The Oxford Handbook *of* REGULATION

Regulation is often thought of as an activity that restricts behaviour and prevents the occurrence of certain undesirable activities, but the influence of regulation can also be enabling or facilitative: when, for example, a market may become chaotic if uncontrolled. This Handbook provides a clear and authoritative discussion of the major trends and issues in regulation over the last thirty years, together with an outline of prospective developments. It brings together contributions from leading scholars from a range of disciplines and countries.

Each chapter offers a broad overview of key current issues and provides an analysis of various perspectives on those issues. Experiences of different jurisdictions and insights from numerous disciplines are drawn upon and particular attention is paid to the challenges that are encountered when specific regulatory approaches are applied in practice. Contributors develop their own distinctive arguments relating to the central issues in regulation and apply scholarly rigour and clear writing to matters of high policy relevance. The essays are original, accessible, and agenda-setting, and the Handbook will be essential reading for regulatory professionals as well as for students and researchers.

Robert Baldwin is Professor of Law at the London School of Economics and Political Science.

Martin Cave is Deputy Chair of the Competition Commission and Visiting Professor at Imperial College Business School.

Martin Lodge is Professor of Political Science and Public Policy at the London School of Economics and Political Science.

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Baldwin
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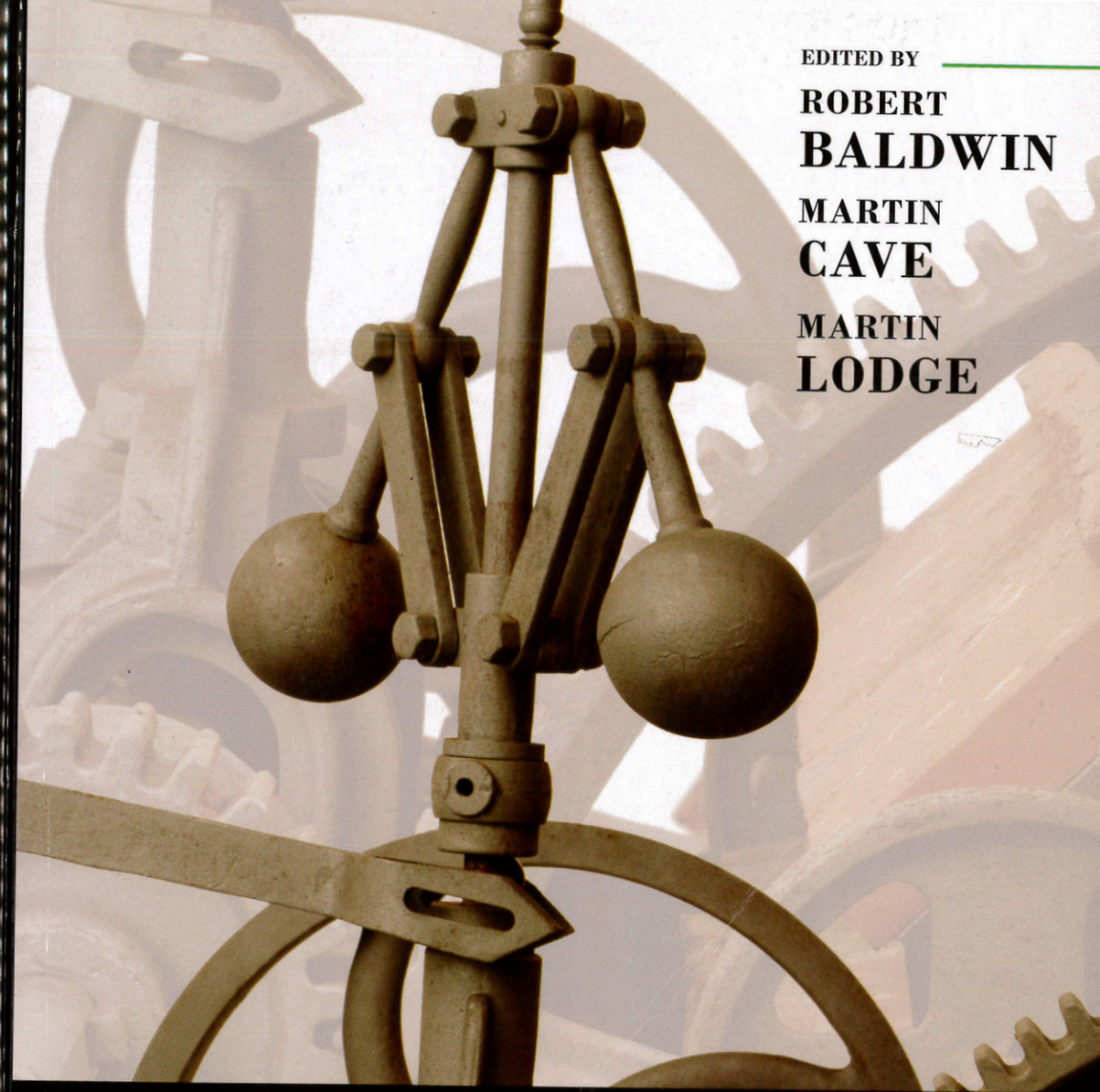

EDITED BY
ROBERT BALDWIN
MARTIN CAVE
MARTIN LODGE

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CHAPTER 13

REGULATORY IMPACT ASSESSMENT

CLAUDIO RADAELLI
FABRIZIO DE FRANCESCO

13.1 Introduction

Regulatory impact assessment (RIA) has spread throughout the globe (Ladegaard, 2005; Jacobs, 2006; Kirkpatrick and Parker, 2007; Kirkpatrick, Parker, and Zhang, 2004; Weatherill, 2007; Wiener, 2006). Based on systematic consultation, criteria for policy choice, and the economic analysis of how costs and benefits of proposed regulations affect a wide range of actors, RIA is a fundamental component of the smart regulatory state advocated by international organisations (OECD, 2002). The European Commission (Commission, 2001) has hailed RIA as a tool for transparent and accountable governance in multilevel political systems.

RIA (or simply Impact Assessment, IA) is a systematic and mandatory appraisal of how proposed primary and/or secondary legislation will affect certain categories of stakeholders, economic sectors, and the environment. 'Systematic' means coherent and not episodic or random. 'Mandatory' means that it is not a voluntary activity. Essentially, RIA is a type of administrative procedure, often used in the pre-legislative scrutiny of legislation. Its sophistication and analytic breadth vary, depending on the issues at stake and the resources available—the degree of

sophistication should be proportional to the salience and expected effects of the regulation. Indeed, the expected effects analysed via RIA may cover administrative burdens or basic compliance costs, or more complex types of costs and benefits, including environmental benefits, distributional effects and the impact on trade. The scope of economic activities covered by RIA ranges from some types of firms to whole economic sectors, competitiveness and the overall economic impact of regulation. RIA can also be used to appraise the effects of proposed regulations on public administration (e.g. other departments, schools, hospitals, prisons, universities) and sub-national governments. Although RIA is often used to estimate the impact of proposed regulation, it can be used to examine the effects of regulations that are currently in force, for example with the aim of eliminating some burdensome features of existing regulations or to choose the most effective way to simplify regulation.

For political scientists, however, what matters is a set of theoretical questions about governance, the steering capacity of the core executive in the rulemaking process, and the changing nature of the regulatory state. In a recent review article on regulatory politics in Europe, Martin Lodge shows that: 'recent interest has focused on the growth of "regulatory review" mechanisms across national states (regulatory impact assessments) as well as their utilisation at the EU level' (Lodge, 2008: 289).

In this chapter we review the theoretical underpinnings of this 'recent interest' comparing the two sides of the Atlantic. We introduce the logic of RIA and the terms of the debate in the US and Europe in Section 13.2. We proceed by exploring different theoretical explanations in Section 13.3. We draw on principal–agent models but also show their limitations and consider alternative theories of regulation. In Section 13.4, we move from theory to empirical evidence and report on the main findings and their implications. Section 13.5 brings together theories and empirical evidence, and introduces a framework for research. The chapter concludes in Section 13.6.

13.2 The Political Logic of RIA Adoption

At the outset, a theoretical investigation of RIA needs a conceptual framework to grasp the essential design features of the rulemaking process. In turn, this invites a joint consideration of regulation theories and theories of the administrative process to assess the broader governance implications of impact assessment as tool and the centralised review of rulemaking as process.

However, scant attention has been dedicated to the linkages between regulation theories and the administrative process wherein RIA is supposed to work (Croley, 1998; West, 2005a). Further, scholars tend to think about RIA with the US political system in mind. Within this system, the key features are delegation to regulatory agencies, presidential oversight of rulemaking, the presence of a special type of administrative law (the reference is to the Administrative Procedure Act, APA), and judicial review of rulemaking. These features should not be taken for granted when we try to explain the adoption of RIA in systems different from the US. In Europe, for example, administrative procedure acts are less specific on rulemaking. There is more direct ministerial control on delegated rulemaking. And rulemaking has a wider connotation, covering the production of rules by parliaments as well as agencies.

With these caveats in mind, the first logic of RIA adoption is based on delegation. The main political dimension of RIA lies with the power relationship between the principal and the agent. Congress delegates broad regulatory power to agencies. Federal executive agencies, however, are not insulated from presidential control exercised via the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Although we will return to this constitutional issue, doctrine and practice have recognised that the executive is a unitary entity, so there is a legitimate degree of control of rulemaking to be exercised by the President. A variant of this explanation is to regard RIA as an instrument to pursue the regulatory paradigm of the President. Thus, one can argue that RIA is introduced to foster de-regulation and stop regulatory initiatives of zealous executive agencies. Centralised review of rulemaking can also trigger action, overcome the bureaucratic inertia of 'ossified' agencies, and shift policy towards a pro-regulatory stance, as shown by the Clinton and, perhaps, Obama administrations (Kagan, 2001). Note that in the former case agencies are seen as excessively active, in the latter as inertial, but the logic of presidential control is the same.

The second logic comes from democratic governance. Administrative procedure is used to change the opportunity structure in which actors (the executive, agencies, and the pressure groups, including civil society associations) interact so that the rulemaking process is more open to diffuse interests and more accountable to citizens.

Finally, there is a logic based on rational policy-making. The logic at work here is that RIA fosters regulations that increase the net welfare of the community (Arrow *et al.*, 1996). Underlying this notion is the requirement to use economic analysis systematically in rule-formulation (re-stated in all US Executive Orders starting from Reagan's 12,291, but defined in much milder forms in European guidelines).[1] Of course, the notion of 'rationality of law' or 'legal rationality' is more complex, referring to process as well as economic outcomes (Heydebrand, 2003). And sometimes rationality is used as synonymous of independence from the

political sphere, as shown by the long tradition of technocratic political and legal theory in the US, from James Landis to Stephen Breyer and Bruce Ackerman.[2]

Academics have aired several perplexities on instrumental rationality and the possibility of direct influence of evidence-based tools on policy choice. Scholars of RIA are puzzled by the repeated reference, in governmental guidelines on the economic analysis of proposed regulation, to rational synoptic theories of the policy process, although experience has shown the empirical and normative limitations of these theories (Jacob *et al.*, 2008; Radaelli, 2005). Perhaps this is a case of 'triumph of hope over experience' (Hood and Peters, 2004). Or perhaps the truth is that, as Sanderson puts it, 'in spite of the post-modernist challenges, a basic optimism about the role of scientific knowledge remains embedded in western liberal democratic political systems' (Sanderson, 2004: 367).

In the US, the different rationales for RIA have spawned a lively debate among constitutional scholars, political scientists and administrative lawyers about who is in control of the rulemaking process. In Europe, what we have said about logics chimes with the discussion on the regulatory state—or regulatory capitalism (Levi-Faur, 2005; Lodge, 2008). The rationale for RIA in terms of executive dominance over the administration can be read across two images of the regulatory state—i.e. political control and symbolic politics. Looking at the UK, a leading author (Moran, 2003) has found that the regulatory state triggers the colonisation of areas of social life that were previously insulated from political interference and managed like clubs. Thinking of the European Union (EU), it has been argued that:

> The process of market-oriented regulatory reform in Europe . . . has *not* meant the emergence of an a-political regulatory state solely devoted to the pursuit of efficiency and completely divorced from a more traditional conception of the state that would stress the pursuit of political power, societal values and distributional goals.
>
> (Jabko, 2004: 215, emphasis in original)

However, political control can also lead to symbolic politics via rituals of verification (Power, 1999). Given the increasing relational distance between principal and agents generated by de-centralisation, contracting out, and the creation of independent agencies, formal procedures replace trust and administrative procedure replaces informal coordination. If political organisations produce knowledge about the expected impact of policy to increase their legitimacy rather than efficiency (Brunsson, 1989), we would expect tools like RIA to play a role in the symbolic dimension of the regulatory state.

The open governance logic is based on changes of the opportunity structure that break down tight regulatory policy networks, blend instrumental and communicative rationality, and create the preconditions for reflexive social learning (Sanderson, 2002). The opportunity structure is tweaked to offer more pluralism (as neo-pluralist notions of the regulatory state have it) or to promote civic republican governance—we will return to these concepts in the next section.

What about rational policy-making and its connection with images of the regulatory state in Europe? Although critical of synoptic rationality, Majone (1989) has fleshed out a notion of the regulator where rationality still plays an important role. In his notion, power is transferred from domestic policy-makers to EU institutions in areas in which distributional matters and values are much less important than efficiency and Bayesian learning—a point about the rationality of expert-based decisions that converges with recent theoretical work in economics (Alesina and Tabellini, 2007, 2008). Regulatory legitimacy—Majone (1996) carries on—is eminently a question of rational and transparent processes. Regulators are credible if they provide reasons for their choices, support decisions with transparent economic analysis and objective risk analysis, and enable courts to review their decisions. Yet again, we find the logic of rational policy-making, this time linked to new forms of accountability and legitimacy (Vibert, 2007: chapters 8 and 11).

13.3 Delegation, Governance, and Rationality

Having introduced the broad logic(s) of RIA, let us now be more specific about the causal chain leading to adoption. In this section, we present a classic rational choice explanation about the political control of bureaucracy. We then enter some limitations and criticisms *internal* to this explanation, before we attend to *external* critiques—looking at the neo-pluralism and civic republican models. Finally, we consider the key concept of rationality.

In rational choice theory, the regulatory process is characterised by demand and supply. In the regulatory market place, however, information asymmetries (moral hazard, adverse selection, and signalling) are more serious than in markets for goods and services. Principal–agent models—developed to explain how delegation problems are solved—shed light on the nature of RIA as a type of administrative procedure.

Delegation generates the problems of bureaucratic and coalitional drifts. The former is a direct consequence of delegation: once power has been delegated, information asymmetries produce agency dominance. The principal can use incentives to react to this state of play but there are empirical and theoretical reasons why this solution may not work (Miller, 2005). However, agencies would still develop rules in the interest of the principals, if proper administrative procedures enforced by the courts were introduced (McCubbins, Noll, and Weingast, 1989). Coalition drift arises because agencies may over time produce rules that do not reflect the original deal made by political principals and their most relevant

constituencies for support (i.e. the pressure groups that entered the original deal) (Horn and Shepsle, 1989; Macey, 1992). Positive political theorists predict that the regulatory process will be dominated by organised subgroups, leading to diffuse collective loss.

Following this theoretical template, administrative procedure is used to exchange information on the demand and the supply of regulation. The design of administrative procedure limits the participation of broader interest groups and facilitates rent-seeking, overcoming the limitations of the incentive structure. Indeed, procedures reduce the principal–agent slack and 'enfranchise important constituents in the agency's decision-making, assuring that agencies are responsive to their interest' (McCubbins, Noll, and Weingast, 1987: 244). Moreover, the 'most interesting aspect of procedural controls is that they enable political leaders to assure compliance without specifying, or even necessarily knowing, what substantive outcome is most in their interest' (McCubbins, Noll, and Weingast, 1987: 244). As such, administrative procedure belongs to the politics of structure (as opposed to the politics of specific policy issues), that is, how institutions with different interests compete to control, change, and exercise public authority (Moe and Wilson, 1994: 4).

Administrative procedure is thus effective in several ways. Firstly, it allows interest groups to monitor the agency's decision-making process (fire alarm monitoring is made possible by notice and comment). Secondly, it 'imposes delay, affording ample time for politicians to intervene before an agency can present them with a *fait accompli*' (McCubbins, Noll, and Weingast, 1989: 481). Finally, by 'stacking the deck' it benefits the political interests represented in the coalition supporting the principal (McCubbins, Noll, and Weingast, 1987: 273–4). Cost–benefit analysis (CBA) plays a specific role. It is 'a method by which the President, Congress, or the judiciary controls agency behaviour' (Posner, 2001: 1140). CBA minimises error costs under conditions of information asymmetry.

Overall, RIA, as administrative procedure, solves the principal's problem of controlling bureaucracies. Its position within the family of control systems is perhaps unique. Whilst some instruments operate either *ex ante* (e.g. statutes and appointments) or *ex post* (e.g. judicial review of agency's rulemaking), RIA provides on-going control. It operates whilst rules are being formulated and regulatory options are assessed.

Some questions and qualifications arise within the principal-agent theory territory—we shall move to 'external' critiques later on. For a start, there are multiple principals (Miller, 2005). Consequently, it becomes difficult to predict who has control. Further, the intuitions about fire alarms in regulatory policy (McCubbins and Schwartz, 1984) were put forward to make the case for Congressional dominance, but the empirical evidence for Congressional control of executive agencies is poor and ambiguous (Kagan, 2001: 2259). Even if they are put to work, Congressional fire alarms are at best status-quo preserving, reactive, and discrete. Consequently, they cannot produce a comprehensive consideration of regulatory matters (Kagan, 2001: 2260).

Political appointees can be useful to the President by identifying preferences or by framing the policy issues (Hammond and Knott, 1999). As shown by Moe and Wilson (1994), the Presidency, as institution, has several structural advantages over Congress and centralised review of rulemaking has been successfully used to move the balance of power from Congress to the White House.

However, the determination of preferences of special groups can be problematic. One of the major difficulties in RIA is the identification of 'who wants what' at an early stage, when regulatory options are fleshed out. Models of rulemaking coalitions show the complexity of preferences constellations across principals and clients within large coalitions (Waterman and Meier, 1998). And perhaps the White House or Congress do not really want to exercise control all the time—it is often efficient to let the agent figure out what the diverse preferences are and how they can be accommodated (Kerwin, 2003: 275–6).

Another consideration is that the theory of delegation is too static without a theory of negotiation (Kerwin, 2003: 278–9). Under conditions of multiple principals, problematic identification of preferences, and uncertainty about how the courts will 'close' the incomplete contract between agent and principal, negotiation plays a fundamental role.

More importantly still, the standard formulation of principal–agent theorising about administrative procedure does not tell us how the agency responds. Here we need a model of the bureaucracy. There are professional differences within agencies—scientific/technical personnel respond to CBA less favourably than personnel trained in policy analysis (West, 1988). The question is not simply one of training but rather one of different visions of the nature of the rulemaking process. Further, the same individual behaves rationally or morally depending on the changing characteristics of the environment and the specific regulatory interaction at stake (Ayres and Braithwaite, 1992). In consequence, it becomes difficult to make a prediction on how the agent will respond to incentives. This reminds us of the 'mixed motives' Downsian bureaucrats of *Inside Bureaucracy*. Given this heterogeneity, agencies can rely on different organisational forms, such as team, hierarchy, outside advisor, adversary, and hybrid models (McGarity, 1991). This observation on internal organisation and professional background hints at a possible fruitful combination of formal models of rulemaking with management theories (Hammond and Knott, 1999).

Normatively speaking, the notion of control over regulatory agencies has spawned a debate among constitutional and administrative lawyers that takes us beyond rational choice theorising. The questions, often revolving around the centralised presidential review of rulemaking rather than the existence of RIA, are 'who has control of rulemaking' and whether this can be justified. The discussion has been heated,[3] with hints of 'religious zeal' (Blumstein, 2001: 852).

With these remarks on the constitutional dimension in mind, we are ready to move on to the next question: What are the models of governance within which we situate RIA? Political control of the bureaucracy (whether in the form of congressional dominance or unitary executive) is not the only option. The neo-pluralism and civic republican models provide alternatives.

In neo-pluralist theory, RIA (and more generally administrative procedures) is adopted to produce equal opportunities for pressure groups (see Arnold, 1987 on environmental impact assessment). Granted that regulatory choice is about collecting information from different sources and balancing different values, RIA can be used to ensure that all the major interests affected compete on a level playing field. Transparency and open processes of rulemaking are necessary conditions for neo-pluralist politics to operate optimally. The explanation of why the executive adopts RIA is not very clear. One must assume that elected officials want to change the opportunity structure to achieve conditions that approximate the neo-pluralist ideal-type. The government may want to do this under pressure from the median voter. As a matter of fact, Congress passed statutes that increase participation in the rulemaking process, such as the Consumer Protection Act (1972), the Occupational Safety and Health Act (1970), and the Toxic Substance Control Act (1976). The courts have also imposed requirements on agencies to release data, disclose the basis of discussions with pressure groups, and carry out public hearings.

One problem with interest-group-oriented models—Kagan (2001: 2267) notes—is that group pressure results in 'burdens and delay on agencies and thus make them reluctant to issue new rules, revisit old rules, and experiment with temporary rules'. Thus, the pluralist model may be—together with the activism of the courts—one reason for the 'ossification of rule-making' (McGarity, 1992) and one of the problems which has led to more flexible instruments, such as negotiated rulemaking (Coglianese, 1997). Formal requirements may also push agencies towards less transparency: the real deals with pressure groups are not done during the formal ceremony of notice and comment and other procedures, where the agency tends to assume a rigid defence of its proposal. They are done earlier and less transparently (Kagan, 2001: 2267 quoting a former General Counsel of the EPA comparing formal procedures to the Japanese Kabuki theatre).

The civic republican theory argues that, under proper conditions, actors are able to pursue the broader community interest (Ayres and Braithwaite, 1992; Seidenfeld, 1992; Sunstein, 1990). This model of the regulatory state provides a direct participatory role to public interest groups, civil society organisations, and citizens. It goes beyond pluralism: weaker groups and the community as a whole are deliberately empowered. Instead of technocratic decision-making, we end up with fully political and participatory policy-making styles (Bartle, 2006).

Within the civic republican theory, Croley expects RIA to provide 'an opportunity for public-spirited dialogue and deliberation about regulatory priorities' (Croley, 1998: 102). A civic republican RIA will therefore aim at making the

community stronger. Regulatory choices will be less about measuring the costs and benefits of regulation, less about making market deals, and would look more like deliberation about major trade-offs in multiple policy sectors (Ayres and Braithwaite, 1992: 17; Morgan, 2003: 224).

Finally, one can turn to a governance model based on rationality and self-control of agencies, on the basis of the technocratic theories mentioned above. If rationality means efficient decisions, for example by using CBA, this still raises the question why would a government want to increase the efficiency of the regulatory process? This is where Majone's non-majoritarian regulatory state offers an explanation, based on credibility, the separation between regulatory policy and other policy types, and procedural legitimacy.

The question is that, for all the virtues of Weberian bureaucracies we can think of, there are also vices, notably inertia, negativity bias, and reluctance to modify the status quo. Controlling bureaucracy may have less to do with 'runaway agencies', as congressional dominance theorists implicitly assume, than with providing direction and energy to otherwise ossified rulemaking systems (Kagan, 2001: 2264). The prompt letters used by the OMB in recent years seem to corroborate this point (Graham, 2007).

It has been argued that the OMB cannot preserve rationality in the regulatory process by using CBA and at the same time exercise a function of political control (Shapiro, 2005). However, a classic objection is that the President, unlike individual members of Congress, is elected by the whole nation and therefore will care about the broad costs and benefits affecting all constituencies (Kagan, 2001: 2335). Presidents also care about leadership. Their individual interests are consistent with the institutional interests of the Presidency. On issues of structure, the President will go for changes that increase the power of the Presidency over Congress, not for special interests politics (Moe and Wilson, 1994: 27).

In consequence, there may be no trade-off between political control, effectiveness, and accountability (Kagan, 2001: on effectiveness see pp. 2339–2346). The personnel in charge of review is pretty much stable across political parties and administrations, thus increasing the likelihood of technical analysis, leaving to the President the political duty to provide overall direction to the agencies.

To sum up then, this rich theoretical debate shows that rational choice theories of delegation provide a useful benchmark with clearly testable implications. The neo-pluralist and civic-republican theories have more normative appeal, although they are less clear on the propositions that can be tested empirically and the logic of introduction of RIA. Notions of rationality enter intervening variables in the explanation.

Be that as it may, the value of these theoretical approaches beyond the US has not been assessed. In Europe, for example, RIA may be used to control the process of rule formulation in governmental departments. However, even if the delegation problems are common everywhere, the institutional context is different. In

Westminster systems, the prime minister and the ministers in charge of different departments belong to the same political party. In other parliamentary European systems, the prime minister has to control departments that can be headed by ministers of different parties in the ruling coalition. The role of the parliament varies markedly across countries but most systems are parliamentary, not presidential (with the partial exception of France). So the question is whether there are functional equivalents to presidential control, otherwise RIA would play a completely different role.

13.4 The Effects of RIA: Empirical Evidence

One critical issue here is to work on concept formation before we move on to measurement. Another is to categorise and measure changes brought about by RIA, being aware that indirect-cumulative effects of knowledge utilisation over a long period of time are more important than short-term instrumental use (or lack of) (Weiss, 1979). A third caveat is to control for the null hypothesis of 'no effects of RIA'. A fourth tricky issue is counterfactual reasoning: Would the change have taken place in any case without RIA (Coglianese, 2002)?

A classic method for the evaluation of changes is the observational study. There are two types of observational study: longitudinal and cross-sectional (Coglianese, 2002):

1. A longitudinal study compares the outcomes of administrative procedure over time.
2. A cross-sectional study compares regulatory outcomes in the same period between a group of countries operating under the procedure and another one that does not.

13.4.1 Longitudinal-quantitative studies

Economists have carried out longitudinal and quantitative empirical studies. The first group of quantitative studies deals with the accuracy of cost and benefit estimates. Morgenstern, Pizer, and Shih (2001) assess the relationship between costs reported in RIAs and the actual economic costs. They conclude that, generally, regulatory costs are overestimated, a conclusion shared by other authors. Harrington, Morgenstern, and Nelson (2000) compare the *ex ante* cost predictions made by OSHA (Occupational Safety and Health Administration) and EPA (Environment Protection Agency) with *ex post* findings made by independent experts. They argue

that cost overestimation is essentially due to the lack of consideration of 'unanticipated use of new technology' (Harrington, Morgenstern, and Nelson, 2000: 314). A comprehensive recent literature review however, concludes that costs and benefits are poorly estimated in the US, but it is not clear if there are systematic biases (Hahn and Tetlock, 2008). Small and medium-n longitudinal studies on European countries show limited use of sophisticated assessment tools (Nilsson *et al.*, 2008; Turnpenny, *et al.*, 2009; Russel and Turnpenny 2008 on 50 British impact assessments).

Another group of quantitative studies has assessed the soundness of economic analyses through scorecards and checklists. Scorecards provide measures of the overall impact of different regulations, relying on economic performance indicators such as costs, benefits, lives or life-years saved, cost-effectiveness, etc. (Hahn, 2005). However scorecards—it has been argued—disregard un-quantified costs and benefits, neglect distributive impacts and do not disclose the true level of uncertainty (Heinzerling, 1998; Parker, 2000). Checklists are a collection of quality assurance measures (generally expressed in Y/N format). Hahn and associates have developed checklists of US RIAs (Hahn, 1999; Hahn *et al.*, 2000). This approach has also been used for the European Commission's impact assessment (Lee and Kirkpatrick, 2004; Renda, 2006; Vibert, 2004) and to compare the US with the EU system (Cecot *et al.*, 2008). International organisations and audit offices make use of scorecards and checklists for evaluation purposes (Government Accountability Office, 2005; National Audit Office (NAO), 2004; OECD, 1995).

What do we know about the overall consequences of RIA (as process) on the final regulatory outcomes? Croley (2003) has considered correlations between the following: the type of rule and the likelihood of change; the type of interest group and the likelihood of change; the type of agency and the likelihood of change; the type of agency and the likelihood of an OIRA meeting. He finds significant correlations between rule stage, type of rule significance, and written submissions, on the one hand, and the frequency with which submitted rules were changed, on the other.

Drawing on 1986 Morrall's data on final and rejected regulations (partially reviewed to accommodate some of Heinzerling's critiques), Farrow has assessed whether OMB review has altered the probability of rejection of high-cost-per-life-saved regulation. He concludes that the type of regulation and the budget of trade-groups opposing the regulation predict the probability of rejection of ineffective regulation better than the cost-per-life-saved variable (Farrow, 2000). This seems to corroborate the rational choice theorists' understanding of RIA.

Recent empirical analyses have focused on the relationship between regulators and pressure groups. Interest groups seem to be able to discern which among several methods of participation is the most effective in achieving a congenial regulatory outcome (Furlong and Kerwin, 2005; Schultz Bressman and Vandenbergh, 2006; followed by critical remarks made by Katzen, 2007). Looking at the correlation between public comments to forty regulations and the direct influence of interest groups, Yackee (2006) concludes that regulatory agencies change their

initial proposals to accommodate interest groups' preferences. Yet another case in which rational choice understandings are supported by empirical evidence.

Overall, quantitative research provides answers to the question of rationality and RIA. Looking at the US evidence accumulated up until now, Hahn and Tetlock conclude that the quality of economic analysis is stable across time and is always below the standards set by the guidelines. It is difficult—they add—to find evidence that economics has had a substantial impact on regulatory decisions in the US. Nevertheless, there is a marginal effect (but marginal changes do count for large sums of money in major decisions!) and, more difficult to prove, a deterrent effect on bad rules that we would otherwise have seen in the statute book (Hahn and Tetlock, 2008).

13.4.2 Longitudinal-qualitative studies

Practically confined to the US with some exceptions (Carroll, 2007: Froud *et al.*, 1998), longitudinal-qualitative analyses are particularly useful in detecting changes over the medium–long term. Since Kagan (2001), most authors agree that RIA and centralised review of rulemaking have been institutionalised (West, 2005b) and used by different Presidents to increase the strength of the executive—although the regulatory policy paradigm may change between one administration and the next.

The critics of the OMB see its analytical function overshadowed by political priorities (Heinzerling, 2002; McGarity, 1991; Shapiro, 2005 and 2007). Others argue that the OMB has defended principles of cost-effectiveness and risk–risk analysis. By doing so, it has widened the perspective of agencies, typically motivated exclusively by their somewhat narrow statutory objectives (Breyer, 1993; Pildes and Sunstein, 1995; Viscusi, Vernon, and Harrington, 1995).

OMB's control—it has been argued—goes against the constitutional architecture designed by Congress to delegate power to agencies—not to the White House (Morrison, 1986). Others have added that OMB's review alters 'the division of power between the Congress and the President in controlling the decision-making; the objectivity and neutrality of the administration; and the role of administrative procedure and courts' (Cooper and West, 1988: 864–5). Cooper and West find that OMB's review has increased the centralisation and politicisation of rulemaking, thus exasperating the negative effects on democratic governance of the politics/administration dichotomy. In the American political system—they argue—the public interest emerges out of a process of decision-making, so: 'each branch must then retain sufficient power to play an influential policy role in both the legislative and administrative processes' (Cooper and West, 1988: 885).

In the opposite camp, Shane (1995) finds that centralised review of regulatory policy is consistent with the constitutional separation of powers—the issue is whether there is a specific justification for a presidential order on the rulemaking process. DeMuth and Ginsburg (1986) note that the President, in order to advance his policies, has to control administrative rulemaking of executive agencies.

By now, most of the legal discussion has converged around a unitary position (Blumstein, 2001), meaning that the executive is a single entity, so the administrative activity of federal executive agencies has to be controlled by the President. Kagan (2001), albeit dissenting with the unitary conceptual framework, agrees that centralised presidential control has increased. Paradoxically (for those who see centralised control as synonymous of de-regulation) it has been institutionalised and even enhanced during the Clinton years. Since the early years, this feature of the system has appeared irreversible, with power shifts towards the institutional Presidency (Moe and Wilson, 1994; West, 2006).

Recent studies do not question that presidential power has increased, but reveal much less proactive coordination and more reactive and politically oriented (as opposed to analytical) intervention than one would expect (Shapiro, 2005 and 2007; West, 2006). This chimes with earlier findings, for instance that RIA has been an effective means of detecting and shaping those policies of federal executive agencies that impact on the key constituencies of the President (Cooper and West, 1988). Considering a more organisational and political framework, RIA has sometimes enabled agencies to look at rule formulation in new and sometimes often creative ways—McGarity (1991: 157, 308) concludes—but with the danger of promoting the regulatory economists' hidden policy agendas 'behind a false veneer of objectivity'.

The broader discussion around the politics of structure and the constitutional issues raised by the administrative state has carried on (Rosenbloom, 2000). Congress has responded to the Presidency's use of regulatory review by directing the OMB not to interfere with special-interest legislation (Moe and Wilson, 1994: 39) and by securing Senate confirmation of OIRA heads, as well as more public information and precise deadlines on the review process. Since OIRA was initially authorised to run for a limited period, Congress had the opportunity to stop funding and/or ask for major concessions, but 'it did not take on the President directly in an all-out assault' (Moe and Wilson, 1994: 39).

The justifications of centralised review have also evolved from constitutional arguments to policy arguments about the consequences of the Presidential administration, such as accountability and efficiency (Kagan, 2001). In Europe, so far no constitutional debate around RIA and executive review of rulemaking has emerged—apart from some original attempts to frame the discussion on the European Union impact assessment system (Meuwese, 2008).

13.4.3 Emerging topics

An emerging topic in comparative research is diffusion (De Francesco, 2008). In diffusion studies one can contrast rationalistic explanations for the adoption of

RIA with emulation and mimicry (Radaelli, 2005: 925). Specifically on implementation, the formal adoption of roughly similar RIA models in Europe has not been followed by the same pattern of implementation (Radaelli, 2005). Economics and law alert us that transplantation is a source of inefficiency of institutional choice (Shleifer, 2005: 448; Wiener, 2006). Hence the transplant of RIA in political systems that do not present functional equivalents to the US may produce completely different outcomes.

Another way of looking at the different implementation patterns of similar policy innovations is to consider the political and administrative costs and benefits (Moynihan, 2005). For a politician, adopting a general provision on how regulatory proposals should be empirically assessed has low cost and high political benefits—in terms of signals sent to international organisations and the business community. To go beyond it and write guidelines, create oversight structures, and implement the guidelines across departments and agencies is politically and economically expensive. Given that the benefits of a well-implemented RIA program emerge only in the medium and long-term, that is after the next elections, there is an incentive to opt for symbolic adoption. Robust networks of RIA stakeholders, however, can change this perverse incentive structure and lay the foundations for institutionalisation (Radaelli, 2004: 743).

Another strand of research has looked at the difference between academic standards of good regulation and the specific notions included in RIA guidelines, thus taking a critical perspective (Baldwin, 2005). Some have pointed to another limitation, observing that there are rival views of High Quality Regulation, thus increasing the ambiguity of tools like RIA (Lodge and Wegrich, 2009). Others have related these limitations to the broader tensions at work in the regulatory state, arguing that better regulation may promote the rise of a meta-regulatory state within the state as a counterweight to the de-centralisation of regulation (Black, 2007). Finally, there have been attempts to connect the analysis of RIA and more generally better regulation in Europe with the broad intellectual questions posed by the so-called New Public Management (Radaelli and Meuwese, 2008), the politics of policy appraisal (Turnpenny *et al.*, 2009), and the problematic relation between integrated forms of assessment and joined-up government (Russel and Jordan, 2009).

13.5 Towards a Research Agenda

On balance, the state of the art is not quite up to the expectations. Most of the studies are based on the US and are not longitudinal. Diffusion studies and systematic, rigorous comparisons that take context and history into account are

almost absent. There is much more emphasis on measurement than on theory and concept formation. Studies on Africa and Asia are emerging (Kirkpatrick, Parker, and Zhang, 2004), but there is no consolidated knowledge on how donor requirements to introduce RIA, administrative capacity, and the quality of democracy affect implementation.

This raises the challenge of working in a comparative mode, with suitable research questions on:

(a) the process of diffusion;
(b) the role of political institutions; and
(c) the political consequences of RIA.

Research questions falling in category (a) could usefully test the hypothesis that RIA is used to increase central political control versus the hypotheses of emulation and coercion. In category (b), RIA becomes a dependent variable and more work should be done on what specific features of the institutional context have what type of effects. As for category (c), the research questions are whether RIA (this time as independent variable) has economic, administrative or political impacts, in the short or long-term, as shown in Table 13.1. Cells 1 and 4 are more suitable for the economic analysis of RIA.

The administrative effects include administrative capacity. In the short term, RIA requirements raise the issue whether an administration has the capacity to deal with the economic analysis of regulation (Schout and Jordan, 2008). The implementation of RIA over a fairly long period of time should leave a mark on the types of civil servants mentioned by West and McGarity. Cell 5 also reminds us of the long-term relationship between administrative procedure and RIA. We do not

Table 13.1 A typology of consequences brought about by RIA

	Economic	Administrative	Political Governance
	(1)	(2)	(3)
Short term	Economic effects of individual RIAs	How RIA creates demand for administrative capacity	How individual RIAs influence the decision-making process
	(4)	(5)	(6)
Long term	Effects on competitiveness and growth	Effects on regulatory cultures and bureaucratic types within agencies RIA and administrative procedure	How RIA triggers constitutional reforms to retrofit it to the constitutional order Effects on the legitimacy of the regulatory state (classic, neo-pluralist, or civic republican versions)

know much about how administrative law shapes European RIA processes and vice versa. The political effects bring us into cells 3 and 6 and to major governance-constitutional issues at the core of the academic discussion on regulatory governance and regulatory capitalism.

At the macro level, the major research question is about RIA and the regulatory state. One way to address it is to go back to the different logics. Does RIA bring economic rationality to bear on regulatory choices? Does it increase executive control? Does it foster the emergence of new modes of regulatory governance, arguably a smart, democratic, open regulatory state?

Let us recap a few important points. Economists focus on whether economic analysis of different types contributes to the emergence of more efficient regulation (Helm, 2006). Another question is whether centralised review increases the efficiency of administrative action—a point where there are sharply contrasting views. An innovative way to look at rationality-efficiency is to ask whether resources for evidence-based policy are optimised across the life-cycle. A dollar invested in RIA cannot be invested in *ex post* policy evaluation—hence the opportunity cost of *ex ante* analysis is given by the money that is not invested in *ex post* evaluation or in any type of assessment taking place after regulation decisions have been made.

Other research questions concern the effects of a specific type of rationality at work in RIA, that is, cost–benefit analysis. In this connection, an interesting issue is about the long-term impact of RIA as comprehensive economic rationality. One of the most powerful insights provided by McGarity is about the conflict between comprehensive and techno-bureaucratic rationality within US agencies. Agencies may deal with conflict by using team models to integrate the two types of rationality, or by using adversarial internal processes to take the benefits of a well-argued defence of different ways to look at regulatory problems and their solutions (McGarity, 1991). It would be useful to use this framework in a comparative mode. Different administrative traditions, attitudes of the civil servants, decision-making styles provide classic variables to control for. It would also be interesting to know if the clash between techno-bureaucratic approaches and economic rationality is bringing about a new hybrid of rationality.

The most important issues for lawyers and political scientists revolve around political control and the overall impact on constitutional settings. Rational choice theorists rightly show that RIA is not a politically neutral device to provide more rational decision-making. We argued that principal–agent modelling should be supplemented by:

(a) a theory of negotiation;
(b) a thorough understanding of the administrative process; and
(c) a public management theory to understand who wins the control game.

One may reason that agencies get captured by the regulated. Majone, instead, would reason that being perceived as fair and relatively un-biased in regulatory analysis is essential. Others would argue that, overall, there has been a decent Congressional and judicial retrofitting of the administrative state, and the constitutional balance is overall preserved (Rosenbloom, 2000). Incidentally, this raises new questions about the European RIA architectures, in which there have been almost no discussion cast in terms of constitutional politics—specifically, in relation to the parliamentary nature of these political systems at a time of increasing strength of the core executive.

13.6 Conclusions

Two decades ago, Thomas McGarity (1991: 303) observed that 'regulatory analysis is currently in a state of awkward adolescence. It has emerged from its infancy, but it has not yet matured.' It is useful to distinguish between RIA as phenomenon and the academic literature on this topic. As a phenomenon, regulatory oversight has been diffused throughout the globe. In some countries, such as Canada, the UK, and the US, RIA has been institutionalised. The recent experience of the EU, where RIAs are produced and used systematically in policy formulation, shows that institutionalisation may take less than a decade. In other countries, there has been adoption followed by implementation problems and lack of convergence. This has led to some frustrations with the rationalistic ambitions of RIA: although academics have provided new moral and decision-making foundations for cost-benefit analysis (Adler and Posner, 2006; Sinden, Kysar, and Driesen, 2009), most countries outside the US have implemented soft or warmer versions of CBA (Wiener, 2006 uses the notion of 'warm' CBA) or stripped-down analyses of administrative burdens (Helm, 2006; Jacob *et al.*, 2008; Jansen and Voermans, 2006). Looking at the future, impact assessment may evolve into more complex activities of regulatory management. Thus, RIA activity may well feed into the construction of systems of regulatory budgeting and regulatory agendas (Doern, 2007).

Although RIA, as phenomenon, has emerged from its infancy, the academic literature is still looking for the most perceptive research questions—it is still in a state of adolescence, although not necessarily awkward. This chapter has argued that RIA offers an opportunity to test theories of political control of the bureaucracy. We can get deeper insights into a key debate, originated by Max Weber, between theorists of bureaucratic dominance like Lowi and Niskaken, and theorists of political control like Weingast. Rational choice theorists are only one of the natural academic constituencies of RIA. The other is made up of scholars who are

broadly interested in developing our understanding of governance and how rationality of different types affects policy-making. RIA can also offer insights on new forms of symbolic politics.

To achieve this, more theory-grounded comparative research is essential, possibly controlling for broader, long-term consequences and for the historical-institutional context. This type of analysis can usefully inform the debates on the regulatory state and constitutional change, as well as the normative appraisal of governance architectures.

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Notes

1. Note however that, following Sunstein (2004), the public can never be 'rational' in evaluating risks. RIA therefore has to cope with the challenge of transforming these non-rational evaluations into rational ones.
2. For European scholars see Vibert (2007).
3. Some of the leading authors in this debate (e.g. Graham (2007), Kagan (2001), Katzen (2007), DeMuth and Ginsburg (1986), and Farrow (2000)) have combined academic life with first-hand experience in the presidential administration (or got very close to it, as in the case of Blumstein, whose OIRA nomination was blocked by the Senate).

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sophistication should be proportional to the salience and expected effects of the regulation. Indeed, the expected effects analysed via RIA may cover administrative burdens or basic compliance costs, or more complex types of costs and benefits, including environmental benefits, distributional effects and the impact on trade. The scope of economic activities covered by RIA ranges from some types of firms to whole economic sectors, competitiveness and the overall economic impact of regulation. RIA can also be used to appraise the effects of proposed regulations on public administration (e.g. other departments, schools, hospitals, prisons, universities) and sub-national governments. Although RIA is often used to estimate the impact of proposed regulation, it can be used to examine the effects of regulations that are currently in force, for example with the aim of eliminating some burdensome features of existing regulations or to choose the most effective way to simplify regulation.

For political scientists, however, what matters is a set of theoretical questions about governance, the steering capacity of the core executive in the rulemaking process, and the changing nature of the regulatory state. In a recent review article on regulatory politics in Europe, Martin Lodge shows that: 'recent interest has focused on the growth of "regulatory review" mechanisms across national states (regulatory impact assessments) as well as their utilisation at the EU level' (Lodge, 2008: 289).

In this chapter we review the theoretical underpinnings of this 'recent interest' comparing the two sides of the Atlantic. We introduce the logic of RIA and the terms of the debate in the US and Europe in Section 13.2. We proceed by exploring different theoretical explanations in Section 13.3. We draw on principal–agent models but also show their limitations and consider alternative theories of regulation. In Section 13.4, we move from theory to empirical evidence and report on the main findings and their implications. Section 13.5 brings together theories and empirical evidence, and introduces a framework for research. The chapter concludes in Section 13.6.

13.2 The Political Logic of RIA Adoption

At the outset, a theoretical investigation of RIA needs a conceptual framework to grasp the essential design features of the rulemaking process. In turn, this invites a joint consideration of regulation theories and theories of the administrative process to assess the broader governance implications of impact assessment as tool and the centralised review of rulemaking as process.

However, scant attention has been dedicated to the linkages between regulation theories and the administrative process wherein RIA is supposed to work (Croley, 1998; West, 2005a). Further, scholars tend to think about RIA with the US political system in mind. Within this system, the key features are delegation to regulatory agencies, presidential oversight of rulemaking, the presence of a special type of administrative law (the reference is to the Administrative Procedure Act, APA), and judicial review of rulemaking. These features should not be taken for granted when we try to explain the adoption of RIA in systems different from the US. In Europe, for example, administrative procedure acts are less specific on rulemaking. There is more direct ministerial control on delegated rulemaking. And rulemaking has a wider connotation, covering the production of rules by parliaments as well as agencies.

With these caveats in mind, the first logic of RIA adoption is based on delegation. The main political dimension of RIA lies with the power relationship between the principal and the agent. Congress delegates broad regulatory power to agencies. Federal executive agencies, however, are not insulated from presidential control exercised via the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Although we will return to this constitutional issue, doctrine and practice have recognised that the executive is a unitary entity, so there is a legitimate degree of control of rulemaking to be exercised by the President. A variant of this explanation is to regard RIA as an instrument to pursue the regulatory paradigm of the President. Thus, one can argue that RIA is introduced to foster de-regulation and stop regulatory initiatives of zealous executive agencies. Centralised review of rulemaking can also trigger action, overcome the bureaucratic inertia of 'ossified' agencies, and shift policy towards a pro-regulatory stance, as shown by the Clinton and, perhaps, Obama administrations (Kagan, 2001). Note that in the former case agencies are seen as excessively active, in the latter as inertial, but the logic of presidential control is the same.

The second logic comes from democratic governance. Administrative procedure is used to change the opportunity structure in which actors (the executive, agencies, and the pressure groups, including civil society associations) interact so that the rulemaking process is more open to diffuse interests and more accountable to citizens.

Finally, there is a logic based on rational policy-making. The logic at work here is that RIA fosters regulations that increase the net welfare of the community (Arrow *et al.*, 1996). Underlying this notion is the requirement to use economic analysis systematically in rule-formulation (re-stated in all US Executive Orders starting from Reagan's 12,291, but defined in much milder forms in European guidelines).[1] Of course, the notion of 'rationality of law' or 'legal rationality' is more complex, referring to process as well as economic outcomes (Heydebrand, 2003). And sometimes rationality is used as synonymous of independence from the