats from potential litigants and courts. The author defends the hypothesis that the legal foundation of regulatory politics does more than provide certain incentive structures and tools for individual actors, although it certainly does that. In the aggregate, as the OSHA case suggests, a focus on legal interactions explains the organic development of policy-making and policy output, as the development of precedents and legal norms in particular cases shapes the playing-field for continuing interaction. In sum, this chapter shows us the importance of professional and cultural values and procedures as imbued in micro-level regulatory interactions.

The final chapter, by Jacint Jordana and David Sancho, concentrates on regulatory designs and institutional constellations, and basically consists of an examination of how political institutions work within the regulatory state. Considering that innovations such as National Regulatory Authorities (NRAs) do not exist in a political vacuum, the authors observe that new regulatory institutions are embedded in institutional settings that were created in previous historical periods and for different forms of public action. Therefore, the accumulation of different institutions with intervening capabilities apparently tends to make the role of institutions for decision-making in regulatory policy much more complicated than in most traditional interventionist policies. This institutional accumulation resulted in more complex institutional settings that combined comprehensive and specialized public bodies aiming to shape public policy according to different public mandates and with different and often contradictory goals. Thus, delegation to autonomous regulatory agencies

represents in fact only one segment of the whole institutional arena in which regulatory policy is made and implemented.

To make sense of this type of situation, the authors discuss several dimensions for analysing it, in particular by addressing two basic issues: the distribution of responsibilities in the regulatory arena, and the nature of power structures in the institutional constellation. The number of veto players, the character of delegation to NRAs, and also the possible existence of time-stabilizers are the basic decision-making procedures considered in the chapter as devices that intervene in the configuration of the institutional constellation for the making of regulatory policy. Overall, this final chapter is intended as a framework for comparative analyses of institutions involved in regulatory policy, considering that, after the diffusion of regulatory reforms and institutions in recent decades, it is necessary to adopt a more general view of institutional interdependencies in regulation than the traditional Anglo-Saxon configurations offer.

CONCLUDING REMARKS

Probably, the most challenging issue facing analysts of the politics of regulation is the transformation of politics from the 'craft of governing' to the 'art of governance' (Rosenau and Czempiel, 1992; Rhodes, 1997). 'Governance' has become a standard way of characterizing politics in a world where interdependencies between political actors, policy outcomes and policy process are increasingly common, across countries, regions, sectors and issues (Gourevitch, 1978; Tsebelis, 1990), and where governments are no longer the exclusive actors at the international arena. While these aspects are particularly salient in the European Union policy process (Grande, 1996; Kohler-Koch, 1996; Hooghe and Marks, 2001), they are evident globally. The politics of regulation nowadays often occurs in complex multi-level arenas, where some actors can play simultaneously at several levels. The goals of these multi-level actors are often obscured from observers who focus their attention on only one arena of policy-making (Tsebelis, 1990). At the same time, new institutions are being created to deal with these new settings, so the institutional arena of policy-making is becoming increasingly complex and the regulatory state is alleged to increase the fragmentation of the state (Jayasuriya, 2001, 101–2). All the contributors to this book have set their studies in the context of these changes. We are confident that some significant progress has been made here, and also that the road ahead in the study of the politics of regulation, while still full of challenges, is one of the most intriguing and interesting that a new generation of scholars might want to take.

NOTES

* We are happy to acknowledge the helpful comments on a draft version from John Braithwaite, Margit Cohn, Sharon Gilad, Fabrizio Gilardi, Nicolas Jabko, Martin Lodge, Bronwen Morgan, Anthony Ogus, Colin Scott, Patrick Schmidt and Volker Schneider. All errors are ours.

1. The rise of the regulatory state is by no means equal across regions. For the slow advance of the regulatory state in the Arab world, see Levi-Faur (2003).
2. Indeed, they not only depart from the past but also create new unanticipated consequences; see Wilks and Bartle (2002).
3. Mercantilist approaches to economic management in general and economic development in particular emphasize the role of the state in the promotion of markets and capitalism. Neo-liberal approaches tend to marginalize the role of the state and to perceive the relations between state and markets in zero-sum terms.
4. We owe this term to Ayres and Braithwaite (1992, 14), who emphasize that the process of change was not as uni-dimensional as the neo-liberals hoped and the leftists lamented.
5. We prefer them to notions of re-regulation as they depict the rationale of the reforms, something that the notion of re-regulation leaves open.
6. The notion of meta-regulation is simple. At heart, writes Morgan, 'it captures a desire to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated' (2003, 2). She further distinguishes between thin and thick notions of meta-regulation, where the thicker version imposes some substantive constraints on policy choice and is more intrusive in its approach towards the market (*ibid.*, 37).
7. Each of these questions deserves further attention, which is beyond the scope of this chapter. Again, we aim to provide here a platform for future research rather than set forth a definitive answer.
8. One example is auctioning the right to use the airwaves or an airport slot (Milgrom, 2000). Another is the use of price-control mechanisms such as PRI-X (Baldwin and Cave, 1999, 226–38).
9. This (pink) view of American capitalism fails to recognize the similarities since the 1930s of American and European approaches to social regulation (health and safety, consumer protection and environment). We owe this point to Anthony Ogus.
10. One problem that our table leaves unsolved regards the implications of globalization. What is civil society in the light of transnational operators? We thank Martin Lodge for this comment.
11. Indeed, Epstein and O'Halloran (1999, 5) suggest that 'What divides the modern administrative state from its predecessors is the delegation of broad decision-making authority to a professional civil service'.
12. For a critical perspective on the effectiveness of self-regulation (and probably of high-trust strategies of regulation in general), see Hutter (2001).

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