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REGULATION

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CHAPTER 2

ECONOMIC APPROACHES TO REGULATION

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2.1 INTRODUCTION

Economics has been at the heart of regulatory reform beginning with the wave of deregulation and privatisations of the 1980s. While not always at the forefront of these changes, economists have played a key role in these developments, and have often become regulators. This has led to better regulation and, paradoxically, more regulation, fuelling fears that the growth of the state, even if a regulatory state, is inevitable even in 'capitalist' democracies. Part of this trend has been due to the replacement of state ownership with private ownership plus regulation, part due to the natural tendency for 'regulatory creep', and the apparent inability of government to roll back regulation.

The economics of regulation is a wide and diverse subject. It has normative (what should be) and positive (what is) aspects; provides economic analyses of prices, access, quality, entry, access, and market structure (regulatory economics), empirical studies of specific legislation (impact and cost-benefit assessments), and organisational and legal applications which examine the behaviour of institutions and regulatory agencies, and the development and design of rules, standards, and enforcement procedures. It is not possible to do justice to such a vast subject in a short review; hence the focus here will be on economic theories of regulation, and the way economics has been used to design and evaluate regulation.

As the title suggests there are a number of economic approaches. However, these all share the conviction that relatively simple economic theory can assist in understanding regulation, and providing practical tools for regulators to make regulation more effective and efficient. This premise gives coherence to the different economic approaches even though they may generate very different views and theories about the rationale and (likely) impact of specific regulatory interventions.

The subject matter of the economics of regulation covers at least four broad areas—economic regulation, social regulation, competition law, and the legal system. Indeed the excellent textbook by Viscusi, Harrington, and Vernon (2005) entitled *Economics of Regulation and Antitrust*, encompasses the first three areas, although many would see antitrust (to use the USA term) as separate.[1] Here a broader view is taken encompassing competition and merger laws, and the field known as law-and-economics or the economics of law which looks at the legal system (Veljanovski, 2006 and 2007).

- **Economic regulation:** Economics is at its strongest and most relevant when it deals with overtly economic issues affecting firm performance, industry structure, pricing, investment, output and so on. Indeed, a separate field of study known as regulatory economics, starting effectively with Averch and Johnson (1962), an article on the distortive effects of rate of return regulation, is concerned with the principles and techniques for regulating a utility, usually a gas, electricity, water, telephone, and railway network, which does not face effective competition (Viscusi, Harrington, and Vernon, 2005; Armstrong, Cowan, and Vickers, 1994; Laffont and Tirole, 1993).
- **Social regulation:** Economists have always been concerned about social regulation—a subject as old as economics itself, arising around the time of the industrial revolution. Social regulation embraces health and safety, environmental, anti-discrimination and other laws. This category of regulation does not have overt economic objectives but does have economic effects, costs, and benefits. These allow economists to evaluate the economic impact and desirability of specific approaches to social regulation.
- **Competition and merger laws:** These seek to control monopolies, cartels, and abusive practices, and mergers and joint ventures which risk giving firms excessive market power (Motta, 2004; O'Donoghue and Padilla, 2006). The core legal framework of European competition law is expressed in Articles 81, 82, and 87 of the EC Treaty and the Merger Regulation.[2] Competition law seeks to support the market and differs from the *ex ante* rules and standards which characterise much of economic and social regulation by being reactive, or as it is often termed *ex post* regulation. This is because it responds case-by-case to actual or highly likely abuses, and penalises anti-competitive and abusive practices. The exception is merger laws which seek to prevent firms from merging and forming joint ventures where this would give them excessive market power. However, generally *ex post* competition law stands in contrast to statutory regulation which is typically a prescriptive *ex ante* approach.
- **Legal system:** The final area is the legal system with its rules, procedures, and enforcement. This provides an important backdrop to regulatory and competition laws, and can often determine their effectiveness and legitimacy. Economists typically deal with this area in a separate field called law and economics which looks at the economics of contract, property, crime, and accident laws, and the basic legal institutions of a society (Veljanovski, 2006 and 2008). Much of this literature is highly relevant to the economics of regulation, such as the economics of crime which offers models and predictions about the relative effectiveness of different sanctions in enforcing regulatory laws, the economics of rules and procedures which provides insight into the factors influencing their effectiveness, and the economics of agency and judicial behaviour.

2.2 Theories of Regulation

When looking at the large literature on the economics of regulation it is important to make a distinction between normative and positive theories. Normative theories seek to establish ideal regulation from an economic perspective, and are prescriptive. They are usually based on the concepts of economic efficiency and 'market failure', and provide an economic version of a 'public interest theory' of regulation. Positive economics is the explanatory and empirical limb of the economics of regulation. It seeks to explain the nature and development of regulation and its impact through statistical analysis, and sometimes cost–benefit assessments.

2.2.1 Normative economic approaches

Normative theories of regulation principally build on the concepts of economic efficiency and market failure, although more recently there has been a widespread recognition that it is misleading and counterproductive to focus solely on market failure, since governments are just as prone to 'failure'. One troublesome area for these theories is the relationship between efficiency, distributive justice, and regulation which will be touched on briefly.

Efficiency

The building blocks of the economic approach are the concepts of economic efficiency and, paradoxically, of markets.

An efficient outcome occurs when resources, goods, and services are allocated to their highest expected[3] valued uses as measured by individual willingness to pay, assuming that the most productive existing technology is used. When there is technical change which expands the productive capacity of the economy for any given level of inputs then economists use the concept of dynamic efficiency. The concept of dynamic efficiency is a less well-worked out concept because the process of technical change and innovation is still poorly understood.

Economists work with two concepts of economic efficiency—Pareto efficiency and Kaldor-Hicks efficiency.

A Pareto efficient outcome is where the welfare of one individual cannot be improved without reducing the welfare of others. Thus Pareto efficiency is a situation where all parties benefit, or none are harmed, by a reallocation of resources, goods, assets, or a change in the law. The 'no-one-is-harmed' constraint avoids the economist making interpersonal comparisons of utility, i.e. evaluating whether the loss to one individual is counterbalanced by the gain to others.

This Pareto criterion, named after the Swiss-Italian economist Vilfredo Pareto, is based on two additional value judgements:

(1) that the individual is the best judge of his or her own welfare;
(2) the welfare of society depends on the welfare of the individuals that comprise it.

These, it is argued, should be widely accepted, at least among those in Western society.

The difficulty with Pareto's 'no-one-is-harmed' constraint is that it precludes the economist from commenting on all but the most trivial policy change since most policies have winners and losers. The only consistent way out of this dilemma is to insist on the gainers compensating the losers as some public choice economists have advocated (Buchanan and Tullock, 1962).

To deal with (or rather side-step) this difficulty, economists have adopted Kaldor-Hicks efficiency—also know as wealth maximisation or allocative efficiency. A policy is Kaldor-Hicks efficient if those that gain can in principle compensate those that have been 'harmed' and still be better off. In other words, the cost–benefit test is satisfied shows that the economic gains exceed the losses to whomsoever they accrue. In this way economists believe that the Kaldor-Hicks approach separates efficiency from the thorny and indeterminate issue of wealth distribution.

Market failure

The second limb of the standard normative theory of regulation is the concept of market failure (Bator, 1958). A (perfectly) competitive market achieves a Pareto efficient outcome. Market failure provides a necessary (but not sufficient) economic justification for state or collective intervention.

Markets can fail in theory and practice for four principal reasons—market power, externality, public goods, and imperfect information.

- **Market power:** Where one firm (monopoly) or a few firms (oligopoly or a cartel) can profitably raise price above the competitive level, then the market is not competitive or Pareto efficient. A monopolist charges more and produces less than a competitive industry. As a result the price it charges exceeds the marginal opportunity costs of production, and consumers demand less of the product than is efficient. The social costs of monopoly are the lost consumers' surplus (the difference between willingness to pay and the marginal costs) on the output not produced by the monopolist's action of creating artificial scarcity. Monopoly can also adversely affect the other terms of trade (such as lower product and service quality), reduce innovation, lead to excessive production costs (known as X-inefficiency), and encourage wasteful expenditure to enhance or protect its monopoly position by unproductive rent-seeking (see below). On the other hand, it is possible that one firm (a natural monopoly) can exist due to the high infrastructure costs necessary to build, say, a water pipeline or electricity distribution network, or firms may acquire market power because they generate more innovation (Schumpeter, 1947; Baumol, 2002).
- **Externality:** Some activities impose external losses or benefits on third parties which the market does not take into account. Externalities can impose losses (such as pollution) or benefits (such as bees pollinating orchards). The presence of external benefits and costs implies that the activity giving rise to them is under- and over-expanded respectively relative to the efficient level. This is because the cost structure of the externality-creating industry does not reflect the full social costs/benefits of its activities. Pollution, congestion, global warming, litter, anti-social behaviour, and crime are examples where the social costs are higher than the private costs which influence individual actions.
- **Public goods:** A public good is one for which consumption of the good by one individual does not detract from that of any other individual, i.e. there is non-rivalrous consumption. The classic example is defence—a standing army provides national defence for all its citizens. Public goods should not be confused with collectively or state provided or produced goods and services. A competitive market may fail to provide an efficient level of a public good because non-payers cannot be excluded resulting in free riding and preference mis-revelation, and the inability to appropriate an adequate return. Because individuals cannot be excluded from consuming a public good, those with high valuations will tend to understate their preferences in the hope of being charged a lower price and others will 'free ride'. Moreover, since a firm cannot exclude non-paying customers, these problems may sufficiently impair the ability to extract any payment that no or too few public goods are produced.
- **Asymmetric information:** Imperfect information can result in inefficient market outcomes and choices. Further, markets may under-produce relevant information because information's public goods nature can make it difficult for those

investing in better and new information to appropriate an adequate financial return. In other cases markets may fail because of *asymmetric information* where the buyer or seller has better information (Akerlof, 1970). Asymmetric information gives rise to two problems—adverse selection and moral hazard. Adverse selection is where one party cannot distinguish between two or more categories of goods, actions, or outcomes which have different costs, benefits, or risks, and therefore makes a choice based on the average value of these. For example, if an insurance company cannot distinguish good from bad risks, it will charge both a premium based on the average risk of the pool. As a result bad risks get cheap insurance and good risks expensive insurance. The losses of the pool rise as good risks don't insure while bad risks do because the premiums are cheap. Moral hazard is a situation where the prospect of compensation to cover risks and losses increases the likelihood and size of the losses because risky behaviour cannot be monitored and priced appropriately, and excessive losses are compensated. This concept received a considerable airing in the 2008/9 banking crisis.

Non-market failure

The implicit assumption of the market failures approach is that regulatory intervention is costless, and of course that it has or should have economic efficiency as its sole objective. In practice regulation is costly and generates its own distortions and inefficiencies. Coase (1960) pointed to this obvious flaw in a highly influential article and advocated that the relevant comparison was not between ideal markets and ideal regulation but between feasible, imperfect, and costly markets and regulation. This set the scene for a 'government failures' framework (Wolf, 1988), or what Demsetz (1969) called the 'comparative institutions approach' which later developed into the transactions costs and the New Institutional Economics approach (Williamson, 1985; Shelanski and Klein, 1995).

There are other implications from the above insight that markets and regulation are costly. The first is that economists and others have exaggerated the incidence and the extent of market failure. Often markets only seem to fail because the economists' models (or the standard set by non-economists) ignored the costs of using the market and the expense of proposed remedial measures. For example, it has been shown that many of the examples used to illustrate market failure in economics textbooks and influential articles have been very wide of the mark.[4]

Take, for example, the allocation of radiomagnetic spectrum. This was seen as a classic example of market failure where the private use of the spectrum led to congestion and radio interference (market failure due to externalities). From the 1920s until very recently it was firmly believed that a market in spectrum was not possible, as it gave rise to inefficient uses and radio interference. Thus the amount and use of spectrum had to be rationed and strictly regulated. Today, there is an appreciation that the reason why early 'markets' in spectrum failed was because of the absence of enforceable property rights, which led to incompatible uses of the same bandwidth

(Herzel, 1951; Coase, 1959). Research has shown that not only could there be a market in spectrum but that the law was evolving to develop a quasi-property rights system through the common law of nuisance and trespass (Coase, 1959). However, most countries 'nationalised' the airwaves and allocated bandwidth by administrative means, often to highly inefficient government and military uses.

The market failures approach also did not recognise that often the costs of using the market generated self-corrective forces. As a result a false dichotomy was drawn between market and non-market activities. However, many seemingly non-market institutions evolved as a cost-effective response to the costs of using the market. This was the essential and still often ignored insight of Coase, who argued that the positive transactions costs of markets could help explain otherwise puzzling economic and institutional features of the economy. The thesis advocated by this literature is that the laws and institutions evolve where they are a less costly way of organising economic activity. Indeed, this explains the existence of the firm—a firm is seen as a nexus of contracts and non-market hierarchal/administrative methods of organising production which replaces arms' length market transactions (Coase, 1937; Williamson, 1985). The firm thereby replaces market transactions costs with the principal/agency costs of internal administrative controls. This logic has been extended to regulation which some economists analyse in contractual and transactions costs terms (see below).

Distributive goals, fairness, and justice

Finally, a brief word about wealth distribution, fairness, and justice. Markets and regulation generate winners and losers. It follows that individuals as market participants and as citizens will often be equally if not more concerned by whether laws increase their wealth than by their impact on others or society in general. Moreover, there will often be views about the fairness and acceptability of market and regulatory outcomes. Thus it would be surprising if the economics of regulation, especially in its guise of a normative theory, was able to ignore these 'non-economic' factors.

There is also a technical reason why distributional issues cannot be ignored. This is because an efficient market outcome is partially determined by the *ex ante* distribution of income and wealth in society. This means that there is an inextricable link between wealth distribution and economic efficiency and market outcomes and by implication regulation. As a result it is legitimate in the normative theory to consider distributional factors, and indeed there is a vast economic literature in welfare economics, social choice theory, public finance, taxation, and social welfare issues which focus on such issues.

However, in the evaluation of regulation economists adopt a decidedly schizophrenic approach. On the one hand regulation is assessed in terms of economic efficiency alone, on the implicit assumption that distributional goals can be achieved at less cost by direct, ideally lump sum, wealth transfers. On the other hand, the economists' positive theories of regulation, discussed below, are driven by politicians and interest groups jostling primarily over wealth transfers.

The reason for the economists' reluctance to incorporate distributional considerations is easy to explain. Most economists view the use of regulation to re-distribute income as a blunt and inefficient instrument. It distorts prices and incentives, and hence leads to substantial efficiency losses and unintended effects which often harm those whom it is designed to benefit (see below). For example, the public interest goal of rent control is to make 'affordable' housing available to the poor. But its effect has been to reduce substantially the availability of housing as landlords withdrew properties and invested their monies elsewhere. Apart from creating a housing shortage, those lucky enough to secure rental accommodation often find that it is sub-standard as the landlord is unwilling to invest in improvements and maintenance. The lesson which most governments have now learnt is that price controls driven by distributional goals have significant negative effects and rarely achieve the desired redistribution of income and wealth. The economists' advice is that such policies should be pursued by other more efficient means such as income support payments etc., that do not distort the efficiency function of prices.

2.3 Positive Theories

Positive economic theories seek to explain regulation as it is. 'The central tasks of the theory of economic regulation' to quote one of its founders (Stigler, 1971: 3), 'are to explain who will receive the benefits or burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources'. This has led to theories which seek to explain why we have the regulation we have.

Economists have used the market failure approach to explain regulation. This is sometimes called the Normative Turned Positive (NTP) theory of regulation.

The NTP theory assumes (often implicitly) that governments seek to correct markets, and to do so fairly efficiently. For example, one survey by two respected British economists (Kay and Vickers, 1988) in the late 1980s concluded that: 'The normal pattern is that market failure provides the rationale for the introduction of regulation, but the scope of regulation is then extended to a wide range of matters which are the subject of general or sectional interests, regardless of whether there is any element of market failure or not.' While this pattern was discernible, there was clearly a lot of regulation that had little to do with correcting market failure. Indeed, in the US there was much talk of crisis as regulators were captured and favoured by the industry they regulated. That is that they promoted producer interests rather than the consumers' interests.

The growing evidence of regulatory capture in the USA led some economists to incorporate the political process into their analysis. At the core of these positive theories is the assumption that the participants in the regulatory process—politicians, bureaucrats, special interest groups, regulators—are all subject to the same self-regarding goals as are assumed to exist in markets, but subject to different constraints. That is the assumption of economic rationality—maximising net benefits subject to the resource and institutional constraints in the political marketplace.

Stigler (1971) was the first to develop a positive economic theory of regulation. His central hypothesis was that regulation was secured by politically effective interest groups, invariably producers or sections of the regulated industry, rather than consumers.[5] It thus had much in common with the political science view of regulatory capture (Bernstein, 1955).

Stigler's model, further developed by Peltzman (1976), has four main features or assumptions.

(1) The primary 'product' transacted in the political marketplace is wealth transfers.
(2) The demand for regulation comes from cohesive coordinated groups, typically industry or special interest groups, and hence differs from the real marketplace, where all consumers are represented.
(3) The effectiveness of these groups is seen as a function of the costs and benefits of coordination (which also explains why consumer groups find it hard to organise as an effective lobby group). The supply side of legislation is less easy to define given the complex nature of political, legislative, and regulatory processes.
(4) The state has a monopoly over one basic resource: the power legitimately to coerce. This is coupled with the behavioural assumption that politicians supply regulation to maximise the likelihood that they will be kept in office.

Stigler's theory generates strong conclusions which have not been fully supported by subsequent research, and indeed observation (Posner, 1974; Peltzman, 1989). For example, Posner (1971) pointed out that the common practice of regulators and legislators requiring public utilities to cross-subsidise loss-making operations and consumer groups (such as rural consumers) was inconsistent with the theory. Another apparent problem is the pressure for and acceleration of deregulation and privatisation, and indeed the massive injection of 'economic rationalism' into regulatory policy, during the Thatcher and Reagan eras. Here economic efficiency seemed to drive regulatory policies to remove patently inefficient and anti-competitive laws. The deregulation of airlines and telecommunications in the USA, and the widespread privatisation and economic regulation of the gas, electricity, telecommunications, water, and railway sectors in the UK, and progressively across Europe and the world, pose a challenge for the view that regulation is driven primarily by producers' interests. They suggest that powerful special interest groups had lost their political influence over politicians to rather undefined political forces opting for the public interest.

Another interpretation of deregulation is that the gains to producers from the then existing regulations and public ownership had been dissipated and were no longer significant. Peltzman (1989) has reviewed this period and noted that it was not a central feature of Stigler's approach that the producers' gains from inefficient regulation were permanent. They change over time and result in producer support for regulation waning, which can explain deregulation. The gains from deregulation in the face of the mounting inefficiency of existing regulation certainly rings true, but existing theories do not provide a clear basis for predicting when deregulation and regulatory change will happen, and in some areas (airlines) there were still significant gains to be had from the existing regulation.

A second approach starts with Becker's (1983) work on interest group influence in politics. This uses the same behavioural assumption used by Stigler but focuses not on politicians' desire to stay in power but on competition between interest groups. Interest groups invest in influencing the political process to gain favourable legislation. The key to Becker's model is the *relative* pressure exerted by a group since the investment made by opposing groups will tend to have a counteracting effect on the effectiveness of resources devoted to gaining influence. This means that a) excessive resources will often be used to influence the political process; and b) the outcome will generally be inefficient.

The mechanics and assumptions of Becker's model do not require detailed discussion here. What is of interest is that using similar assumptions to the Stigler/Peltzman model he generates markedly different 'predictions' more sympathetic to the public interest/NTP view of regulation. For example, Becker's model indicates that as the inefficiency of regulation increases there is less regulatory lobbying. This suggests that regulation which is welfare-enhancing is more likely to be implemented, and that industries where market failure is significant and endemic are more likely to be regulated. This is because inefficiency implies that the losses are greater than the gains of inefficient regulation. However, Becker's model also suggests that regulation may occur where there is no significant market failure because some interest groups can organise themselves more cheaply.

Yet another approach comes from the public choice school. This builds on the concept of rent-seeking (Tullock, 1967; Krueger, 1980; Rowley, Tollison, and Tullock, 1988), defined as unproductive profit-seeking by special interest groups to secure favourable legislation. Legislation that creates barriers to competition or confers monopoly rights leads to increases in the wealth of those favoured, which cannot be eroded or competed away. These rents provide the incentive for producer groups to invest in securing favourable legislation, hence the term 'rent-seeking'.

The idea behind rent-seeking is simple to explain. Take the case where the government plans to award a monopoly franchise to sell salt, and assume that this will generate monopoly profits of £20 million to the successful bidder. Faced with this opportunity potential bidders for the monopoly right to sell salt would be prepared to invest resources in lobbying (and bribing) the government to secure the monopoly franchise. Suppose that four bidders reveal themselves. The expected profits from lobbying for the monopoly franchise is £5 million (equal to 25% of the £20 million to reflect the uncertainty of winning the franchise). It thus would be rational for the four bidders each to expend up to £5 million to secure the franchise. In this way the monopoly profit is converted into unproductive and wasteful costs, and inefficient outcomes.

Taken in the round, economics is rather agnostic as to the purpose and nature of regulation. Indeed, the so-called 'Chicago School', whose exponents number Stigler, Peltzman, Becker, and Posner, do not have a unitary view of regulation other than the belief that it can be modelled using economics. The Becker/Posner approach is as likely to see regulation as tending toward efficient responses to market failure, as it is to identify it serving producers' interests only. This is graphically seen in Posner's analysis of the common law which is driven by economic efficiency considerations (Rubin, 2005; Veljanovski, 2008), efficiency models of statutory law, and the general economic justification for competition/antitrust laws (Posner, 2001). Indeed, those working in the regulatory field do not regard the capture theory as a good general description of regulation today, which overtly seeks to regulate market power and to foster competition.

2.4 Regulatory Design

Economics has been used to design and draft efficient or cost-effective legal rules and standards, and to identify the inefficiencies and distortive effects of existing and proposed regulation. These range from rather specific economic approaches to the choice between legal rules and standard, and *ex ante* and *ex post* regulation, to the use of cost–benefit analysis to ensure (cost) effective regulation and to cut 'red tape' (Hahn and Tetlock, 2008); or more imaginatively to propose and design market-like alternatives to the traditional command-and-control approach to regulation. Here we consider some of these applications.

It has long been recognised that the inefficiency of regulation is often the result of a mismatch between regulatory objective and regulatory instruments (Breyer, 1979 and 1982). This disjunction has been due either to the multiplicity of goals given to regulators or to the belief that non-economic goals could be achieved costlessly. It has also been due to the excessive use of what have been termed command-and-control approaches. That is, prescriptive rules were used to regulate inputs and impose obligations backed by administrative enforcement and penal sanctions.

For example, safety legislation would require compliance with technical and legal requirements which focused on safety inputs. The employer would comply by making the necessary capital and other expenditures such as purchasing machines with guards. This led to two problems—first, it raised costs and reduced productivity; and second the mandated safety devices may not have had an appreciable effect on the accident rate. It also gave rise to a third set of offsetting responses by those regulated and benefiting from regulation (see below). This resulted in the perversity of increased enforcement and compliance leading to higher costs for industry yet disappointing reductions in the accident rate.

2.4.1 Design of legal rules

Economics has been used to provide a framework to identify the factors that should govern the choice between rules and standards and between *ex ante* and *ex post* responses. This is drawn from the law and economics literature, but it has direct applicability to regulatory design.

Ehrlich and Posner (1974) were the first to set out a general framework set around minimising four categories of costs:

- the (fixed) costs of designing and implementing legal standards (rule-making costs);
- the costs of enforcing the standards (enforcement costs);
- the costs that they impose on the regulated industry (compliance costs); and
- the social costs imposed by regulatory offences (harm costs).

To these a fifth cost can be added—error costs. Judges and regulators are not omniscient or error proof. As a result they make Type I and Type II errors, or set out legal standards and rules that do not encourage efficient behaviour. A Type I error is where the regulator finds an infringement when there is none. A Type II error is when the regulator fails to find an infringement when in fact there is one. Clearly such errors reduce the gains from complying with the law, and alter the formal legal standards.

An 'efficient' set of rules or a standard minimises the sum (total) of these expected costs and losses by selecting the appropriate type of rule, and level and type of enforcement.

Shavell (1984) has used a variant of the above approach to identify the factors relevant to the choice between *ex post* (liability rules) and *ex ante* safety regulation. In his 'model' the choice of the optimal legal response depends on weighing four factors among victims and injurers:

- asymmetric information concerning risks;
- capacity of the injurer to pay;
- probability of private suit;
- relative magnitude of legal and regulatory costs.

Ex post responses, such as tort liability and private litigation in antitrust, are attractive if the victim is better informed, potential defendants can afford to pay claims, there is a high probability of suit should there be an actionable wrong, and legal process costs are low. Where these factors are weak, then *ex ante* law techniques become more attractive, either as a substitute for private or public prosecutions, or a complement.

The choice between *ex ante* and *ex post* legal responses has been a perennial topic in both economic and social regulation. It has found new vitality in legal reform across Europe as the European Commission and national governments grapple with the best way to regulate utilities—whether through antitrust laws (an *ex post* response) or *ex ante* sectoral regulation. The EU's New Regulatory Framework,[6] which regulates the communications industry, has emerged from an intense debate on whether to control the market power of telecommunications operators through general competition law or specially crafted price and access controls administered by sectoral regulators. The European solution has been to develop a new system of *ex ante* sectoral regulation based on *ex post* competition law principles. Yet another example has been the move to give those harmed by breaches of EU and national competition laws the right to sue and claim damages, thus privatising part of the enforcement process.

2.4.2 Comparative regulatory effectiveness

Economists have also begun to investigate why similar regulatory responses appear more effective in one country than another. This has generated a better understanding of the regulatory process and the interplay between regulation, law, and economics. One approach to this type of comparative analysis is the transactions costs approach associated with the new institutional economics.

Levy and Spiller (1994) provide one variant of the transactions costs approach. They view regulation as an implicit relational contract[7] between government and a regulated firm characterised by specific investment, opportunitistic behaviour, and commitment and governance. The network industries (telecommunications, water, gas, electricity, and railways networks) have specific features that mark them out from most other industries:

(1) their technologies require heavy specific, sunk investments;
(2) they generate significant economies of scale and scope;
(3) they produce mass-consumed, often 'essential', services.

Regulated firms in these sectors are required to make large asset specific investments in networks, i.e. investments which have limited alternative uses and salvage value giving rise to large sunk costs (and potentially stranded assets). Governments, on the other hand, are often not bound to adhere to agreements and regulations they set out when the regulated firms make these investments. This can create significant regulatory risks to the firm and its shareholders as governments and/or regulators effectively expropriate the returns by increasing regulatory and indeed competitive pressures.

Levy and Spiller see regulatory design as consisting of two components: regulatory governance and regulatory incentives. The governance structure of a regulatory system consists of the mechanisms that societies use to constrain regulatory discretion, and to resolve conflicts that arise in relation to these constraints. On the other hand, the regulatory incentive structure consists of the rules governing utility pricing, cross- or direct-subsidies, entry, access, interconnection, etc. While regulatory incentives may affect performance, Levy and Spiller argue that regulatory incentives (whether positive or negative) only become important if effective regulatory governance has been established.

This requires that the regulatory framework be based on credible commitments by both parties. Weak regulatory commitments create poor incentives for investment and ineffective regulation, and the failure of regulatory reforms.

An interesting aspect of Levy and Spiller's approach is the focus on what they term the 'institutional endowment' of a country wherein regulation takes place. This consists of 'hard' variables such as the nature of legislative and executive branches of government, the administrative capabilities, and judicial institutions; and 'soft' factors such as customs and informal norms, contending social interests, and ideology.

Levy and Spiller (1994) argue that the credibility and effectiveness of a regulatory framework—and hence its ability to facilitate private investment—varies with a country's political and social institutions. This approach is supported, for example, by work undertaken by the World Bank (2004), which shows, for example, that the legal heritage of a country—particularly whether common or civil law—has a measurable effect on the level of governance and efficiency of legal institution, and also on economic growth (Veljanovski, 2008).

2.4.3 Market-based alternatives

The obvious remedy to many of the problems identified above is to abandon the command-and-control approach and adopt market solutions or market-based regulation. These vary over a spectrum of techniques that focus on outcomes rather than inputs, and seek to give firms and individuals incentives to adopt cost-effective solutions. Among the techniques available are creating private property rights and markets, auctions, pricing, and fiscal incentives (taxes and subsidies).

Creating markets is the most obvious response to many areas where direct regulation is currently used. This can take the form of creating and enforcing property rights in previously unowned resources and assets. This in turn harnesses the profit motive to prevent over-exploitation and husband natural resources.

Consider the plight of the African elephant. The regulatory response is to have state-run National Parks and a militia to protect the elephants from being gunned downed by poachers. The government can respond to increased poaching (which is a product of the world demand for ivory) by making the penalties for poaching draconian and burning any confiscated ivory. But this in the end only sends the market price of ivory soaring and increases the gains from poaching. An alternative response is to privatise the elephants. If elephant farms were permitted, normal economic forces would ensure that these precious beasts were not poached to extinction. This type of response is happening in Africa.

In other cases pseudo-markets can be set up, such as tradable pollution or emission rights. For example, marketable emission or pollution permits can be issued to firms up to the level of the desired cutback. The permits can then be traded. This creates a market in pollution in which firms who find it unprofitable to reduce the level of, say, toxic emissions sell permits to other firms that can achieve reductions at low cost or which value the right to pollute very highly. In this way the desired reduction in pollution is achieved in the least costly way.

Market solutions are being used in other areas, such as radio spectrum. Today the use of market solutions has become accepted, but not as yet a fully-fledged market in spectrum. Across Europe and elsewhere auctions have been used to allocate spectrum to third-generation (3G) mobile phones. This has the attraction of being a more transparent and fairer way of allocating spectrum than the previous 'beauty parades' based on administrative and technical criteria, and of course has raised considerable sums of money for governments. Further, reforms are afoot to extend the use of markets to allow limited trading in spectrum, known as secondary trading, in the UK (Cave Report, 2002) and Europe, as has already been implemented in New Zealand and Australia. One country that has gone further by embracing a market solution has been Guatemala, under its telecommunications law of 1995. Spectrum rights there have been assigned on a first-in-time basis for uses determined by those filing claims with the regulatory agency. Those who have secured spectrum rights can negotiate 'change of use' subject to pre-defined technical limits designed to minimise technical interference. This market-determined approach appears to be working well (Spiller and Cardilli, 1999).

The above attractions of market solutions must be qualified. The mere fact that a market-type approach has been adopted does not guarantee its efficiency or effectiveness. This is because government still plays a large role in setting the number of tradable permits, the definition of initial property rights and the tax base and rates. Often these are inappropriately set. A recent example of 'government failure' in this area was in 2006, when it emerged that some EU member states (e.g. Germany) had issued permits allowing more carbon emission than the level of CO_2 produced by their industries. The result was no expected reduction in CO_2 emissions and market chaos as the price of the tradable emission rights halved from a peak of €30 to €12 per tonne over several days in April 2006. The auction of spectrum licences is another example. While this can place the available spectrum in the hands of those who value it most, the use, amount, and parcelling of spectrum among users is still determined by government, and trading in spectrum is limited. Thus while an auction and a secondary market can make a good job of a bad situation, the overall outcome may still be far from efficient.

Another solution is to use prices to ration usage and guide investment. The use of prices has been advocated for many years by economists to deal with road congestion and pollution. The adoption has been hindered by political resistance and the absence of a technology that would enable such pricing schemes. As the volume of traffic and congestion in urban areas has increased, however, governments have been forced to seek solutions rather than endlessly attempt to build themselves out of congestion. Singapore paved the way, and congestion charges implemented in central London have reduced the volume of traffic.

The last approach is fiscal instruments. A regime of taxes is implemented which reflect the social costs that a harmful activity imposes on society. Thus, instead of having environmental controls, a 'pollution tax' is imposed on some measure of emission or some variable positively correlated with the level of pollution, such as units of output sold. By imposing a tax on pollution or injuries that approximates the uncompensated losses imposed on other individuals, the industry is left to decide whether clean-up is cost-effective and in what ways it can be undertaken. Taxes must ideally be placed on the undesirable activity that one is seeking to internalise or deter. For example, if one wants to encourage a cost-effective reduction in pollution, the ideal tax is an emission or pollution tax which is placed on the harmful output or activity. Imposing a tax on cars is not efficient since it does not take into account the level of emission of different cars, nor does it encourage the adoption of less polluting engines. Thus the choice of the tax base and the tax level are important, as are the enforcement costs.

2.5 Regulatory Impact Studies

Whether and to what extent regulation achieves its stated goals is an under-researched subject. Regulatory 'impact studies' seek to predict and measure the impact of regulation often using sophisticated empirical techniques. Some take this further by undertaking cost–benefit assessments (Hahn, 2008; Hahn and Tetlock, 2008; Radaelli and De Francesco, 2010 this volume).

Impact studies are not straightforward, easy to undertake, or common, and often their quality is low. The first reason is that often the data required to undertake an 'impact study' are unavailable or incomplete. The second reason is that the effects of regulation may be difficult to identify and predict. To illustrate, consider several examples.

The market-failure approach interprets environmental and industrial safety legislation as responses to deal with the inability of markets to provide adequate protection of workers, consumers, and the public. This is often the stated intention of such legislation and assumed to be its effect. Yet empirical research often fails to find significant improvements in environmental quality and safety arising from such laws, even while they increase industry costs substantially. This suggests that there is industry compliance coupled with low impact in achieving stated regulatory objectives. One reason for the failure to have a beneficial impact has been the excessive use of command-and-control approaches.

There is another factor which often explains why the actual impact of regulation on desired goals is less than predicted or estimated. Firms, management, workers, and consumers often rationally adapt to these increased costs and constraint of regulation by relaxing unregulated efforts and inputs which may be more effective in reducing accidents. Resources are simply channelled into compliance with ineffective laws, rather than into preventing accidents in the most effective way. This type of adaptive response is graphically illustrated by a case unearthed by Kagan and Scholz (1984) in their study of the enforcement of industrial safety regulation by the US Occupational Safety and Health Administration (OSHA). A steel company became embroiled in disputes with OSHA, which during the 1970s adopted an aggressive enforcement policy. One of the firm's immediate responses to what it regarded as unreasonable persecutions by OSHA was to sack the trained safety engineer who headed its accident-prevention programme and replace him with a lawyer charged with litigating OSHA prosecutions. This outcome is a clear example where the response was to substitute one input for another (in this case to deal with regulation) that was less effective in reducing harm and improving worker welfare.

The effects of such safety regulation do not stop there. It has indirect effects. If regulation is stringent and vigorously enforced, it raises a firm's costs and makes entry into the industry more difficult for the smaller firm. If firms have different compliance costs, owing to their size, location, or the production process used, then regulation will have a more pronounced impact on some firms than others. This, in turn, will disadvantage those firms bearing higher costs, and the higher costs will act as a barrier to the entry of new firms or the expansion of small firms. A number of empirical studies have confirmed this.

A study of US industrial safety and environmental regulations by Bartel and Thomas (1987) found that these raised the profits of industries with a high proportion of workers in large firms or in the 'frost belt', while those industries with a large number of small firms or located in the 'sun belt' lost profits. That is, they acted to give a competitive advantage to larger firms and those in particular locations. This is exactly the outcome that public choice theorists would predict–established, politically effective firms often lobby for legalistic command-and-control approaches to regulation specifically because they impose greater costs on competitors and enhance their own profits, and this explains why industry is often hostile to tax and liability approaches, which would hit their profits immediately (Buchanan and Tullock, 1975). Or it may just be the unintended consequence. Either way these costs and consequences which are wider and more subtle are often not taken into account and difficult to measure retrospectively.

Another interesting illustration of adaptive offsetting responses is the experience with compulsory seat belt legislation. There is now fairly conclusive evidence that the net effect of seat belt laws has been small. This is not because they are ineffective in protecting vehicle occupants but because they encourage risk-taking and accidents by drivers. Compulsory seat belt legislation reduces driver risks and injuries, which can result in drivers adjusting their behaviour by driving faster and with less care. This can lead to fewer driver fatalities and more pedestrian fatalities and injuries, and damage to vehicles, thus increasing accident costs. The economics of the drivers' decision is simple to explain. A compulsory seat belt requirement decreases the risks and harm to the driver which causes him or her to undertake more risky aggressive driving.

Peltzman (1975) tested this simple economic proposition using the US *National Traffic and Motor Vehicle Safety Act 1966*, which made the wearing of seat belts compulsory. Using statistical analysis, he found that occupant deaths per accident fell substantially as expected, but this reduction was entirely offset by more accidents to those not protected by seat belts, i.e. pedestrians and cyclists. While this finding was ridiculed at the time as fanciful, subsequent research by economists and traffic safety engineers has confirmed that compulsory seat belt legislation has not resulted in a measurable decline in road fatalities (Adams, 2001). Indeed, Peltzman (2005) has revisited his original research to note that the annual rate of decline in highway deaths in the USA was 3.5 per cent from 1925 to 1960, before the legislation was enacted and at the height of Naderism; and between 1960 and 2004 it was also 3.5 per cent!

The theory of offsetting behaviour is evident in most command-and-control legislation. Minimum wage laws, rent controls, sexual and racial discrimination laws, and affirmative action laws all lead to adaptive or offsetting effects that reduce, sometimes substantially, their impact. Individuals and firms seek to minimise the costs that these laws impose, and this leads to a wider range of substitution effects, which may often not be in the desired or expected direction.

2.6 Conclusion

To paraphrase Keynes, the economics of regulation is not a settled body of facts but an approach. It uses the economists' toolkit to develop political economy theories of regulation, and to assist regulators with the technical details of framing effective

regulation. It is however still in its formative phases. There remain many puzzles and paradoxes to be explained such as the tremendous growth in regulation in parallel with greater role played by markets and economics; the nature of regulatory failure; what propels public interest regulatory reform; and what explains these different regulatory styles and approaches.

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Notes

1. Also see the classic but dated text by Kahn (1970) which takes this narrower view.
2. Council regulation (EC) No 139/2004 *Control of Concentrations between Undertakings.*
3. The term expected here is used to take account of risk and uncertainty, expected being used in the sense of the expected value of an uncertain outcome, and to emphasise that economic efficiency is an *ex ante* concept.
4. Economists have generally assumed rather than established market failure. A classic example often used in economics texts is the bee and apple. According to the distinguished economist James Meade, when bees make honey from and pollinate the apple blossoms this is an example of a 'reciprocal external benefits' which the market failed to take into account. Cheung's (1973) study of bee keeping showed that this was not the case, and markets did deal with this in the absence of government intervention. In Washington State there was an active market in nectar and pollination services which was even advertised in the Yellow Pages telephone directory. Cheung's study showed a well developed set of contractual practices, which even dealt with other 'externalities' arising from strategic behaviour where apiarists contracted for fewer beehives, taking advantage of positive benefits of neighbouring orchardists, and, secondly, the use of pesticide sprays damaging bees. Many of the other examples used by economists turn out not to be market failure (Spulber, 2002).
5. Stigler makes use of the insights from the earlier work of Downs (1957) and Olson (1965). A separate literature looks at the economics of bureaucracy and agency behaviour starting with Nisakanen (1971).
6. *Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services*, 24 April 2002 (*Framework Directive*); *Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities*, 7 March 2002 (*Access Directive*).
7. The term comes from the writings of Ian McNeil (1980), a lawyer, in a series of articles beginning in the 1960s, and has been developed into an economic model of contract by Williamson (1975) and others. Views about relational contracts differ, with McNeil seeing them largely as long-term personal contracts whereas economists view them as contracts where asset specificity is critical.

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CHAPTER 3

REGULATORY RATIONALES BEYOND THE ECONOMIC: IN SEARCH OF THE PUBLIC INTEREST

MIKE FEINTUCK

3.1 INTRODUCTION

This chapter contends that regulation in certain fields should incorporate and give emphasis to values beyond those of market economics. It will be argued here that the frame of reference of the market is too narrow to encompass properly a range of social and political values which are established in liberal democracies and can be seen as constitutional in nature. Examples from fields such as environmental regulation and regulation of the media will be used to illustrate a range of non-economic values which have been, are, or should be reflected in regulatory theory and practice as a means of recognising and reflecting principles related to social justice. Such principles extend beyond, and may be antithetical to the practices, values, and outcomes of market-driven decision-making.

Such themes will inevitably play out very differently in different constitutional settings. Thus, the experience of the mainland European democracies, with their differing histories and traditions (see, for example, Majone, 1996) will be rather different to those of the Anglo-American contexts, where long unbroken constitutional patterns, and a shared jurisprudence, will result in more accessible comparison. It is this transatlantic context which forms the basis for this chapter. The dominant strain of regulatory thought over recent years, in the UK and the US, has been premised upon the claim of legitimacy deriving from individual choice in the marketplace, and has sought to pursue the extension of market and quasi-market (Le Grand, 1991) based solutions into an ever-increasing range of domains, historically often considered 'public services', such as healthcare and education. However, it will be argued here that there is also a range of issues and values, for which economic analysis and the mechanisms of the market are not appropriate. Thus, it may seem necessary or advisable to posit an alternative vision starting from a public rather than private interest orientation. It is, however, one thing to assert such a case, but quite another to establish it and demonstrate why such an approach should be promoted or defended in the face of the powerful tide of market-driven forces which threaten to sweep over all alternative approaches.

What is clear is that, without clarity on the limits of market values, and the nature of 'public interests', the tensions between market and public approaches can make for confused policies. This was exemplified in 2008 when the UK Government and Competition Commission (CC) were prepared in effect to clear instantly the takeover of the HBOS group by LloydsTSB. The 'public interest' in the stability of the UK financial industry suddenly overrode the 'public interest' in a competitive retail banking sector—a precise reversal of the finding in 2001 (under the competition regime prior to the Enterprise Act 2002) when it was decided that a proposed takeover by Lloyds TSB of major rival Abbey National would not be permitted, on competition grounds. Little could have illustrated more dramatically the vulnerability of visions of public interest, at least when such visions were premised exclusively on economic priorities.

Proponents of a 'public service' rationale, however, face not only the challenge of producing an acceptable model of 'the public interest' but also that of countering the power of the market model. It is impossible to deny the ongoing dominance of economic approaches to public services in both governmental and scholarly circles. An excellent starting point for establishing the parameters of recent debate over the role and forms of regulation is Ogus's *Regulation: Legal Form and Economic Theory* (1994). Reflecting the book's orientation, but also perhaps the dominance of market-based thinking, his section on 'non-economic goals' is a mere eight pages. In this brief section, Ogus refers to matters of distributional justice, noting 'liberal' approaches, which 'temper a respect for individual liberty and acceptance of distributions resulting from the market processes with a concern for unjust outcomes', and 'socialist' approaches, in which 'pursuit of equality is a common theme' (Ogus, 1994: 47). He also identifies approaches informed by 'paternalism', noting that: 'Although paternalism is not often invoked in policy discussions, it may be safely assumed that it remains a powerful motivation for regulation', though: 'its theoretical base and content nevertheless remain controversial' (Ogus, 1994: 52). Beyond these non-economic approaches, Ogus does note also 'a set of public interest goals which may loosely be described as "community values"', observing, reasonably enough, that 'the unregulated market has only a limited capacity to achieve those goals' (Ogus, 1994: 54).

Within the parameters on which it is based, Ogus's work has much to offer and it is generally wrong to criticise scholarly works for what they do not address. However, it is difficult to accept that a set of values and approaches which informed the British welfare state and public service tradition, and formed the basis for legitimate public intervention even prior to that era (e.g. pragmatic interventions in pursuit of public health; see Harramoës *et al.*, 2002: 5), as politically unfashionable as they may presently be, should be so marginalised in discussion. The problem is that, in a sense, Ogus's approach is merely reflecting a deficit in the development of thinking relating to regulation beyond the market, namely the failure to identify and articulate with reasonable clarity the basic values that must necessarily inform the principles around which regulatory intervention can legitimately take place. Too often, such interventions will be premised upon a too vague construct of 'public interest'. Simply put, 'an agreed conception of the public interest may be hard to identify' (Baldwin and Cave, 1999: 20) and, in the absence of a strongly developed alternative vision, there is almost an inevitability about such regulation becoming focused on limited, though apparently concrete issues such as monopolies, public goods and information deficits, etc. to the exclusion of broader social values which might permit or encourage a broader perspective. Such approaches only address a sub-set of the relevant issues and values, and it can be argued that a more inclusive approach is required.

The now dominant school of thought in relation to regulation is closely related to 'public choice' theory, based upon what Ogus (p. 59) summarises as an assumption that 'behaviour in the political arena is, in its essence, no different from behaviour in the market, the individual acting in both contexts rationally to maximise his or her utility.' In Ogus's terms: 'The exchange relationship which lies at the heart of, and fuels, the market system of production, is thus perceived to play an equally crucial role in the political system', or as Craig expresses it, '*homo economicus* who inhabits the ordinary market-place also inhabits the political arena and behaves in much the same way, operating so as to maximise his own individual preferences' (1990: 80). As public choice theorists assume that general welfare will be maximised by the exercise of individual choices, they will conclude that regulatory intervention is demanded essentially only where examples of 'market failure' need to be corrected in order to ensure the ongoing 'proper' operation of the market.

As we will see shortly, in relation to mergers and takeovers involving media corporations, it is perfectly possible to find examples where the interests of consumers in effective operation of markets do not mesh neatly with the interests of individuals and groups as citizens. Yet there is no doubt that the public choice world-view is massively dominant and that the alternative public interest perspective struggles to be heard, not only because of politico-economic fashion, but also perhaps because it has been less clearly articulated. This is despite the telling critiques of the market/public choice approach that have been delivered from a range of different perspectives. (Katz's 1998 collection, *Foundations of the Economic Approach to Law* illustrates a number of such arguments.) Such approaches range from 'liberal' perspectives such as Dworkin's, arguing that economic approaches can tend to understate individual rights and freedoms, to the 'Critical Legal Studies' position summarised by Kelman, 'that there is absolutely no politically neutral, coherent way to talk about whether a decision is potentially Pareto efficient, wealth maximising, or whether its benefits outweigh its costs' (Kelman, 1998: 329) and through to Leff's 'Legal Realist' critique of Posner which points towards the reliance of such an approach on simplistic majoritarianism and its failure to take account of existing power inequalities (Leff, 1998). It is also worth emphasising the approach adopted by Sunstein, to which we will return, in identifying 'arguments for freedom of contract and private ordering' as depending on 'crude understandings of both liberty and welfare' (1990: 39). Elsewhere, he notes succinctly that, 'in any society, existing preferences should not be taken as natural or sacrosanct' (Sunstein, 1997: 4), and that 'markets should be understood as a legal construct, to be evaluated on the basis of whether they promote human interests, rather than as part of nature and the natural order, or as a simple way of promoting voluntary interactions' (1997: 5).

While each of these lines of critique brings its own range of problems to be resolved, the collective effect of such approaches may be to cast doubt on the validity of market-driven approaches to social justice. However, though suggesting clearly that 'emperor market' may indeed have no clothes, they do not necessarily offer strongly constructed or complete alternative visions and it is clear that the politico-economic fashion is still for mechanisms of the market. From this point, debate can move in one of two directions. Either we can focus on those arguments which may undermine, at a theoretical level even if not in political reality, the market-based approach. Or, we can endeavour to develop a conceptually robust competing vision, premised on a very different set of values. The task attempted here is largely the latter.

3.2 The Public Interest as the Holy Grail? An Impossible Quest?

In so far as public interest rationales and public service cultures may serve as obstacles to the further extension of the market, so, proponents of 'public choice' will seek to challenge continually the ideas and institutions of public interest and this challenge will be greatly strengthened where public interventions are seen to, or can readily be presented as having failed. Actual or perceived regulatory failure in this context can arise from a variety of causes, including regulatory capture, but the absence of adequately clear regulatory objectives can prove a fundamental issue. Any perceived failure to regulate effectively results in disrepute and the de-legitimising of the institutions of public interest regulation. As Baldwin and Cave (1999: 20) observe:

> [T]he public interest perspective is prone to attack on the basis that regulation often seems to fail to deliver public interest outcomes. Some observers see this as an indication that appropriate lessons must be learned from failures so that better regulatory regimes can be designed. The message for others is that regulation is doomed to failure and that policies of deregulation should be looked to.

In the absence of clear explication of the substantive objectives for public interest regulation, there will be difficulties in identifying what constitutes successful intervention, and hence problems with defending the legitimacy of institutions charged with pursuit of the public interest. Meanwhile, the identification of meaningful and legitimate objectives will be impossible in the absence of clearly expressed rationales for intervention. It is never enough to simply assert public interest—the claim must always be, and expect to be, challenged—and the quest for a general (as opposed to context-specific) meaning of public interest is likely to prove a fool's errand at other than the most abstract level (Feintuck, 2004). Thus, the establishment of a coherent structure of context-specific substantive value and principle is a necessary prior task to effective regulation in pursuit of public interest objectives.

It is also necessary, though, to seek to establish how such matters are consistent with inherent and established social and constitutional norms, and how they might be embedded in legal and regulatory discourse. That said, protecting and furthering the democratic legitimacy and the procedural and substantive legality of public interest intervention, will not in itself serve as a surrogate for the development of conceptual clarity as to substantive objectives. Embedding substantive values in institutional forms which are consonant with the constitutional settlement remains an important, if ultimately second order, task. Rationally, values must be determined, and principles drawn from them before institutions can be designed to pursue the resulting objectives.

In reality, however, the case for institutional recognition of non-economic values in regulation does not have to be made *ab initio*. While the conceptual underpinnings may remain underdeveloped, certain regulatory activity does, in practice, indicate the ongoing acceptance of values typically associated with 'the public interest'. We can see these in practice, even if they often remain far from uncontested and inadequately explored, theorised, and explicated. For example, in environmental regulation, 'the precautionary principle' has become established, if continually under reconstruction and challenge, yet the extent of its recognition is sufficient to indicate a substantial degree of legitimacy for the non-economic and non-instrumental values which lie at its heart. Likewise, in relation to regulation of the media, while powerful international corporate forces have combined with rapid technological change to challenge the 20th century role of the state at the centre of broadcasting regulation, arguments persist regarding how to maintain regulation premised upon 'the public interest' (Feintuck and Varney, 2007) generally associated with quantity, quality, diversity, and accuracy of information in the service of citizenship, implying again a set of values, worthy of protection which will not necessarily be guaranteed or served by market forces. The complexities of regulating the media, both in terms of substantive principle and multi-agency institutional structures will be returned to.

3.3 Conventional Wisdom or Enduring Myth—The Market as Neutral

Before moving to consider the challenges of establishing a 'public interest' rationale for regulation, it is necessary to contest any notion that the *contentiousness* of the 'public interest' model contrasts with the *neutrality* of the market model. Here it is worth noting Sunstein's observation that 'the satisfaction of private preferences', from which market-based arguments often derive, 'is an utterly implausible conception of liberty or autonomy' (Sunstein, 1990: 40). He goes on to argue (ibid.) that:

> Above all, the mistake here consists in taking all preferences as fixed and exogenous. This mistake is an extremely prominent one in welfare economics and in many contemporary challenges to regulation. If preferences are instead a product of available information, of existing consumption patterns, of social pressures, and of legal rules, it seems odd to suggest that individual freedom lies exclusively or by definition in preference satisfaction.

Subsequently, Sunstein goes on to argue that, therefore, more fundamentally, 'it is incorrect to claim that something called the market, or respect for private arrangements, embodies governmental "neutrality"', and that, 'private preferences are partly a product of available opportunities, which are a function of legal rules'. Thus, he concludes, the allocation of rights and entitlements will have 'a profound effect on and indeed help constitute the distribution of wealth and the content of private preferences', and that therefore: 'Whether someone has a preference for a commodity, a right, or anything else is in part a function of whether the legal system has allocated it to him in the first instance' (1990: 41). What we have here is a very persuasive illustration of the circularity of arguments for the use of market forces in matters of public concern, though this does not in itself constitute or define a coherent alternative vision.

Thus, while the deregulatory message has been widely transmitted, and has become essentially the received and accepted wisdom on the subject, traces of an alternative perspective remain. Indeed, the language of public interest remains all pervasive, and almost unavoidable. However, in the absence of clear explication of their underlying values, claims and visions of public interest remain highly vulnerable to attack from and capture by the forces of the market and deregulation. Even for proponents of public interest approaches, coherent visions, capable of being embodied in robust regulatory regimes which will be perceived as legitimate in a harshly economics-driven climate, are hard to find.

Morgan and Yeung do tentatively dip a toe in the deeper waters of the substantive values which might be incorporated in such a broader vision, identifying Sunstein's work as an exemplar of the approach, but they conclude rather passively that: 'the task of prescribing substantive visions of values that regulation can legitimately pursue is controversial, given the pervasiveness of moral disagreement and value pluralism that characterises modern societies' (2007: 36). In the absence of the establishment of values, which can inform the regulatory endeavour and form a focus for activity, we are left with regulation in pursuit of that which can be measured in economic terms—we may end up exclusively valuing the measurable, rather than measuring, and regulating for, the valuable.

There only seem to be a couple of alternative routes from this situation. The first is to accept the impossibility of constructing modes of regulation which incorporate and pursue values beyond the economic, for any or all of the range of reasons just identified. The second is to make the case for the legitimacy of regulation premised upon values inherent in the democratic settlement, and on these foundations to seek to construct modes of regulation which reflect and defend these values. The critiques of market approaches highlighted previously create a space in which this alternative edifice might be constructed, but do not in themselves offer more than a general indication of the form this structure might take in practice.

3.4 Exemplifying Public Interest Regulation in Practice (if Not in Theory)

Essentially, the process of regulating in pursuit of public interest objectives faces two fundamental problems: the elusiveness of the concept at the theoretical level, and its (consequent) fragility as a basis for practical regulation. While, as indicated earlier, examples can be found of practical regulatory activity targeted at 'public interest' goals, 'the public interest' will always be a fragile basis for intervention, so long as it remains theoretically unspecified.

As will be apparent from the foregoing, despite the availability of powerful lines of critique, currently dominant thinking in relation to regulation fails to offer much support for regulation in pursuit of non-market objectives. However, despite this strong trend, which has retained a firm hold since the Thatcher–Reagan era, it remains possible to identify rationales which both chime with the underlying basis for the democratic settlement, and which are in reality still embodied in legal principles and practices which inform regulation. That is not to say though, that such instruments and institutions are necessarily adequately justified, or that adequate conceptual development necessarily underlies and provides firm foundations for such regulation. Their survival into the modern era, in the face of their marginalisation from the mainstream political discourse, does suggest some inherent value, or perceived necessity in relation to democratic fundamentals which transcend the political fray. Nevertheless, the common pattern which emerges is that principles relating to regulation in pursuit of collective objectives are consistently much less clearly elaborated and less developed than those relating to private interests.

One area where complex collective interests are regularly addressed is that of environmental regulation, where, despite general deregulatory trends, short-term private economic interests are on occasion overridden by long-term collective interests which look beyond economic values, even if the conceptual foundations on which such interventions are based are sometimes less than satisfactorily elaborated. The most obvious example in this area is 'the precautionary principle', which, though controversial, has become embedded in varying forms across numerous jurisdictions in Europe and worldwide (for a series of early case studies, see O'Riordan and Cameron, 1994), and in particular has been a focal point regarding the development of the EU's environmental law (see da Cruz Vilaça, 2004; also Fisher, 2003).

Across and within jurisdictions, a diverse range of debates goes on regarding the principle, concerning its procedural or substantive nature, weak and strong versions of it and indeed the very concept of risk which underlies and informs its application. They extend even to whether a 'principle' properly-so-called can be identified at all, or whether we should confine discussion to 'precautionary approaches' (Feintuck, 2005). Despite such controversies, and despite its clear orientation towards proactive intervention to prevent irreversible damage—a stance that sits far from easily with modern deregulatory trends—the precautionary principle has become, over the last thirty years, a significant element in attempts to preserve and further perceived public interests in the face of the onslaught of public choice approaches. At its strongest, as represented in the 1998 Wingspread Declaration (see Morris, 2000), it serves to outlaw certain proposed commercial activities in pursuit of environmental protection:

> Where an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of the activity, rather than the public, should bear the burden of proof.

Though in practice invariably weakened significantly, by reference to proportionality or even 'cost-effectiveness', and consistently challenged by those with instrumental or political reasons to do so, the collective, long-term essence of the concept remains and appears to resonate with core social values. It has therefore become central to regulatory discourse in the environment and elsewhere. Operating at the point of confluence of science, economics, law, and democracy, the precautionary principle, at its best, can serve to embody and protect a series of non-instrumental values attaching to the environment, and takes account of a wider range of factors than is typically to be found in market-based mechanisms.

What we see in the precautionary principle is an attempt on occasion to limit potential private interests in commercial gain by reference to a set of broader societal concerns regarding the progress of science and its commercial applications and its potential future impact. Yet the 'principle' remains essentially contested. The degree to which its legitimacy is accepted varies dramatically both between interest groups and across jurisdictions, and given that its operation is often inevitably international and cross-jurisdictional, the absence of an unambiguous and agreed core meaning renders it a fragile and vulnerable device.

As with the LloydsTSB takeover of HBOS, noted earlier, conceptual fragility in the face of economic *force majeure* is illustrated vividly in the 'compromise' between the EU and World Trade Organisation (WTO) on living modified organisms (LMOs), arising from the trade dispute over growth hormones in beef cattle, which excluded most LMOs from the most demanding requirements of the applicable protocol, and demonstrated, concludes Salmon, 'the hegemony of the free trade imperative underpinning regulatory interactions on the international playing field' (2002: 138). Specifically, this can be thought to indicate future difficulties for autonomous European action based upon precautionary regulation, but deeper questions also remain regarding problems of 'reconciling the goals of environmental protection with the fundamental objectives of Community policy which are primarily economic' (Hession and Macrory, 1994: 151). The benefits potentially associated with the wider view-screen which the precautionary principle might seem to offer in respect of environmental disputes, may be substantially undermined in such a context. While acknowledging that, 'the market mechanism provides the best framework we know for maximising the *instrumental or economic value* of nature', Sagoff makes the case, in the context of environmental decision-making, for the necessity of moving beyond economic reasoning, arguing that 'market allocation has to be balanced with political deliberation with respect to social policies that involve moral or aesthetic judgment' (2004: 13).

Some parallel, and again context-specific, considerations can be discerned in relation to regulation of the mass media, especially broadcast media (Feintuck and

Varney, 2007). It is worth exploring this area here, by way of illustrating further the vulnerability of social values in the absence of their clear explication and embodiment in regulatory statutes and practice.

Often premised on somewhat vague 'public interest' criteria, aspects of the historic media regulation regime in the UK have survived beyond a period of dominance of public service broadcasting into an era in which frequency scarcity has been superseded by frequency abundancy as a result of digital technology. Technological changes, corporate conglomeration, and globalisation have combined to change radically the basis on which broadcasting operates (see generally, Seabright and von Hagen, 2007). Yet, as we will consider shortly in relation to the example of BSkyB/ITV, there remains scope for intervention with strong claims of legitimacy based on the idea that there are values worth pursuing which are beyond, and often antithetical to, market forces. However, the extent to which potentially contested notions of public interest are translated into clearly articulated and applicable regulatory criteria remains problematic. It is worth reviewing briefly the statutory basis on which regulation is premised in relation to media mergers in the UK, by way of highlighting some of the difficulties which arise in this context.

The Enterprise Act 2002, as amended by the Communications Act 2003 forms the basis for regulation of media markets. The light touch regulatory approach promised by the latter, combined with the competition-oriented approach of the former, would suggest little likelihood of significant regulation in pursuit of objectives beyond those economic values that are typically the subject matter of competition law.

The Communications Act 2003 swept away a complex web of provisions under the Broadcasting Act 1996 (see Feintuck, 1999) which had established maximum holdings and intervention thresholds within and across media sectors. In place of these provisions, Sections 369–372 of the Communications Act granted Ofcom concurrent powers with the Office of Fair Trading (OFT), with the potential for further grants of power by the Secretary of State. Under Sections 373 and 374, the provisions of the Fair Trading Act 1973 that had historically provided specific measures applicable to takeovers and mergers in newspapers were replaced by the general provisions of the Enterprise Act (Feintuck and Varney, 2007).

In the Enterprise Act and Communications Act, reference is made, respectively, to 'public interest cases' and 'media public interest considerations'. Section 42(1) of the Enterprise Act allows reference by the Secretary of State to the OFT via an 'intervention notice' where a public interest consideration is relevant to a merger situation. Incorporated into Section 58 of the Enterprise Act by Section 375 of the Communications Act are unusually detailed specifications of what constitutes 'the public interest' in relation to mergers between newspapers, between broadcasters, and in relation to mergers which cross the two sectors. These provisions, often described as 'the plurality test', establish 'the public interest' in this context in the following ways.

In the case of a newspaper merger, the public interest considerations, as defined by the Act, are:

- The need for accurate presentation of news in newspapers.
- The need for free expression of opinion in the newspapers involved in the merger.
- The need for, to the extent that is reasonable and practicable, a sufficient plurality of views expressed in newspapers as a whole in each market for newspapers in the UK or part of the UK.

In the case of a broadcasting merger or a cross-media merger, the public interest considerations as defined by the Act, are:

- The need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience in relation to every different audience in the UK or a particular area/locality of the UK.
- The need for availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests.
- The need for persons carrying on media enterprises and for those with control of such enterprises to have a genuine commitment to the attainment of the broadcasting standards objectives that are set out in Section 319 of the Communications Act 2003 (for example governing matters of accuracy, impartiality, harm, offence, fairness, and privacy in broadcasting).

In essence, the provisions are targeted at maintaining a degree of diversity and quality within media output in the UK. Though, at one level, these seem quite detailed elaborations of the principles underlying the powers, it is clear that the precise way in which such broad provisions will be interpreted remains subject to substantial discretion on Ofcom's behalf, and ultimately: 'It is in essence for Ofcom to objectively consider whether the new company would have too prominent a voice across all sectors of the media' (Stewart and Gibson, 2003: 358).

This regime has unique aspects since the general system of competition law in the UK is based almost entirely on economic considerations and the procedure under Part III of Chapter 2 is the only part of the Enterprise Act 2002 which bestows a significant role on the Secretary of State. The Secretary of State is, moreover, prevented (by s.54(7) Enterprise Act 2002) from interfering with the competition findings of the OFT and CC and this, accordingly, demands engagement with arguments relating to a vision of 'public interest' which extends beyond competition. The DTI (Department of Trade and Industry) has produced an extensive document (DTI, 2004) which offers some illustration of the considerations that the Secretary of State will take into account in such situations, although it offers little indication of the relative weight that will be placed on the various factors discussed in the document. Especially in the early years of the new regulator exercising this jurisdiction, companies involved in actual or proposed mergers needed guidance as to how the powers might be used and Ofcom moved quickly after taking up its powers to indicate how it would go about offering general advice as regards proposed mergers. In essence, however, Ofcom's advice mirrored the

DTI guidance, and in reality amounted to little more than a restatement of the provisions summarised above and identified its role as being one of applying the tests and reporting the results to the Secretary of State with a recommendation as to whether the merger should be referred to the CC for further consideration. What was, and is, abundantly clear, however, and what gives these provisions their particular significance in the present context, is that they constitute measures, within a competition law context, which unambiguously introduce into the equation a range of non-economic factors relating to the social and democratic significance of the media. The media is not simply to be treated as another industrial/economic sector, but it is recognised as having a broader importance to society which is concretised in legislation as a basis for regulatory intervention.

The first real test of how these measures would operate in practice arose in the context of BSkyB's 2007 purchase of a stake in ITV. The regulatory response (see Select Committee on Communications 2008, Chapter 6, Paras 268 *et seq.*) highlighted some complexities in a multi-agency regulatory system in which Ofcom, the OFT, the CC and, ultimately, the Secretary of State (Business Enterprise and Regulatory Reform) all had an interest. In this case, the first in which the full 'public interest test' established by the Communications Act 2003 had been applied, the CC was prepared to identify a 'substantial lessening of competition', in terms of the operation of the television market as a whole, but it did not find that the stake cut across 'public interest' values in relation to plurality and diversity in media output. Ed Richards (Ofcom's Chief Executive) giving evidence to the House of Lords Select Committee on Communications in 2008, publicly aired surprise at this finding, though he also expressed a relaxed attitude towards the finding, given the CC's finding on competition, which supported intervention. While possibly a reasonable conclusion, regulation of the media is ultimately premised on such democracy and citizenship-serving values and, if regulators are unwilling, or find themselves unable to defend these values, the legitimacy of regulatory intervention in media markets (to do anything beyond ensuring the effective operation of markets) will be severely challenged given the absence now of justifications based on a statist view, or pragmatic arguments such as frequency scarcity, on which regulation of broadcasting was historically premised.

Permitting the CC to investigate both competition values and the non-economic plurality issues associated with 'the public interest' risks blurring the two sets of issues and values and may not ensure due prominence for values integral to media regulation which extend beyond the economic. As the Lords Select Committee stated subsequently, 'it would have been perfectly possible for the CC to have come to different conclusions to Ofcom not only on plurality but on the appropriateness of the merger overall. It is just a coincidence that despite disagreeing with Ofcom on plurality, the CC found there was a significant lessening of competition and therefore suggested there was a problem with the merger' (Select Committee on Communications, 2008, para. 270). For the record, by way of remedy, BSkyB was subsequently required to sell-down its share-holding in ITV. Though it had to do so at a considerable loss, it is possible that this was considered a price worth paying as the original purchase had served a strategic purpose in blocking a potential alternative bid by its rival Virgin Media. Though subject to subsequent scrutiny by the Competition Appeal Tribunal ([2008] CAT 25), the scope of review here is strictly limited, and does not examine directly the substantive basis on which decisions have been taken.

Prosser (2005: 14 and chapter 9) properly observes the tensions between approaches premised on competitive markets and competition law on the one hand, and public service on the other, in the context of broadcasting regulation. While the CC has a pivotal place in the modern scheme of regulation in this context, the issues at stake here, in terms of democracy and social justice, clearly extend beyond the terms of reference of competition law and it might be expected, as seems to be intended by the legislative framework, that the other regulatory players will properly bring perspectives which look beyond market competition. If regulators in an area such as the media do not effectively bring anything beyond the reflection of market forces, we have been misled, our democratic expectations will not have been met, and the legitimacy of the regulators to do anything more than simply reaffirm the primacy of markets will be undermined.

What we see, in regulatory attempts to pursue and enforce both precautionary and public interest approaches, are interventions apparently premised on non-market values—attempts to pursue what is perceived as valuable to society which extends beyond that which can readily be measured in economic terms. Yet these interventions are continually challenged and threatened on various grounds. Most conspicuously, however, both approaches run against the strongly dominant politico-economic current which emphasises and prioritises market forces. If devices such as the precautionary principle or public interest are to serve alternative ends successfully, they must be perceived as legitimate, and in the current hostile climate this means have the strongest possible foundations for their legitimacy. As has been noted, current manifestations seem to fail in this respect through lack of clarity, and also through lack of sufficient articulation of, or primacy for, the values which they represent. If it is possible to identify and highlight a lineage which runs directly from constitutional values, it may be that their prospects of success will be somewhat greater.

3.5 From Practice to Theory: The Need for Clarity Regarding Underlying Values

The above examples illustrate that regulatory interventions in pursuit of public interest objectives do continue in practice, though they remain flimsy and vulnerable in the absence of the conceptual foundations that are necessary for building claims of legitimacy and resisting challenges by those private interest groups that see their interests as threatened by such action. Such challenges are likely to be especially powerful where the dominant norms in political discourse are those of 'public choice', rather than 'public interest'.

Yet the narratives of the precautionary principle and of public interest regulation in broadcasting both demonstrate and illustrate the continuing existence of values and objectives which extend far beyond the values of the market. They are already embodied in legal and regulatory provisions, albeit often controversially, but in order to continue to have any meaningful effect, their claims of legitimacy need re-examining and reasserting. It is possible to claim that their foundations lie within a series of collective constructs which underpin the political settlement and are, in a sense, constitutional in nature. If one of the 'law jobs' (see Harden and Lewis, 1986, referring to Llewellyn) is the constitution of groups, then it is perfectly proper for the law and the regulators to act in pursuit of agendas which are agreed, and which further the interests of the collective, even in the face of a politics which prioritises individual and economic interests beyond all others. Just as society has long since agreed that there is a proper place for the existence of private property claims, and has sought through legal mechanisms to define the nature and acceptable extent of such claims, so society has acknowledged the existence and need for those mechanisms and principles which define the collective interests, and which contribute towards the continuation of society. The problem here, as noted earlier, is that this latter category of interests is far less clearly defined, and far less well protected in law, than are private interests.

Even within the liberal-democratic states, there will be wide-ranging differences as to how such values are recognised and protected within varying constitutional and legal systems. Differences in approaches to public services in the UK and other Western European democracies are well-charted (Majone, 1996), while the radically different trans-Atlantic approaches as between the UK and USA, despite the shared common law heritage, are striking. The differences observable here can be traced both to differences in constitutional form, and constitutional priorities.

What is also striking is that identifying 'public' values seems hardly less difficult where there is a written constitution. In contrast with the UK, the US may seem to have more clearly articulated constitutional principles, yet the tasks of bodies such as the Food and Drug Administration or Federal Communications Commission (FCC), who have to grapple daily with 'public interest' briefs in their respective fields, are not necessarily aided by the very different constitutional setting.

The FCC, for example, has explicit power, originating from the Communications Act 1934, to regulate in pursuit of 'the public interest, convenience, and necessity'. Of course, the presence of such a phrase alone does not signify in itself the establishment of a strong normative concept. That said, it might be expected that in the seventy years in which the phrase has been in use, in the context of US administrative procedure and law, steps would necessarily have been taken to define it in substantive terms. On inspection, however, it soon becomes apparent that though the FCC's actions have indeed been the subject of fierce debate, this has resulted in only limited, if any, progress being made in terms of developing a coherent understanding of what is meant by the public interest.

Of course, the FCC's brief must be viewed in its constitutional setting. The First Amendment guarantee that, 'Congress shall make no law . . . abridging freedom of speech or press', provides a starting point of positive liberty, very different from that historically found in the UK. This starting point may form part of the reason why the prominent 'public service' tradition in broadcasting, so common in Western European democracies, is so manifestly absent in the US. It would seem constitutionally unthinkable for a US regulator to intervene to set and enforce detailed programme standards or quotas on independent broadcasters, or impose strict requirements of balance in news reporting, in the way that the ITC (Independent Television Commission—a predecessor of Ofcom) did until recently in the UK. However, it is also clear that the First Amendment promise of freedom of speech is not as absolute as it might superficially appear, and US courts have repeatedly found circumstances in which they were prepared to find regulation of print and, especially, broadcast media to be constitutional in spite of arguments to the contrary based on the First Amendment (Feintuck, 2004, chapter 4).

Inevitably, however, the FCC's actions and the scope of its substantive powers remain controversial. From at least three perspectives, its activities in pursuit of 'the public interest, convenience and necessity' are subject to vehement criticism. First, the exercise of its powers is attacked on the basis that it has been ineffective, having patently failed to avoid a situation of oligopoly within US media markets, potentially a problem from the point of view of the interests of competition, consumers and citizens (see Bagdikian, 2004; and Herman and McChesney, 1997). Related to this is a second line of criticism that states that the FCC's agenda is too vulnerable to capture through political appointment of commissioners and/or by powerful media business lobbies. The third critical line, attacking its regulatory power as unconstitutional, by virtue of being too extensive or too ill-defined, is adopted primarily by those who seek to pursue a deregulatory agenda. It is this third line of argument that perhaps most clearly raises questions over what is to be understood as 'the public interest' in this context. Commenting extra-judicially, Judge Henry Friendly is found to be extremely critical of the concept as used in the Communications Act, finding it as 'drained of meaning' (see Krasnow and Goodman, 1998: 626) and there are still voices that consider the public interest standard simply 'too indeterminate to be constitutional' (May, 2001).

Thus, constitutional principles can cut both ways. Conspicuously in the US setting they may on occasion inhibit regulatory activity (rightly or wrongly) but they also have the potential to serve as an essential context and justificatory basis for regulation. While constitutional principles and expectations extend beyond the market, they are presently much less apparent and less clearly articulated than arguments deriving from market choice. It is therefore crucial to remain aware that within the context of a political settlement which relies for its legitimacy both on economic *and* non-economic values, excessive focus on any one set or subset of these values is likely to lead to the exclusion or marginalisation of other values. If lawyers, as they often do, choose to emphasise apparently more concrete issues of procedure or doctrinal disputes (tempting as this may be in a jurisdiction such as the UK, where constitutional principles may appear less clear than elsewhere), this may serve to compound the risk of marginalisation of the wider range of underlying values.

If constitutional principles provide no ready conception of the public interest, it is necessary to look elsewhere. In the USA, the development of regulation owes at least as much to the writing of political economy as to legal thinking. Writers such as Mitnick (1980) and Breyer (1982) provide a politico-economic perspective that has a much higher profile in the American literature than the British. While the massive and rapid development of US administrative law in the 1970s, 'provided no key to a substantive definition of the public interest' (Rabin, 1990: 125), what is abundantly clear is that the public interest, and regulation undertaken in its name, lies at the very intersection of law, politics, and economics, and is, quite properly, subject to critique from scholars within all these disciplines. In Sunstein's terms, which may appear somewhat alien to UK eyes, 'the liberal republicanism of American constitutional thought' is premised on 'a set of ideas treating the political process not as an aggregation of purely private interests, but as a deliberative effort to promote the common good' (1990: 12).

Capacities to *deliver* public interest outcomes have also been a concern of commentators. Thus, an ongoing concern on either side of the Atlantic has been that of regulatory capture. In the terms of Baldwin, Scott, and Hood (1998: 9) the public interest approach 'has been said to understate the extent to which regulation is the product of clashes between different interest groups and (alternatively) the degree to which regulatory regimes are established by, and run in, the interests of the economically powerful'. Whatever angle it is approached from, the chance is that regulation is unlikely ever to be found to be delivering fully or satisfactorily the public interest outcomes which it seems to promise. Of course, this should be relatively unsurprising if an awareness is maintained of the lack of development of a robust and conceptually independent construct of public interest within the regulatory context and the polity more generally. There can be no doubt that the failure to establish and articulate with adequate clarity a construct of public interest within the US regulatory system has left underlying values exceedingly vulnerable.

The cross-jurisdictional differences of constitutions and theoretical approaches that are noted here seem to reflect very different conceptions of citizens and their associated expectations, both as individuals and groups. Yet constructs of citizenship, as different as they are, consistently reflect both the interests of citizens as individuals *and* the continuing interests of the group; not just one, or the other, but both. Indeed, it might be argued that by pursuing a linkage between claims of public interest and a concept of citizenship, which can only meaningfully exist within the context of a political community (and hence certain collective interests), both a more meaningful construct of public interest might emerge, and the interests of the collective may be reasserted alongside the dominant voice of individual interests.

Arblaster identifies 'those . . . for whom democracy and the freedoms which often accompany it are an inconvenience, an obstruction to the uninhibited pursuit of wealth and profit' (2002: 55). In resisting such forces, in preserving society *qua* society, in protecting the democratic element of liberal-democracy, the institutions of regulation and the legal system have potentially critical roles to play, via what can be characterised as 'assuring the larger constitutional values inherent in the rule of law to promote rational civic discourse' (Harden and Lewis, 1986: 263). This can be seen to parallel closely the deliberative element of civic republican thought referred to by Sunstein and noted earlier. Though it is at least as problematic in the British context as the US, in terms of giving it practical effect, it remains clear that such institutions which might be charged with producing deliberative outcomes will be disabled from doing so if they are not in themselves able to identify the basis for their legitimacy within the larger political settlement and its value system.

Here we return to a link identified by Sunstein, between questions of 'the regulatory state' and 'the purposes of constitutional democracy'. While he identifies 'political equality, deliberation, universalism and citizenship' as amongst 'basic republican commitments', these are also among the features which he identifies as consistent with liberalism, and, as such, they may be expected to be present as much in British democratic arrangements as in America. In pursuing their regulatory agendas, bodies such as Ofcom appear to have the potential to further such democratic expectations, especially that of citizenship, in serving to 'promote social justice through public action' (Young, 2000: 117).

Ofcom's powers, in seeking to ensure a degree of diversity in media output via maintenance of pluralism in ownership and control, are clearly intended to service a set of needs related to the full range of elements of citizenship such as that classically set out by Marshall (1964). Meanwhile the kind of universal service obligation which may be imposed on utility providers by way of 'social regulation', (Feintuck, 2004: chapter 3; Graham, 2000; Prosser, 1997) also seems closely related both to what has been discussed here in terms of 'public interest' regulation and to the kind of 'basic threshold of resources and capabilities' referred to by Honohan (2002) in her discussion of modern republicanism. To a large extent, the underlying problem here emerges as the difficulty in reconciling private property ownership with the social, 'public interest', objectives which underlie regulation of the power deriving from private property, or what Robertson refers to as: 'The public dimension of private power' (1999: 255).

Robertson notes, with approval, observations made by Cohen in the 1920s that in exercising their economic power, 'the owners of large productive assets get not just *dominion over things* through their property rights, but also, and more importantly, *sovereignty over people*' (Robertson, 1999: 258). There is, however, nothing inherent or immutable in this undermining of equality of citizenship. Reflecting Sunstein's arguments set out above, in Robertson's terms: 'The system of property arrangements in any society has to be consciously designed to maintain the proper form of political and social order' (p. 248). As Gamble and Kelly put it: 'if there is marked inequality in a society, it is a result of political choice, not of deterministic and irresistible economic logic' (1996: 96). This is true, both in relation to substantive, economic equality, and equality of citizenship.

Robertson summarises succinctly the root cause of many of the difficulties inherent in regulating property power which might be encountered here. His important thesis is that:

> [T]he democratic, rather than the liberal tradition, better highlights the public and constitutional aspects of private property. However, since the democratic tradition is less dominant in our culture than liberalism, its insights into the public dimensions of private property are more marginalised and muted.
>
> (Robertson, 1999: 246)

The development and use of a concept of public interest explicitly linked to the value of equality of citizenship, which underlies liberal-democracy, might be one avenue through which to address such issues.

In an era in which, 'market driven politics can lead to a remarkably rapid erosion of democratically determined collective values and institutions' (Leys, 2001: 4) it is especially important that regulatory mechanisms are developed which seek to preserve and further such features of the democratic settlement. Recourse to a discourse of citizenship, which meshes with the underlying constitutional and democratic fundamentals, but will often run counter to presently dominant liberal rhetoric of the market, may help in this regard by clarifying the basis of legitimacy for such collective claims.

3.6 Conclusion

To borrow (and subvert) a strap-line from a current commercial for credit cards: 'For what really matters to society collectively there is public law, for everything else there's private law.' Or, in Ackerman and Heinzerling's terms, there is a need to move beyond, 'knowing the price of everything and the value of nothing' (2004). The point of this aphoristic approach is to emphasise that although the mechanisms and principles of private law are essential to resolving questions of private economic interests, they do not represent or incorporate the full value set which underlies the democratic settlement, which should be institutionalised in public law.

Even in an era in which the public domain may appear to be in decline (Marquand, 2004), it is crucial to remember that regulation exists within the realm of public law. Within this context, regulation may appear to raise predominantly matters usually characterised as administrative law, and it is the technical aspects of this area that are most often explored in the literature. But, scratch the surface and we also find issues which are constitutional in nature. If we unpack underlying regulatory concepts such as the precautionary principle or the public interest as applied to the media, we find a set of core values which are essentially political and contestable but which are embedded in legal discourse, and, perhaps more importantly, within the democratic settlement. Thus, regulation relates to, or resonates with the constitutional context and values, and must properly be viewed in that light.

As such, the real issue, it can be argued, is not so much the identification in general terms of where something we might call 'the public interest' lies or what constitutes a proper degree of precaution in relation to scientific developments, difficult though these tasks are. Rather, the crucial task is that of establishing with adequate force and clarity the constitutional and democratic legitimacy of such claims, to allow them to be reasserted effectively above the clamour of proponents of the market.

Certainly, the institutional structures must be appropriate to address the particular congeries of issues thrown up in a situation of 'public interest' regulation. As such, it is proper to support the kind of recommendations for legislative reform made by the 2008 Lords Select Committee 'that Ofcom should investigate the mergers only on the basis of public interest criteria, while the Competition Commission's brief should be limited solely to the competition issues arising from media mergers' (Para. 271). It would be wrong to oppose the intentions here, yet in themselves such recommendations as to institutional structure are of limited value if an adequately strong understanding of 'public interest' is not established and a sufficiently prominent place in the hierarchy of competing values assigned to it.

Massive problems remain with identifying a unifying construct of public interest to inform regulation by way of counterpoint to dominant accounts informed by the economics of private interest. What has been suggested, however, is that there are concepts currently in play which can be found to have strong claims of legitimacy and which pursue objectives which clearly extend beyond, and will often conflict directly with, the dominant values of the market. The pursuit of a public interest agenda which drives at ensuring a degree of equality of citizenship, even in the face of market forces, can be viewed readily as an attempt to pursue democratic values which have been incorporated into the constitutional settlement.

Likewise, restricting commercial exploitation of scientific developments by reference to concerns over the risk such activities may pose can be viewed as linked to the fundamental 'law job' of resolving disputes in such a way as to ensure that society continues to be able to operate as society. At a more specific level, it may also be the case that both in relation to precautionary interventions and general public interest regulation, the interests of future generations may be at stake, raising questions akin to those associated with discussions of 'stewardship' (Feintuck, 2004: 241–3; Lucy and Mitchell, 1996) which might be marginalised or neglected entirely if debate is focused too tightly on the pursuit of individual interests via the market.

Particular problems of interpretation and application of a public interest principle may arise in a jurisdiction such as the UK, where the judiciary does not have a longstanding habit of giving effect to broad principles as opposed to narrower rules, or where private, individual interests are recognised much more readily than public, collective interests. In the context of common law responses to environmental questions, and issues arising both from rules of standing and the use of *amicus curiae* briefs in pursuit of 'public interest' objectives, Goodie and Wickham talk of how, 'non-pecuniary public interests are subject to "pragmatic and situated" calculation within the common law' (2002: 37), indicating a degree of dissonance between established common law principles and the concept of 'public interest'. Much the same might be said about the precautionary principle in the same legal context.

Sagoff indicates very clearly the need to recognise that, often, or even invariably, 'environmental disputes, at bottom, rest on ethical and aesthetic rather than economic conflicts—differences in principle rather than in preference' (2004: 28). Meanwhile Coyle and Morrow's pursuit of the philosophical foundations of environmental law takes a different route in considering the relationship between environmental law and property rights yet reaches an apparently closely parallel conclusion, that environmental law 'demands interpretation against a background of sophisticated moral and political principles, rather than straightforwardly utilitarian rules and policies' (Coyle and Morrow, 2004: 214). In each case, the bottom line is that both the social values associated with democracy and non-instrumental values attaching to the environment demand a form of decision-making which takes account of a wider range of factors than is incorporated in market mechanisms.

Though progress in such a direction often seems faltering, some sense of direction still appears from time to time. While it may appear that the terms of the debate are increasingly set by the language of the market, it is still possible for authoritative sources to point us in directions that encompass a wider range of issues and a broader sense of the social and democratic issues that underlie regulation. To return to the context of regulating the media, the Lords Select Committee (2008) which investigated the relationship between media ownership patterns and the democratically necessary diversity of news output, concluded that:

> ... when Ofcom plays its role in the Public Interest Test, citizenship issues should be at the centre of its considerations. We recommend that when Ofcom considers the public interest considerations of a media merger it should be required to put the needs of the citizen ahead of the needs of the consumer.
>
> (Para. 275)

Such an explicit statement of priorities and the recognition that there may be significant divergence between the essentially economic and individualised interests of citizen *qua* consumer and those of citizen *qua* citizen, serves as a helpful reminder that regulation in such areas must be focused in such a way as to capture the wider, and more fundamental, value-set that the latter implies.

At a broad political level, difficulties in presenting such regulatory interventions as legitimate should not be unexpected in a post-Thatcherite world in which the values of the market and liberal-individualism dominate political discourse, and where society is increasingly viewed as, at most, the context for the fulfilment of individual wants and needs. The very real risk inherent in such a situation is what has been described as the threat of, 'the destruction of non-market spheres of life on which social solidarity and active democracy have always depended' (Leys, 2001: 71). The ideological dominance of market-driven politics is such that the preservation of the wider liberal-democratic value set stands desperately in need of protection, yet the legal system seems to struggle to develop fully or recognise adequately devices which serve such values. While the legal system seems to be good at recognising individual, property-related interests, it has much more difficulty in validating and protecting 'non-commodity' values. Put simply, the legal system's ability to protect the apparent economic interests of individuals, reflecting the dominant view of us as *consumers*, will not adequately protect the broader and often collective interests of us all as *citizens*.

At this stage, it is perhaps worth returning to Sunstein's words quoted earlier: 'the liberal republicanism of American constitutional thought' is premised on 'a set of ideas treating the political process not as an aggregation of purely private interests, but as a deliberative effort to promote the common good' (Sunstein, 1990: 12). This is by no means an uncontested vision of US constitutional values, and certainly is not immediately transposable to Britain. It does, however, point towards the existence of a set of values, which we can reasonably presume to be common across the Anglo-American tradition, which remain important and essential to the continued existence of society *qua* society, even if the sentiments are too often only partially and inadequately expressed in constitutional and regulatory discourse.

In Bell's terms: 'The public interest is used to describe where the net interests of particular individuals may not be advanced, but where something necessary to the cohesion or development of the community is secured' (Bell, 1993: 30). Bell goes on to discuss 'the public interest' in terms of 'fundamental values [which] characterize the basic structure of society', (p. 34) while others such as Milne (1993), providing some echo of Sunstein's republican expectation of deliberation, also identify the concept's close connections with an idea of a 'community' which represents more than a collection of individual interests. In a similar vein, in respect of the precautionary principle's original context in environmental debate, Sagoff makes a powerful case for the need to move beyond economic reasoning: 'the market mechanism provides the best framework we know for maximising the *instrumental or economic value* of nature [but] market allocation has to be balanced with political deliberation with respect to social policies that involve moral or aesthetic judgment' (Sagoff, 2004: 13). The 'public interest', on this view, may be seen as standing in direct opposition to the Thatcherite vision of there being only individuals and families, and 'no such thing as society'.

The underlying reason why the legal system often seems to struggle in respect of matters such as the precautionary principle or any meaningful vision of the public interest can be seen as arising from its very clear emphasis on individual interests, often to the exclusion or severe marginalisation of collective interests within legal discourse. Only by incorporating devices and principles which reflect and give due priority to collective as well as individual interests, can the legal system truly serve the full set of values on which the democratic settlement is based. Undue emphasis on the values of liberal-individualism, to the exclusion of other values, may lead to fundamental expectations of liberal-*democracy* being dashed.

At the time of writing, it is unclear whether indications of a return to something approaching a Keynesian approach to economic management in the UK, as an immediate response to the financial crisis of 2008, will turn into a longer-term trend. Likewise, whether the end of the Bush presidency in the US results in an incoming Democratic administration with redistributive and regulatory intentions remains to be seen and it is difficult to predict with certainty how this might play out, given the shadow cast by the context of ongoing global financial uncertainty. However, it would be wrong to underestimate the power of strongly embedded market forces, especially when combined with a largely passive position adopted by both UK and US regulators over a lengthy prior period. It is difficult to envisage a return to an active and politically popular regulatory tradition in the short term, or a 'new deal *de nos jours*': despite proper scepticism deriving both from the sorts of arguments canvassed here and the realities of something of a crisis in global capitalism, the market tide still runs strong, and will not easily be resisted. What is certain, however, is that any shift in governmental approaches to the economy and to regulation, to be perceived as legitimate would need to be accompanied by substantial development in thinking in relation to the basis for regulation and the development, and embodiment in law of a system of principles on which it can be founded. Otherwise, the history of vagueness and scepticism associated with 'public interest' regulation seems certain to continue.

If the democratic credentials of 'public interest' visions are explored and highlighted, and, specifically, if their lineage from citizenship expectations is emphasised, their legitimacy can be reaffirmed and they may yet have a role to play in ensuring that fundamental values are measured and protected, rather than allowing only that which can be measured in economic terms to be valued.

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CHAPTER 4

THE REGULATORY STATE

KAREN YEUNG

4.1 Introduction

Scholars from various disciplines frequently claim that the closing decades of the twentieth century have witnessed the 'rise of the regulatory state'. There is, however, considerable disagreement about the precise meaning and content of this claim. In essence, the regulatory state is primarily an analytical construct that seeks to encapsulate a series of changes in the nature and functions of the state that have resulted from a shift in the prevailing style of governance following sweeping reforms in the public sector within many industrialised states throughout the 1980s and 1990s. The breadth and malleability of the regulatory state concept has, though, provided scholars with considerable latitude in the subject matter, range of issues, focus of analysis, disciplinary perspectives and methodological approaches which they have brought to bear in seeking to explore its various dimensions.

This chapter sets out to examine the main features of the regulatory state and consider some of the explanations that seek to account for its emergence. My aim is to examine some of the principal claims made about the regulatory state arising in academic discussion, rather than to undertake a comprehensive literature review. I begin by briefly exploring the core characteristics that are claimed to define the regulatory state, focusing on changes in institutional form, functional mission, and policy instruments employed by the state to guide and stimulate economic

and social activity. Secondly, I consider some of the explanations that have been offered to explain its emergence, focusing on Majone's influential account of the development of the EU as a regulatory state. Thirdly, I explore the paths of regulatory development in two other locations that are frequently labelled as regulatory states—the USA and the UK.

A comparison of the developmental trajectories of these three so-called regulatory states reveals significant variation, with each diverging (some quite considerably) from the positive theories of the regulatory state that scholars have offered. Although this suggests that it may be more apt to speak of regulatory states, each with their own distinctive characteristics and dynamics, rather than a single or uniform regulatory state, they all sit somewhat uncomfortably with traditional conceptions of democratic governance. Accordingly, the fourth section of the chapter touches upon various attempts to reconcile the apparent tension between the image of regulation as a technocratic, apolitical process in pursuit of economic efficiency, and recognition that regulatory decisions invariably have political dimensions, and therefore require democratic legitimation. In the concluding section, I consider whether the regulatory state has a future, and what this might imply for state–society relations.

4.2 The Regulatory State as Successor to the Welfare State

As an analytical construct, the regulatory state purports to depict a shift in the mode or style of governance that took place in the socioeconomic environment of many advanced capitalist nations during the three closing decades of the twentieth century. Accordingly, the defining qualities of the regulatory state are typically identified in opposition to, or at least contrasted with, at least three core dimensions that are claimed to define the welfare state: the latter denoting the predominant role and mode of governance that prevailed within many industrialised states from the mid 1940s and continued until the mid 1970s (see, for example, Loughlin and Scott, 1997; Braithwaite, 2000).

After the end of the Second World War, many western governments accorded high priority to the tasks of post-war reconstruction, redistribution, and macroeconomic stabilisation (Majone, 1997: 139, 141). There was widespread social consensus that the role of the state was that of macroeconomic planning, market stabilisation, the provision of welfare, and acting as employer of last resort. To fulfil these ambitions, many states expanded their control over major resources, most visibly through ownership of key industries, including public utilities such as gas, electricity, water, telecommunications, and the railways. This extended the state's capacity to effect changes to macroeconomic policy unilaterally through discretionary direct intervention in the activities of key industries. The hierarchical authority exerted by the state over significant swathes of industrial activity was replicated in the organisation of the state's bureaucratic apparatus, through a departmentally organised central government with executive control lying in the hands of a Minister situated at the pinnacle of each departmental hierarchy.

By the mid 1970s, however, this mode of state governance appeared to have outlived its usefulness as industrialised states struggled to influence macroeconomic indicators through the direct levers to which they had become accustomed. Inflation and unemployment levels spiralled upwards, contrary to the inverse relationship posited by prevailing Keynesian economic orthodoxy. It was in this context that significant changes began to take place in the way in which the state conceived its role, its organisational structure, and in the ways in which it sought to discharge its functions. It is these changes that the image of the regulatory state seeks to capture.

Throughout the 1980s, many industrialised states embarked upon a programme of privatising state-owned assets, transferring ownership of key industries, particularly the network utilities, to the private sector (see for example, Yarrow and Jasinski, 1996). Because many of these industries retained their natural monopoly characteristics at the time of privatisation, it was widely accepted that there was a need for some kind of regulatory supervision over their activities following privatisation. In many states, the institutional form adopted for this purpose was that of the independent regulatory agency, established by statute and endowed with statutory powers, but which operated at arm's length from government rather than being subject to regular ministerial direction (see for example, Burton, 1997). Despite the long history of this institutional form, it was the proliferation of utility regulators that began to attract scholarly attention (Black, 2007). At the same time, many governments introduced a systematic programme of restructuring the provision of public services, based on the separation of public policy-making functions from operational or service delivery functions. These so-called 'New Public Management' reforms were intended either to shift the role of service delivery out of the public sector and into the hands of the private or voluntary sector (by contracting out), or at least to make service delivery more responsive to competitive market forces; for example, through the introduction of compulsory competitive tendering (Hood, 1991; Freedland, 1994).

The result is claimed to have brought about three major shifts within the public sector. At the institutional level, the state had been 'hollowed out'—no longer a single, monolithic entity but an allegedly trimmer, policy-focused core executive supplemented by a series of discrete units, with varying degrees of autonomy from the central core (Rhodes, 1994). This fragmentation of institutional form, when combined with the transfer to the non-state sector of a considerable tranche of

service delivery functions, is alleged to have generated a change in both the state's function and the instruments which it employed. Although many services were now being delivered by an extensive network of commercial and voluntary sector providers, this did not entail the wholesale relinquishing of control by the state over service provision, reflecting its reconfigured mission as a regulator, rather than direct provider, of welfare and other essential services. In the words of Osborne and Gaebler's oft-quoted metaphor, the state's function had shifted from that of rowing to steering (Osborne and Gaebler, 1992: 25).

This shift in function is also alleged to have necessitated a change in the kinds of policy instruments available to the state in seeking to fulfil its regulatory functions, for the state could no longer rely on hierarchical authority arising from direct ownership of the resources from which many services had previously been provided. Scholars differ, however, in the ways in which they characterise these policy instruments. For some scholars, the fragmentation of service provision entailed by the rise of the regulatory state led to greater reliance on formalised, rigid forms of control, largely through the specification of rules to govern the terms on which services would be provided (Loughlin and Scott, 1997: 207; McGowan and Wallace, 1996: 560). But for others, it has entailed a shift to softer, negotiated forms of control (Moran, 2003: 13).

Despite emphasising apparently contradictory qualities, most scholars of regulation agree that the regulatory state 'governs at a distance', no longer able to employ unilateral, discretionary control via command, necessitating reliance on more arm's length forms of oversight, primarily through the use of rules and standards specified in advance. Some have commented that one consequence of the regulatory state's increasing reliance on rules, rather than through direct hierarchical control, has been an expanding role for courts and other judicial-like institutions to resolve disputes concerning the proper interpretation and application of those rules in concrete contexts, for disputes could no longer be solved internally through bureaucratic fiat (Majone, 1997: 139).

Although broad agreement about the defining characteristics of the regulatory state exists, there is considerable divergence in academic views concerning its implications for the appropriate locus of analysis. Some scholars interpret the concept as necessitating an exclusive focus on the state and its activities to the exclusion of wider state–society relations (Scott, 2004), whilst others see it as capable of comfortably accommodating the latter (Moran, 2003: 13). As a consequence, those who adopt the former interpretation argue that the analytical focus of the regulatory state is unduly narrow, and have therefore suggested alternative terms that would extend the focal range beyond the confines of the state. For example, Scott prefers to speak of the 'post-regulatory state' (Scott, 2004: 145), whilst Braithwaite, who once used 'regulatory state' terminology liberally, now prefers to speak of 'regulatory capitalism' (Braithwaite, 2008: 11). My own view is that the concept does not require or imply an exclusive focus on the state detached from its relationship to civil society more broadly, so that these latter terminologies are more apt to confuse rather than clarify, particularly given that the regulatory state concept has always been a rather fuzzy edged heuristic, rather than a precisely formulated term of art.

4.3 Explaining the Emergence of the Regulatory State

While scholars have broadly similar views about the defining characteristics of the regulatory state, explanations seeking to account for its emergence have attracted considerable disagreement. Before the term 'regulatory state' entered academic parlance, a number of North American academics had engaged in intense debate about why regulation emerged in particular policy sectors. Traditionally, the need for, and establishment of regulatory supervision of economic activities had been understood in terms of market failure, based on the view that state intervention to correct such failures is needed to enable the market to function efficiently. But orthodox market-failure explanations came under sustained attack throughout the 1970s by a group of so-called 'rational choice' scholars arguing that, in practice, regulation operated for the benefit of the regulated industry and its members, rather than for those it was ostensibly intended to protect. According to rational choice theory, the emergence of regulation in particular industries could best be explained as the product of powerful sectional interests, primarily powerful business interests and bureaucrats, rather than a need to protect the interests of the general public.

Although empirical evidence from various North American industries has been claimed to support rational choice explanations, one leading regulatory theorist, Stephen Croley, has commented that the same evidence has also been relied upon to discredit rational choice theories (Croley, 1998). Moreover, the sweeping trend in favour of deregulation and the liberalisation of markets that took place alongside public sector reforms on both sides of the Atlantic and which prevailed throughout the 1980s and 1990s could not be readily accounted for in rational choice terms (Peltzman, 1989). The push for market deregulation was championed by neo-liberals who advocated the superiority of market forces over state intervention in managing the economy, although it is questionable whether the pursuit of deregulatory policies in many industrialised nations was a product of ideology or more pragmatic political concerns, such as burgeoning national debt and increasing recognition that massive investment in public infrastructure was long overdue but beyond the state's capacity to afford (Heald, 1988). Others claimed that the apparent decline in the ability of national governments to steer macroeconomic

indicators in the desired direction provided evidence that the mode of governance associated with the welfare state was no longer suited to a globalised environment characterised by high levels of cross-border trade and high capital mobility (Majone, 1997; Loughlin and Scott, 1997).

One of the most well-known positive theories of the regulatory state in Europe that applies and develops the logic of the welfare state failure thesis is that offered by Giandomenico Majone (1994). He argues that the European Union, as well as nation states within Europe, can best be understood as 'regulatory states' that have evolved in response to the demands of economic modernisation. The deregulatory reform movement that took place in many industrialised economies roughly coincided with a burst of institution-building within the European Union, marked by the injection of momentum in the development and completion of the Single European Market with the passage of the Single European Act in 1986. It was in the context of seeking to understand the driving forces and dynamics underpinning European integration that scholars of European politics sought to explain the emergence of regulation in Europe. In particular, Majone ambitiously set out to explain what he sees as the systematic emergence of regulatory modes of governance throughout advanced industrialised states, rather than in specific industries. His thesis, as it applies to the EU, has three dimensions: it seeks not only to characterise the EU as a regulatory state, but also seeks positively to explain its emergence, and normatively to defend the legitimacy of regulation undertaken by independent agencies despite their apparent lack of democratic credentials.

First, he claims that the EU's primary function is to secure the efficient functioning of markets through regulation. Because the EU lacks what Majone considers to be the two other main functions of the modern state, notably stabilisation and redistribution, he argues that the EU displays only limited features of statehood and is therefore best understood as a 'regulatory state' rather than a fully fledged state. Secondly, he posits a theory of why the EU developed into a regulatory state, by setting out to explain why the European Commission, as the primary initiator of Community policy, has pursued regulatory policies rather than pursuing alternative strategies of expansion, and why EU member states were willing to transfer regulatory powers to the EU level. In order to expand its prestige and influence, the European Commission could not proceed by initiating large-scale initiatives in important policy sectors because it lacks both access to financial resources and the bureaucratic muscle to impose policies upon member states or sectional interests. But these limitations do not preclude it from promulgating regulations, allowing it to enlarge its influence whilst pushing the costs of implementation onto member states.

At the same time, Majone argues that member states were willing to delegate important regulatory powers to the EU level owing to difficulties encountered by national governments in establishing credible policy commitments aimed at attracting foreign capital investment, combined with a desire to avoid the high transaction, monitoring, and implementation costs associated with seeking to harmonise regulations intergovernmentally in order to prevent other states from using market regulations opportunistically to pursue national interests. In addition, the European Commission's attempts to expand its influence via regulation are supported by transnational enterprises, increasingly operating across national frontiers and which therefore have a rational interest in uniform European rules.

Thus Majone's account of the emergence of the European regulatory state resonates with rational choice theories, at least to the extent that individuals and institutions are portrayed as self-interested, rational actors seeking to maximise their power and position. On the other hand, his explanation also relies upon more conventional accounts of welfare state failure, in so far as the range of options available to nation states and other participants in the European market to pursue self-interested strategies are shaped by the modern global environment and the challenges it presents for the task of governing. To this end, Majone sees the independent regulatory agency as uniquely suited to meet these challenges—being less exposed to political pressure, and thus meeting with greater credibility from the regulated community. He points to the growth of this institutional form both at the EU level, and within European states (both member and non-members alike) as evidencing the rise of the regulatory state across Europe more generally. For Majone, the lack of democratic mandate underpinning these 'non-majoritarian institutions' should not be regarded as undermining their legitimacy provided, however, that they do not exceed their proper function—that of seeking to correct market failures in the pursuit of economic efficiency.

While the third dimension of Majone's argument has been the subject of significant scholarly discussion, to which I will return in the final section of this chapter, the positive component of his theory has not been left unchallenged (McGowan and Wallace, 1996). Several scholars have sought to test the validity of Majone's account by comparing the path of regulatory development within states that are often regarded as 'regulatory states', often identifying considerable variance. In other words, a closer examination of the history and developmental profile of regulation in various European contexts has cast doubt on the success of Majone's attempt to develop a general explanatory theory of the regulatory state, with scholars drawing attention to other important variables such as the importance of political dynamics (Jabko, 2004; Eberlein and Grande, 2005), cultural context, and historical timing (Moran, 2003: 13) that help account for its development.

Others have pointed out that there is considerable variation in the extent to which regulatory reform has penetrated individual European states, with considerable divergence within states and across sectors (Thatcher, 2002). At the same time, it should be borne in mind that there is considerable breadth and variety in the explanations offered by scholars of European politics in accounting for the character of the EU and the development of EU integration, so that regulatory state explanations comprise merely one strand of this extensive literature (see, for example, Jachtenfuchs, 2002; Hix, 1998; Weiler, 1999; Douglas-Scott, 2002).

4.4 Real States as Regulatory States?

Although the regulatory state is primarily an analytical construct with descriptive and positive (explanatory) dimensions, it has not generally been regarded as a normative ideal, except by neoliberal theorists who advocate minimal state intervention for the purpose of correcting market failure. Accordingly, its analytical strength might be assessed by reference to how accurately it captures the key characteristics and explains the development of real states that have been labelled as regulatory states. Thus the following discussion examines in broad-brush fashion the general path of regulatory reforms taking place in two further locations—the USA and the UK, and compares them with the characteristics regarded as definitive and the explanation posited by Majone in his depiction of the rise of the regulatory state in Europe.[1]

4.4.1 The US regulatory state

Long before the EU was conceived, the specialised independent regulatory agency designed to manage public control over specified economic activity had become a familiar institutional form on the other side of the Atlantic, and it is in the USA that the phenomenon of regulation has been most extensively studied. Hence Moran asserts that the US can 'claim copyright' to the title of 'regulatory state' (Moran, 2003: 17). Yet the growth of the regulatory state in the US did not evolve in either a gradual or deliberate fashion. Nor was it the product of rational processes of institutional design. Rather, it developed in fits and starts, in what Schuck has described as a 'characteristically American way: rough, ready and pragmatic, aimed primarily at resolving the bitter political struggles of the day' (Schuck, 1994: 10). Its historical development has been the subject of comprehensive examination, and although scholars differ in the interpretation and emphasis ascribed to particular events or movements, historical accounts generally divide the development of the US regulatory state roughly into four periods: an early stage culminating in the Progressive era regulatory agencies (1880s–1920s), the New Deal era (1930s–40s), the social rights revolution (1960s–early 1970s), and the deregulation movement (from the late 1970s onwards) (see, for example, Rabin, 1986).

The US grew out of a war that eschewed the organisational qualities of the nation state as it had evolved in Europe over the eighteenth century, so that one of its striking features was the radical devolution of power to regional units rather than a strong and extensive national government (Waldo, 1948). The workings of the early American state relied primarily on the judgments of state courts, supported by and in conjunction with political parties. Together, these nationally integrated institutions established the modus operandi of the state's operations and state–society relations. But the pressures of rapid industrialism, urbanisation and its economic disruption, inextricably linked to long distance transportation (particularly the railroad firms and their practices), brought increasing demands for a permanent concentration of government controls. These pressures spawned the Progressive movement during the 1890s, advocating the need for a national political leadership in order to preserve the country's nationality and integrity in the face of such rapid growth.

The administrative reforms advocated by the Progressives rested on a belief that politics and administration could be separated, the latter being a 'science' that could be entrusted to 'expert' administrators and thus insulated from, and transcend, electoral politics (Wilson, 1887). From this perspective, the independent regulatory commission was a natural choice for locating administration, and it was this institutional form that provided the model for the establishment of the Interstate Commerce Commission (1887), the Federal Reserve Board (1913), and the Federal Trade Commission (1914), all of which were designed primarily to deal with various aspects of market failure. Under the presidencies of Roosevelt and Wilson, significant growth in regulatory activity occurred, as executive political alliances were forged outside party channels by new cadres of professionals outside established centres of institutional power.

The so-called 'New Deal' refers to a package of political reforms and underlying outlook offered by Franklin Roosevelt between 1933 and 1948 when the US federal government assumed a far greater responsibility for the nation's economy in response to the profound sense of insecurity created by the crippling impact of the Great Depression. It comprised a raft of public works and social insurance programmes that effectively placed the federal government squarely in the position of employer and insurer of last resort. The New Deal was a watershed, for it transformed the earlier 'weak' associational impulse of the Progressive era into a commitment to permanent market stabilisation activity by the federal government (Rabin, 1986).

During this period, the number of regulatory agencies grew rapidly (e.g. 1933–4 saw the creation of more than 60 new agencies) as did the size of the federal administration. While some scholars claimed that the justification for such agencies was largely a technocratic one, reflecting a faith in the ability of experts to develop effective solutions to the economic disruptions created by the market system, others deny that the New Deal recovery programme rested on any single coherent reform strategy or articulated regulatory philosophy (Rabin, 1986). But whether coherent or not, it is difficult to deny the high level of optimism that supported the proliferation of regulatory agencies and their ability to provide for the efficient functioning of economic processes.

By the early 1970s, the focus of regulatory activity had expanded well beyond correcting the market failure that had characterised the mission of the New Deal agencies due to an upsurge of interest in health, safety, and environmental preservation, supported by an activist judiciary. As a result of public concerns about a variety of social issues concerned with social equity and quality of life, a series of social initiatives saw a resurgence in regulatory reform activity, in fields as diverse as motor vehicle safety, product design, air and water pollution, occupational health and safety, and many others (Sunstein, 1990).

But by the late 1970s, the optimism that surrounded the creation of the New Deal agencies four decades earlier appeared misplaced, given the extensive dissatisfaction with the New Deal agencies which were perceived as mired in legalism and unwieldy adversarial procedures (Stewart, 1988). From the Carter administration onwards (1977–1981), bureaucracy bashing had become commonplace, fuelling a strong push for administrative reform, including the 'deregulation' of structurally competitive industries which critics argued should never have been subject to regulation in the first place. The Reagan administration (1981–1989) initiated further measures intended to relieve enterprise from the onerous burdens that regulatory and other administrative agencies had imposed upon them whilst seeking to make public administration more responsive to citizen's demands through sensitivity to competition.

4.4.2 The British regulatory state

Although the predominance of a regulatory mode of governance in Britain has been noted by many authors, Michael Moran has subjected the British regulatory state to the most comprehensive exploration and analysis. Moran provides a vivid illustration of the magnitude of changes in the organisation of British government in the final decades of the twentieth century by painting a portrait of the structure and operation of British government in 1950 and comparing it with that of its new millennium counterpart (Moran, 2001). In 1950, British society was subject to extensive government controls: the British state controlled industry via public ownership following post-war nationalisation of key industries (coal, steel, and almost all important public utilities); the state retained tight administrative control over production and consumption; the government played a major role in the stabilisation of the whole economy through public investment, publicly owned industries, and tax policy, seeking to steer the whole economy on a path of economic growth; and public administration, particularly in central government, was organised as a unified, hierarchical bureaucracy, exemplified in a unified civil service. Nevertheless, there were important spheres of economic life, such as the financial markets, the legal and medical professions, and universities, into which the state did not intrude, allowing them to organise and regulate themselves. And there remained large areas of social and economic life (such as workplace safety, food hygiene, gender and racial equality) that remained outside the realm of organised regulation, either through state control or self-regulatory restraints.

Fifty years on, the system of government in Britain had been entirely altered, and it is this 'wholesale transformation' which Moran seeks to capture in his account of the rise of the modern regulatory state in Britain, singling out a series of major structural changes initiated under the Thatcher administration. These included fundamental changes in the balance of state responsibilities in which the state no longer attempted to manage the whole economy but instead emphasised intervention to correct particular market failures; the collapse of old hierarchies of civil service in favour of more loosely coordinated sets of public agencies; public ownership as a mode of control largely replaced by a network of regulated privatised industries; the subjection of vast new areas of economic and social life such as food safety, working conditions, and transport to legal control, usually administered by a specialised agency; and the replacement of self-regulation of the most prestigious professions, the leading financial institutions and elite institutions like the universities by statutory regulation, also typically administered by a specialised agency (Moran, 2003).

Accordingly, Moran identifies not one regulatory state in Britain but two. One of the unique and distinguishing features of the first, which prevailed for 'thirty glorious years' after the second world war, was its reliance on a system of self-regulation over the elite professions, bearing the organisational features of a British gentlemen's club to which he ascribes the label 'club regulation'. At the heart of the club system was the set of institutions and practices that lay at the highest echelons of central government—within Whitehall itself—based on ministerial responsibility. These amounted to an uncodified partnership between Ministers and civil servants that operated through a series of tacit understandings rather than through formal rules and graded sanctions (Moran, 2003: 125).

By contrast, the successor to this club-like regulatory state emerging at the end of the twenty-first century is one which is in many ways the antithesis of the first, replaced by a series of governing arrangements Moran describes in terms of 'high modernism', seeking to make transparent what was hidden or opaque; to make explicit, and if at all possible, measure what was implicit and judgmental; and above all, to equip the state with the capacity to have a synoptic, standardised view of regulated domains and thus enable it to pursue a wide range of projects of social control (Moran, 2003: 159). For Moran, the rise of the modern British regulatory state has entailed the collapse of an anachronistic governance system that was based on trust and tacit agreements between business and governmental elites forged in pre-democratic times and its replacement by a modern system of regulation.

Moran traces the origins of this transformation to a combination of economic, political, and socio-cultural shifts. By the late 1970s, it was evident that the welfare state had failed, as deep competitive problems lying at the heart of the British economy began to surface, prompting a drive to produce economic and governmental institutions that would improve Britain's competitiveness in what had become a global marketplace. At a deeper socio-cultural level, Britain's economic malaise indicated that the club-government model was no longer sustainable. Its origins were forged in the Victorian era when oligarchy preceded the development of formal democracy in the UK, when Britain's ruling classes feared the challenges of democracy and the new threatening working class created by industrialism. But this model was ill-suited to respond to the demands of an increasingly sceptical public.

At the same time, Moran argues that the collapse of the British empire, cemented by entry into the then European Economic Community, played an important role in symbolically undermining the vision of a hierarchical society and a culture of deference, while pushing the substance of regulation towards greater codification, formal organisation, and increasing fragmentation of the governing system (Moran, 2003: 171). Instead, globalisation and Europeanisation provided a new source of symbolic capital, lending powerful cultural support for the modernising, standardising impulses in the new state while stimulating institutional reforms that contributed to the demise of club government.

4.4.3 Variety in regulatory states

There are several features uniting these selective thumbnail accounts of regulatory development in the EU, US, and UK: a belief in the possibility of providing meaningful separation between policy-making concerning service quantity and quality, on the one hand, and the mechanics of service delivery on the other; reliance upon the independent regulatory agency as an institutional form in order to monitor and enforce regulatory standards and promote policy credibility, often intended to shift areas of economic life perceived as 'high politics' into the realm of 'low politics'; and a decline in state capacity to control national economic indicators attributed to increased cross-border trade and capital mobility associated with globalisation and a quest for improved national competitiveness and efficiency in the provision of publicly-funded services. All these features either closely resemble, or relate directly to, those identified in the previous section as characteristic of the regulatory state, suggesting that, at least as an analytical construct, the regulatory state has considerable value.

On the other hand, the development of regulation in these three locations has been far from uniform, with apparently similar developments emerging in response to quite different pressures and partly in response to different starting points. For example, the US never embraced the idea of public ownership as a means for guiding and stimulating national economic growth, unlike its European counterparts, preferring a strategy of limited and selective intervention in private economic activity by regulation. Accordingly the proliferation of independent regulatory agencies in the US during the New Deal era marked the growth of government intervention in the economy, whilst their growth in the UK occurred much later, signifying a reduction in the extent of direct government involvement in economic and social affairs. At the same time, significant differences are evident across a range of variables, which is hardly surprising given the diverse sources of instability and change that operate upon regulatory and governance regimes. Hence, closer examination at the national and sub-national level of the institutional landscape, degree of prevailing political support, and patterns of interaction between regulatory stakeholders often reveals significant differences within and between states often labelled as regulatory states.

Nor does the development of regulation in the US or the UK bear a strong resemblance to Majone's economic modernisation thesis, although this should not necessarily be regarded as a criticism, for Majone was concerned with explaining regulatory developments that took place from the 1970s onwards, so that the deeper historical origins of US and UK regulation extend beyond his frame of reference. Even so, Majone's attempt to transcend the influence of local political and cultural conditions to generate a general explanatory account of regulation capable of applying beyond the EU context not only calls into question its capacity to provide an adequate account of regulatory developments in any particular location, but also whether the general explanatory account which he offers risks oversimplifying what is in fact a complex and highly context-dependent phenomena. In other words, the high level of variation revealed by closer examination of the regulatory landscape in particular states and sectors makes it more difficult to regard the regulatory state as either a coherent or stable analytical construct. Yet if one accepts that much of the utility of any analytical construct lies in providing a general benchmark at a fairly high level of abstraction against which the particular can be compared and examined, then even considerable variation should not necessarily be thought to negate the construct's utility. Nevertheless, it points to the need for caution in applying the label 'regulatory state' to any particular state without first identifying its salient features. In short, it may be more apt to refer to multiple regulatory states, with their own distinctive characteristics and dynamics, rather than to speak of a single or uniform regulatory state.

4.5 Democracy and the Regulatory State

Despite diversity across and within regulatory states, one institutional feature that commonly emerges is the independent regulatory agency. Its popularity is often explained by its capacity to combine professionalism, operational autonomy, political insulation, flexibility to adapt to changing circumstances, and policy expertise in highly complex spheres of activity. Yet the growth of this institutional

form has not been without its critics, primarily on the basis that such agencies lack democratic legitimacy. Although questions focusing upon the democratic legitimacy of regulatory regimes have been a fertile site for political and academic debate, the fault lines around which such debates often take place are typified in discussions concerning the democratic legitimacy of the independent regulatory agency. Because decisions of independent regulatory agencies have a differential impact on individual and group interests, in which some gain more than others, their decisions can be understood as having a political dimension. Within democratic states, public officials empowered to make politically sensitive decisions are considered to do so on behalf of the electorate to whom they should be responsive and accountable. Yet the insulation of independent regulatory agencies from direct ministerial control often generates claims that they lack a democratic mandate for their decisions, leading to what is sometimes described as a 'crisis' of democratic legitimacy within the regulatory state.

A range of suggestions have been put forward by both scholars and policy-makers for escaping this crisis. The first is to deny that regulatory agencies make political decisions. In Section 4.3, we noted in passing, Majone's defence of regulation by 'non-majoritarian institutions' on the basis that their decisions derive legitimacy primarily from their effectiveness in remedying market failure rather than because they reflect the will of the people. In other words, Majone sees the legitimacy of such institutions as lying primarily in their expertise, rather than in their democratic credentials. On this basis, he argues that the aim of regulation should be narrowly circumscribed in terms of promoting economic efficiency. Because interventions which promote aggregate efficiency benefit the general community, this avoids the need for value-judgments that are inherent in attempts to redistribute resources within the community and which, therefore, require democratic legitimation by representative institutions (Majone, 1994: 92–5).

But even if one accepts Majone's claim that the aim of regulation should be restricted to correcting market failure, this does not eliminate the need for value judgments, even if informed by appropriate expertise. For example, some evaluation is required to identify what constitutes the relevant market, and whether the market should be regarded as failing in particular circumstances, all of which are matters over which economists frequently disagree when asked to assess the same market conditions. And even if there is consensus concerning the need for intervention in any given market, decisions about the appropriate form of intervention involve inescapable value judgments that can have important social and political implications, resulting in the differential allocation of burdens and benefits across and between social groups and interests (Yeung, 2004). Furthermore, few regulatory agencies in Europe have a single narrow focus, so that trade-offs between a range of regulatory objectives become unavoidable (Lodge, 2008: 292–5).

By downplaying local political and cultural conditions, implicitly characterising them as aberrations that detract from the normative purpose of regulation, Majone presents a highly stylised image of the regulatory state, one in which the regulatory process is portrayed as a largely technocratic endeavour, based on neutral expertise and measured evaluation of market conditions to identify how and when regulatory intervention is needed to enhance economic efficiency and stimulate economic growth. This image reflects a belief that politics and regulation can be separated, with the latter lying in the realm of science which can be entrusted to suitably qualified experts, shielded from the vagaries of politics. Such beliefs have been central to the development of the regulatory state in its various locations, particularly the growth of the independent regulatory agency as an institutional form, by providing a basis for avoiding the need to establish the democratic legitimacy underpinning their decision-making powers. Yet the myth of apolitical regulation has long been shattered, with bureaucratic politics becoming the subject of scholarly examination from the 1940s, in which it is well-established orthodoxy that the line separating politics and administration is both unstable and untenable (Waldo, 1948). Hence many other suggestions have been put forward by those who acknowledge that reliance upon unelected institutions to administer regulatory programmes sits uncomfortably with modern demands for democratic legitimacy.

In exploring these suggestions, it is helpful to bear two ideas in mind. First, Western political thought has understood modern democracy primarily in terms of a system of representative democracy whereby representative institutions are regarded as the core mechanism through which the will of the people can be translated into public policies (Held, 1996). But the concept of democracy is subject to a range of meanings, including conceptions which rely less on representative institutions and more upon direct citizen participation. Secondly, as a form of collective decision-making, regulatory decision-making can be disaggregated into different stages, each of which may contribute to, or detract from, democratic legitimacy: input-legitimacy concerns the extent to which citizens have opportunities to participate in decision-making; throughput-legitimacy concerns certain qualities of the rules and procedures by which binding decisions are made, including how collective decisions are realised in the absence of consensus, the quality of participation in decision-making, and the institutional checks and balances to guard against the abuse of power; and output legitimacy, which concerns the capacity to produce outcomes that contribute to the remedying of collective problems and the extent to which decision-makers are accountable for their decisions (Bekkers and Edwards, 2007).

Seen in this light, Majone's response to the alleged democratic deficit of non-majoritarian regulatory institutions rests on output legitimacy, rather than input legitimacy, combined with mechanisms for bolstering throughput legitimacy that are intended to protect the minority against the tyranny of the majority. Attempts to enhance both input and throughput legitimacy can also be seen in the US initiatives made in response to concerns about the democratic legitimacy of decisions by the increasing number of New Deal regulatory agencies. In particular,

a range of procedural reforms were initiated, including the Administrative Procedure Act 1946, aimed at improving opportunities for citizen participation in the regulatory process, both at the level of regulatory standard setting and in bolstering post-hoc participation by strengthening regulatory accountability mechanisms, including obligations to make information concerning regulatory decisions publicly available and extended provision for judicial review (Rosenbloom and Schwartz, 1994).

Implicit in these measures was the recognition that the participation within representative democracies expressed through voting at periodic elections was a fairly blunt and limited form of participation, emphasising instead a liberal view of democracy which seeks to establish and maintain institutional mechanisms that safeguard the citizen against encroachment by the state. Several decades of experience have shown, however, that translating these intentions into workable, responsive regulatory practice has been anything but straightforward, as US regulatory decision-making soon faltered under the weight of procedural formalism, leading to what has been described as a 'crisis of legalism' in US regulatory administration (Moran, 2002: 395).

Attempts to enhance participation as a means for promoting input legitimacy, but in quite a different guise, can be seen in the sweeping public sector reforms now referred to as New Public Management techniques (see above), which sought to enhance the responsiveness of publicly-funded services to citizens' demands through market-like mechanisms. By providing opportunities for those seeking to consume such services to express their preferences via market (or market-like) mechanisms, this could be expected to enhance output legitimacy. Providers that fail to produce services that reflect the wishes and needs of consumers (in terms of price and quality) would not survive. Yet these approaches have come under sustained attack on the basis that they fare poorly in terms of throughput legitimacy.

In particular, it is claimed that markets provide a rather limited and partial form of participation, failing to provide meaningful opportunities for citizens to express their political preferences as citizens concerning the collective goods which may differ from their direct consumption preferences (Freedland, 1995). At the same time, market-based techniques assume that the price mechanism provides a reliable, accurate, and transparent measure of consumer preferences. But for many services, the unit of measure adopted is a very rough proxy of quality of service, so that the resulting gap between the measure adopted and actual service quality can result in various gaming behaviours that risk creating unintended and often counter-productive outcomes.[2]

Many of these reforms have led to increasing fragmentation within the regulatory state, with many policy sectors populated by extensive networks of regulators and service providers from both the state and non-state sector. Although it is sometimes claimed that this allows for greater responsiveness and flexibility, such fragmentation presents considerable challenges for democratic practice. Representative democracy relies upon formal channels of hierarchical authority that place responsibility and accountability for the making and implementation of policies squarely on the shoulders of elected officials who are accountable to the voting public. But the rise of markets and networks has disrupted these lines of formal accountability. Although optimists claim that such networks open up new lines of informal accountability, their multiplicity and informality within a complex network of actors and institutions greatly obscures overall transparency, making it extremely difficult if not impossible to identify clearly who is accountable, to whom and for what (Scott, 2000).

4.6 Conclusion

The challenges of democratic legitimation for the regulatory state resonate strongly with, and in many respects overlap with, debates about the democratic legitimacy of the so-called 'New Governance'. The New Governance refers to the apparent spread of markets and networks, the state's increasing dependence on non-state actors to deliver its policies following the public sector reforms which took place throughout the 1980s and strategies for managing such networks effectively (Bevir, 2007). Various scholars have suggested that the resulting transformation in patterns of governance suggest that a more diverse view of state authority and its relationship to civil society is needed (Bevir, 2007: xlv). For scholars who interpret the regulatory state concept broadly so as to accommodate state–civil society relationships, rather than limiting the parameters of examination to the role of the state, they share considerable common ground with New Governance scholars.

To the extent that the task of regulation is one of many tasks of governance, then it is plausible to anticipate that the language of the New Governance will subsume that of the regulatory state, while the latter gradually fades out of use. To the extent that the New Governance has arguably attracted a higher level of scholarly interest, from a more diverse range of disciplinary perspectives, then perhaps this is no bad thing. On the other hand, it would be rather premature to consign the regulatory state to the dustbin of history. As an analytical construct, the regulatory state arguably provides a sharper focus for analysis by emphasising the purposive dimension of regulation, in which multiple actors and institutions may participate in various ways in order to secure the attainment of particular collective goals. Yet it is sufficiently durable to support investigation of the interaction and relationships within and between the networks that influence the ways in which regulatory goals are realised, circumvented, or thwarted. Indeed, the continued persistence within academic discourse of the regulatory state's predecessor—the welfare state—albeit in new contexts, including debate about the emergence of a new EU welfare state, suggests that the terminology of the regulatory state may well endure.

More importantly, as a socio-political phenomenon, the recent crisis of confidence that emerged in financial markets around the world in 2007, largely attributed to widespread recklessness by financial institutions, has seen national state authorities intervene to support private financial institutions facing imminent collapse, despite the absence of any legal obligation to do so, in order to avert the threat of catastrophic market failure. What we may well be witnessing is the swinging of the pendulum, as citizens and politicians alike lose faith in the capacity of markets and networks of non-state actors to provide adequate regulatory regimes. While the state may no longer occupy the role of direct welfare provider, its citizens nevertheless look to it as chief risk manager, clamouring for protection against a wide range of hazards associated with contemporary life, many of which are alleged to be potentially catastrophic.

The rise of complex globalised networks may well have undermined the capacity of the welfare state to steer the direction of national economic activity, but it has arguably magnified the sources and size of externalities against which individuals, acting alone, cannot guard against. This may help to explain why the dismantling of the welfare state appears not to have dislodged popular expectation of the state's role as protector of last resort, however hard the state may try to encourage its citizens to adopt individual precautionary measures. Accordingly, it would be naive to foreshadow the death of the state's regulatory role, although it may well be that scholars find a new analytical mantle to carry forward their investigations of this enduring phenomenon.

Notes

1. The label 'regulatory state' has been attached to a wide range of individual states, including Australia (Berg 2008), Germany (Müller, 2002), Canada (Doern *et al.*, 1999), Malaysia and Thailand (Painter and Wong, 2005), and regional localities, such as Latin America (see Jordana and Levi-Faur, 2006), South-east Asia (see Sudo, 2003), and the Commonwealth Caribbean (Lodge and Stirton, 2006).
2. See, for example, Bevan and Hood (2006).

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CHAPTER 6

STANDARD-SETTING IN REGULATORY REGIMES

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6.1 Introduction

Standards of one kind or another are central to all regulatory regimes. Conceived of in most general terms, standards are the norms, goals, objectives, or rules around which a regulatory regime is organised. Standards express, if not the broad outcomes intended for a regime, then at least some aspect of the behaviour which participants in the regime are intended to adhere to. The first part of this chapter elaborates further on the meaning of standards within regulatory regimes. Recent research closely allied to jurisprudence and legal theory has been concerned with understanding the variety of ways in which standards may be expressed, in terms both of instrument types and the nature of standards (see further Black, 1995). The evaluation of regulatory standards in this way can contribute to matching the expression of standards both to objectives of regimes and to the contexts in which they are to be applied.

A second and quite distinct research theme, more closely allied to political science, has been concerned with the variety of state and non-state actors who

are involved in standard-setting and the processes through which standards are set and applied. The setting of standards is characterised by a diffusion of responsibility—national and supranational levels, state and non-state organisations (Haufler, 2001; Cutler, 2002). Whilst these observations are challenging to a traditional model of regulatory governance which focuses chiefly on the role of state agencies, they provide the basis for a revised account which seeks to evaluate both the effectiveness and legitimacy of these more diffused regimes (Kerwer, 2005). The final substantive section of this chapter addresses the challenges of accountability associated with the emergence of a highly diffuse 'industry' for regulatory standard setting.

6.2 Regulatory Standards

The term regulatory standards is often deployed in a narrow sense as referring to the standards developed by technical standardisation bodies such as the International Organisation for Standardisation (ISO) and its sectoral, regional, and national equivalents. A broader conception of standards defines them as instruments which encourage the 'pursuit or achievement of a value, a goal or an outcome, without specifying the action(s) required' to achieve this, in contrast with a legal rule, which is prescriptive as to what its subject must or must not do (Braithwaite and Braithwaite, 1995: 307). Accordingly technical standards are an important sub-set of the larger group of regulatory standards.

A regulatory regime is a system of control which may comprise many actors, but within which it is possible to identify standards of some kind, ways of detecting deviation from the standards, and mechanisms for correcting such deviations (Hood, Rothstein, and Baldwin, 2001). Key capacities within regulatory regimes, may be widely dispersed amongst both state and non-state actors, and this dispersal of regulatory capacity has generated a wide variety of legal forms for regulatory standards (Black, 2001a; Scott, 2001). In this section I examine regulatory standards first by reference to their legal form, and second by reference to the structure of the standards themselves. The question of structure is distinct from legal form, and refers to the way that the standard is expressed and the linkage between such expression and the achievement of the objectives sought. This became an issue of considerable public interest following the widespread banking failures which hit the global economy in 2008 as claims were made that the use of broad principles or standards as the basis for regulatory regimes had permitted the behaviour which caused the failures, in circumstances where more detailed rules might have prevented them.

6.2.1 Instrument types

Within the kind of classical regulatory model which developed in the United States in the twentieth century the three aspects of a regulatory regime noted above were frequently within the control of a single, independent regulatory agency. These regulatory powers were (and still are) exercised through the making of rules and standards, monitoring for compliance and application of legal sanctions against businesses or others who do not comply. Consequently in the United States the archetypal regulatory standard is made by an agency under delegated statutory powers following extensive procedural requirements and published in the Code of Federal Regulations (Weimer, 2006: 570). Within many of these regimes regulatory standards are also found in primary legislation establishing the regime and the agency.

The mix of primary and delegated legislation to set regulatory standards is common in other jurisdictions too, but within many parliamentary systems of government, such as those found in many European countries, there is a reluctance to delegate rule-making powers to agencies. Accordingly it is more common to find that the delegated power to make regulatory rules is held by ministers, empowered to issue statutory instruments or decrees, although power to make standards referred to in rules is often found elsewhere. Within the member states of the European Union the delegated power to make rules is frequently deployed for the transposition of European Community directives—measures which require adoption within national regimes to take legal effect—and this has caused a proliferation of regulatory standards made under delegated legislation.

In addition to setting regulatory standards through public law instruments, governments frequently use their financial resources and power to enter into contracts to set standards that are not of general application, but rather apply only to the parties they are contracting with (Daintith, 1979). This 'government through contract' process has been used to develop and apply principles relating to employment standards for employees of supplier firms and to pursue other objectives, for example relating to the environment (McCrudden, 2004). Contracts used in this way may provide not only the applicable standards for suppliers, but also mechanisms of monitoring (for example third party certification) and enforcement, in the form of agreed remedies for breach (Collins, 1999). This form of standard setting is not dissimilar to the use of supply-chain contracts in the private sector where, once again, the wealth and contracting capacity of a buyer is used to impose standards on sellers. Similar effects are found in franchising agreements where the franchisor uses a contract to impose conditions, including standards, upon the franchisee. In many instances these will be product standards (for example in compliance with technical standards set by a third party). But increasingly supply chain and franchise contracts are used to set or apply standards relating to processes, for example relating to the management of the contractor's

business, or its compliance with particular environmental standards (Potoski and Prakash, 2005).

This analysis invites a distinction between product standards and process standards, the former relating to the properties specified for a product and the latter concerning the way in which a product is produced. Process standards are of particular significance where a harm to be regulated is generated through the production process. A key example relates to regulation of environmental emissions, where often targeting of the process may address the harm more directly. A new twist on this distinction derives from recent research on consumer behaviour which suggests that at least a sub-set of consumers value aspects of process highly. This phenomenon has been observed in respect of voluntary standards regimes for fairly traded products and for sustainable forestry (Taylor, 2005). Some consumers will pay a higher price for products conforming to such process standards, whether they originate from single firms, for example in the context of a corporate social responsibility regime, or from some larger standard setting organisation, as with some fair trade and environmental process standards (O'Rourke, 2003: 4; Kysar, 2004).

Whilst governments frequently use public law and contractual instruments to set legally binding standards, governments may also use their governmental authority to set regulatory standards without using legally binding instruments. The proliferation of soft law instruments, defined as instruments which are not legally binding but which are intended to have normative effects (Snyder, 1993), is widely understood to provide a means for governments to set standards in a way that extends beyond their legislative mandate, and without the requirement of legislative approval. A central example used by many governments is guidance documents deployed to encourage citizens, business, and others to behave in particular ways either within the framework of some broader legislation or without a legislative framework. For example, the Dutch regime for disaster management is largely implemented through guidance issued to local municipal councils, in a form which is non-binding, but also flexible and revisable. A particular advantage is that it harnesses professional expertise within the local authorities in a form which enables professionals to interpret guidance with flexibility. However, a risk has been identified that such guidance may harden and be treated as part of the requirements of the applicable regime, stifling the potential for interpretation by local professionals and for the development of innovative ways of addressing disaster management. In this circumstance soft law becomes *de facto* part of the hard law regulatory regime (Brandsen, Boogers, and Tops, 2006).

It is already clear that businesses have capacity to make or apply standards to others in a form that is legally binding through specification in supply chain contracts. In one sense the acceptance of the standard is voluntary, rather than imposed, since its application is a consequence of voluntarily entering into a contract. Similarly individuals, firms, and others who join associations are frequently volunteering to be bound by the rules of the association, expressed in some form of collective contract between the members. Such associational rules constitute regulatory standards for many professions (sometimes with some delegated statutory authority) and in many industries, though the intensity of such associational governance varies between jurisdictions. Within the EU such associational regulation is a somewhat stronger feature of the governance of Northern European countries and rather less well developed in the Mediterranean states. In the United States there is some hostility to self-regulation and a commitment to substantially restricting the development and application of regulatory rules to state agencies, constrained as they are by strong procedural rules. There has been considerable discussion about how the power of self-regulatory regimes can be recognised and made accountable, for example within a constitutional perspective which attaches the potential of judicial review to self-regulatory bodies as if they were public bodies (Black, 1996).

As noted above, the term regulatory standards is often understood to refer to the standards developed by specialised standardisation institutes. These standards, which are very numerous and of great significance in many industries, are typically not legally binding of themselves, but are liable to be incorporated into supply-chain and other contracts. In some instances, compliance with particular standards may be specified as a legal requirement in primary or secondary legislation. For example, the UK 'Wheeled Child Conveyances (Safety)' Regulations (SI 1997/2866, r 3(1)) provide that it is a criminal offence to supply any 'wheeled child conveyance' (for example a pushchair or pram), which does not comply with BS7409, the applicable standard produced by the private British Standards Institution (BSI). In other instances, compliance with a recognised but unspecified, technical standard may either be required or may provide evidence of compliance with the legal requirements. For example, the European Community 'Directive on General Product Safety' (2001/95/EC, Art 3(2) (3)) provides that no product shall be placed on the market unless it is a safe product. Products are deemed safe where they comply with EU or national legal rules, or in the absence of legal rules, with national voluntary standards.

6.2.2 The nature of standards

A classic analysis of administrative rules by Colin Diver suggests that three dimensions of a rule are critical to its success—transparency, accessibility, and congruence. The analysis applies equally to regulatory standards. Transparency refers to the requisite that a rule should be comprehensible to its audience, using words with 'well-defined and universally accepted meanings' (Diver, 1983: 220). Accessibility refers to the ease of application of a rule to its intended circumstances and congruence to the relationship between the rule and the underlying policy objective (Diver, 1983: 220). A rule should apply to all the circumstances within the intent of the policy maker and to none that fall outside that intent. Put more technically, it should be neither under- nor over-inclusive.

I noted earlier that process and product standards focus on the specification or design features of an activity or a product. In some instances standards focus not on the properties of a product or a process, but rather on the performance or output from an activity, without specifying the means by which a specified performance is to be achieved (Baldwin and Cave, 1999: 119–20). The EC Directive on General Product Safety, introduced in the previous section, is illustrative of this approach, with compliance denoted by achieving performance under which a product is safe, but without specification as to how a product is to be made safe. This general output standard has the merit of a high degree of congruence with the overall objectives of the regulatory regime (maintaining confidence of consumers in the safety of products marketed within the EU and preventing consumers from being harmed by consumer products). However, this sort of general standard also has obvious weaknesses—it requires further elaboration in order to know what is meant. Set against Diver's concept of rule precision noted above, a general safety requirement is not very accessible because it is far from obvious what is meant by the term 'safe'.

Many consumer products present dangers and if they did not they would not be fit for their purposes—for example, cars, steam irons, and knives. The requirement to look first elsewhere in the directive for further elaborations reduces the transparency of the standard—the ease with which persons interested in it can discover what it requires. Relatedly, vagueness may make enforcement (and even compliance) more costly. This does not mean that we should discard such general standards. It depends on the context. If the creation of a general standard stimulates a process which may involve not only regulator and regulatee but also representatives of those to be protected by regulation, then this may be productive and generate a form of 'dialogic accountability' for the standards, superior to legislative setting detailed standards (Braithwaite and Braithwaite, 1995: 336).

In particular the EC Directive on General Product Safety provides (Art 1(2)):

> (b) 'safe product' shall mean any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:
>
> (i) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
> (ii) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
> (iii) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;
> (iv) the categories of consumers at risk when using the product, in particular children and the elderly.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be 'dangerous'.

The Directive points towards the relevant kinds of factors in determining safety, but still does not yield a precise specification. Accordingly, it creates discretion in the application of the criteria which must be applied by the producer and in the event of a product's safety being questioned, by enforcement officials, and ultimately, in what is likely to be a very small number of cases, by a court. The reference to other legal rules and standards, noted above, provides further specification. In some instances, this will be quite precise, as where there is a technical standard specifying all the properties of a product. Mindful of the importance of technical standards for consumer products there is some attempt to create the kind of 'dialogic accountability' discussed above within the EC regime, as the European Commission sponsors consumer groups to participate in such standard-setting alongside industry representatives (Howells, 1998).

What is clear from this analysis is that the general performance standard set down in legislation has nested within it more precise standards, some of which are contained within the legal instrument itself, and others of which are incorporated by reference to other legal and voluntary standards, and/or through the discretion of the people applying them.

Whilst the tighter specification of what appear to be broad standards is likely to be fairly routine—through one mechanism or another—there is not generally a route through which very detailed standards can be made more general. Thus, if there are problems with detailed standards being too detailed or otherwise unduly restrictive or inappropriate, this may be difficult to resolve. The dilemma is well-illustrated by research carried out in Australia and the United States on the regulation of nursing homes. The Australian regime deployed broad performance or outcome standards, a key example of which was that nursing homes should offer to residents a 'home-like environment' (Braithwaite and Braithwaite, 1995: 310). The United States regime deployed a wide array of detailed standards relating to all matters of care of the residents. The researchers indicated that their initial prejudice was that the US regime was superior in design because inspectors would be able to easily check for compliance, and this would make compliance for the nursing homes both more attractive and straightforward, while simultaneously making enforcement more reliable (in the sense that there would be consistency across the evaluation by the different inspectors within the regime).

However, the results of the research defied the initial intuition of the researchers. The specification of detailed rules, in this context, appears to have encouraged a mentality which prioritised the ticking of the appropriate boxes over the care of the elderly, and to have robbed both managers and staff of the capacity for creativity in offering even better care than set down in the minimum standards. By contrast, the broad general standards deployed in Australia gave wide discretion to managers and staff to work out how the different ways in which they could reach a standard that was 'home-like' and in many cases this involved matters which would be difficult to capture in a check-list of standards. With inspection, evaluation against the detailed standards in the US proved to be considerably less reliable than inspection against the broad Australian nursing home standards (Braithwaite and Braithwaite, 1995: 311). Part of the problem with a proliferation of detailed standards is that both regulators and regulatees are able (and even required) to pick and choose between the standards to be followed. Paradoxically it broadens rather than narrows discretion (Braithwaite and Braithwaite, 1995: 322).

This debate about the relative merits of general principles versus detailed standards has become central to consideration of how to address the causes of the corporate scandals and financial crises for which the early years of the twenty-first century will be remembered. A central argument, one which would appear to have purchase for the nursing homes example discussed above, is that the promulgation of detailed rules to regulate behaviour creates the risk that those subject to the rules will follow them to the letter but find ways to evade their spirit and thus undermine the objectives of the regime. This phenomenon, observed in company practices in the UK of the 1980s and 1990s, has been labelled 'creative compliance' (McBarnet and Whelan, 1991 and 1999). The potential for evading the spirit of the law in rules-based regimes is one of the factors said to have led to the collapse of the US energy firm Enron in 2001—a company that had routinely hidden the true position of its balance sheet through the use of off-shore subsidiaries, a matter on which the company's auditors, the now-defunct Arthur Andersen, failed to report to shareholders.

A key debate arising out of Enron has been whether the system that permitted this major corporate collapse, with all its ramifications, failed because of its structure in rules which could be evaded or because of its operation by those responsible for oversight, both private audit firms and public regulators (McBarnet and Whelan, 1991 and 1999). A similar debate had arisen around the banking crisis of 2007–9. It is argued that because principles-based regulation, to be effective, requires those subject to the regime to develop and elaborate on the requirements in their internal practices and oversight, a high degree of trust is required for such a regime to be credible and effective (Black, 2008: 456). Julia Black's position is that principles-based regulation involves a number of paradoxes which are capable of undermining of its effectiveness, but that rules-based regimeshave many of the same vulnerabilities (Black, 2008: 457). Accordingly the rules-versus-principles choice is a false dichotomy. Neither is inherently superior, but rather either or both must be fine-tuned to the particular social and economic contexts in which they apply for there to be confidence in a regime.

6.3 Standard-Setting

While the nature and content of standards is clearly relevant to their application and effects, so also are the processes through which standards are set. The characteristics of the process are likely to affect the quality of the standards and also their legitimacy, each of which is fundamental to their operation. Quality is affected by the nature of information available for decision-makers and their expertise, or capacity to process the information. Legitimacy, in its procedural dimension, is a product of the process as it affects who participates and on what terms. In practice the quality and legitimacy distinction is rarely sustainable since legitimacy is not simply about process, but is also affected by the quality of the outcome in many instances. Whilst this preliminary discussion might lead to the conclusion that maximum information, processing capacity, and participation are the characteristics of an optimal standard-setting process some notes of caution are required. First, the deployment of such expansive processes necessitates a trade-off with speed and economy in decision-making. In practice, some compromise is often necessary. Second, the design of processes which match information and expertise effectively whilst promoting a pattern of participation which supports the legitimacy of the outcomes is extremely challenging and has received limited attention, both in public policy settings and academic evaluations.

I have noted already that a wide range of different types of organisations are involved in setting regulatory standards, ranging between legislative bodies, government ministers and agencies, through to associations, private (and some public) standards institutes, and individual firms. Necessarily this creates a wide range of processes through which standards are set including the processes for making primary and secondary legislation, and for self-regulatory and private standard-setting. A key question is whether public and non-state standard-setting should each be evaluated against similar ideals relating to information, processing capacity, and participation. Alternatively, a more contextualised understanding is required. One which sees the ideals of standard setting as dependent not simply on the public or non-state character of the process, but also linked to the character of the regime (for example, setting broad safety standards to be treated differently from detailed technical standards) and interests, and relative power of the key actors.

6.3.1 Public standard-setting

Legislative standard-setting and the making of delegated legislative instruments have associated with them procedures and oversight arrangements which contribute to the legitimacy of legal instruments generally. These processes are arguably most developed in the case of regulatory rule making by agencies in the United

States. However, the highly proceduralised and adversarial nature of rule making in the United States under the Administrative Procedure Act of 1946 has been subject to much criticism and a search for alternatives that are less adversarial and more inclusive. One response to this critique was the deployment of new procedures provided for in the Negotiated Rule Making Act of 1990, which have been taken up in a relatively small number of cases. The less adversarial procedures for negotiated rule making are characterised by processes in which the various stakeholders are encouraged to discuss proposed regulatory rules in a multilateral setting. Such processes were advanced on the basis that they would enhance both the quality and legitimacy of the rules which resulted, with the added advantage that the process might be quicker because competing views would be identified and resolved more rapidly (Freeman and Langbein, 2000: 71). An empirical study suggested that while the costs of traditional rule making and negotiated rule making differed little, there was greater legitimacy and therefore, 'buy-in' from participants for the latter processes. Such processes, it is suggested, are superior for 'generating information, facilitating learning, and building trust' (Freeman and Langbein, 2000: 63).

6.3.2 Non-state standard-setting

US experiments with negotiated rule making are part of a broader pattern of arguments in favour of emphasising the procedures by which regulatory standards are set as providing a basis for sharing of information and facilitating learning through the standard-setting process (Black, 2000; Black, 2001b). Non-state standard-setting can be evaluated by reference to these ideals, since it shares with public standard-setting the same problems of demonstrating effectiveness and legitimacy. Standard-setting by non-state organisations is said to be particularly appropriate where the organisations involved are able to incorporate the main expertise in the field, and where the subject matter of the standards are subject to rapid change (Weimer, 2006). This argument is suggestive of non-state standard-setting being legitimate largely on the technical grounds of its superiority in achieving the relevant task. A broader argument would emphasise that the capacity for inclusiveness in decision-making over standards provides an alternative forum for democratic governance of standards.

The most opaque processes for standard-setting are likely to be where individuated contracts are used because this involves decision-making by a single party, and sometimes bargaining by the two parties to a contract, in circumstances that are typically regarded as confidential to the parties, even where one of the parties is a government agency. For example, where governments in the US, Australia, and the UK have used contracts to set down standards for prisoner care and security, where the provision of prisons services is contracted out to private companies, the content of the agreements typically remains confidential and there is very unlikely to be any participation by third parties in determining the appropriate standards (Sands, 2006).

In other instances, standard setting processes are developed to include the variety of constituencies involved, often with extended and iterative processes to get standards right, and to generate confidence in the standards amongst users.

Technical standard-setting through standards organisations has been in the vanguard of the development of inclusive procedures for enhancing both the quality and legitimacy of standards. This is in part a response to the desire to enhance legitimacy in the face of explicit or implicit delegation to such standards organisations by governments. The ISO has an architecture of over 200 technical committees which are devoted to the making and revision of ISO standards in the various areas in which it has taken on a role. The ISO is a membership organisation comprising representatives of the national standardisation institutes, which also provide most of its financing (the balance coming from sales of standards). In organising its standard-setting functions the ISO treads a path between efficient processes, on the one hand, and demands for openness, representation, and inclusion amongst the various communities affected by the standards on the other (Hallström, 2000: 85). The process for setting a new standard is initiated by a vote of a technical committee, and the task of drawing up a draft standard assigned to a working group of the committee. It is reported that working group processes generally work through consensus and, typically, quite slowly. A draft is subject to revision, initially by the full technical committee and subsequently by all members of the ISO, where it is again subject to comment and revision, twice (Hallström, 2000: 87). Participants in the processes comprise users of standards (typically employees of large firms), members of national standards organisations, and other experts, including those from universities and consultancy firms (ibid). The elaborate architecture of decision-making within the ISO is concerned with ensuring both that published standards are useable by market actors, and that they support rather than impede trade.

The proliferation of private standard-setting extends well beyond the traditional technical standards bodies. For example, the setting of the standards for accounting practices which are relied on by both public and private sector organisations, has largely been delegated to non-state national accounting standards bodies and an international umbrella organisation—the International Accounting Standards Board (IASB). Whilst general principles of accounting requirements continue to be set in legislation relating to the governance of companies, public bodies, and so on, the detailed practices (assumptions to use, how to reflect costs, losses, and so on) are determined by reference to non-state standards. This delegation to non-state organisations facilitates the deployment of industry expertise in setting standards, while at the same time shifting responsibility away from governments (Mattli and Büthe, 2005: 402–3; Weimer, 2006). However, it creates a problem identified by Mattli and Büthe, insofar as such regimes operate as agents not only of governments, but also of the businesses from which they draw a substantial portion of their expertise and legitimacy. It is inevitable that the various principals are able to oversee and shape outcomes

within the accounting standards regimes to different degrees and, in the case of private accounting standards in the US, the authors suggest, it is businesses that have succeeded in shaping the standards to suit their interests (Mattli and Büthe, 2005).

A major area of development has been the emergence of NGOs (non-governmental organisations) as standard setters in areas such as environmental protection and labour rights. Here the development of standards is frequently linked to measures to promote the take up of voluntary standards—frequently through the application of pressure on producers and/or retailers. In these instances the legitimacy of the process and the content of the standards is looking beyond regulated firms to investors, shareholders, unions, and consumers who may contribute to pressures on businesses to take up the standards (Marx, 2008). Such pressures depend on the needs of firms to protect and enhance reputation and to use reputation to distinguish themselves from competitors. But this analysis demonstrates that the effectiveness of such regimes is likely to be limited with businesses which have fewer incentives to participate, for example because they are privately owned or non-unionised (Marx, 2008).

6.4 Accountability for Standard-Setting

The diffuse nature of contemporary regulatory standard-setting raises important questions about oversight and accountability for such processes. The observation of a wide array of non-state standard-setting processes accentuates these concerns. Anxieties about excessive regulatory burdens have generated a wide variety of mechanisms for oversight of governmental regulatory regimes, with a particular focus on the evaluation of the costs and benefits associated with regulatory rules (Froud *et al.*, 1998). Regimes of better regulation, incorporating but extending beyond cost–benefit analyses of regulatory rules originated in the United States but have been strongly advocated by the OECD (Organisation for Economic and Co-operation Development) and have developed in most of the industrialised countries, and at the level of the European Union. Such regimes have had only a limited impact on non-state standard setting—for example, in measures from the Australian Office of Regulatory Review to incorporate self-regulatory rules within regulatory impact analysis (Office of Regulation Review, 1999).

Non-state standard-setting raises rather different issues of control and accountability (Freeman, 2000). With little or no public funding or oversight by legislatures and limited or no potential for judicial review, traditional mechanisms of public accountability appear to have a limited role. The international character of many regimes also raises issues concerning the capacity of governments to oversee them. However, these limitations may be set against the advantages of a high degree of interdependence between the actors involved in non-state standard setting and the potential that mechanisms of competition and or community application of social norms may substitute for public accountability (Scott, 2008). Standards organisations, for example, are characterised by a high degree of participation from members of the relevant industry community, and by the need to sell their standards in the market-place. The risks with such standards is not that there is no accountability, but rather that the accountability is too much geared towards the regulated industry. Where such standards are coordinative—for example seeking to ensure that peripheral equipment for computers can be plugged into and work with any computer—then such accountability is likely to be sufficient. However, where standards are protective—for example relating to the safety of consumer products—then some counter-balancing of the industry through agency oversight and/or bolstering the participation of protected groups, such as consumers may be desirable. Further to this, within many regulatory regimes the setting of standards is quite distinct from the take-up and application of the standards. Thus even where accountability of standard-setters (for example, which are non-state and supranational) is weak, the accountability of enforcers (who may be national and public) may be stronger. Oversight and enforcement by third parties, such as certification companies, raises particular problems (Kerwer, 2005: 623).

With some standards regimes there is potential for competition with effects that are likely to both pull standards up, as regimes compete for broad credibility, and down, as they compete for businesses to sign up to the standards. The potential for competition between non-state regimes has been advanced but is relatively under-explored (Ogus, 1995). In the area of sustainable forestry the proliferation of regimes has created competition for industry adherents, between NGOs such as the Forest Stewardship Council (FSC) and industry association schemes, such as the US Sustainable Forestry Initiative (SFI). A key difference between the regimes is that whereas the SFI standard-setting is dominated by the industry, the FSC regime is driven by NGO participants (Cashore, 2002). Without taking a view on which is superior this gives both the retailers (who incorporate the standards into their contract) and purchasing consumers choice, choices which are then supposed to discipline the standard-setters in their decision-making.

Another possibility is that standard-setters are part of a community or network of decision-makers, and that the community holds members' actions within a reasonable sub-set of potential decisions (Kerwer, 2005: 625). The ISO, discussed above, is far from the only example of an international standards body which, through national membership arrangements is simultaneously held in check and holds its members in check. The OECD provides an example of such a network comprising governments, rather than non-state standard-setters (Kerwer, 2005: 626).

The most challenging mechanisms of non-state standard-setting, from the perspective of accountability, are those found within bilateral contracts where one party can impose terms on another, with little or no participation, or transparency. If the supplier of goods and services cannot sell elsewhere there is not even a high degree of market discipline over the standards being imposed (Scott, 2008).

6.5 Conclusion

The setting of standards is a core aspect of any regulatory regime. For governments responding to the demands of the financial crisis of the late Noughties, there is a temptation to think of laxity in regulatory standards as part of the problem. In particular, standards based on broad principles have been subjected to widespread critique, such that we can expect them to be displaced, to some extent, by more detailed rules. However, the attempt by national governments to assert control through detailed rules appears to fly in the face of recent trends in regulatory standard setting. The organisations and processes involved in the setting of standards are highly diffuse. There is much evidence of the importance of decentred regulation in filling in much of the detail of regulatory requirements on businesses and governments, and in a manner which appears to be less costly and more expert than would be true were the functions fulfilled by governments.

Accordingly, while questions concerning the status and nature of standards remain important, consideration of the broader regimes within which standards are made is likely to be a matter of continuing interest, both to actors in the policy world and academia (Kerwer, 2005). In the world of public policy a resigned acceptance that much of the capacity for steering social and economic behaviour is located elsewhere is combined with a sense of the potential for harnessing non-state standard-setting to deliver on public purposes deploying a variety of mechanisms. What is of interest to academic commentators is not only the potential that such non-state standard-setting may have to deliver less costly and more expert standards, but also to offer alternative fora for varieties of democratic decision-making over standards. Accordingly, future research is likely to analyse in more detail the pressures on non-state regimes of standard-setting in order to evaluate the extent to which relationships with governmental, market, and community activity can be expected to ground a new equilibrium of governance.

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CHAPTER 13

REGULATORY IMPACT ASSESSMENT

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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
Short term	(1) Economic effects of individual RIAs	(2) How RIA creates demand for administrative capacity	(3) How individual RIAs influence the decision-making process
Long term	(4) Effects on competitiveness and growth	(5) Effects on regulatory cultures and bureaucratic types within agencies RIA and administrative procedure	(6) 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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CHAPTER 14

THE ROLE OF RISK IN REGULATORY PROCESSES

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14.1 Introduction

Risk is becoming a significant organising principle of government and a distinct unit of governance. Indeed many argue that the role of government is increasingly being characterised and assessed in terms of the identification, assessment, and management of risk (e.g. Fisher 2007; Rose 1999) and that regulation is simply a form of risk management (Hutter 2001). Further, both within and beyond the state, risk is becoming a benchmark of good governance for organisations (Power 2007). Such comments may suggest that after the 'nightwatchman state' (Nozick 1974), the 'welfare state' (Marshall 1964, 1967), and the 'regulatory state' (Majone 1994, 1997; Moran 2003) we are now in the 'risk state', or at least a 'risk regulatory state'.[1] Sociologists have been telling us for some time that we are in a 'risk society', in which society is orientated towards managing the risks that it has itself created (Giddens 1990, 1999; Beck 1992). If the 'risk society' thesis, or at least a minimal version of it, is valid, the 'risk state', or at least 'risk regulatory state', should come as no surprise. Government, as a key (if not always successful) social manager, surely both is affected by, and has a role in, this shift in societal orientation, reflecting and producing the 'risk turn' in governance both within and beyond the state.

This chapter explores the role that risk plays in different parts of the regulatory process, in order to evaluate the extent to which risk has become an 'organising principle' of governance and its implications. This exploration is only partial: the

study of risk could be the subject of its own OUP Handbook. Further, notwithstanding the 'governance' turn and the decentring of regulation, it focuses only on the state. This chapter focuses more specifically on the role that risk plays in constituting, framing, and structuring regulation and regulatory processes, and analyses some of the key themes of the broader risk literature in this context. These include the questions of how people perceive risk, whether and how to inject greater public participation in risk-related policy decisions, and the internal management of risk by organisations.

This chapter argues that risk currently plays four main roles in regulation: providing an object of regulation; justifying regulation; constituting and framing regulatory organisations and regulatory procedures; and framing accountability relationships. Risk is an *object of regulation* in that much regulatory activity is defined in terms of risk. Risk plays a *justificatory role* in that it defines the object and purpose of, and provides a justification for, regulation, and thus frames regulatory policy making. Risk plays an *organisational and procedural role* in that risk provides the basis for the regulator to operationalise its objectives and for the introduction of particular sets of internal organisational policies and processes. Risk provides an internal and external *evaluative and accountability role* in that the language of risk is used, both within the organisation and by those outside it, to define a matrix of measures which are used in an attempt to structure the discretion of the organisation and those working within it, to make them accountable, and to provide a (contested) criterion of evaluation. In the first two roles, risk thus constitutes and defines regulatory mandates. In the second two roles, it structures and frames regulatory processes. The chapter explores each of these roles in turn. It suggests that in each case, the role of 'risk' serves to destabilise decision-making, leading governments and regulators to attempts to find stability through attempts to rationalise processes and procedures, attempts which are often unsuccessful due to the inherent nature of risk itself.

14.2 Risk and the Regulatory Mandate: Risk as an Object of Regulation

The regulation of risk is hardly a new activity for the state, neither is regulation to prevent risks: food prices have in the past been the subject of regulation in attempts to prevent outbreaks of public disorder, for example. Many examples of the UK's present 'regulatory state' were born from the recognition that industrialisation posed risks to health, safety, and welfare from passenger ships, factories, roads, and railways. As has been well noted by others, as technology advances, regulation accompanies it in an attempt to manage the risks that are thereby created in the course of the development, production, and use of those technological innovations (Giddens, 1990; Beck, 1992). Chemicals, pharmaceuticals, GMOs, transport, stem cell research, nuclear power, even financial engineering, all have prompted the development of risk regulation regimes. 'Risk-based policy making' in many areas of regulation is therefore familiar, in the sense that regulation is directed towards the minimisation of risks to health, the environment, or financial well-being.

Risk as an object of regulation is thus not particularly new, but it is striking that the range of activities which are regulated in the name of risk has been expanding significantly, most particularly through the 1990s. This expansion has led commentators to argue that the subject matter of all regulatory activity is being defined or redefined in terms of risk (e.g. Fisher, 2003). There was certainly an increased focus on risk regulation in the 1990s, which has continued through the next decade. The precautionary principle was introduced as a principle of EU environmental regulation in the 1992 Maastricht Treaty (article 130r, now article 174), and its application was extended to all risks to the environment or the life and health of humans, animals, and plants in 2000 (European Commission, 2000). New institutional structures for risk regulation were created in both the EU and the UK. In the UK, responsibility for environmental management was consolidated in the creation of the Environment Agency in 1990. In the area of food, the heightened emphasis on risk led, as a result of the BSE crisis, to the establishment in the UK of the Food Standards Agency, and at the EU level to the creation of the European Food Safety Authority (Vos, 2000, 2009).

The state's role in regulating technological risks rightly attracts significant commentary and analysis (e.g. Fisher, 2007). But not all the new risk regulators focus on risks that arise because of new technological developments. The Adventure Activities Licensing Authority was established in 1996 following a canoeing accident in which four schoolchildren died, with the remit of managing the risks to health and safety arising from activities carried out through centres offering climbing, watersports, caving, and trekking to those under 18.[2] Canoeing is hardly a 'high-technology' risk. Neither is worker exploitation, and yet in 2005 the Gangmasters Licensing Authority was established to license those who provide labour for the agricultural and shellfish sectors. It is a classic example of a regulator that has no statutory objectives, only functions, but its self-described 'mission statement' is to safeguard the 'welfare and interests of workers' in these sectors, and its scope is explained in terms of the identification of those sectors where the 'risk of exploitation' is deemed to be highest (Gangmasters Licensing Act 2004). Dangerous dogs also have their own regulatory regime, though not a separate agency (Hood, Rothstein, and Baldwin, 2001).

Risk regulation is clearly a significant part of the regulatory state, but two questions arise. First, to what extent is all of regulation being reframed in terms of risk? Secondly, just what is the 'risk' that is being referred to in the different contexts in which it is being used? Addressing these in reverse order, broadly, the 'risk' being referred to can shift, often without much explicit recognition, from

risks to health, the environment, security, or indeed financial stability and well-being, to the risks of policy or regulatory failure. The former are increasingly being referred to by government as 'public risks', or by academics as 'societal risks' (e.g. BRC, 2006; RRAC, 2009); the latter have no official name, but may be termed 'institutional risks' (Black, 2005a; Rothstein, Huber, and Gaskell, 2006). This is a point to which we will return below.

Returning to the first question, is it true to say that all of regulation is concerned with risk, or more particularly societal risk, even if a significant proportion of it is? Obviously this depends on how we identify 'risk'. The definitional issue is one we will revisit below, but it is striking that, at least at the level of description, not all regulation is described as being about 'risk'. The regulators of water, rail, telecommunications, competition, and energy are typically referred to by policy makers and academics not as 'risk' regulators but as 'economic' regulators. These economic regulators are the archetypal 'regulatory state' regulators identified by Majone, established to regulate liberalised markets in the 1980s and 1990s across a wide range of countries (Majone, 1994, 1997; Levi-Faur, 2005; Gilardi, 2005). In accordance with the canons of economic liberalism, the object of regulation for those regulators is defined in terms of the market, and regulation is justified principally in terms of its role in correcting market failures: monopolies, barriers to entry or exit, externalities, information asymmetries, or principal/agent problems (Mitnick, 1980; Breyer, 1982; Ogus, 1994).

So while risk may provide a strong regulatory narrative, so does economics. Not all regulation is about risk, not all regulation is about economics, and not all regulation is about either of those things, but is about ethical issues, or rights, to name but two. Focusing on risk and economics, however, there is some fluidity in these two categorisations. 'Risk' as the object of regulation can subsume economics if the object of regulation is seen as market risk and the purpose of regulation is simply framed in terms of managing the risk of market failure. Conversely, it is possible to translate the remits of many of the 'risk' regulators into the language of economics: pollution, after all, is not only a risk to the environment but a classic example of a negative externality. Unsafe food poses a health risk; it is also an example of negative externalities, information asymmetries, and principal/agent problems.

It is striking, however, that despite the potential to frame much regulation in terms of both risk and the market, there is a clear demarcation in the way that regulators themselves are defined, and define themselves. In the UK at least, the economic regulators, including competition authorities, still are defined, and define themselves, in terms of their role in perfecting the operation of the market (e.g. Ofwat, 2008; Ofgem, 2009; OFT, 2009). In contrast, neither the legislation establishing the Environment Agency, the Health and Safety Executive, and the Food Standards Agency, nor their own documentation, describes their remits in economic terms. Rather they each use the risk management language of safety and protection (Environment Agency, 2009; Food Standards Agency, 2007; Health and Safety Executive, 2009).

The statutory objectives of the Environment Agency are to 'protect and enhance' the environment (Environment Act 1995, s. 4(1)).[3] The Food Standards Agency's functions are defined in terms of their contribution to food safety: policy formation, provision of advice, information, and assistance, monitoring of enforcement, and emergency powers (Food Standards Act 1999). However, as discussed below, the notion that risk somehow displaces economic rationales is not entirely accurate; it rather depends where one looks. The Food Standards Agency may be a 'risk regulator' but economic rationales are reintroduced at the operational level in its determinations of why it should regulate, and economic risk–benefit calculations are used to decide how it should evaluate and respond to risk. As to why this should be so, it is suggested that the introduction of economics into decision-making about risk is an attempt to 'stabilise' risk's justificatory role in regulation, a role to which we now turn.

14.3 Risk and the Regulatory Mandate: Risk as a Justification for Regulation

Risk is not just being used to define the object of regulation, it is also being used as a justification for governmental regulation. Concomitantly, therefore, it is being used to determine the boundaries of the state's legitimate intervention in society. Government's role is to manage risk, and it is justified in intervening in society in the pursuit of that objective.

However, as a justification for regulation, risk provides an unstable base. For it poses the question of which risks the state should attempt to manage, through regulation, social welfare provision, or some other means, and which risks should be managed by others. There is a far bigger story than can be written here on the individualisation of risk, and on the interaction of the growth of economic liberalism and the increasing emphasis on the individual's own responsibility for managing risk (see, e.g., Giddens, 1999). The extent to which individuals have been expected to manage their own financial risk, for example, has been well observed (Rose, 1999: 158–60; O'Malley, 1992). Over the twentieth century, financial security was socialised, and then has been progressively individualised as community-based systems of financial support, be they given by governments or through company pensions, were gradually minimised. The expectation that people will provide for their own financial well-being through savings, investments, and insurance has been described as the 'new prudentialism' (O'Malley, 1992).

The individualisation of risk management is not confined to financial risk, and has clear implications for the manner and extent to which the management of risk is used as a justification for government intervention. A clear statement both of individualisation of risk management and of the justificatory role that risk plays, at least in the UK context, is given in the Better Regulation Commission's document, *Risk, Regulation and Responsibility: Whose Risk is it Anyway?* (BRC, 2006). In the same way that welfare economics provides the boundaries of state interference in the economy, 'risk' was used by the BRC, and indeed its successor the Risk Regulation Advisory Council (RRAC), to provide the boundaries of state intervention in society. Risk and regulation, it argued, had become tangled, so that any emerging or salient risk was seen to require a regulatory response. Noting the paradox that criticisms of a 'nanny state' and 'health and safety gone mad' often sit alongside calls that 'more must be done' by government to protect against a whole range of risks, the BRC argued that government should wherever possible resist calls for more regulation whenever a risk emerges or comes to public attention. Instead, it should seek to push responsibility for risk management down to the level of the individual or civil society. Government should 'emphasise the importance of resilience, self-reliance, freedom, innovation and a spirit of adventure in today's society' and only intervene if it really is in the best place to manage risk (BRC, 2006: 38). Individuals should be responsible for managing risks 'where they have the knowledge to make an informed assessment of the risk, consider the risk to be acceptable and regard the cost of mitigating the risk to be affordable or insurable' (BRC, 2006: 29). Regulation should be targeted on those who are most at risk, should be cost-effective, and take into account the opportunity costs of managing risks (BRC, 2006: 38). The dictates of cost-effective risk management should thus define the appropriate role for the state.

Risk is thus being used as a justification for regulation but it is not alone. As noted above, economics is usually the main contender for this role. Indeed all the main textbooks on regulation since the early 1980s have used economics to provide the boundaries of the state's legitimate intervention in society, or at least in that part of it which constitutes the market (e.g. Mitnick, 1980; Breyer, 1982; Ogus, 1994; Baldwin and Cave, 1999).

The principles of economic liberalism provide a much clearer and, for policy makers, more stable basis on which to base decisions about when and how to regulate than does the notion of risk. This is not to say that economic rationales are apolitical and uncontested. Market failures can be decried by cynics as market operations which cause political problems. The role of cost–benefit analysis in regulation is also contested (for discussion see, e.g., Pildes and Sunstein, 1995; Baldwin, 2005; Hahn and Litan, 2005; Jaffe and Savins, 2007). However, there has been for the last twenty or thirty years a significant consensus as to what market failures consist of, and how they should be corrected. The current financial and economic crisis may well cause a paradigm shift in the understanding of government's role in markets, though it is too soon to say: but prior to the crisis the hegemony of neo-liberalism was almost uncontested by policy makers. Regulation is seen as a matter of 'problem diagnosis–remedy prescription' where the remedy proposed fits the disease. If there are monopolies, the remedy is liberalisation and competition, and failing that, price controls and service obligations. For information asymmetries, the prescription is information disclosure. For principal/agent problems, the answer is regulatory monitoring of the behaviour of the principal plus disclosure. For negative externalities, it is internalisation of costs and minimisation of impacts. There are difficulties in the precise design and implementation of each remedy, as well as issues with respect to which actors are best placed to perform different roles in the regulatory regime and their coordination, but the relatively straightforward model of 'diagnosis–prescription' is nonetheless quite clear (e.g. Mitnick, 1980; Breyer, 1982; Gunningham and Grabosky, 1999).

Moreover, economic liberalism can cross cultural boundaries more easily than conceptions of risk because markets can be homogenised: what constitutes a 'risk' cannot be, or at least not so easily. All markets are treated as identical, no matter whether what is being traded is use of a mobile phone in an African village or credit derivatives in New York.

As a result of the conceptual homogenisation of what constitutes a 'market' and the dominance of neo-liberalism's prescriptions for how governments should interact with it, economics is a more stable rationale for regulation than risk. This is not to say that economics is superior in some broader normative sense, it is rather to argue that, for policy makers, basing their justifications for regulation on economics places them, in the current institutional context, on much less contested ground than basing their justifications on risk. For whereas economists can look to neo-liberal economics to provide them with the blueprint for an efficient market (so defining the object of regulation) and then use their models to determine when there are deficiencies and how they should be remedied (so defining the justification for regulation), there is no such consensus as to what a risk is (the object of regulation) which risks should be left unregulated, and which should merit government intervention, of what kind, and at what level (the justification for regulation). 'Risk', as discussed below, is a far more culturally contested concept; everyone might agree on the definition of a market, even if they may differ on what governments' relationship to it should be; but far fewer people are likely to agree on what constitutes a 'risk'. Moreover, what is in issue is often not a 'risk' in the sense that its occurrence can be derived from statistical probabilities, but uncertainty. There is no accepted blueprint for what governments or regulators should do in these contexts, though there are many contestants for that role, as discussed below.

Further, risk is inherently linked to undesirability, and thus to anxiety. Anxiety is not itself a stable state, nor is there homogeneity as to what people consider undesirable, what makes them anxious, or as to who should be responsible for mitigating the undesirable: the individual, the community, or the state. As Rose argues, 'the culture of risk is characterised by uncertainty, anxiety and plurality and is thus continually open to the construction of new problems and the marketing of new solutions' (Rose, 1999: 160). His observation was made in the context of a discussion of the management of financial risk, but it is of wider application.

The comparative instability of risk as a justification for regulation has a number of implications. Most critically, its very contestability provides policy makers with a significant challenge, as it opens up debate as to what government should do, how, and why. In an attempt to provide some stability, some foundation on which to base risk regulation, governments and policy makers have tried to devise various 'rules' or principles for how to make decisions about risk. There is as yet no consensus as to what these principles should be, nor how they should operate in particular contexts, however. Moreover, using risk to justify regulation also has significant implications for the engagement of civil society. Just as risk creates instability for policy makers, it creates opportunities for civilians. For the very contestability of risk potentially opens the door to civil society to participate in decision-making, a door which adherence to economic rationales of regulation keeps firmly shut. Both of these arguments are returned to below; first we need to explore in more depth the contestability of risk.

14.3.1 The contestability of risk

Risk, in a negative sense, is the possibility that something undesirable will occur, whether as a result of natural events or human activities, or some combination of the two (see, e.g., Giddens, 1990). In that beguilingly simple notion are in fact three latent questions, each of which is a source and site of socio-political contestation. First, what constitutes an 'undesirable' state of affairs is clearly a normative judgement as to what constitutes a 'bad thing' (Renn, 1990). There are, moreover, different degrees and forms of undesirability, and they may not be commensurable. Commensurable outcomes are by their nature relatively simply to compare. Most people would regard a leg amputation as more undesirable than a sprained ankle, for example. But where the 'bad things' are of a completely different nature it is hard for such rankings and comparisons to be made. Consensus would be far harder to obtain, for example, on the question of which is more undesirable, a leg amputation or personal bankruptcy; or, to provide a more politically relevant example, the loss of biodiversity or rural poverty in developing countries. But policy makers frequently have to try to balance or trade off incommensurables, an inevitably contested task as often the same policy (e.g. intensive farming) can prevent one undesirable state of affairs (rural poverty) but exacerbate the other (loss of biodiversity) and vice versa (protection of habitat, e.g. the Amazon rainforest, can deny farming/logging opportunities to rural communities). Furthermore, the 'bad things' are likely to be unevenly distributed across and within societies, giving rise to distributional issues.

Secondly, the notion of 'risk' necessarily involves an assumed cause and effect relationship between the event or activity (or more specifically, the hazard or source of danger) and the undesirable state of affairs (Douglas, 1966). A significant part of the debates around risks focus on this cause and effect relationship in particular instances: whether there is a causal relationship at all between a particular event or activity and the undesirable state of affairs, and the degree to which that relationship is pervasive and persistent. The debate on climate change is a case in point. Some cause–effect relationships are clear, and the activity has occurred sufficiently frequently for statistics to have been developed as to the probability of the activity resulting in the adverse event. Thus we know that driving a car can result in death. However, people do not die every time they drive, only sometimes. That 'sometimes' is measured in terms of probabilities based, usually, on statistical relationships and relative frequencies. Thus we know that some people will die driving a car, we have a reasonable idea of how many will die and, indeed, can produce separate probabilities for different countries, cars, particular roads, drivers, and many other variables, but we do not know who in particular will die and when.

The term 'risk' is sometimes confined to this situation, 'a quantity susceptible of measurement', following Frank Knight's seminal work in finance theory in the 1920s (Knight, 1921). Risk is conventionally measured to be probability × impact (Knight, 1921; Fischoff, Watson, and Hope, 1984). Driving is characterised as a risk because we can quantify the probabilities of the adverse event, and indeed we can quantify the consequences of the adverse event through loss of life valuations (though in fact both these quantifications are often contested). For example, the risk of driving can be calculated in different circumstances by multiplying the impact of an accident (death of driver, pedestrian, motorcyclist, passenger, etc.) by the probabilities of an accident happening if driving at a particular speed (50 mph, 30 mph) on a certain road (motorway, surburban, rural). Knight argued that 'risk' in this quantifiable sense should be distinguished from 'uncertainties', which are unquantifiable. In the standard technical assessments, 'risk' is derived from the probability of the adverse event occurring multiplied by the impact of that event or state of affairs. Uncertainties are susceptible to no such simple quantitative formula.

This distinction between risk and uncertainty is useful not only in finance but in policy making, but it is important to recognise that it distinguishes three, not two, radically different states of knowledge. In Rumsfeld's famous terms, there are the known knowns (statistical probabilities and quantifiable impacts: risks);[4] the known unknowns (we know about genetic modification or nanotechnology but we do not know what its effects might be: uncertainties);[5] and the unknown unknowns (we are not even aware that things or activities may produce adverse impacts at all, for example the state of knowledge about the risks of aerosols in the early twentieth century: what might be termed radical ignorance). Each different state of knowledge has implications for how we attempt to manage risks, in other words how we seek to reduce risks to a level deemed tolerable by society, and the limits of those attempts (see, e.g., Klinke and Renn, 2001).

Thirdly, even if we can agree on what is undesirable and how it is caused, there remains the question, what should be done about it and by whom? The very notion of cause suggests that the causal chain can be affected, managed, in some way. We will

turn to the issue of managing risks below. But we cannot attempt to avoid or manage all possible undesirable states of affairs that may or may not emerge in the future. So how and why are some particular risks selected for attention and some not?[6]

14.3.2 The selection and perception of risk

Risks, as Mary Douglas, once observed, 'crowd us in from all sides' (Douglas, 1985: 59–60). So far today I have risked a heart attack, the death of myself and my children, cancer, and repetitive strain injury. Yet all I have done is been for a run, taken my children to school, had a cup of coffee,[7] and typed on my computer. There could be no more apparently risk-free day. So how do we as individuals select which risks to run, and how do policy makers make this selection? Using the criteria of the appropriate management of risk as the justification for government intervention into society places a significant premium on finding a consensus as to which risks are selected and how severe (in terms either of probability or impact, or both) they are seen to be.

Three or more decades of research by cognitive psychologists into how people perceive risk has given us a fairly clear set of reasons why individuals select certain risks for attention or see certain activities, events, or states of affairs as more 'risky' than others. Generally speaking, people's perception of risk is affected by the familiarity of the person with an activity or natural hazard (e.g. living next to a river), the degree to which they are (or feel they are) in control, the nature of the consequences (the 'dread' factor), the distribution of the impact, the 'availability heuristic' (the perceived probability of an event is affected by the ease with which relative instances are remembered or imagined), whether they have exposed themselves voluntarily to the risk or not, and the perceived benefits of the activity (Slovic, Fischoff, and Lichtenstein, 1979, 1980). People consider an activity or natural hazard to pose a lower risk if they are familiar with it, have some degree of control over it, the consequences are not 'dreaded' or catastrophic, the impact is widely distributed, they are not significantly aware of the adverse event occurring, they have exposed themselves to the risk voluntarily, and they think benefits will derive from it to themselves (see Slovic, 2000). The elements of voluntariness and control lead people to have what Douglas referred to as 'subjective immunity' (Douglas, 1985: 29): they know the adverse event will happen but assume it will not happen to them. Moreover, in estimating risks, people also routinely ignore statistically derived probabilities (e.g. Slovic, Fischoff, and Lichtenstein, 1976) and are routinely over-confident in their judgements about the frequency with which a particular risk will occur (Slovic, Fischoff, and Lichtenstein, 1979). Furthermore, people display different attitudes to risk depending on whether the risk is framed in terms of making a gain or avoiding a loss: Kahneman and Tversky's 'prospect theory' (Kahneman and Tversky, 1979; Kahneman, Slovic, and Tversky, 1982). Interestingly, experts demonstrate the same cognitive biases in decision-making as lay people, and moreover exhibit a strong affiliation bias, with those experts working in industry having a more benign view of the relevant risks than those experts working outside (Kraus, Malmfors, and Slovic, 1992).

How policy makers select risks for attention is more complex. It is partly related to their psychological perceptions as individuals, but in their position as policy makers institutional forces also come into play. There is considerable evidence that there is variation both within and between countries as to which risks are selected for political and regulatory attention. Thus it is often argued that the USA is more precautionary with respect to BSE in beef and blood donations than the EU, but less precautionary with respect to hormones in beef. Conversely, the EU has been more precautionary than the USA with respect to GMOs but less precautionary with respect to carcinogens in food additives (Brickman, Jasanoff, and Ilgen, 1985; Weiner and Rogers, 2002; Vogel, 2002). The USA has also historically been more precautionary with respect to occupational health and safety than Sweden (Sunstein, 2005). The differences are not only across the Atlantic. Within Europe, France has been using nuclear power for decades but Sweden banned the construction of nuclear power stations after the nuclear accident at Three Mile Island in the USA in the 1960s and only lifted the ban in early 2009 (*Financial Times*, 6 February 2009).

Often more striking than variations between countries as to how they handle the same type of risk is variation within countries as to which risks are selected, even when their characteristics may be similar (see, e.g., Hood, Rothstein, and Baldwin, 2001). For some hazards governments adopt onerous, anticipative, and intrusive regulatory arrangements, such as the banning of beef on the bone in the UK or the compulsory slaughter of over a million chickens in Hong Kong in 1997 to prevent an outbreak of bird flu. For other hazards such as smoking a much lighter regime is adopted. More generally, Huber has observed that 'old' risks tend to be treated differently and more 'leniently' than new risks (Huber, 1983). Old risks are regulated through standard-setting (e.g. on poor air quality); new risks are regulated through pre-market screening, e.g. medicines, bio-technology, nuclear energy. Huber argues that screening allows through only the 'acceptably safe' whereas standard-setting systems exclude the 'unacceptably hazardous' (Huber, 1983). How the same hazard is handled within states also changes over time. Smoking has been subject to a progressively more onerous regulatory regime in the UK over the last ten years, for example; in 2007 smoking was banned in public places in England and Wales and there are currently proposals that cigarettes should not be on display in shops, even though knowledge about the risks of smoking has not changed significantly during that period. Chemicals regulation across the EU has also undergone a radical shift with the introduction of the new REACH regime, monitored by the newly created European Chemicals Agency (ECHA) (Regulation (EC) No. 1907/2006). Whilst Huber's argument held true in this area until 2006, the 'old' chemicals are now subject to new regulatory requirements, despite there being no radically new information on the risks associated with them (see Fisher, 2008b; Pesendorfer, 2006; Heyvaert, 2009).

The reasons for the variation in which risks are selected for attention by policy makers lie inevitably in the complexities and dynamics of the policy-making process. Huber, for example, argued that the reason for the double standard in how old and new risks are handled is that it is politically more difficult to remove tangible benefits that people already enjoy than to stop something that has not yet come onto the market as there is a smaller set of vested interests in play (Huber, 1983). By extrapolation, shifts in the regulatory regime such as those noted above would be explained by changes in the interests of the most powerful players. Interest group theories of policy making are familiar across political science, and in their study of variation across nine risk regulation regimes in the UK, Hood, Rothstein, and Baldwin found that the interest-driven explanation was the most accurate overall predictor of the content of a risk regulation regime. 'Where concentrated business interests were in the field, the position they could be expected to prefer over regime content was normally adopted, whatever the logic of general opinion responsiveness and minimum feasible response might suggest' (Hood, Rothstein, and Baldwin, 2001: 136). Even if business interests lose out at the standard-setting stage, as water companies in the UK did with respect to the maintenance of precautionary standards in EU regulation of drinking water regulation, they can extract compensatory benefits, in this case the ability to pass the charge for the clean-up on to the customer in full, plus a profit mark-up (ibid.).

Policies, and interests, are also affected by the way in which risks are either amplified or attenuated at various points in the policy process, particularly (but not uniquely) by the media. The 'social amplification of risk framework' developed in the late 1980s and early 1990s suggested that there are different types of mediators between a hazardous event and its impact. The manner in which information is given and portrayed about the hazard affects public perceptions of risk and in turn has political and socio-economic impacts, such as stigmatisation, changes in consumer behaviour, or changes in policy responses. These can lead to 'ripple effects', whereby the response to that particular hazard is generalised across to the response to other hazards (Kasperson *et al.*, 1988; Kasperson and Kasperson, 1987, 1996; Renn, 1991, 1992; Pidgeon, 1999a; 1999b; Breakwell and Barnett, 2001; Pidgeon, Kasperson, and Slovic, 2003). The amplification effects may benefit particular interest groups, or indeed be manipulated by them to serve their own political ends. Moreover, to the extent that politicians are blamed for the effects, this in turn can prompt a 'Pavlovian' response, in which politicians respond by introducing new regulation (Hood and Lodge, 2006).

Although the construction and distribution of interests is an important explanatory factor in policy making, regulatory regimes are frequently shaped by other institutional factors. As a result, policies may be more immutable than the pure interest group theories would suggest. Institutionalists, in contrast, emphasise the importance of path dependency in policy making (North, 1990). Policy making, and indeed interest group activity itself, is shaped by institutional constraints and existing patterns of regulation. As Hood, Rothstein, and Baldwin's study found, once strict standards are introduced it is hard for interest groups to ensure their dilution (Hood, Rothstein, and Baldwin, 2001: 140).

Moreover, they found that the way that risks are regulated (the manner of regulation rather than its content) owes less to the play of external interests and more to the 'inner life' of bureaucracies. Hood, Rothstein, and Baldwin argued that the reasons for variation in the style and structures of the risk regulation regimes lay as much, if not more, in the workings of the 'risk bureaucracies' and in the diverse cognitive and normative frameworks of the scientific advisers, regulators, and public policy officials that comprise them, as in the play of interest group pressures. The importance of the 'inner life' of these diverse sites of regulatory policy making cannot be overlooked. Not all of regulation is politically salient, and in the absence of a single dominant business interest the norms and preferences of the 'risk bureaucracies' are often critical in shaping risk regulation regimes (Hood, Rothstein, and Baldwin, 2001: 143; Black, 2006).

Understanding the role of the risk bureaucracies is critical, for it has been argued by Douglas that those risks which are selected for attention by risk managers (broadly conceived), are those that they know they can manage (Douglas, 1991). This selection is in turn linked to the extent to which they perceive that they are able to protect themselves from blame should the risk materialise. The politics of risk selection thus has significant implications for accountability, a question to which we will return below.

14.3.3 Assessing risks

As Douglas commented, 'Every choice we make is beset with uncertainty.... A great deal of risk analysis is concerned with trying to turn uncertainties into probabilities' (1985: 42). The contestability of risk pervades the assessment of risk as much as it does the identification and selection of risks. As risk is being used to justify governmental regulation, there needs to be agreed a common way to assess risks in order to stabilise decision-making. Just as the 'dismal science' of economics (Carlyle, 1896–9) is used to stabilise decision-making about intervention into the economy, natural sciences are used in risk regulation in an attempt to stabilise decision-making about the nature and management of risks.

Efforts to provide a common scientific framework for assessing risk are increasingly international, not least because different assessments lead to different regulatory requirements, which has implications for international trade, discussed further below. A triangular 'risk assessment dialogue' was launched in 2008 by the European Commission, for example, with the aim of promoting a mutual understanding of risk analysis systems and approaches, and developing a framework for collaboration and convergence on risk assessment methodology and substantive

risk issues, particularly with respect to emerging risks, such as nanotechnology. There are ambitions to extend this into a 'global dialogue' to produce a common science-based approach for ensuring 'the effectiveness, efficiency, sustainability, acceptability and compatability of risk governance' (European Commission 2008). This may be (cynically) regarded as an attempt by the EU to ensure the dominance of its scientific assessment methodologies over others, in particular those in the USA, but the relevant point here is that both attempt to use the scientific risk discourse to provide a stable basis on which to found decisions about risk.

The EU has attempted to embed a distinction between the 'pure' process of scientific risk assessment and the 'political' process of risk management in its institutional structures, and thus to institutionalise a distinction between the stable and the less stable aspects of decision-making on risk. Risk assessment in areas such as the environment, pharmaceuticals, chemicals, and food safety is in formal terms the preserve of EU regulatory agencies.[8] Decisions about risk management lie with the Commission and other EU institutions. In terms of actual practice, the division of roles is less clear cut (see, e.g., Chalmers, 2003; Eberlein and Grande, 2005; Randall, 2006), but the political aim is clear: to enhance the legitimacy of the decision-making process (Vos, 2000).

However, even if it were possible to disentangle scientific risk assessment from political risk management, science does not provide the degree of stabilisation that policy makers may want. Scientific modes of assessment have been heavily criticised for a number of years (see, e.g., Renn, 1992 for review), and it is now clear that scientific risk assessment cannot be isolated from broader questions of participation and accountability. First, it has been argued that their models are inadequate for a number of reasons: sample sizes are too small, extrapolations are inaccurately based, and there are other methodological flaws. Secondly, in making their assessments, experts are just as prey to the cognitive biases which are present when lay people make risk assessments, including the availability heuristic, over-confidence in making predictions on the basis of small sample sizes, and probability neglect (Slovic, 2000 for review). Thirdly, scientific methods are criticised for being overly narrow, or for excluding valuable sources of information on the basis that these are not regarded as scientifically valid. Wynne, for example, has argued that scientists made significant errors in estimating the fallout from the Chernobyl explosion as they failed to take account of the experience of sheep farmers in Wales, who argued their sheep were suffering from the effects of radiation (Wynne, 1996). Fourthly, scientific methods tend to be more suited to easily quantifiable measures (e.g. mortality) than less easily quantifiable ones (e.g. morbidity), and as a consequence the more easily measurable types of risk can be systematically favoured over others. Fifthly, one of the most common techniques for dealing with uncertainties, scenario analysis, has been shown to be deeply flawed, as again the cognitive biases which affect lay people's perceptions of risk are equally present in scenario analysis and have significant impact, as they limit the range of scenarios that modellers envisage, and the frequencies that are put upon them. The recent financial crisis has demonstrated how limited and misleading scenario analysis can be. In August 2007, even before the most intense periods of the crisis, the Chief Financial Officer of Goldman Sachs, David Viniar, was reported as commenting that events that were in most models assumed to happen only once in several billion years (once every 6×10^{124} lives of the universe to be precise) were happening several days in a row (Haldane, 2009). Sixthly, the scientific assessment process has been criticised for being biased, both commercially and politically, and thus infused with conflicts of interest (Jasanoff, 1990, 2003; Kraus, Malmfors, and Slovic, 1992). Finally, science is criticised as being an inappropriate basis for making decisions as to how risks should be managed within any particular society, as perceptions of risks vary significantly from the scientific assessments of probability and impact, due to cognitive and cultural differences: the familiar lay versus expert divide (for review see Renn, 1992; Royal Society of Arts, 1992).

These criticisms mean that the role of science, far from acting as a stabilising mechanism, is instead deeply contested. One of the key questions, therefore, in contemporary risk governance is how to manage the contested role of science by ensuring the engagement of science, policy makers, and civic society in the governance of risk. It is an issue which we return to below when we discuss accountability.

Focusing here on the role of science, within the scientific community some argue that there has also been a shift in scientific methods themselves, driven by a recognition that science cannot remain hermetically sealed. Drawing on examples relating to pharmaceuticals, GM (genetically-modified) crops, and the management of BSE, Jasanoff argues that the 'old' model of 'pure' science conducted in autonomous spaces of university research laboratories, free from industrial or political influence, has collapsed, for a number of reasons (Jasanoff, 2003). First, the distinction between pure and applied science has increasingly become seen as false and often unhelpful to scientific innovation. Secondly, instances of industrial funding and political influence or political views distorted scientific practices. Thirdly, it has become clear that the 'strict' scientific methods may be insufficient to understand risks, let alone predict them, and recognition is needed that knowledge exists and is produced in a wider range of sites than those recognised in conventional science (Wynne, 1996). Finally, there has been a recognition, amongst some scientists at least, that they need to be more aware of the social context in which their scientific investigations and findings operated and would be utilised (Jasanoff, 2003).

Gibbons *et al.* (1994) term this combination of factors as producing 'Mode 2 science', a shift in scientific methods which derives from a recognition that science can no longer insist on a separate institutional 'space' for basic research with autonomous quality control measures through scientific peer review. Rather, science is, and has to recognise that it is, increasingly more embedded in, and hence more accountable to, society at large. They argue for the 'contextualisation' of science. Others have argued in a similar vein. Funtowicz and Ravetz propose a model of 'post-normal science' in which scientific assessments are subject to stakeholder review, not simply scientific peer review (Funtowicz and Ravetz, 1992). Schrader-Frechette's model of 'scientific proceduralism' exhibits the same participative turn (Schrader-Frechette, 1991). Jasanoff pursues further the question of how the public can be meaningfully engaged, and proposes a change in the culture of governance and the development of 'technologies of humility'. These would expand the way issues are framed, engage people in discussions on their vulnerability and on the distributional impacts of innovations, and engage in reflexive learning (Jasanoff, 2003). The exact prescription of different writers thus varies, but the message is the same. It is that quality control of scientific assessments has for practical purposes merged with accountability. The tradition of peer review remains, but one of the key issues in risk governance is who should be the 'peers', and what is their capacity to conduct reviews?

The potential for science to stabilise risk-based decision-making is therefore limited, and in practice many government bodies are recognising that basing decisions on the basis of scientific evidence alone is politically inadequate (e.g. BRC, 2008). Governments in democratic societies are under an obligation, which is often a political reality even if not accepted as being normatively desirable, to take public perceptions of risk into account in decisions on which risks to respond to, how, and how much to spend on doing so.

14.3.4 Responding to risk

Responding to risks and attempting to manage them necessarily involves anticipating the future, a future which, as noted, scientists, statisticians, and quantitative modellers try to stabilise and render less uncertain through the production of probabilities and scenario analysis, but which is nevertheless by its nature unknown. In anticipating that future, we are bound to make mistakes. In statistical terms, there are two main ways in which risk assessments can be in error. They can err on the side of assuming that a null hypothesis (an assumed state of affairs) is false when it is true (a false positive or Type I error); or err on the side of assuming that the null hypothesis is true when it is false (a false negative or Type II error). Type I errors are often regarded as more sensitive than Type II errors: a statistically higher degree of significance is required to reject the null hypothesis than to retain it; so what is defined as the assumed state of affairs is thus both scientifically, and politically, significant. In the case of risk, then, the error could either be to assume that something is risky when it is safe or safe when it may turn out to be risky. In governmental decision-making about risk, this is a political choice. In law, the laws of evidence in many countries clearly prefer to err on the side of false negatives (that someone is innocent when in fact they might be guilty) (for discussion see Schrader-Frechette, 1991). The onus is on the accuser to prove that the person is guilty. However, in regulation there is no such set of clear-cut assumptions.

Moreover, presenting the policy decision in these binary terms presents a beguilingly simple decision. In practice, the costs and benefits of each approach will fall quite differently on different producers and consumers (Schrader-Frechette, 1991).

The choice pervades all aspects of risk management by and within organisations, and is not just present at the initial standard-setting stage. But the epistemological and cultural contexts in which those decisions are made vary significantly. Risks can be categorised epistemologically, on the basis of the knowledge about the likelihood of their occurrence, and on the basis of their consequences (for example see Klinke and Renn, 2001). Thus there are 'normal' or 'routine' risks, in which there is little statistical uncertainty, or the possibility to reduce statistical uncertainty through testing, for example of drugs, relatively low catastrophic or 'dread' potential, and the cause and effect relationships are well understood, such as smoking or road accidents. At the other end of the spectrum are the catastrophic and 'dread' risks with potentially irreversible effects, such as nanotechnology. Near to those are what may be termed the complex-catastrophic risks where the cause and effect relationships can be hypothesised and may even be known, such as nuclear explosions or systemic financial collapses, but because the risks occur within a system with complex interrelated elements, the site of Charles Perrow's 'normal accidents' (Perrow, 1984), they are likely to defy most attempts to manage them.

The 'normal' risks are usually managed, to the extent they are managed at all, on an implicit or explicit cost–benefit basis, with all the advantages and disadvantages of that approach, some of which are discussed below. It is with respect to what to do in situations of uncertainty and with respect to catastrophic risks that the debate usually occurs.

In this context, there are a number of different decision principles which again are used in an attempt to stabilise decision-making and justify the regulation of risk by providing a blueprint for how regulators, including policy makers, should respond. These are principally the precautionary principle, the principle of resilience, and variations on the theme of cost–benefit analysis, including the catastrophic principle.

The precautionary principle

The precautionary principle is a set of political rather than scientific choices. It has developed in the last decade to become the central principle of risk regulation in the EU. However, it is treated with suspicion by its opponents, who regard it as raising costs, delaying the introduction of new technologies, unscientific, and unhelpful in dealing with unpredictability. An early example of the precautionary approach in public health was the action by the medic Dr John Snow in 1854, who recommended the removal of the handle from the water pump on Broad Street in London, as he noted a significantly increased risk of cholera in people who drank water from the pump in comparison to those who drank clean water, even though the scientific understanding at the time was that cholera was an airborne disease (Harremoes *et al.*, 2002). It began to develop into an explicit concept within environmental science in environmental regulation much later, and its first appearance is usually credited to be in Germany in the 1970s, in context of attempts to try to manage 'forest death' (ibid.; see also O'Riordan and Cameron, 2002; Majone, 2002).

Although it had appeared in previous international agreements, its first appearance in a major international document was in the Rio Declaration on Climate Change in 1992. This stated that 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' The principle has been reiterated by the European Commission, which has made it the central principle of its regulation of risks to health and the environment (European Commission Directorate General, 2008), and there is sector-specific guidance on how the precautionary principle is used, for example in food law (Regulation (EC) 178/2002).[9] In the UK, initial resistance to the principle has given way to its acceptance, and Treasury guidance on risk management states that the government 'will apply the precautionary principle where there is good reason to believe that irreversible harm may occur and where it is impossible to assess the risk with confidence, and will plan to revisit decisions as knowledge changes' (HM Treasury, 2005: Annexe B). There have been a number of calls on the government to clarify what this means for policy making in guidance, but none has as yet been forthcoming (e.g. House of Commons Science and Technology Committee, 2006; ILGRA, 1998).

There is an extensive literature on the use and merits of the precautionary principle, which can only be briefly reviewed here (see, e.g., Harremoes *et al.*, 2002; O'Riordan and Cameron, 2002; Majone, 2002; Sunstein, 2005; Fisher and Harding, 1999; Fisher, Jones, and von Schumberg, 2006; Fisher, 2007). Those who support it argue that it is underlain by three principles which should inform risk management. First, risk aversion towards uncertain but especially harmful outcomes. Secondly, a reluctance to make irreversible commitments foreclosing future courses of action. Thirdly, a concern for intergenerational equity when benefits are immediate but risks are imposed on those not yet born.

However, its critics argue that the precautionary principle is undesirable for six main reasons (Majone, 2002; Sunstein, 2005; Wildavsky, 1988). First, it ignores large existing benefits whilst concentrating on small existing risks. Secondly, it does not take into account opportunity benefits, for example, delaying approval of a medicine which could pose a small risk denies those who are ill the benefits of being treated by it. Or the banning of a food additive which is harmful if consumed in high doses but beneficial if consumed in low doses denies consumers those benefits. Thirdly, the precautionary principle cannot help when dealing with risk/risk trade-offs (Graham and Wiener, 1995; Sunstein, 2002). For example, we know that DDT can be used to kill mosquitoes, so reducing the risk of malaria, but carries significant other health risks. In determining how the health risks of DDT should be balanced against the risk of malaria, the precautionary principle is of little help. Related to this argument is Wildavsky's criticism that the principle ignores the inevitable trade-off noted above between Type I and Type II errors, between what he calls 'sins of omission and sins of commission', and in erring on the side of commission (erring on the side of safety) it causes us to lose discriminatory power to determine what really is a risk (Wildavsky, 1988).

Fourthly, critics argue the principle ignores the effects of economic costs on safety. Critics of the precautionary approach argue that the attempt to control poorly understood, low-level risks necessarily uses up resources that in many cases could be directed more effectively towards the reduction of well-known, large-scale risks (Majone, 2002). The figures can be striking. A risk–benefit analysis of the BSE-related 'over thirty month' (OTM) rule, which banned all cattle aged over 30 months from entering the food chain, concluded that the OTM rule on its own would prevent at most an additional 2.5 deaths from vCJD over the next sixty years, but at an annual cost of over £300m. The Food Standards Agency concluded the costs were disproportional, and the ban was removed in 2004 (Food Standards Agency 2003).

Fifthly, the application of the principle gives rise to distributional issues. The principle is sometimes dubbed 'producer-risk' as it places the onus on the producers. Where these are large multinational companies, the social issues may not be of particular concern. However, the 'producers' may not be highly profitable firms. Majone gives the example of the EU ban on aflatoxin coming into EU from Africa. The risks of cancer from aflatoxin are lower than for liver cancer, but fewer precautions are imposed on liver cancer than on aflatoxin despite the fact that the ban imposes significant losses on African farmers (Majone, 2002).

Finally, the precautionary principle (some prefer to call it an 'approach') is criticised as being too vague. In the UK, the House of Commons Science and Technology Committee has argued that it has become surrounded with such ambiguity and confusion that it has become devalued and 'of little practical help' (House of Commons Science and Technology Committee, 2006: paras. 51, 166). Majone argues that although the principle purports to provide a legitimate basis for taking protective regulatory measures even when reliable scientific evidence of the causes and/or the scale of potential damage is lacking, thus appealing to those who fear the 'globalisation of risks' through the channels of free trade, it expands regulatory discretion, which could be used to meet legitimate public concerns, but also 'to practice protectionism, or to reclaim national autonomy in politically sensitive areas of public policy' (Majone, 2002; see also Heyvaert, 2006). The argument that the precautionary principle is at base a mask for protectionism is deeply fought, politically as well as in academic journals. It was essentially on this basis (though technically on the basis of the interpretation of World Trade Organisation (WTO) provisions) that the USA fought and won their case in the WTO against the EU's ban on beef hormones, much to the consternation of the EU and upholders of the precautionary approach (see, e.g., Skogstad, 2002; Goldstein and Carruthers, 2004; Fisher, 2007; Lang, 2008).

As this brief sketch of the debates around the precautionary principle indicates, precaution is, to use O'Riordan's phrase, 'a fully politicized phenomenon'. As he argues, the precautionary principle is as much about 'styles of government, patterns of power, and changing interpretations of participation . . . as it is about taking awkward decisions in states of uncertainty and ignorance' (O'Riordan, 2002: xi). The precautionary principle thus is a decision rule adopted by some regulators in varying degrees in an attempt to provide a stable basis for determining how society and government should respond to risk, but again the degree of stability it provides is limited, because it is so politicised and so contested.

The principle of resilience

The principle of resilience, advocated by Wildavsky (1988), is based on the argument that as we cannot know which risks will crystallise, we should proceed on the basis of trial and error, and ensuring resilience in systems if things should go wrong. These can include what engineers call 'redundancies', controls which come into operation when others have failed. In practice, public policies often do include aspects of resilience: for example the requirement for 'clean-up' funds to be set aside by companies to cover part of the costs of environmental disasters that they cause. In financial regulation, banks are required to set aside a certain amount of capital to enable them to withstand a certain level of losses. But as the financial crisis in 2008–9 clearly illustrated, resilience requires more back-stop measures should it turn out that the front-line defence is not enough. Although regulatory attention is now turning towards crisis management on a national and cross-national basis, this issue was previously left unaddressed, largely because on a cross-national basis reaching a common decision on how bank rescues or collapses should be coordinated, and who should be making the decisions, is highly contested.

In practice, resilience on its own is not seen as a politically acceptable strategy for managing many risks, particularly catastrophic or irreversible risks. Whilst more attention to resilience may be beneficial in some circumstances, in practice preventive steps are also imposed, and the question in risk governance is always just what those steps should be, and, more particularly, how much should be spent on them and by whom.

Cost–benefit analysis

Part of the reason for risk's instability as a justification for regulation is that the question 'how safe is safe enough' has no universally accepted answer. One attempt to provide a blueprint for answering the question, and moreover to make decisions on risks commensurable, is to use cost–benefit analysis. Economics thus enters the risk narrative at this second-order level. Risk is the first-order justification for having regulation at all; cost–benefit analysis is propounded as the second-order justification which indicates how much regulation there should be.

In practice, cost–benefit analysis is used extensively in many areas of risk regulation. In some cases the risks being assessed are often risks to health and life. One of the key quantitative variables is therefore the value placed on a life. More particularly, it is a statistical estimate/calculation of the cost of reducing the average number of deaths by one. The methodologies for valuing life and quality of life are quite varied even within the UK, let alone across different countries, as are the numerical values which are used (for discussion see Viscusi, 1993, 2004). Methodologies include expressed preferences (how much people say they would pay for safety equipment, for example); revealed preferences (how much they in fact pay); economic productivity value (what is their contribution to the productive economy); quality of life years (QALYS, based on what value people say they place on health), and disability life years (DALYS, based on assessments by medical experts of the relative lack of quality of life experienced by people with different types of disabilities). Each has obvious limitations: in expressing preferences, people usually overstate what they would be prepared to pay, for example; but revealed preference approaches make no allowance for the fact that people might want to spend more on safety but cannot afford to do so. In practice, the value placed on a life varies significantly across government departments and regulators both within the UK and across countries (see, e.g., Viscusi, 2004).

Supporters of cost–benefit analysis argue that it provides a rational tool for decision-making and enables comparisons to be made. Using cost–benefit analysis, we can compare how much is being spent on preventing a death on the roads as opposed to a death on the railway, for example. Anomalies can thus be identified, and although the decision may be made that they are justified for various reasons, at least a conscious and rational decision process has been gone through (e.g. Sunstein, 2002; 2005; Posner, 2004).

However, despite its potential usefulness (see, e.g., Stern Review, 2008) there are significant limitations to cost–benefit analyses in evaluating risk. First, there is the question of how to translate future costs into present costs (discounting). In situations of uncertainty, there is no 'scientific' way to determine the level at which the discount should be set and over what period. Secondly, cost–benefit analysis is dependent on probabilities, but where these are impossible to determine, the cost–benefit analysis can be self-fulfilling, as raising the probabilities for what is in reality an uncertainty will lead to the conclusion that more should be spent avoiding it, whereas lowering them would lead to the conclusion that less should be spent.

Nevertheless, cost–benefit analysis has significant supporters, and is highly influential (e.g. Stern Review, 2008). Posner, for example, argues that cost–benefit analysis is 'indispensable' to evaluating possible responses to risk, in particular catastrophic risk, despite the great difficulties in quantifying the essential elements of cost–benefit analysis, including the value of life, discount rates, and the range of potentially substantial but difficult to quantify costs and benefits (Posner, 2004). He suggests techniques such as 'time horizons' and tolerable windows to adapt cost–benefit analysis to assessing responses to catastrophic risk. In deciding how much to spend

now to reduce the risks from global warming, for example, he argues that we should divide the future into the near term, in which future costs are weighted equally with present costs, and the far term, in which the future is given no weight. The length of the term is determined by dividing 1 by the discount rate, so if the discount rate is 2 per cent then the near term is fifty years, so we should count all costs that we think will occur in the next fifty years as occurring now, without discounting. 'Tolerable windows', he argues, can be drawn up to provide a framework for assessing costs and benefits. Even though we cannot determine the optimal level of costs and benefits taken to reduce or eliminate catastrophic risk, we can know enough to create a 'window' formed by two vertical lines: to the left of the frame the benefits clearly outweigh the costs, to the right they clearly do not. The window of tolerability is some point either side of the optimal. So some level of costs exceeding benefits is acceptable, but if it appears 'excessive' then other strategies such as 'wait and see' or 'more research' could be adopted (Posner, 2004).

Cost–benefit analysis can be a useful tool in decision-making, but it has clear limitations and is not value free. In Posner's model, for example, there is no 'right' decision as to what the discount rate should be for determining time horizons. There is no 'right' way of deciding where, within what will in practice be a huge window of tolerability, regulatory intervention should start or stop or what form it should take. Sunstein's 'anti-catastrophic' principle is little better in this respect (Sunstein, 2005). Sunstein argues that where probabilities and consequences are reasonably well known, decisions for how to respond to risk should be based on cost–benefit analysis which uses revealed preferences, 'adjusted' to take into account differences between abilities to pay, willingness to take risks, and distributional concerns to determine the value of a life. However, in the face of potentially catastrophic outcomes where probabilities cannot be assigned, then a limited version of the precautionary principle should be adopted, combined with principles of cost-effectiveness, subject to three qualifications: first, attention to be paid to both risk/risk trade-offs; second, account be taken of distributional concerns; and third, that a large margin of safety be built in. How big depends, he argues, on the probabilities. However, again this proposition is circular, for if the probabilities are not known (as by nature they cannot be with much certainty in all but the most 'routine' of risks) then there is no real guide as to how big the margin of safety can be. The question of 'how safe is safe enough' is inevitably a political one which no attempts at rendering rationally scientific can, and arguably should, resolve.

14.3.5 Summary

As a justification for regulation, notably governmental regulation, risk thus provides an unstable base. This poses a normative challenge; it also poses a functional one. Whilst there might be broad agreement that governments should regulate risk, just which risks should be selected for attention, how they should be assessed, and how they should be responded to are all politically charged questions. Regulators and governments attempt to stabilise decisions on these issues through the use of scientific assessment[10] and through developing various principles for how to respond, notably the precautionary principle and cost– or risk–benefit analysis. However, whilst the application of these principles can enable policy makers to routinise decisions on how to respond to risk, as each of them is contestable and contested both the normative and functional stability that they provide can be limited.

14.4 Risk, Organisations and Procedures

The third role that risk plays in regulation is organisational and procedural. Risk is providing an organisational objective around which regulators can orientate their activities. Regulators, in common with other non-profit organisations, do not have a profit motive to provide their overriding objective or a benchmark against which they can assess themselves and try to ensure that others assess them. Risk is fast developing as an alternative to the profit motive to serve these functions. 'Risk' is now stated, at least by the UK government, to be the 'critical starting point' of policy making (BERR, 2005). 'Risk' is thus used as a basis for developing routines and procedures for organisational action. These procedures all take a common form, borrowed from the private sector, and in particular a model of risk assessment developed by the US Committee of Sponsoring Organisations of the Treadway Commission (COSO, 1991), appointed after a Congressional inquiry into financial reporting. Power argues that COSO established a 'baseline framework' for risk management processes which has become widely diffused as a significant reference point and resource for risk management procedures (Power, 2007: 49).

The standard flow chart shows the idealised policy progression from risk identification, to risk assessment, risk management, risk communication, looping back to evaluation, feedback, and modification. Extensive guidance has been produced by central government over the last ten years or so, particularly in the UK, on each of these aspects. Following highly critical reports of its handling of risk, the UK government initiated a risk strategy in 2002 (Cabinet Office, 2002). The UK Treasury currently has over ten different pieces of guidance relating to risk management which departments and regulators are meant to follow (e.g. HM Treasury, 2004a, 2004b, 2004c, 2005, 2006, n.d.a, n.d.b, n.d.c; see also Cabinet Office, 2002, n.d.).

But in the drive for 'risk-based policy making' the meaning of 'risk' itself becomes slippery. Requirements to manage risks to the public can turn almost without recognition into requirements to manage the risks of organisational failure. Some of these pieces of guidance are focused on managing institutional risks: risks to successful delivery of programmes, or internal risk management processes. Others are focused on public or societal risks: risks to health, safety, or the environment. Some are focused on both. The 'risk' that is in issue glides quite quickly from 'societal risks' to 'institutional risks'. To a point this move makes sense: there is a clear link between the two, in the sense that managing societal risks requires the regulator or government department to perform effectively. But there is nonetheless sufficient difference in focus between the two that such elision from one to the other can be misleading.

14.4.1 Procedures for managing societal risk

Although risk identification, assessment, and response are in practice intertwined, they are usually portrayed as distinct stages in a decision process (or at least separate boxes on a consultant's flow chart). The first stage in any standard risk management process is to identify and assess risks. It is at this stage that risk-based policy making is clearly linked to the drive for 'evidence-based' policy making. The evidence in issue is seen principally to be scientific evidence (e.g. BERR, 2005). Internal government guidance requires scientific assessments to be peer reviewed. Policy makers are exhorted to communicate clearly to ministers and the public the varying levels of uncertainty that surround any scientific evidence used (ibid.). However, the UK government's practices of risk assessment and in particular its use of scientific evidence have been criticised by successive parliamentary committees (e.g. House of Commons Select Committee on Science and Technology, 2006, House of Lords Select Committee on Economic Affairs, 2006), as well as being the subject of the broader academic commentary noted above (e.g. Jasanoff, 2003). Increasingly, analysts and policy makers are required to ensure that they include evidence of any differing perspectives of risk (including perspectives from the public) as well as scientific risk assessments.

At the EU level, there are a number of official statements of principles of risk analysis, which contain a number of common and related themes relating to risk assessment, risk management, and risk communication. Following the BSE episode, the Commission has clung strongly to the operational principle that risk assessment should be separated from risk management. As noted above, risk assessment is seen within the EU regulatory regime as being something which can be performed as a 'pure', scientific process, whereas risk management is more appropriately a political process. There are a number of official communications and decisions which contain principles according to which risk assessments have to be performed. Broadly these require that risk assessments are to be performed by scientific advisers who are independent of political and commercial interests, and advisory committees are required to be transparent in their membership and operations, and to have a plural membership representing a range of disciplines, cultures, gender, and geographical diversity. Risk communications have to be clear and in language that non-scientists can understand (e.g. European Commission, 1997, 2002, 2004, 2008).

The policy focus on managing societal risks has also given rise to innovations in organisational structures and policy-making processes within the UK. The Risk Regulation Advisory Council was established in 2008 with the remit of gaining a better understanding of public risk and how to respond to it, and working with external stakeholders to develop a more considered approach to policy making relating to public risks.[11] It had a novel way of working for a government body, using 'experiential' learning through facilitated workshops of government and external stakeholders rather than the usual reliance on reports and recommendations. It also had a website where people could post comments on 'big questions'. There was not much indication that the latter was enthusiastically received by the public, however. Three questions were posted in July 2008, but by June 2009 only twelve comments had been received in total across all three questions, and these were from six separate people (assuming the same people did not use different names).[12] Their report, published in the same month, suggested that other more interactive approaches had been more fruitful (RRAC, 2009).

'How to' guides inevitably lead to calls for, and perhaps even the provision of, training. Risk-based policy making has been no exception. Within the UK, the Better Regulation Commission and parliamentary committees both recommended the provision of training for policy makers in central departments and regulators in 'risk-based policy making' (House of Commons Select Committee on Science and Technology, 2006; House of Lords Select Committee on Economic Affairs, 2006; BRC, 2008). The National School of Government is meant to be providing courses in these techniques for ministers and senior officials.

The various official communications and guidance on 'how to do' risk-based policy making offer a view of policy making which is one which can be rational and ordered. However, policy making more normally follows Cohen, March, and Olsen's 'garbage can' model, in which problems, choices, issues, and decisions flow in and out of the garbage can, and which gets attached to which is largely a matter of chance (Cohen, March, and Olsen, 1972). Moreover, these official exhortations on 'how to do' risk-based policy making significantly understate the nature of the task. The issues involved are often highly complex policy decisions, in which the issue of risk plays a role, but quite often the debates are not confined to risk but extend into broader questions of morality, equity, free trade/protectionism, and even law. Debates on genetic modification, for example, are framed by some participants in terms of risk but for others they are questions of intellectual property, or free trade (e.g. Black, 1998). Furthermore, given that risks surround us, it can be hard for policy makers to determine just which risks they should focus on, notwithstanding the use of risk–benefit analysis and other decision principles noted above, as Rothstein and Downer's study of the UK Department of the

Environment, Food, and Rural Affairs (Defra) illustrates (Rothstein and Downer, 2008). The problem of focus is exacerbated by the fact that the question of how to assess and manage societal risks can become quite quickly the question of how to manage institutional risks.

14.4.2 Procedures for managing internal and institutional risk

Institutional risk is the risk that the regulator will not meet its organisational and policy objectives (Black, 2005a; Rothstein, Huber, and Gaskell, 2006). Managing that institutional risk has itself become the basis for developing particular internal management policies and procedures, a development which I have elsewhere characterised as the 'new public risk management' (NPRM) (Black, 2005a; Power, 2007). The impetus for the NPRM strategies comes both from within regulators and departments themselves, as well as being imposed on them through internal guidance from central government.

The focus on the management of institutional risk is evident not just in those regulators whose remits are specifically to manage societal risks to health or the environment, but for those whose remits are defined still in economic terms. The Office of Fair Trading, for example, in its 'Prioritisation Principles' states that it will prioritise its work on the basis of its impact to the consumer, its strategic significance, and 'risk', which is defined as the likelihood of a successful outcome (OFT, 2008). In developing its initial risk-based framework, the Financial Services Authority took its four statutory objectives and turned these into seven 'risks to objectives', which then provide the foundations for the categorisation and scoring of risk indices in its risk-based approach to monitoring and supervision (Financial Services Authority 2006). So the management of institutional risk is a widespread organisational concern, irrespective of whether the object of regulation in a particular instance is framed as societal risk or market failure.[13]

The development of internal risk management systems

The drive to improve the management of internal risks was prompted by the need to deliver on the initial Labour government's *Modernising Government* agenda and given impetus by the Strategy Unit's 2002 document on managing risk (Cabinet Office, 2002). It is in essence the transposition of private sector risk management methods and processes to central government. As Power argues, risk has become an organising principle in private and public sector management thinking, and in the public sector, 'risk' is emerging as the basis for 'self-challenging' management practices for public organisations not subject to the discipline of competition, profits, or share prices (Power, 2007). The internal risk management systems being advocated across central government all share the central elements of risk management strategies common in private firms: risk identification, assessment, management, and evaluation. The risks identified, as in private sector risk management strategies, are comprised broadly of external and internal risks: those arising from the environment in which the organisation operates, and risks arising from within the organisation itself.

As noted above, there is a rainbow of internal guidance setting out policies and procedures for internal risk management and policy evaluation emanating from the Treasury, in addition to the guidance on how to do 'risk-based policy making'. The most significant of these is the Orange Book, *Management of Risk Principles and Concepts* (HM Treasury, 2004a; the other colours are green (HM Treasury, n.d. c) and magenta (HM Treasury, n.d.d)). In addition, there have been two Parliamentary Select Committee investigations into the government's handling of risk in the last three years. These attempts by the centre to control regulators and departments are examples of what Power has described as the 'turning inside out' of organisations (Power, 2007: 42). Power's comments apply equally to regulation inside firms as to regulation inside government (Hood *et al.*, 1999). The internal procedures of regulators and government departments have themselves become a politically salient issue. However, the evidence at present is that the adoption of risk management approaches across departments in practice is distinctly patchy (House of Commons Select Committee on Science and Technology, 2006; House of Lords Select Committee on Economic Affairs, 2006; HM Treasury, 2003, 2004d).

Risk, organisational objectives, and tolerance for risk

Managing internal risks is focused on aspects of the organisation's own internal operations that could affect its ability to formulate and deliver policy objectives, such as IT failures, terrorist attacks, outbreaks of avian or swine flu, or poor project management. Managing institutional risks also requires a focus on the design of regulatory interventions and the deployment of resources. In the UK at least, central government has been far slower to focus on that strategic aspect of institutional risk management than the more internal, managerial aspect, and regulators themselves have led the way (Black, 2008b; Hampton, 2005).

Fundamental to the development and operation of the strategic management of institutional risk is a need for regulators to determine their objectives and their risk tolerance. Determining the organisation's objectives may not necessarily be a straightforward task. Some regulatory organisations are fortunate in having a set of statutory objectives. However, some do not: they have a set of statutory functions, but no objectives as such. Large, multi-function government departments often do not even have that. Determining what the organisation's objectives are in any particular area can thus require significant internal debate (Rothstein and Downer, 2008 for examples).

Determining the organisation's risk appetite can be just as challenging for the organisation. Regulators do not often articulate what their risk appetite is in

public, or even private. Those that have stated their risk tolerances publicly differ significantly between sectors. In occupational health and safety, the UK Health and Safety at Work Act 1974 introduced the principle that risks be reduced to a level which was 'as low as reasonably practicable', the ALARP principle. In food regulation, the policy with respect to food additives and residues of pesticides and veterinary drugs is usually one of 'notional zero-failure', although for contamination by micro-organisms, food regulators tend also to adopt a standard of 'as low as reasonably practicable'. As a review of food regulatory systems observed, however, given the difficulties in obtaining reliable data and the public expectation that food should pose no risk, targets are usually defined in relative terms (a reduction of 25 per cent over two years) rather than absolute terms (Slorach 2008).

The financial regulators, in contrast, adopt a non-zero failure policy, at least in theory. A clear statement of this position is the Financial Services Authority's paper *Reasonable Expectations* published in 2003, and which many other financial regulators have also publicly followed (Financial Services Authority 2003). The Financial Services Authority noted there was a gap between public expectations of what regulators should or should not be able to achieve, and what 'reasonable' expectations should be. The paper made it clear that 'non-zero failure' meant that the regulator would not, and should not be expected to, prevent every 'negative event'—every financial failure of a firm, every incidence of non-compliance, every incidence of market failure—and that public and political expectations of what regulation can achieve should be modified accordingly.

However, the political and regulatory response to the credit crisis demonstrates how a regulator's 'risk appetite' for both societal risks and institutional risks can be significantly modified when the political context shifts. The financial crisis has illustrated clearly that regulators, even independent regulators, need a 'political licence' to operate. Irrespective of their formal relationship to government or their formal legal powers, the approach that a regulator takes is conditioned by the political context. In financial regulation, a key role of financial regulators is to contain the risk taking of financial institutions such that they do not impose systemic damage on the system as a whole. But to what extent should regulators contain the risk taking of financial institutions? If regulation, either in its design or in its implementation, is too risk averse, it will inhibit innovation and competitiveness. Being too ready to pick up the pieces can also lead to moral hazard, and thus inadvertently exacerbate risk. Ensuring that regulation is appropriately calibrated is fiendishly hard. Getting political buy-in for the assessments that regulators make is just as difficult. Regulators, probably rightly, argue that any calls they may have made for financial institutions to restrict their risk-taking behaviour prior to the crisis would have lacked any political support and been seen as an unwarranted intrusion into the running of those institutions. In contrast, in the current political climate, no intrusion is likely to be seen as too great, no regulatory policy considered too risk averse. The terms of their political licence, in other words, have shifted.

The development of risk-based regulation

Risk-based regulation is the new arrival to the better regulation agenda, and can be linked to the attempts to manage institutional risk. Risk-based regulation has generally two distinct meanings, which are often conflated (Black, 2005a, 2005b; Hutter, 2005). The first refers to the regulation of risks to society: risks to health, safety, the environment, or, less usually, financial well-being (e.g. Hampton, 2005: paras. 2.13–2.48). In this respect, 'risk-based' regulation refers to the management of societal risk, discussed above (e.g. Health and Safety Executive, 2001). The second, emergent meaning of risk-based regulation refers to regulatory or institutional risk: risks to the agency itself that it will not achieve its objectives. For regulators, in this newer sense, risk-based regulation involves the development of decision-making frameworks and procedures to prioritise regulatory activities and the deployment of resources organised around an assessment of the risks that regulated firms pose to the regulator's objectives (Black, 2006, 2008b; Rothstein, Huber, and Gaskell, 2006; Hutter, 2005; Hutter and Lloyd Bostock, 2008). In their narrowest form, risk-based frameworks are used to allocate inspection resources. However for an increasing number of regulators, risk-based frameworks are being developed to help them structure choices across a range of different types of intervention activities, including education and advice (Black, 2008b).

'Risk-based regulation' is a complex hybrid of inward and outward focuses. Inwardly, it is directed at the regulator's own risks, arising from its legislative objectives as it interprets and perceives them. This inward-looking orientation has a number of consequences, not least, as discussed below, a dissonance between the regulator's understanding of 'risk' and that of the firm, or indeed the wider public. However, in attaining those goals, or preventing the risk of their non-attainment, risk-based regulation is not focused inwardly on what the regulator may do or fail to do, which is the usual focus of risk management systems (e.g. on its own operational risks, IT risks, financial or human resources risks) (e.g. COSO, 1991; Power, 2007), but outwardly, on what the regulated firms may do or fail to do which would prevent or exacerbate those risks.

Risk-based frameworks are gradually diffusing across different regulators, and there has been a significant increase in the use of risk-based frameworks for inspection and supervision in a range of countries and across a number of sectors, by both state and non-state regulators (for review see Black, 2008b; IOPS, 2007; Brunner, Hinz, and Rocha, 2008). A number of regulators in different parts of the UK have been developing 'risk-based' systems of this general nature for some years. The Food Standards Agency for England and Wales, the Environment Agency in England and Wales, and the Financial Services Authority have separately been developing such systems since 2000. They are not alone: financial regulators in Australia, Canada, Hungary, France, and the Netherlands all have been developing risk-based systems of supervision. In the environment sector, regulators in Ireland, Portugal, and the Netherlands have been doing the same (Black, 2008b).

Risk-based frameworks are acquiring similar features. They all involve a process of identifying and prioritising the risks that the regulator will focus on, which requires a determination of both its objectives and its risk appetite; an assessment of the hazards or adverse events occurring within regulated firms and the regulatory environment which relate to the ability of the regulator to achieve its objectives, their probability of occurring, and the nature of their likely impact; and the assigning of scores or rankings to regulated firms on the basis of these assessments. How the regulators construct the scores varies quite significantly, as does their organisational response to them. Most attempt to direct their inspection and supervisory resources to the firms identified as being the most high risk. Some also link the deployment of their enforcement resources into the same framework (i.e. they are more likely to take formal enforcement action against high-risk firms), but not all take this approach (for discussion see Black, 2008b). They often serve other functions as well, discussed in part below, but this is one of their main roles.

Although the precise reasons for each regulator to adopt a risk-based approach are obviously unique, research to date suggests there is a common core of motivations (Black, 2005b; IOPS, 2007; Hutter and Lloyd Bostock, 2008; Rothstein, Huber, and Gaskell, 2006). These are broadly functional, organisational, environmental (in the broadest sense), political, and legal.

First, regulators have turned to risk-based frameworks in an attempt to improve the way in which they perform their functions. They have adopted risk-based frameworks in an attempt to facilitate the effective deployment of scarce resources and to improve compliance within those firms which posed the highest risk to consumers or the regulators' own objectives. Risk-based frameworks are also adopted to improve consistency in supervisors' assessments of firms, to enable regulators with broad remits to compare risks across a widely varying regulated population within a common framework. More broadly, risk-based frameworks are being adopted as part of a more general desire by regulators to become more 'risk aware' and less rule driven in their activities.

Second, risk-based frameworks have been adopted to address a range of internal organisational concerns. In particular, they have been introduced to provide a common framework for assessing risks across a wide regulatory remit, and to deal with mergers of regulatory bodies. They have also been seen as a way in which to improve internal management controls over supervisors or inspectors. In federated structures, where the regulatory regime is split between central government and local authorities or municipalities, risk-based frameworks are also used to provide a framework for central government control. An example here is the risk-based frameworks for inspection issued by the UK Food Standards Agency with which local authorities in England and Wales have to comply.

Third, risk-based frameworks have been adopted in response to changes in the market and business environment. For example, banking regulators started developing risk-based systems in tandem with an increasing preoccupation within banks in using risk-based assessments for their own internal purposes. Food regulators in the

USA point to the introduction of HACCP (hazard analysis and critical control points) as facilitating the introduction of a risk-based inspection system (FSIS, 2007).

Fourth, the political context can be highly significant. Risk-based frameworks have been adopted in response to previous regulatory failures, and to provide a political defence to charges of either over- or under-regulation by politicians, consumers, the media, or others (Black, 2005a, 2005b). More generally, having a risk-based framework has increasingly become a badge of legitimacy for a regulator. Risk-based systems are a key part of the 'better regulation' framework, and as such are a core attribute that regulators need to possess.

Finally, as risk-based regulation becomes seen as a functionally efficient tool for improving regulation, politicians and others are increasingly requiring regulators to adopt such frameworks by law. In the area of food safety, for example, EC regulations require that inspections be carried out on a 'risk basis' (EC 882/2004). In the UK, regulators are now subject to new statutory duties of 'better regulation' set out in the Compliance Code. These include the requirement to adopt a risk-based approach to inspection (BERR, 2007).

In practice, however, resources do not always follow the risks in the way that the framework would suggest. This is partly because resources take time to shift. But it is also because of the vagaries of the political context. As argued above, regulators need a political licence to operate. Consequently, the higher the political salience of a sector or risk, the less will be the regulators' tolerance of failure in that particular area. The political context is often fickle, however; issues that were not salient suddenly become so, and vice versa. This has consequences for the allocation of resources, which may not always go where the risk model says they should. Risk-based frameworks also have implications for accountability, for regulators are making decisions as to which areas of their legal remit they will focus their resources on achieving, and which they will not. Regulators have always made these decisions, but the adoption of explicit, published risk-based approaches makes them more obvious. Paradoxically this increased transparency prompts more questions about the accountability of risk-based decision-making than the implicit and thus more opaque decision processes that preceded it.

14.5 Risk, Accountability and Evaluation

The fourth key role that risk plays in regulatory processes is that it structures the terms of regulators' accountability relationships as well as debates on what those relationships should be. To the extent that the objectives and justification for regulation are conceptualised in terms of risk, it is a logical extension that

regulators should be evaluated in terms of their success in managing risks, both societal risks and institutional risks. Indeed, Fisher has argued that risk is a 'regulative' concept in the context of public administration, in that it acts as a way of both constituting and limiting public administration. Defining the activities of public administrators and regulators in terms of risk dictates what they should do and how they should do it (Fisher, 2003: 464, 2007).

The focus on how others use risk to evaluate regulators and hold them to account is an important observation, but risk is not just being used as something external to the organisation which is imposed on it as a regulatory framework. Alternatively or in addition, regulatory organisations are themselves using risk, or more particularly institutional risk, to provide the basis for the development of instruments of internal accountability and evaluation. This section therefore looks at how regulators use risk to perform control and accountability functions within their own organisations; how others use risk to 'regulate' regulators, evaluate them, and hold them to account; and the 'risk–blame' game: how regulators seek to employ 'risk' to define the terms on which others should make them accountable, or the terms on which they should be blamed.

14.5.1 Risk, internal control, accountability and evaluation

Regulatory organisations themselves are using risk, notably institutional risk, and processes based on the management of institutional risk, as instruments of internal accountability and evaluation. A clear example of this is the systems of risk-based regulation which have been or are being adopted. As discussed above, regulators' motivations for adopting 'risk-based approaches' to regulation are clearly varied, but a common theme is that they serve several key management functions. For example, certain types of risk-based systems, notably those where the risk assessments are performed by supervisors, are also characterised by systems of internal accountability in which the risk assessments that individual supervisors make of the firms for which they are responsible are subject to internal validation and challenge (Black, 2006, 2005a, 2005b). Regulators also use their own risk-based frameworks as a method of evaluating their performance. Thus they look at the movement of firms between risk categories as evidence of regulatory performance, and concomitantly targets are set by reference to firms' movement from 'high' to 'low' risk categories. Risk-based frameworks of evaluation and accountability are thus not just imposed on regulators by others, but are deliberately chosen and developed by regulators themselves.

14.5.2 Risk, external control and accountability

Risk has a role in structuring the accountability relationships that regulators have with those outside the organisation, including central government. Governance functions are distributed across a wide range of state and non-state bodies, but one of the striking developments of the last decade has been the extent to which central government has sought to exert control over the increasingly 'hollowed out' state. Functions within the state have been dispersed away from central government and departments; and there is a strong 're-centring' trend in which central government seeks to regain control over these dispersed dominions (Black, 2007). In many areas, the terms on which regulation inside government is being conducted are increasingly based on risk. The range of internal guidelines on managing societal and institutional risks was noted above. In addition, as also noted above, regulatory bodies are increasingly being legally required to adopt various 'risk-based' approaches, principally to inspection and enforcement.

Others outside the extended executive hold regulators to account on the basis of their success in handling risks. We have seen above that there have been successive investigations in the UK by parliamentary committees and the NAO into how well government manages risk, both societal risks and institutional risks. The management of risk is used as a benchmark by which to evaluate success or otherwise of the regulator—how good was it in targeting the 'right' risks? Were its policies and practices based on sound scientific evidence? Did it manage risks proportionately and successfully? Unfortunately for regulators, as risk is an inherently unstable basis for either justification or evaluation, these assessments are contested, shifting, and often contradictory. As noted above, criticisms of 'the nanny state' and 'health and safety gone mad' usually sit alongside demands that 'something must be done' to protect people from any number of risks.

The role of risk in providing the object of and justification for regulation has far more fundamental implications for accountability, however, than the requirements on regulators to adopt certain policies and internal practices. The contestability of risk may be problematic for policy makers, providing a constantly shifting and unstable basis for policy decisions, but that very contestability opens up the policy process, providing a route in for those outside the normally closed world of regulatory and governmental bureaucracy. Whereas the tight prescriptions of economics close down debate, the contested concept of risk opens them up.[14]

As argued above, the very acts of identifying and assessing risks have become inextricably intertwined with questions of accountability and participation. Furthermore, the work of social psychologists on the existence of and reasons for different perceptions of risk has begun to penetrate policy making (e.g. BRC, 2008; RRAC, 2009). At its extreme, this creates a presumption that in certain policy areas, a scientific risk assessment may be simply politically irrelevant, as it does not accord with public perceptions of risk. More frequently it prompts a recognition that responses to risk cannot be determined by experts alone. The uncertainty that characterises many decisions, the potential for catastrophic or irreversible consequences, and mistrust of governments and scientists have all led to calls for improved communication about risk and for increased public participation in decisions on how to manage societal risks. Participation is normatively justified in

a democratic society; it can have instrumental value for the regulator, legitimising decisions and increasing trust, and substantive value, improving the decision or outcome (Fiorino, 1990; Pidgeon, 1999a, 1999b). Of course, it can also delay policy development, reveal and exacerbate conflict, and be merely window dressing, having no impact on the substantive decision. Nevertheless, the mantra of the need to have public participation in decision-making is greater with respect to regulatory policies relating to risks than it is in almost any other area.

In the UK, the triggers for a fundamental shift in government attitudes were the BSE crisis and the debates on GMOs (genetically-modified organisms). Reports into both were clear that there was a fundamental lack of trust in policy makers (Phillips, Bridgeman, and Ferguson-Smith, 2000; House of Lords Science and Technology Committee, 2000). Other countries have come to similar conclusions (e.g. US National Research Council, 1996). The lessons were clear, and prompted the recognition that there needed to be far greater public engagement in decisions about some types of risk, notably complex catastrophic risks arising from new technologies. It was therefore unsurprising that the Royal Society report on nanotechnology emphasised that there had to be public engagement early on in the development and introduction of technological innovations if they were to be accepted by the public (Royal Society, 2004).

Recognition of the need for greater public engagement has led to the creation of new legal rights, and to the development of active participatory processes of policy making. Environmental regulation has been the area where the greatest advances have been made in securing legal rights to participation in policy making. The Aarhus Convention which opened for signatures in 1998, and was ratified by the EU (and UK) in 2005, provides the public with rights of access to information, public participation in decision making, and access to justice with respect to environmental matters (UNECE, 1998; on implementation see, e.g., Defra, 2008; IEMA, 2002). Policies and practices for public involvement have also been developing in a wide range of countries. These include stakeholder forums, citizen's juries, consensus conferences and discussion groups, or initiatives such as the UK's GM Nation (see, e.g., Fischoff, 1995; Horlick Jones *et al.*, 2006; Taylor-Gooby, 2006).

There remains a tension in both the practice and debates on public participation, however, between those who consider the task to be to improve the public's understanding of science, and those who consider the task to be to improve scientists' understanding of the public (see, e.g., Irwin and Wynne, 1996; Fischoff, 1995; Royal Society of Arts, 1992). The development of more participative models of engagement suggests that policy makers have recognised that the task is to do more than have a one-way communication from scientists to the public, in which the public become properly educated about risk. It is to foster a dialogue between scientists and various groups within civic society as to how best to manage societal risk (see, e.g., Renn, 1992; Fischoff, 1995; Black, 1998).

Fostering dialogue is a laudable aim but deliberative processes face fundamental difficulties, not only practically but because finding a common language in which to talk about risk can be extremely challenging (see, e.g., Jasanoff, 2003; Black, 2000, 2001). Moreover, there is some scepticism as to the utility of the various participation exercises which have been conducted. Problems tend to include lack of expertise by participants, weaknesses in the design of the participation methods, the different framing of the issues by policy makers, experts, and representatives from the public, lack of mutual trust, the representativeness of those members of the public participating, and the difficulties in resolving the tensions as to who should be doing the understanding, scientists or the public (see, e.g., Horlick-Jones *et al.*, 2006; Pidgeon *et al.* 2005; Irwin, 2006; Black, 1998; Fischoff, 1995).

However, the debate on participation is about more than who should be listening to whom, and the practicalities of how the conversations should occur. Rather, it goes to the heart of the legitimacy of risk regulation. Indeed, Fisher argues that debates on the accountability of risk regulators reveal a tension between two paradigms of what constitutes 'good' public administration: deliberative-constitutive and rational-instrumental, which in turn embody different conceptions of risk (Fisher, 2003, 2007). Under the rational-instrumental paradigm, risk is perceived as something that can be ordered, managed, and controlled, and so regulators can implement their legislative mandates in an objective, rational, and efficient manner without exercising 'excessive' discretion. Accountability mechanisms such as regulatory impact analysis, risk assessments, and post-hoc constitutional accountability structures will ensure the decision-maker is kept within its appropriate boundaries. Under the deliberative-constitutive paradigm, risk is a highly contested concept, and regulators are required to have extensive discretion; regulators must be semi-independent political institutions, creating, expressing, and realising public purposes. Accountability processes have to ensure that the regulator is engaged throughout that process in active and iterative deliberation with a wide array of participants. Each in turn is associated with, and requires, a different legal culture of adjudication and relationship between the courts and the administration. Disputes as to whether 'lay people' or experts should make policy decisions on risk are thus not about epistemology, or even about risk, but about the appropriate role and legitimacy of the public administration, i.e. regulators, in regulating risk.

14.5.3 Risk, external accountability and managing the parameters of blame

Disputes about accountability are thus intrinsically linked to disputes about legitimacy. However, we need to recognise that regulators can attempt to define the terms of their accountability and to create and manage their legitimacy. In this context there is a third role that risk plays in structuring accountability relationships. Regulators use their risk-based systems in an attempt to define the terms on which they should be made accountable, and in effect to define the parameters of

blame. This is a complex process, critical to which are the association of risk with blame, and the dialectical nature of accountability relationships.

Take, first, the nature of accountability relationships. Most debates on accountability see the regulator as the object of attempts made by others to render it accountable. In those debates, the regulator is usually assumed to be passive—just as firms are often assumed to be passive actors in debates on how they should be regulated. But regulators are not passive in the face of accountability claims, just as firms are not passive recipients of regulatory edicts (Black, 2008a). In the context of risk, regulators are asking, implicitly or explicitly, that they should be assessed on a 'non-zero' failure basis: that they should not be expected to prevent every negative occurrence in the regulatory system, and, concomitantly if less explicitly, that they should not be blamed for all those that occur (see, e.g., Davies, 2005).

There is, of course, the potential for dissonance between the regulators and the wider polity as to the level of risk that is acceptable. Some regulators attempt to 'manage' this risk of dissonance by factoring in public perceptions and the risk of damage to their own reputation in the risk indices used in their risk-based frameworks and in allocating their inspection resources. The Food Standards Agency, the Health and Safety Executive, and the Environment Agency (England), for example, deliberately take into account public perceptions in allocating inspection resources and believe they would be heavily criticised if they cut back inspection activity. This has a significant bearing on the allocation of their resources. The Health and Safety Executive and Environment Agency, for example, believe that after their preventive work, the public expectation is that they will investigate and prosecute companies in the wake of accidents or pollution incidents, and indeed the Health and Safety Executive spends over half its front-line regulatory resources on accident investigations (NAO, 2008). The UK Pensions Regulator includes public perceptions in its definition of risk: 'risk [is] that we may be perceived as not making a difference' (TPR, 2006: 50).

Regulators' attempts to manage the terms on which they should be made accountable are linked to their attempts to manage their legitimacy. Most debates on accountability posit certain legitimacy criteria against which regulators should be assessed, and which, implicitly, those accountability claims should be directed at validating: efficiency, due process, democratic participation, and so on. The assumption is frequently that regulators are there as passive objects to be 'rated' on some form of legitimacy scorecard. However, again, regulators are not passive in their relationship with their evaluators. Regulators can and do attempt to build their own legitimacy, and do not wait passively for it to be 'endowed' upon them by others (Meyer and Rowan, 1977; Black, 2008a).

Regulators can attempt to manage their legitimacy in a number of ways. They can attempt to conform to legitimacy claims that are made on them; they can seek to manipulate them; or they can selectively conform to claims from among their environments, or legitimacy communities, conforming to claims of those that will support them (Suchman, 1995). Accountability is a way for those assessing the legitimacy of a regulator to validate their legitimacy claims, to ensure that the regulator is acting efficiently, or fairly, or in conformity with whatever legitimacy claim is being made. What we are seeing in the emergence of risk-based approaches is that regulators are attempting to define the terms of those accountability relationships, and thus, at least in part, of their legitimacy. The risk-based frameworks are being used in an attempt to define the parameters of responsibility and to reshape public and political expectations of what the regulators should be expected to achieve, what risks they should be expected to minimise, and to what level.

In order to see how the dynamics of accountability and legitimacy work in this context, we need also to understand the association of risk and blame (Douglas, 1992; Douglas and Wildavsky, 1982). Which risks should be selected for attention and which should not is bound up with which risks are considered 'normal', and which are not. Insofar as risk-based frameworks are defining what levels of risks are tolerable, they are attempting to define which risks should be politically acceptable, and which should not. Those that are not tolerable are 'blameworthy' risks; those which are tolerable should result in no blame when they occur. In this sense, the development of risk-based frameworks could be seen as another technique adopted by a bureaucracy to shift or dissipate blame (Hood, 2002). But here, the risk-based framework is not being used to shift blame so much as to articulate and define when it should be accepted at all. In many instances, regulators have adopted risk-based approaches to regulation in an attempt to provide a defence to politicians, the media, the wider polity that they have failed in their task, and that they should have prevented a risk from occurring (Black, 2008b, 2006, 2005a).

The influential cultural theorist Mary Douglas argues that whether decision-makers are risk takers or risk averse depends on their ability to protect themselves from blame (Douglas, 1985: 61). The nature of the 'blame game' is often such that policy makers, and perhaps regulators, are rendered 'too' risk averse. The BRC paper observed, for example, that the incentives for ministers, civil servants, regulators, and front-line inspectors were skewed in favour of attempting to prevent all possible risks. 'The present culture encourages the state—ministers, councillors, officials and regulators—to feel that they must take total responsibility and impose systems to neutralise all potential hazards' (BRC, 2008: 25). It argued that the select committees and the media hold ministers and civil servants responsible for avoiding risks and they naturally become increasingly risk averse. The BRC reported that most of the senior officials they spoke to were sceptical that, in a select committee hearing, they would want to rely with any confidence on a defence that 'at the time, this looked like a manageable risk and I decided to take it' (BRC, 2008: 23–6).

The importance to the agency of maintaining its legitimacy, its social and political licence to operate, is clear in the operation of all the risk-based systems investigated to date. But the actions it has to take are often unclear and contradictory. Calls from politicians, businesses, and the public to 'reduce red tape' or 'roll back the nanny state' usually run parallel to calls that 'something must be done'. Despite the rhetoric of 'regulatory burdens' there are some risks that in political terms a regulator simply cannot leave alone, regardless of the probability of their occurrence or their impact. As one commented, 'events force you up the probability curve'. The higher the political salience and demands for regulatory intervention, the lower the probability level at which the regulator will intervene. Risk is critical, but it is the political risk which is critical in determining a regulator's risk appetite and its risk tolerance, and thus the allocation of regulatory resources; regardless of what the impact and probability studies would otherwise indicate.

Summary and Conclusion

Risk thus plays a critical role in constituting and shaping regulatory processes, or at least state-based regulatory processes. Has the regulatory state (Majone, 1994, 1997; Moran, 2003) become the 'risk regulatory state'? I would suggest that it has not. Totalising labels are in any case likely to be inaccurate, as they admit of no nuances and no exceptions. In this case, despite the significant role of risk in constituting, framing, and structuring regulatory mandates, regulatory processes, and accountability relationships, regulation is not just about risk. Not all of regulation can be characterised, or indeed characterises itself, in terms of risk, or at least it only does so if risk is so broadly defined to describe every policy the state pursues, in which case the label is descriptively accurate but analytically useless. The narrative of economics is still dominant in certain regulatory domains and even in the risk domain, economics re-enters the frame at the second-order level in the form of risk–benefit analyses.

Risk does however play a significant role in regulatory processes. This chapter has identified four main roles: as providing an object of and justification for regulation (and thus defining regulatory mandates), and as constituting and structuring regulatory processes and accountability relationships. However, the risks that are in question shift often imperceptibly between societal and institutional risks, notwithstanding the differences between the two.

The nature of risk means that the roles that it plays in regulation are at once a source of and response to the difficulty which risk poses for policy makers. Risk, by its nature, is related to uncertainty and anxiety. Risk is emotive, culturally constructed, and culturally contested. The highly politicised and contested nature of debates on risk poses governments the problem of how to rationalise or stabilise decision-making on questions such as: which risks to select for attention, how much attention to give them, of what nature, and who should be involved in making those decisions. These problems are enhanced when the normative boundaries of the state are themselves defined in terms of risk.

In an attempt to stabilise decision-making, governments and regulators have attempted to devise decision-making principles and procedures which will render risks calculable and commensurable. In Power's terms, risk managers, including by extension governments and regulators, confront uncertainty by trying to organise it (Power, 2007). The stability provided by the institutional and organisational devices which policy makers attempt to construct is ultimately fragile, however. For as trust in scientific experts and government declines with respect to particular risks, this creates chinks in the walls of the risk bureaucracies, chinks through which the unruly forces of public participation can creep. Framing policy in terms of risk, combined with the political recognition that many decisions on complex risks require public engagement, has significantly boosted the cause, and extent, of public engagement. But public participation can itself be destabilising, running counter to the rationalising attempts manifested in risk management policies and procedures. Not surprisingly, the bureaucratic response has been to try to structure participation in the policy-making process as well, both cognitively and procedurally, but not always successfully. Further, in structuring their internal processes, of policy making, or monitoring and enforcement, governments and regulators have more recently turned to risk-based processes in an attempt to manage organisational discretion and behaviour, both their own and that of others, thus attempting to regulate regulation through risk. However, again, contestation is inevitable as to the choices which are made. Ultimately, for both governments and regulators, regulating risk is a risky undertaking.

Notes

1. Here my use of the phrase differs from Fisher, who uses it to refer not to that part of the regulatory state which is concerned with risk, but more narrowly to the specific controls which are imposed on regulators and policy makers in the name of risk (Fisher, 2008a).
2. In a spate of institutional reshuffling following the Hampton Report (Hampton, 2005), in 2007 the powers of the Authority were transferred to the Health and Safety Executive; however the Health and Safety Executive's responsibilities were then contracted back out to the same organisation, which was now renamed the Adventure Activities Licensing Service. AALS, *Interim Notice*, undated, available at http://www.aals.org.uk/documents/ImportantNotice.doc.
3. Environment Act 1995, s. 4(1). The full statement is 'to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development'.
4. However, even in the 'known knowns' there may be statistical uncertainties (Stirling, 1994).
5. Sometimes referred to as 'fuzzy' uncertainties (Stirling, 1994).

6. It should be noted that whilst the following sections separate out the processes of selection and perception, assessment, and response, these do not necessarily happen in linear stages but are intertwined.
7. Which whilst raising the risk of pancreatic cancer may have curbed the risk of liver cancer—so as a choice of beverage it seems pretty evenly balanced.
8. Respectively the European Environment Agency, the European Medicines Agency, the European Chemicals Agency, and the European Food Safety Agency.
9. Regulation (EC) 178/2002 (food safety) establishes the following requirements for the application of the precautionary principle in food safety cases: (1) risk assessment, (2) possibility of harmful effects on health although scientific uncertainty persists, (3) provisional measures, (4) proportionality (no more restrictive of trade than is required to achieve the high level of protection chosen; the measures adopted must be technically and economically feasible), and (5) a high level of health protection.
10. For discussion of the use of statistics to play a comparable rationalising and legitimising role in governance more broadly, see Porter (1995).
11. See DBERR, http://www.berr.gov.uk/deliverypartners/list/rrac/index.html. The RRAC was established as a result of two reports by the Better Regulation Commission on risk (BRC, 2008).
12. See http://rrac.intelligus.net/portal/site/rrac/bigquestions/ (accessed 16 June 2009). The three questions are, 'What is a nanny state? Has the UK gone too far? How much freedom are you prepared to give up for protection by the government?'; 'Risk is a part of life. How much personal responsibility should you take for the risks you face?'; and 'Should there always be someone to blame when things go wrong? Do accidents "just happen"?'
13. Subject to the discussion above on the relationship between the narratives of risk and economics in providing the object of and justifications for regulation.
14. Or more specifically, it is the political recognition that risk is a contested concept which provides the opening. See also Jasanoff (2003).

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CHAPTER 15

ACCOUNTABILITY IN THE REGULATORY STATE

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15.1 INTRODUCTION

Over the last quarter of a century and more, claims about the essential desirability of accountability—the obligation to explain and justify conduct to some other party (see Day and Klein, 1987: 255)—and the particular forms it ought to take have been at the forefront of debates in public law and political science, and in the social sciences more generally. Thus for Tony Prosser the task of the 'critical' public lawyer is to:

> ... flesh out the concepts of participation and accountability and evaluate existing institutions against them, whilst at the same time attempting to establish the conditions for their realisation.
>
> (Prosser, 1982: 13)

Bruce Stone, a political scientist, raises 'questions how different accountability systems are chosen and combined to maximise accountability without impairing the effectiveness of different sorts of administrative work' (Stone, 1995: 523).

Meanwhile, an accountant, Michael Power (1997) puts forward the view that the United Kingdom has become a society fixated with the rituals of account-giving, arguing that the practice of auditing is unlikely to live up to expectations of accountability, especially when extended beyond its origins in the field of financial accounting.

In the era of privatisation, such concerns were quickly carried over into the privatised utilities, and into the regulatory arrangements put in place for their oversight and supervision, with some diagnosing a 'crisis' of regulatory accountability (Graham, 1997; also Prosser, 1997). But the developments of the last quarter of a century present more than an additional venue for the rehearsing of well-worn debates among lawyers, political scientists, and others. Two characteristics of the regulatory state in particular give rise to concerns that go beyond the age-old problem of holding public authorities to account:

(i) The importance placed on insulating regulatory decision-making from 'improper' political and industry influence.
(ii) The essential *plurality* of regulation, with the variety of its forms and venues, and the actors which shape regulatory decisions and are affected by them.

Each of these characteristics challenges conventional assumptions and doctrines of administrative accountability. In place of concerns about how to make administrators responsive to political demands comes a more nuanced concern about the complex trade-offs between ensuring the fidelity of regulators' decisions to the roles entrusted to them by politicians and the public, ensuring that regulators have appropriate powers and adequate discretion to carry out their mandate effectively, as well as the credibility to retain the confidence of regulatees, users, and others affected by their decisions (see Horn, 1995 for one interpretation of this trade-off). Moreover, the plurality of regulation, emphasised by advocates of a 'decentred' or 'polycentric' perspective on regulation (Black, 2001; 2008), naturally leads to a much-expanded set of answers to *who, to whom*, and *for what*, questions about the accountability of regulators and regulatory regimes.

While debates about the accountability and especially those relating to the two features of the regulatory state outlined above are amenable to analysis, they are ultimately contestable 'trans-scientific' issues which go to the root of how as a society we apportion responsibility (and blame). Rather than advancing any particular view regarding how regulators should be held accountable, we suggest that debates require greater awareness of the various components of regulatory regimes and the existence of a diverse, but nevertheless finite set of instruments that are inherent in any institutional design. Accountability in regulation will never reach a state of 'perfection' and stability, but will remain, given competing values and shifting priorities, in a state of continued tension and fluidity. In other words, debates require transparency regarding the very different ideas concerning the appropriate means and ends of accountability.

The chapter develops this argument in three steps. First, it considers the background to contemporary debates surrounding accountability, pointing to traditional concerns as well as to a change in context captured by discussions about 'polycentric' or 'decentred' regulation. Second, this chapter points to key components of any regulatory regime over which demands of accountability are commonly asserted, and to four ways of considering institutional design and accountability. It highlights the importance of looking at the compatibility of different logics of accountability. Third, and finally, this chapter suggests that debates on whether the rise of the regulatory state has led to a decline or rise of accountability and transparency are misplaced. Rather we should be interested in looking more closely at the continuous 'remixing' of various accountability tools and thereby enhance clarity as to what is supposed to be held accountable and how often suppressed assumptions shape argumentation regarding accountability and transparency. For the world of practice, this means that we should be interested in the quality rather than the mere existence of formal accountability mechanisms and to identify their prerequisites and limitations.

15.2 Accountability in the Regulatory State: The Old and the New

Any attempt to find the 'core' or the 'essence' of accountability is likely to be plagued by the plurality of interests and ideas that surround this concept. Standard dictionary definitions suggest that 'accountable' is linked to '(1) responsible; required to account for one's conduct. (2) explicable, understandable.' Indeed, the history of accountability as part of government is linked to the word's French origins as 'aconter', the official registration and accounting of property. In that sense, tax registers, financial disclosure requirements, and other similarly standardised monitoring devices are the instruments of accountability, traditionally understood. In modern parlance, accountability more commonly signifies the obligation of officials to account for their behaviour, rather than the duty of private parties having to account to public authority (see Bovens, 2007).

Contemporary debates are further complicated by the addition of 'transparency' into many of those discussions traditionally reserved to the idea of 'accountability'. According to dictionaries, 'transparent' is defined as '(1) allowing light to pass through so that bodies can be distinctly seen. (2a) easily seen through; (2b) easily discerned; evident; obvious. (3) easily understood; frank; open.' Originating in the Latin 'transparere' ('to shine through'), the idea is encapsulated in Bentham's famous canon that 'the closer we are watched, the better we behave'. In contemporary parlance, accountability is often associated more with the 'reporting' duties, whereas 'transparency' offers 'visibility', such as the publication of all procurement contracts on the Internet and such like. However, what unites both of these terms is a concern with the use of discretionary (private and public) authority—and therefore we use them interchangeably.

15.2.1 Traditional concerns

The concern with the discretionary powers of regulatory (and usually non-majoritarian) institutions has been a long-standing one, with important antecedents in the contending views of Mill and Bentham on whether responsibility for public services should be vested in committees or in 'single-seated functionaries' (see Schaffer, 1973). Classic debates have been heavily dominated by the US experience, and the early British and European literature is influenced by North American concerns (for example, Baldwin and McCrudden, 1987). This has been the case even (as in Hancher and Moran, 1989) where the intention was to draw contrasts as much as similarities.

A central preoccupation within the literature on the US-regulatory state since the late 19th century has been the delegation of legislative and executive power, and the mechanisms for the control of the discretionary power arising from such grants of authority. This literature emphasises elections, hierarchical reporting, and the impersonal application of rules, with the development of a substantial literature on the formal ways through which administrative bodies account for themselves. Devices for achieving regulatory accountability included reporting duties, oversight by the legislature and the use of rewards and punishments to ensure responsiveness to political demands. The modern literature on the effects of structures and processes on the political control of administrative agencies (McCubbins, Noll, and Weingast, 1987, 1989) has its roots in this perspective. This latter discussion also extends to those accounts that stress the importance of establishing devices that provide credibility in the face of time-inconsistent policy preferences. If delegation to non-majoritarian agencies is seen as a strategy for impeding policy-makers from giving effect to their short-run preferences, then improved accountability (and, hence, responsiveness) 'upwards' may even undermine the effectiveness of regulation (see Levy and Spiller, 1994).

The vertical relationship between democratic government and independent agencies has attracted considerable and changing debates among administrative lawyers, especially in the United States. Initially, regulatory agencies were first seen as a technocratic and 'clean' (i.e. non-political) device, insulated from the factional politics of Congress and the Presidency, and also capable of bringing to bear greater professional expertise than the judiciary.[1] However, concerns were soon expressed with the growing discretionary powers of these administrative bodies. For example, the 1937 Brownlow Commission warned about regulatory commissions being an unaccountable 'fourth' branch of government. While the subsequent political science literature fretted over the possible biases of regulators, *in extremis* the 'capture' of the regulator by the regulated industry (Bernstein, 1955), administrative lawyers turned their attention to how the discretion of regulators could be constrained within substantive and procedural limits, and made accountable for their decisions. Trial-type hearings, notice-and-comment provisions, internal review procedures, as well as judicial review were advocated as providing an appropriate compromise between agency expertise and accountability. The influence of this approach can be seen in many pre-war regulatory statutes, as well as in court decisions of the time. The triumph of this approach arguably only came with the enactment of the Federal Administrative Procedure Act in 1946. During the period of 'social regulation' in the US, discretion was increasingly checked by 'hard look' judicial review (see Rodriguez, 2008). The trend towards increasingly 'hard look' judicial oversight waned during the 1980s. The *Chevron*[2] decision in particular, has been seen as restoring an earlier emphasis on the professional expertise of administrators, requiring a reviewing court to defer to the agency's interpretation of its legislative mandate, thereby restricting lower court's authority in reviewing regulatory agency decisions.[3] In the context of accountability, this judgment was seen as asserting the idea of accountability of agencies, as part of the executive, to the President.

A number of theoretical developments went hand-in-hand with the application of notice and comment requirements and other participatory devices of 'regulatory democracy' (Cuéllar, 2005). These developments sought to articulate the means to reassert control over regulatory agencies, but also represented, to some extent, a shift away from the pluralist view of regulation as the outcome of interest group politics towards an emphasis on the 'rational' assessment of instruments (see Rose-Ackermann, 2008). In particular, the principal–agent perspective changed views regarding the possibilities of control, the utilisation of different types of instruments to hold to 'account', the impact of judicial review, and rival views as to whether conflict was exercised through 'presidential' or 'congressional' dominance (Epstein and O'Halloran, 1999; McCubbins, Noll, and Weingast, 1987; McCubbins and Schwartz, 1984; Moe, 1984).

The adoption of formal 'cost–benefit' testing of regulation has been advocated as a procedural way of enhancing the 'rationality' of rules, while ensuring accountability (in practice, to the executive branch) for the broader economic impact of regulatory decisions. Accountability is obtained by informing decision-makers as to what is the appropriate ('rational') option (McGarity, 1991; also Baldwin, 1995: 193–9). Conversely, critics such as Peter Self (1972: 212) have argued that, far from making decisions more transparent, a reliance on cost–benefit analysis serves only to make the decision-making process impenetrable to all but special interests, while also establishing particular biases. Following the argument of increased 'rationalising' of rule-making through procedural devices, ideas regarding 'regulatory impact assessments' and 'regulatory budgets' flourished throughout the 1990s and 2000s as devices to control bureaucratic and political regulatory 'instincts'. At the same time (anticipating our argument to come) the application of cost–benefit testing of regulation in the United States and elsewhere arguably reflected a particular, contestable understanding of rationality.

15.2.2 The 'new' context of the regulatory state

While neither the practice nor the analytical discussion of polycentricity in regulation is a recent discovery (Hancher and Moran, 1989), the wider context of regulation has changed considerably over the past 30 years. Without claiming to offer an exhaustive account, we point to three key changes that made discussions regarding accountability more pertinent, both in terms of accentuating existing debates and in terms of challenging traditional understandings of regulation. Each of these three contextual elements links accountability issues regarding legitimacy, ensured integrity of decision-making and enhanced performance, with 'contemporary anxieties' (Mashaw, 2005: 15; Mulgan, 2004).

First of all, the contemporary era of the regulatory state raises a number of distinctive issues that go beyond traditional concerns (see Yeung, 2010; Lodge, 2008; Lodge and Stirton, 2006). The 'regulatory state' is characterised by privatisation and marketisation of public services (regardless of the widespread 'nationalisation' of banking sectors that occurred during the autumn of 2008), the rise of non-majoritarian regulatory bodies, as well as a greater degree of formalisation of relationships between actors within a regulated policy domain (Loughlin and Scott, 1997). While long-standing concerns in the North American context, these policy trends challenge traditional notions of accountability (at least in the setting of liberal democracy). They are said to signify the 'hollowing out' of the state, requiring additional elements to the traditional components of accountability, usually signified by reporting duties to parliamentary bodies, if not by the idea of political responsibility over distinct public service activities.

The idea of privatised public services has been seen by some as a direct challenge to social citizenship rights that emerged in the context of the post-Second World War welfare state, at least in (West) European states. In addition, the creation of 'regulatory bodies' proved to be problematic for the traditional legal understandings of administrative structures (and their implicit accountability requirements). Such difficulties of formal standing became further confused with the rise of novel legal constructs, such as the one chosen for the British communications regulator Ofcom in 2003. However, the rise of these agencies also raised in a European context concerns about discretionary powers of such supposedly independent regulatory agencies, in particular when it came to issues of balancing economic, social, and environmental objectives. Such concerns can be seen as a direct parallel to the preoccupations that had earlier dominated the North American literature.

While these concerns related to changing relationships between 'government' and 'regulator', the increasingly private nature of public service provision created a new context in which demands for greater accountability were raised. In this new context, the change in emphasis towards 'transparency' in the sense of disclosure requirements is often seen as problematic. According to this argument, the past decade has established a new type of emphasis on performance management, requiring 'accountability' of output measures rather than of inputs and procedures. According to critics, this emphasis has led to a reduction in accountability, especially as the favoured devices are said to reduce public involvement and undermine 'positive' definitions of accountability that stress the importance of individual attitude rather than a reliance on quantifiable output measures.

Second, the diversification of regulatory arenas in terms of reliance on self- (or co-) regulation, the rise of international standards, whether negotiated through international organisations by national states or by international industries themselves (for example, the Forest Stewardship Council), and the rise of bodies with international reach or the international agreement by private parties on binding standards, indicate that regulatory authority is fragmented and polycentric (and mandated by varying bases). Such diversification makes problematic any attempt at locating accountability in any one source (Black, 2008).[4]

A particularly pessimistic view of the effects of polycentricity is put forward by Patrick Dunleavy (1994), who argues that contemporary governments are outmatched in terms of expertise and resources by international service providers, not merely because of a lack of financial resources and understanding technical complexity, but also due to a lack of bureaucratic competence in the area of procurement or control. According to this view, the traditional problem of concentrated corporate power is therefore even more problematic in this supposedly globalised era than in the days of 'national' capitalism. While in an earlier era Woodrow Wilson (echoing Bentham's canon) could advocate greater transparency as the regulatory commissions' remedy for corporate misbehaviour—'turn it [light] on so strong they can't stand it. Exposure is one of the best ways to whip them into line' (cf. Cook, 2007: 96)—such accountability requirements ultimately face challenges in an environment that is counter-learning and international. The problem with 'putting on the lights' was particularly prominent during the debates regarding the perceived regulatory failures in financial markets in the mid-to-late 2000s. The financial system was condemned for non-transparent financial and international interdependencies that was further characterised by inadequate instruments of control both from within the banks themselves and from outside, via national regulators.

Third, there are also those who point to the societal sources for the perceived rise in the demand for *more* accountability. Society is said to have undergone a change towards more egalitarian and individualist worldviews, each of them united in their opposition and distrust of authority and official discretion. The tragic consequence of a non-trusting society is that those instruments supposed to address this distrust are likely to jeopardise existing mechanisms rather than advance the overall quality of the regime (see Power, 1997, 2007).

In contrast to those who diagnose a decline of overall accountability and transparency in the context of the contemporary regulatory state, others suggest that complexity and differentiation across levels of government and between private and public spheres have *not* led to a reduction in accountability and transparency. First of all, regulatory activities impose compliance costs on regulated parties. As a result, this means a high degree of likely mobilisation given the lack of an information asymmetry between standard-setters and the regulated (whose experience of the compliance cost of regulation makes them well-informed) (Horn, 1995). Such mobilisation is likely to be partial, given different degrees of concentration of costs incurred across regulated actors. However, the formation of 'fire alarms mechanisms'[5] for salient groups has been considered, as has the co-opting of public interest groups in the regulatory process (see Ayres and Braithwaite, 1992). Some have noted that procedural devices have encouraged regulatory agencies to consult widely and extensively (Thatcher, 1998), while others, following Majone (1994), have noted the technocratic and apolitical nature of regulatory agencies providing for 'credible commitment'. A third view points to the growing redundancy of various accountability channels given greater differentiation among regulators and private and public actors in the provision of public services in the regulatory state (Scott, 2000). Traditional concerns with the discretionary activities of regulatory bodies, prominent since the early twentieth century in the United States, have encouraged the search for procedural evaluation devices, such as cost–benefit analysis, regulatory impact assessments and 'standard cost models' to allow for a greater questioning of administrative decisions, as already noted.

In short, debates regarding accountability in the contemporary regulatory state to some degree echo traditional concerns with administrative bodies, such as regulators, and the exercise of discretion and delegation. At the same time these debates take place under the conditions of polycentricity (in both the vertical and horizontal senses), whether this is the distribution of authority (i.e. to international organisations and non-state organisations) or the transnational nature of corporate power in areas that traditionally were reserved for national states (especially in the area of utilities, such as telecommunications). And debates over whether the regulatory state has led to a rise or decline in accountability, or to a shift from one set of understandings and instruments to another remains inconclusive.

More broadly, these debates point to a wider set of phenomena and contested arguments regarding the qualitative implications of these phenomena on citizenship that go beyond traditional debates. These debates reflect fundamental disagreements regarding the nature of the state, rival understandings regarding democracy and the relationship between the state and markets, as well as the basis of human motivations. And such debates are reflected also in those contributions that discount the continuing centrality of national states in shaping behaviour. Therefore, in the next section we point to the various aspects within regulatory regimes that, while central to these debates are not often articulated. By boiling down the various debates to their distinct grammar, it is possible to suggest that these debates, while plural, are nevertheless of a finite diversity.

15.3 Accountability in the Regulatory State: Doctrines and Tools

Despite the acceptance that authority in any domain is fragmented rather than concentrated in any single agency (of whatever organisational status), the standard response has been to continue the search for 'who is accountable for what, how, and to whom'. In particular, while the administrative law literature (understandably) has concentrated on legal, administrative, and political understandings of accountability, such accounts usually neglect alternative accountability mechanisms, that rely on professional or market-based processes. Related to such questions are the types of obligations that underline such accountability requirements, the type and degree of openness of the forum in which 'account' has to be given and what the purpose of disclosure is (to allow for sanctioning and/or learning, for example) (see Bovens, 2007; Fung, Graham, and Weil, 2007). These questions are then translated into different social contexts, in order to highlight the diversity and potential contrary nature of different accountability and transparency devices (see Mulgan, 2000; Pollitt, 2003; Hood, 2006; Mashaw, 2006). Different devices, ranging from the market, the political to the social, can be discussed in various types of taxonomies and typologies. Such discussions reflect the diversity of accountability and transparency mechanisms and suggest that the quest for the way to hold authority to account is unlikely to be ever fulfilled. Our focus on *doctrines* and *tools* of accountability avoids the temptation to make ever more fine-grained distinctions, pointing instead to a limited repertoire of basic arguments and instruments. We develop this argument in two stages. First we discuss five dimensions of regulatory design which face demands for accountability in any regulatory regime. Second, we point to four worldviews regarding accountability. Given the multiplicity of debates, it is important to go back to the grammar of such arguments and point to the finite nature of arguments regarding diverse accountability mechanisms.

15.3.1 Dimensions of regulatory design

In a polycentric setting those actors that are supposed to give account or whose activities are required to be transparent will vary substantially—and so will the relationships among these actors. As noted elsewhere in this volume, the study of regulation has increasingly utilised the notion of a 'regulatory regime' to highlight that regulatory activities include three essential components, namely regulatory standards, behaviour modification (enforcement) and information gathering components (Hood, Rothstein, and Baldwin, 2001). These three components are essential to keep the controlled system within the preferred subset of all possible states. Elaborating slightly, we can identify five crucial dimensions that require separate analysis and consideration in any discussion of accountability:

(i) the decision-making process that leads to the creation of a regulatory standard in the first place
(ii) the existence of a regulatory standard for affected participants within the regulated policy domain
(iii) the process through which information about the regulated activities is being gathered and how this information is 'fed back' into standard-setting and behaviour-modification
(iv) the process through which regulatory standards are being enforced
(v) the activities of the regulated parties themselves.

These five dimensions stretch any discussion of accountability and transparency beyond the debates that centre on how decision-making is to be made in a visible, reasonable, and justifiable way (i.e. the traditional administrative lawyer's concerns). The advantage of looking at these five dimensions is that it highlights the limited nature of the traditional concentration on the publicness of rule-making. Knowing what has been decided is not a particularly extensive form of accountability (Stirton and Lodge, 2001: 474–7). The other four dimensions highlight the importance of holding the 'information gathering'-component to account, especially given the widely reported failures of regulation that have been associated with failures in information gathering. Equally, the openness of the process through which standards are enforced is seen by many as crucial given the high degree of discretion enforcement involves.

In themselves, these five dimensions already suggest considerable diversity of views as to 'how to' provide for 'appropriate' accountability and transparency. For example, controversies arise as to the level of public engagement in the setting of standards, the degree of openness and 'informed consent' through which information is gathered, the degree of openness of the regulatory actors to outside scrutiny or the degree to which 'frontline regulators' have to account for their activities when it comes to enforcement. Among the cross-cutting concerns across the five dimensions is the extent to which the advocated degree and methods of holding to account should be in 'real time' (i.e. at the time when processes occur) or allow for ex-post scrutiny only.

The five dimensions apply to all kinds of regulatory regimes, whether national or transnational, state-centred or polycentric, and encompass the most traditional command and control type regimes, as well as pure self-regulation. Crucially, they affect different organisations, especially as regulatory activities are fragmented across levels of government. In the case of a typical European state and the field of environmental policy, standards would often be agreed at the EU-level, be transposed at the national level, but requiring 'transposition' at the regional level and enforcement at the local level. Such fragmentation across jurisdictions (and organisations) generates demands for transparency ('level playing field'), and it also raises the issue as to the purpose of particular mechanisms to establish accountability (i.e. we may want to utilise different mechanisms if we regard the European Union as an intergovernmental organisation or as a 'quasi-state').

15.3.2 Four worldviews on accountability in the regulatory state

In order to move towards a better appreciation of both the variety of ways in which institutional design can provide for accountability in the contemporary regulatory state, but also an overview over key arguments and doctrines put forward in debates over the past thirty years, we distinguish between four different worldviews that underline any understanding of what needs to be held to account, by how much, and what sorts of motivations are said to underline actors behaviours. Jerry Mashaw (2006) argues that any understanding of the 'grammar' of institutional design regarding accountability needs to be conscious of the different values that underpin the instrumental value of the public service in question itself. Such a discussion also suggests that there are inevitable trade-offs between any institutional choice given contrasting answers to the traditional questions of being accountable *to whom?* and *for what?* Furthermore, it raises distinct responses to the condition of polycentricity.

This quest for a 'grammar' can be advanced using the framework of grid-group cultural theory (Thompson, Ellis, and Wildavsky, 1990; Hood, 1998). This device allows for a typology to unpack and contrast accounts as to what regimes and instruments are advocated and are regarded as appropriate. As noted, institutional design is neither a straightforward nor a value-free engineering process. And the way we see the world, hold individuals and organisations responsible, and blame them if things go wrong is fundamentally affected by views regarding the 'nature' of the world.

Table 15.1 provides for an overview of the four worldviews, the way they consider 'failure' and hence 'blame', and therefore also how they view appropriate mechanisms to hold regulatory regimes accountable.

The *fiduciary trusteeship* doctrine has been particularly prominent in traditional public administration and administrative law and has also been influential in the study of regulation. It resonates with those who are troubled by the 'public–private divide' (Haque, 2001) that is said to have increased as a result of privatisation policies as well as the growing popularity of 'co-regulation' devices. According to this 'technocratic' doctrine, emphasis is placed on legal and political forms of accountability that make public officials responsible for their actions, either through legal means or through electoral punishment. The implication of this view of bureaucratic rationality is that experts and those in authority inherently 'know best' as information costs and collective action costs are high, but that this discretion needs to be checked against abuse through procedural devices and other substantive checks. Regulatory activities are to be exercised in an orderly and structured way to minimise discretion, thereby safeguarding certainty. Accordingly,

Table 15.1 Four worldviews regarding accountability and regulation

Surprise and Distrust	Fiduciary Trusteeship
- Failure inevitable as life uncertain and actors 'game' - Routine requirements lead to gaming and wear-out - Need to maintain fundamental distrust in discretionary decision-making - Reliance on surprise and unpredictability	- Deviance from existing orders and procedures explains failure - Authority to account for one's actions - Opposition to challenges against established order - Accountability towards and on basis of rules—predictability - Relates to accountability as 'technocracy' ideas
Consumer Sovereignty	**Citizen Empowerment**
- Failure due to personal miscalculation, given basic competence of individuals to take risk - Reliance on individual decision-making - Opposed to prescription and collective decision-making - Relates to accountability as 'market' ideas	- Individuals are corrupted by bad systems and trust in authority - Scepticism of authority and market - Emphasis on professional peer review and decision-making in the 'eye of the public' - Relates to accountability as 'forum' ideas

oversight and review are to be conducted by authoritative and responsible experts with a mandate provide for accountability.

Fiduciary trusteeship views have difficulty in terms of dealing with the messy context of polycentricity and argue that accountability needs to be ensured through mandates and official recognition. In terms of tools, this view emphasises representation; regulatory activity is said to be suitably accountable once it is appropriately justified, especially when in front of an audience of competent representatives. Advocates of *fiduciary trusteeship* related views warn against subject involvement in regulatory deliberations given perceived risks of populism and ignorance, and the likelihood that such involvement will lead to extensive challenges to hierarchical authority.

The *consumer sovereignty* worldview, in contrast, regards citizens as the best judges of their own needs, who should be allowed to take their own decisions (others therefore refer to this view as 'market' (see Mashaw, 2005; Pollitt, 2003). Individuals are regarded as capable of taking informed decisions and therefore the significance of choice or competition is emphasised, with regulation playing a role as facilitator of market processes. As a result, polycentricity does not raise any particular challenges for this worldview as it emphasises the importance of individual choice and self-regulation. Providers of goods and services find it in their own interest to be transparent and accountable in order to increase their chances of survival on the marketplace. Accountability however, need not just be provided by market participants on a voluntary basis, but different degrees of required disclosure of performance components are compatible with this particular view, and may be necessary in some circumstances to prevent 'lemon' choices.

The *citizen empowerment* worldview suggests that the two worldviews noted above offer only limited accountability. Instead, the importance of accountability through 'forum' devices is emphasised (Pollitt, 2003 and Mashaw, 2005: 24 broadly consider related ideas as 'social accountability'). Fiduciary trusteeship-type regimes are opposed as they concentrate power and rely on authority within existing hierarchies, while consumer sovereignty-type regimes are accused of over-emphasising the universal capability of individuals to choose, while regarding markets as desirable social order. In contrast, this worldview suggests that accountability and transparency are about reducing social distance and relying strongly on group-based (or mutuality-based) processes (conceptualised as 'regulatory conversations' by Julia Black, 2002). We can therefore imagine two distinct forms of institutional design, both of which with distinct implications for a context defined by polycentricity. One is based on self- or 'professional' regulatory regimes with strong pressures on members to account for their conduct. The second, a more demanding and overarching 'citizen empowerment' argument emphasises the importance of citizen participation to the greatest extent possible (and arguably beyond mere procedural provisions, such as 'notice and comment' (but see Cuéllar, 2005). This worldview advocates maximising input-oriented participation and the placing of maximum scrutiny ('mandating') of anyone with discretionary power. Such participatory tools not only hold power to account, but they also have a transformative effect on the nature of citizenship (Bozeman, 2002: 148). Consequently, the emphasis of this worldview is on 'voice' in the sense of direct input, 'information', in the sense of being closely involved in each of the five dimensions of a regulatory regime, and also representation, in the sense that it emphasises close control over delegated authority, whether through extensive scrutiny or through other devices, such as rotation. Some observers also place much faith in participatory methods via modern computing devices, although whether the anonymity provided by message boards is a good substitute for the 'face to face' encounters in 'town hall meetings' is questionable.

Finally, the *surprise and distrust* worldview shares with the last two worldviews their scepticism regarding the granting of discretion to actors with delegated powers. This view is however doubtful about the capability of individuals to undertake meaningful choices (and thereby force units to be accountable through the fear of 'exit'), while it also shows scepticism about the possibility of social participatory processes to achieve accountability. Accordingly, those in positions of authority need to be treated with distrust and subjected to constant surprise—thereby offering a distinct take on Wilson's constant light or Bentham's close watch, as already discussed. The argument is that 'good behaviour' will be achieved as those who are supposed to be accountable do not know when they are being watched, or when the lights will 'go on'. One example of such a device is Freedom of Information legislation—given that those in authority do not know what will be unearthed, so it is argued, they have to adjust their behaviour. This particular worldview stresses that the context of polycentricity challenges the possibility and attractiveness of accountability as seen through formal oversight (as advocated by *fiduciary trusteeship* views). Instead, ideas regarding the possibility of redundancy, overlaps, and elements of surprise, such as through 'fire alarms', offer the only way to establish some form of accountability in a polycentric context.

For some, pointing to 'surprise and distrust' as a conscious strategy may seem surprising. Indeed, it is notable how this advocacy of unpredictability is absent in the wider literature on accountability. One reason for this absence could be that this strategy is fundamentally opposed to the view that the (liberal) state is 'transparent' and 'accountable' only if it is rule-oriented and predictable (see Hood, 2006 for this 'rule'-strain in transparency debates). Unpredictability, in contrast, is exactly the kind of strategy widely associated with dictators and despots past and present. However, distrust of those in authority is a viable strategy—although it may not qualify as a distinct view regarding the nature of democracy.[6] Indeed, it is often used as a control method within administrative accountability relationships, for example, prisons, and it is also widely used in aspects of keeping private firms 'accountable', for example in the area of slaughterhouse and meat processing inspections.

Table 15.2 Four worldviews and regulatory regimes

	Fiduciary Trusteeship	Consumer Sovereignty	Citizen Empowerment	Surprise & Distrust
Decision-making regarding rule (standard)-setting	Professional & authoritative decision	Competition between different standards	Participative deliberation	Ad hoc adaptation
Standard	Authoritative statement	Allows for information to advance individual choice	Available for public understanding	Fixed, but uncertainty regarding enforcement
Information-gathering and feedback mechanisms	Review by experts	Market selection process	Participation	Ad hoc and contrived randomness
Behaviour-modification	Procedural application of sanctions	Via market selection mechanism	Persuasion	Unannounced inspections
Disclosure of activities of regulated parties	Formal disclosure requirements	Disclosure requirements	Maximum exposure to population	Formal standards but unpredictable requirements

We have over-emphasised distinctions when, at the margin, there is overlap and hybrids are possible (Table 15.2). In the next section we turn to the limits of accountability and institutional design. We stress inherent systemic weaknesses in each of these perspectives that reinforce certain tendencies, while arguably weakening others. We also note wider issues that highlight that simply advocating 'more accountability' in regulation is unlikely to have entirely benevolent effects.

15.4 Limits of Accountability

Having first pointed to the background of accountability debates and then considered various strategies as to 'how to' hold to account, we now turn to the consideration of potential limitations of accountability ideas. While 'more accountability' is likely to generate universal support, the discussion in the previous section suggests that the way we achieve 'more accountability' is contested and therefore, what is regarded as 'more' is similarly likely to attract controversy (Lodge, 2005). Without seeking to offer a comprehensive discussion, we consider two areas in which calls for 'more accountability' are likely to face limitations, namely in terms of unintended consequences and trade-offs.

In terms of unintended consequences, distinctions can be made between those effects that are due to adaptive responses and due to systemic weaknesses. We briefly consider each one of them in turn. First, as studies regarding government responses to Freedom of Information legislation and requests have shown (Roberts, 2005), those who are being watched will seek to hide away from being held to account. Thus, 'real' decision-making takes place by way of 'post-it notes' and informal meetings once official minutes are likely to be released. Official minutes therefore become relatively meaningless documents. Similarly, target-setting encourages creative gaming responses exercised by risk-averse organisations (Hood, 2007). In other words, considering inherent blame-avoiding tendencies within organisations (public and private), demands for 'more accountability' are likely to generate creative compliance responses with the overall effect of reducing, rather than advancing the overall standard of information. Second, as Andrea Pratt (2006) has shown, the types of incentives required to achieve particular types of outcome vary according to activity. For example, it could be argued that requiring European Central Bank committee members to reveal their voting patterns would expose them to undue national pressures. In that sense, 'too much' accountability may reduce the overall decision-making process.

Third, each one of the four views regarding accountability discussed in the previous section has inherent systematic weaknesses. One weakness is that each worldview advances particular institutional mechanisms and thereby weakens others. Placing emphasis on hierarchy not only re-affirms that hierarchical ordering, but also arguably weakens participatory elements and market-oriented approaches. Similarly, placing trust in distrust may reduce possibilities of gaming, but may be seen as undermining the basis for having confidential and 'high-trust' relationships, seen by many as essential for having an informed regulatory relationship that goes beyond the adversarial or box-ticking variety of regulation. Emphasising ideas of consumer sovereignty may advance the possibilities of exercising choice on the market place, but may expose limitations when it comes to those products associated with high information costs and ideas of equality of treatment, and peer-review. And as all critics of 'self-regulation' would suggest, putting faith in professional forms of accountability is likely to advance 'closure' to outside demands for accountability and responsiveness.

A consideration of trade-offs also points to the need to establish some balance between difficult choices. For example, answers as to how open and punitive the holding to account should be in the case of a 'failure' vary between those who argue for a 'pointing the finger' at the individual who is seen to have been at fault, while others note the organisational conditions under which individuals make errors

(i.e. corporate manslaughter provisions). Others will also note that in order to encourage learning, accountability needs to be limited to small and closed settings to encourage open exchanges and overall improvement. Similarly, accountability in all but its most impoverished notions is fundamentally linked to a degree of responsiveness. How such responsiveness looks is however again contested, with answers as to 'how much' and, more importantly, 'to whom' varying across the four views on accountability noted above.

Furthermore, calls for 'more accountability' also conflict with wider core administrative values, such as efficiency, equity, and resilience. For example, calls for extensive participation and input can be seen as standing in the way of decisive action. Similarly, embracing extensive information to facilitate choice could fundamentally affect ideas regarding fairness and equity as some groups within society are more likely than others to identify, digest, and act on information regarding choice. For example, the 'transparent' quality and pricing information regarding utilities services is one thing, but their accessibility and availability might be a different matter. And the platform on which information is being provided is also likely to show different degrees of 'attractiveness' to different groups within society.

In short, asking for 'more accountability' is a too simplistic and potentially highly problematic demand. It is too simplistic as it does not acknowledge key differences in different forms of institutional design regarding accountability, but it is also dangerous as it does not sufficiently take into account potential limitations. As a result, ideas regarding institutional design of accountability need to be reconsidered. We take up this question in the conclusion.

15.5 Conclusion

Over a decade ago, Cosmo Graham (1997) enquired whether there was a crisis in regulatory legitimacy, especially in relation to British utility regulators, reflecting a contemporary discussion that reflected the move from a 'privatisation' to a 'regulation' phase in British politics. Such debates regarding the legitimacy of regulatory institutions and overall regulatory processes can be traced back to the early twentieth century in the US and have been at the centre of wider thinking regarding the 'publicness' of political decision-making for much longer.

We have argued that the study of regulation over the past thirty years or so has not just been about the recycling of debates that have flourished in the administrative law field since the rise of regulatory agencies in the North American context. First, empirically the context of regulation has moved further towards one of transnational polycentricity that 'old' understandings of distributed regulatory authority within a 'regulatory space' do not fully capture (see Hancher and Moran, 1989). Furthermore, there have been analytical developments, first of all, the growing interest in utilising the language of principal–agent relationships to account for the political foundations of regulatory regimes and their accountability provisions, and second, a growing appreciation of having to consider not just the institutional design of accountability mechanisms, but also realising the contested and diverse nature of different doctrines. There are three main implications that arise from these observations.

One is a greater explicit awareness of the trade-offs that are inherent in any institutional choice, and therefore also in the way in which 'publicness' is designed into a regulatory regime. Side-effects, surprises, and unintended consequences are hardly a new item on the menu of the social sciences (see Merton, 1936), but advocates of 'more accountability', especially considering perceived regulatory failures, often seem to neglect the side-effects of various instruments. Similarly, Bovens (1998), noting the inherent limitations of different understandings of accountability in the light of generic cooperation problems (which he terms the 'many hands problem'), suggests that therefore more emphasis needs to be placed on encouraging and facilitating acts of individual responsibility. Furthermore, ideas regarding trade-offs also point to the inherent limited variability of options. One key development in the wider literature regarding accountability and regulation has been a shift away from a close focus on devices to hold an administrative-regulatory unit accountable and towards a wider interest in different 'modalities', modes, or tools of accountability across different aspects of a regulatory regime. However, these different conceptions have not been collected in a very systematic manner so far.

The second avenue is to acknowledge more explicitly the argumentative nature through which advocacy of accountability devices is conducted. This triggers the question why particular words flourish (such as 'transparency') and, arguably more importantly, why particular dominant meanings that are attached to words rise and fall. In the worlds of practice and research, there needs to be a greater awareness about the doctrinal nature of much of the 'recipes' for supposedly 'better' regulation. It also encourages the search for appropriate codes in which these conversations can take place. As Julia Black (2002) noted in a different regulatory context, understanding institutional design as a process of a conversation requires agreement regarding the norms and standards in which these conversations take place. Much of the conversation regarding regulation has been very limited in its focus and attempts at codifying standards of argumentation have also been restricted. The former has been due to the dominance of a focus on formal regulatory institutions and formal procedural rules, the latter has to do with the tendencies of any worldview to claim exclusivity. For the study of regulation to advance, especially in its polycentric incarnation that goes beyond the 'national' and 'public', we need to have more accountability and transparency among the contributors to this debate.

Third, and finally, our discussion regarding institutional design of accountability also takes issue with the inherent engineering perspective that is part-and-parcel of the 'institutional design' terminology. On the one hand, the illustration of the four views regarding accountability and their side-effects and limitations suggests that the discussion needs to consider 'mixes' of different tools rather than rely on any single one approach. Similarly Mashaw (2005) has called for an increased attention to differing modalities. However, given the competing incentives of different actors within any regulatory regime and given the high demands placed on each one of the five dimensions of a regulatory regime that needs to be accountable or transparent, it is not likely that accountability will ever be 'complete' or that attempts at 'avoiding' or 'gaming' accountability requirements will not take place. In addition, inevitable crises and failures and subsequent demands for 'more' accountability and transparency suggest that any institutional design for accountability is exposed to endogenous and exogenous sources of change. In short, we expect a continued revision and alteration of the tools and instruments that are supposed to ensure accountability.

As a result, simple dichotomies between state and market, private and public, or state and non-state will not do. Instead, the debates can be advanced through the use of theoretical devices that make the plurality of views explicit and transparent, but such debates need to take place within a setting of regulated conversations, as noted. Accountability and any attempt at designing a regime to advance accountability is fundamentally linked to different aspirations inherent in regulatory activities. These aspirations are multiple and conflicting and therefore it is not surprising that competing ideas regarding accountability persist (Mashaw, 2005). The study and practice of accountability is therefore not about whether there is 'less' or 'more' accountability, but it is about understanding and managing the tensions between different competing objectives and interpretations, as well as coming to a closer understanding of how to make all aspects of a polycentric regulatory regime more visible. Such a challenge is unlikely to allow for headline grabbing reform announcements, but is less unlikely to improve the functioning of regulatory regimes.

Notes

1. Majone (1997) has been accused of resurrecting this image of 'neutral' regulators in his discussions of the supposed rise of the regulatory state across European countries.
2. *Chevron v. Natural Resource Defense Council* 464, US 837.
3. The scope of *Chevron* has arguably been reduced since *United States v. Mead Corp.* 533 US 218 (2001).

4. In other words, the fragmentation of roles within the regulatory state has accentuated the 'many hand's problem', i.e. the problem in identifying any one source that is responsible within a co-production setting (see also Bovens, 1998).
5. In the principal–agent literature, fire alarms are seen as mechanisms to control against agency shirking in that affected constituencies raise the 'alarm' among political principals in view of particular agency actions.
6. Admittedly, we hereby move beyond the classic texts of grid-group cultural theory. More broadly, there has been the use of lotteries in the allocation of school places (thereby arguably removing the need to be accountable for decisions regarding place allocation, while also removing the linkage between wealth, neighbourhood, and school place). More broadly, Calabresi and Bobbit (1978) suggest that lotteries and therefore randomisation offers one important way of making decisions about 'tragic choices'.

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CHAPTER 16

ON THE THEORY AND EVIDENCE ON REGULATION OF NETWORK INDUSTRIES IN DEVELOPING COUNTRIES

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16.1 Introduction

As with so many other policies, the regulation of network industries in developing countries has traditionally been modelled off corresponding practice in developed countries. Until the mid-1990s, politicised, hardly accountable, largely self-regulation was the norm, pretty much as in many OECD countries. Then, when developed economies started to reform regulation as part of the restructuring of