

Handbook on the Politics of Regulation

Edited by

David Levi-Faur

The Hebrew University, Israel and the Free University of Berlin, Germany



Morel Drefler, No Man's Land

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Endorsements

"Political science has leap-frogged law, economics and sociology to become the dominant discipline contributing to regulatory studies. David Levi-Faur's volume taps the rich veins of regulatory scholarship that have made this the case. It brings together the talented new network of politics scholars intrigued by the importance of the changing nature of state and non-state regulation. Their fresh insights complement important new work by established stars of the field. Definitely a book to have on your shelf when in search of exciting theoretical approaches to politics"

Prof. John Braithwaite, Australian National University

"“Regulation,” in its manifold forms, is the central process of contemporary governance, as it seeks to blend the dynamism of market economies with responsiveness to political and normative demands for health, safety, environmental protection, and fairness. Understanding regulation’s varieties, vulnerabilities and virtues has become a significant focus of academic research and theory. This volume provides an extraordinary survey of research in that field -- a survey remarkable in its comprehensiveness, outstanding in the quality of the contributions by leading regulatory scholars from different nations and academic disciplines."

Robert A. Kagan, Professor of Political Science and Law, University of California, Berkeley

"An authoritative collection by a range of contributors with outstanding reputations in the field"

Prof. Michael Moran, WJM Mackenzie Professor of Government, University of Manchester

"This is an extraordinarily useful one-stop-shop for a wide range of traditions and approaches to the political aspects of regulation. David Levi-Faur has assembled a fine collection that by reporting on the state of the art also shows the way ahead for a discipline that has to capture and explain dramatic changes in real-world regulatory philosophies and policies"

Prof. Claudio Radaelli, Director, Centre for European Governance, University of Exeter (UK)

"This is an unusually impressive edited volume. Its contributors include the leading academic experts on government regulation from around the world. Its several clearly written and informative essays address the most important topics, issues, and debates that have engaged students of regulatory politics. I strongly recommend this volume to anyone interested in understanding the breadth and depth of contemporary scholarship on the political dimensions of regulation".

**Prof. David J. Vogel, Department of Political Science & Haas School of Business
University of California, Berkeley**

Preface

The invitation to edit the Handbook on the Politics of Regulation came from Edward Elgar and his team. Following some hesitation, I humbly undertook it in order to ensure and consolidate the work done by my colleagues and me in the ECPR Standing Group on Regulatory Governance and with the interdisciplinary journal *Regulation & Governance*. I also trusted the professionalism of the publisher and his contribution to the social sciences. I was not disappointed. This is the second edited collection that I have published with Elgar (The first being *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, co-edited with Jacint Jordana, 2004). The contribution of Edward Elgar's team to the development of the field is evident to anyone familiar with their catalogue on regulatory governance.

My interest in the study of regulation was first ignited by a public seminar on "Governmental Regulation in the Global Economy" chaired by Robert Kagan and David Vogel at the Center of Law and Society at UC Berkeley in 1995/6. It took, however, some time before I placed regulation on my research agenda. Its relevance became all the more clear when I studied the so-called deregulation of the Israeli, European and global telecommunications regime and even more so when I developed a strong interest in EU public policy. Regulation, EU public policy and International and Comparative Political Economy all came together during a research fellowship with Jeremy Richardson at Nuffield College between the years 2000-2003. After this, I had the opportunity to develop my interests and extend my perspective first briefly at the Centre on Regulation and Competition at the University of Manchester and then for a longer period with RegNet at the Australian National University mainly with John Braithwaite, Peter Drahos and Peter Garbosky. During this period I cooperated with Jacint Jordana who became not only a partner in my scholarly explorations but also a friend.

I started to work on this handbook in 2008 shortly after moving from the University of Haifa to the Hebrew University of Jerusalem. It took almost three years of work, with the final stages being done during a research leave in Berlin. This is an

opportunity to thank my colleagues and friends at Hebrew University of Jerusalem who warmly facilitated my integration into the Department of Political Science and the Federmann School of Public Policy. I am also grateful to my hosts in Berlin: Tanja Börzel and Thomas Risse at the Free University and Dieter Plehwe and Arndt Sorge at the Wissenschaftszentrum Berlin für Sozialforschung (WZB). The excellent research assistance provided by Hannan Haber and Michal Alef is deeply appreciated. Finally, it is a pleasure to note and acknowledge my gratitude to the 57 contributors of the various chapters for their cooperation and dedication to the project and to the field of regulatory governance. Their work in this handbook, and beyond, extends the scope of research in this field and lays strong foundations for a better understanding of the politics of regulation. I do hope that what we present here allows us to be optimistic about further, ever better and more exciting research than we can currently envisage.

Berlin, January 2011

Marketing Description

This unique Handbook offers the most up to date and comprehensive, state of the art reviews of the politics of regulation. It presents and discusses the core theories and concepts of regulation in response to the rise of the regulatory state and regulatory capitalism, and in the context of the 'golden age of regulation'. Its ten sections include forty nine chapters covering issues as diverse and varied as theories of regulation; historical perspectives on regulation; regulation of old and new media; rise regulation, enforcement and compliance; better regulation; civil regulation; European regulatory governance; and global regulation. As a whole, it provides an essential point of reference for all those working on the political social and economic aspects of regulation.

This comprehensive resource will be of immense value to scholars and policymakers in numerous fields and disciplines including political science, public policy and administration, international relations, regulation, international law, business and politics, European studies, regional studies and development studies.

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ABSTRACTS

Chapter 1 Regulation & Regulatory Governance, David Levi-Faur

This chapter discusses the various facets of the notions of regulation, regulatory governance, and regulatory capitalism. It aims to serve as an updated introduction for scholars and practitioners. Its starting point is the observation that while we were supposed to be living in an “era of deregulation”, regulation, against the expectations and rhetoric of many is exploding. The chapter combines state-centered perspective with civil or private regulation perspective in one major theme around the notion of regulatory capitalism. The notion of regulatory capitalism suggests that the study of regulatory governance should proceed beyond states, markets and societies into the identification of hybrid forms of regulation and towards the creation of autonomous regulatory spaces that blur the distinctions between the global and the national.

Chapter 2: Bootleggers and Baptists in the Theory of Regulation, Bruce Yandle

Theories of regulation offer thought facilitating devices that may help to explain the functioning of government in a political economy. Among formal theories put forward in the 20th century are public interest, capture, special interest, and money for nothing. The Bootlegger and Baptist theory is based on the frequent observation of two distinct and different interest groups pursuing the same regulatory end. The name comes from experiences observed in regions of the US where religious groups oppose the Sunday sale of alcoholic beverages, a position welcomed by bootleggers, illicit sellers who welcome a wider market for their services. In the context of regulation generally, the “Baptists” are those who take moral high ground in the efforts to gain regulation, as with environmental groups. The “bootleggers” are those who gain monopoly rents when the Baptists successfully provide an output restriction, as when producers of clean energy see coal operations closed down. Part of the rapid rise of US regulation since 1970 may be better understood by applying Bootlegger/Baptist theory to the political economy that produces regulation.

Chapter 3: Capturing “Capture”: Definition and Mechanisms, Barry Mitnick

The concept of capture is defined as referring to cases in which a regulated industry is able to control *decisions* made about that industry by regulators and/or *performances* by regulators related to the industry. It requires three conditions: essentiality and/or generality of the benefit, stability or persistence of provision of the benefit, and the public provision of defensive measures or actions that entrench the benefits against actual or potential challenges. Based on the literature of capture, twelve mechanisms claimed to facilitate capture are identified and sorted into six logical groups. The mechanisms include: imbalanced affective access politics; substitutional governance; competency myths; *regulatory arbitrage* (the ability of firms to capture benefits within the uncontrolled space created by the agency problems of maladaptive regulation), and others.

Chapter 4: Beyond Capture: Towards a New Theory of Regulation, Steven Croley

The interest group capture theory of regulation has enjoyed unrivaled influence. It occupies, still, a central place in the academic understanding of—given its tenets—the defects of regulatory government. It has, accordingly, provided a foundation for policy arguments to limit the reach of regulatory government. For on the capture account, sound regulatory government is a naïve aspiration. Yet the theory has seen criticism as well, broad and deep if unevenly across the social sciences. It rests on a flawed account of interest group formation, and an incomplete account of exactly why interest groups, *qua* groups, participate in regulatory decision-making. It also oversimplifies regulatory institutions. Not surprisingly given these defects, its evidentiary base is weak. Its deregulatory policy prescriptions are, therefore, not compelling.

That capture theory has been the focus of critical attention is a testimony to its dominance. It is *the* theory to be evaluated. Thus the challenge for capture theory’s critics: Supply an alternative. Existing critiques have yet to be synthesized; they constitute more or less piecemeal objections, powerful as some may be. Consequently, the lack of a rival theory, not capture theory’s irresistibility, explains

its resilience. If capture theory is to be replaced rather than displaced, additional conceptual, empirical, and indeed normative theory-building must be undertaken.

The following pages briefly summarize the central claims of the interest group capture theory of regulation, and review illustrative critiques. Having surveyed some of the theory's shortcomings, this chapter then identifies some of the steps to be taken towards constructing an alternative. Centrally, the development of an alternative theory requires increased attention to regulators' decision-making processes and methods. Challengers to the interest group theory of regulation must also articulate, convincingly, the marks of desirable regulation, as the endurance of capture theory owes in part to its attractive specificity of what constitutes undesirable regulation.

Chapter 5: Institutional Design and the Management of Regulatory Governance, Steven J. Balla

This chapter examines the instruments that elected officials utilize to manage policymaking authority delegated to public bureaucracies, as well as the implications of these instruments for understanding regulatory governance. Foundational perspectives on regulation, such as public interest theory and capture theory, state specific expectations regarding the extent to which regulatory proceedings are dominated by one type of constituency at the expense of others. These theories, however, do not offer empirically sustainable accounts of the institutional environments within which elected officials make decisions, as political management of regulatory governance does not occur exclusively in settings oriented toward translating the interests of specific constituencies into bureaucratic outputs. As highlighted in this chapter, agency design and oversight vary over time and across political systems in the extent to which they facilitate the pursuit of objectives beyond positions immediately articulated by regulatory stakeholders. The expectations of public interest theory and capture theory are most likely to be realized in institutional environments characterized by active political oversight and agencies designed to produce decisions stacked in favor of specific constituencies. In contrast, the utilization of instruments that are procedurally neutral, such as public commenting on proposed regulations, are likely, relatively speaking, to be associated with patterns in stakeholder participation and influence that deviate both from industry capture and

regulation in the public interest. The specification of such connections between agency design, oversight, and regulatory governance promises to integrate theories of regulation more closely with the study of decision making in political institutions.

Chapter 6: Voluntary Programs, Compliance and the Regulation Dilemma, Matthew Potoski & Aseem Prakash

When it comes to enforcing and complying with regulations, government regulators and firms are often stuck in a dilemma: each would be better off cooperating and solving the compliance problem but each has an incentive to shirk, leaving both worth off. Solving this dilemma is complicated by firm's difficulty in conveying whether their regulatory violation was a result of willful shirking or a benign an accident that happened despite the firm's good faith efforts to maintain compliance. Voluntary programs, in which firms promise to produce positive social goods beyond what is required by law, can help solve this dilemma by providing firms a means for more credibly signaling their cooperative intentions and actions. To be effective in this role, voluntary programs need effective standards and monitoring mechanisms.

Chapter 7: Competing Theories of Regulatory Governance: Reconsidering Public Interest Theory of Regulation, Jørgen Grønnegaard Christensen,

Two questions remain central in the study of regulation. First, what is the role of affected interests in regulatory policy and administration? Second, to what extent does regulatory administration balance the public interest against the regulated interests within the private sector? The chapter compares three different theories and the research based on them. They are classical public interest theory, capture theory, and the modern theory of credible commitment. Their underlying logic and assumptions are identified and the empirical scope of each of the theories is set out. Finally, it is discussed, on the basis of existing research whether there is supporting evidence for them. The conclusion is that they all cope with highly relevant issues but also points to the persistence of a highly politicized environment. This politicization has not excluded change and reform but the pattern of change has not followed the patterns

proposed by capture and credible commitment theory. To the contrary the chapter contributes to the rehabilitation of classical public interest theory, although in a modest and refined form.

**Chapter 8: The Rise of the American Regulatory State: A View From the Progressive Era,
Marc T. Law & Sukkoo Kim**

We examine the rise of the US regulatory state with a specific focus on regulations that arose during the Progressive Era, the period during which state and federal governments became dominant actors in regulating economic activity. Our analysis highlights four key themes in the rise of regulation in America. The first is how a major shift in the structure of government during the mid nineteenth century preceded the rise of regulation at the state and federal levels. The second is how the forces of specialization created an environment conducive to the emergence of regulation. The third deals with the path-dependent nature of regulation. The final theme concerns the federal nature of the American political system and its implications for the rise of regulation.

**Chapter 9: Beyond the Logic of the Market: Toward an Institutional Analysis of Regulatory Reforms,
Marc Allen Eisner**

This chapter examines deregulation from an institutional perspective. Although deregulation is commonly framed as the diminution of state control and a return to “the market,” the chapter argues that this portrayal fails to acknowledge both the complexities of governance and the role of the state in shaping decisions about governance. It is argued that the category of “the market” subsumes a variety of governance mechanisms that economic actors use to coordinate their behavior. Moreover, the market-state dichotomy within which discussions of deregulation are commonly framed ignores the central role of the state in shaping decisions regarding governance. Following deregulation, industry actors commonly employ various governance mechanisms (e.g., long-term contracting, obligational networks) that have little in common with classical markets. Moreover, the evolution of governance regimes is not simply driven by efficiency concerns but is shaped by public policies

and institutions. Thus, even under deregulation, the role of law and institutions is foundational. The chapter illustrates these points through three cases of deregulation in the United States: commercial aviation, railroads, and finance.

Chapter 10: The Chinese Model of Regulatory State, Neil Collins & Joern-Carsten Gottwald

The People's Republic of China is establishing a Socialist Market Economy. As part of its ongoing institutional and organizational reforms since 1978, the Chinese leadership has introduced important elements of the regulatory state into its economic governance. An analysis of the food safety regulation and the reform of financial services indicate, however, that the introduction of regulatory agencies, international standards and best practice followed the political logic of a developmental one-party state which uses de-regulation and re-regulation to concentrate and strengthen its authority over important sectors of the Chinese economy. The main mechanism to preserve its authority has been the nomenklatura- and cadre management system operated by the Communist Party of China. Leading managers, regulators, supervisors, and politicians all fall under the CCP organizations department. In addition to the traditional structures of fiduciary relationships and division of responsibilities between expert bodies and the general public, the party mechanisms allow for top-down enforcement and long term development. In this regard, the PRC has succeeded in signaling its willingness to integrate international standards into its economic governance while at the same time strengthening the overall authority of the party-state. Without the buffer in form of quasi-independent regulatory bodies, however, failure and crises threaten the core political institutions contributing to a latent instability of the Chinese regulatory state.

Chapter 11: The Institutional Development of the Latin American Regulatory State, Jacint Jordana

In the three decades after the 1980s Latin American countries radically transformed their administrative states in the context of a large-scale process of liberalization, privatization and democratization. Out of this process of transformation a complex structure of regulatory governance emerged that might be best described as the Latin American regulatory state. The extent of the reforms, which replaced, to certain

extent, the traditional developmental state that had prevailed in previous decades in most countries, does not mean that regulation was new to Latin America but nonetheless suggests that something new had emerged in the way regulatory governance was extensively diffused in the region.

The emerging Latin American variety of the regulatory state displays certain specific characteristics, such as the influence of the presidential system in institutional arrangements and the peculiar mixture of American and European influences in policy frameworks. However, the shift involved not a simple transformation of state structures and policy preferences but a new pattern of public policies and institutions. This pattern included on the one hand the dissemination of regulatory agencies, involving some continuity with previous experience of institution building in the region, and on the other hand the adoption of new approaches to articulating the relationship between markets and politics that differed significantly from traditional processes of embedding economic policy in political networks.

V. Selected Issues in the Study of Regulation

Chapter 12: Policymaking Accountability: Parliamentary versus Presidential Systems,

Susan Rose-Ackerman

Modern states cannot realistically limit policymaking to the legislature. Pressing contemporary issues are too technically complex, too dynamic, and too numerous for busy, non-expert legislators to resolve in detail. Delegation under broad, framework statutes is essential for effective government, but this does not eliminate the need for democratic responsiveness. Hence, committed democrats need to work toward the public accountability of all policymaking—not just in the legislature, but in other institutions as well. Periodic elections are not a sufficient popular check on government. Government accountability is a source of political legitimacy in three distinct senses. Call these performance accountability, rights-based accountability, and policymaking accountability.

The first sense requires the state to carry out public programs competently, using expert professionals as needed and assuring a high level of efficiency and integrity in the public service. Political actors set the goals, and bureaucrats ought to carry them out in a cost-effective way—using their specialized knowledge. The key word is ‘competence’. It implies both the use of experts and the existence of hard-working, well-trained civil servants who do not take bribes, embezzle funds, or create conflicts of interest. Call this *performance accountability*. It requires both transparency and a means of holding officials to account if they perform poorly.

Second, *rights-based accountability* implies legal constraints that protect individuals against the abuses of arbitrary power. It is not conditional on popular sovereignty. These rights may be enforced through a written, constitutional list of rights or by applying judicial concepts of ‘natural justice’ or *principles généraux du droit*. If one accepts the value of a particular set of rights, a government is only legitimate if citizens can monitor the enforcement of such rights and hold government officials to account.

Third, the policymaking process itself should be responsive to democratic values. There are two ways to achieve such accountability. One route is through laws passed by representative assemblies where elections provide the link to public opinion. However, elections are an insufficient check if the legislature delegates policymaking to the government/executive or to independent agencies and private entities. Delegation of policymaking is pervasive in modern democracies, but it needs to be exercised consistent with democratic values. I call this *policymaking accountability*, and my aim is to analyze it and argue for its central importance.

Performance and rights-based accountability are background constraints. Policymaking accountability, however, goes beyond issues of competence, honesty, and the protection of rights. Statutes are frequently vague, unclear, and inconsistent, and they often leave difficult policy issues to the implementation stage. Delegation frequently requires the exercise of substantive policy discretion. Sometimes the executive makes policy on its own without any statutory framework. In all cases, however, officials must use their power consistent with democratic values. Electoral accountability is not sufficient; it is too infrequent and too rough-grained.

Whatever the risks and the countervailing political pressures, legislatures worldwide believe that the benefits of delegation outweigh the costs, and some constitutions require a degree of devolution and delegation through federalism and through constitutionally mandated institutions, such as central banks and broadcasting commissions. Given the ubiquity of delegation, I ask whether administrative law can help assure the democratic character of policymaking.

Administrative law can provide a framework for the achievement of policymaking accountability. Scholars of administrative law need to move away from a primary focus on the formal legality of state actions toward the study of rules and principles that can enhance political accountability and competent policymaking. Protecting the rights of individuals and businesses against an overarching state is not enough. Public law should also help contain excesses of executive power and monitor private or quasi-public entities that carry out public functions. After summarizing the aspects of policymaking accountability in part I, part II outlines three models based on political accountability, expertise, partisan balance, and privatization. With this background, part III contrasts policymaking accountability and oversight in parliamentary and presidential systems.

**Chapter 13: LAW AND REGULATION: THE ROLE, FORM AND CHOICE OF LEGAL RULES,
Margit Cohn**

Law is central to the creation and application of regulation, but several simplistic assumptions regarding its form have been challenged and require further attention. The chapter, concerned with the form and role of law, addresses the following questions: in which forms do legal rules appear—are detailed legislative mandates, which reflect regulatory frameworks in their entirety, indeed the keystones of regulatory arrangements? Or does law function as a symbol or threat, while ensuring the legality of regulatory behavior? And how and why do actors in the regulatory sphere choose one form of law over another? It offers an overview of the trends in the study of this issue and two taxonomies. The first fully maps the formal status of legal rules and their binding force. Moving away from the simplistic distinction between legality and illegality, the second taxonomy surveys different ways in which regulators and

regulates may operate within the confines of legality, albeit in the absence of law's central attributes: the provision of clear, detailed frameworks that both empower and limit all participants in the regulatory space. The chapter ends with a tentative analysis of the strategic elements of the choice between different forms of law. The study of all of these aspects is necessary for the understanding of the nature and role of law in the field of regulation.

**Chapter 14: The independence of regulatory authorities,
Fabrizio Gilardi & Martino Maggetti**

This chapter offers a theoretical and empirical assessment of the distinctive feature of regulatory agencies, namely their independence. First, we discuss the formal and informal aspects of regulatory independence, their conceptualization, and their operationalization. Second, we present empirical research explaining the variation of formal independence across countries and sectors. We also point out that formal independence is neither a necessary nor a sufficient condition for regulators' de facto independence from political decision-makers and from the regulated industries. We conclude by highlighting the persistent relevance of regulatory independence for the study of the ongoing processes of re-regulation and agencification.

**Chapter 15: The Regulatory Rescue of the Welfare State,
Deborah Mabbett**

The regulatory state and the welfare state can be described in terms of contrasting pairs of 'types of policies' and 'types of politics' following Lowi (1972). The paradigmatic regulatory type of policy is market coordination, and its type of politics is nonmajoritarian, technical and supranational. The welfare state has redistribution as its paradigmatic type of policy, and the dominant type of politics is majoritarian, party-political and national. This chapter dissects these distinctions. Public sector reforms mean that regulatory types of policy can increasingly be found within welfare service provision. Different arrangements for labour market coordination are integral to different welfare state regimes, and at the same time these regulatory arrangements are concerned with combating market failure and promoting efficiency. There are abundant examples of technical, expertocratic policy-making within the welfare state

and a high level of supranational policy exchange. Delegation is important to the institutionalisation of the welfare state, as are nonmajoritarian commitments to social rights, secured for example for migrants. These findings cast doubt on the characterisation of welfare state policy-making as political and partisan. It is suggested that the interpenetration of regulatory politics enhances the robustness of the welfare state in the face of international market integration, while at the same time biasing policy towards the promotion of efficiency and suppressing the importance of solidaristic political values.

Chapter 16: The Regulation of Privacy, Andreas Busch

Privacy as a basic human need has always existed and is crucial for the development of the individual as well as society. But technological developments such as the spread of computers and more recently the internet pose a threat to its protection. Attempts at regulating the collection, storage, transmission and use of person-related data to protect privacy in the face of such challenges have taken many forms which can analytically be distinguished; but the simultaneous existence of international, supranational and national level attempts have led to the emergence of a complex situation in reality. Internationally, voluntary “codes of practice” coexist with binding rules of differing legal quality; nationally, comprehensive legislation spanning the private and public sectors, with implementation overseen by an agency, can be distinguished from piecemeal legislation without specific overview. Such differences, together with competing economic and security interests as well as variations in the ultimate justification of the protection of privacy, have led to international conflicts around the transmission of person-related data for commercial and security purposes. Given the increasing economic importance of such data, as well as rising sensitivity towards the protection of privacy in many populations, regulatory competition in this field is likely to increase in the future, while the direction of that dynamic is difficult to predict.

V. Regulating Old and New Media

Chapter 17: Regulating the media: four perspectives, Amit Schejter and Sangyong Han

The media of mass communications are social institutions that have the technological capacity to disseminate mass produced messages. Media regulation is the authoritative establishment of the quantity, quality and type of messages that they can or are required to distribute in a given social order. As such it would be unworkable to discuss media regulation within a narrow definition of “regulation” that is limited to secondary legislation, as it takes place at all levels of governance. In order to analyze the different models of media regulation, both historically and contemporarily, this chapter identifies four perspectives of media regulation: Media regulation as economic regulation; media regulation as a technological issue; media regulation as cultural paternalism; and media regulation as promoter of democracy. The chapter analyzes each of these perspectives, sets each perspective within its historical context and ideological underpinnings, and provides examples for the development and changes in media regulation as they pertain to each of them. The media landscape is undergoing changes challenging all of the four historic perspectives. At this developed stage in the history of media regulation, it is clear that normative choices truly determine which perspective is adopted in each locale. An informed and educated citizenry should be able to seize the opportunity created by this ongoing change and ensure it works to favor civil empowerment over economic and technological determinism and open and egalitarian cultural exchange over top-down paternalistic imposition.

Chapter 18: The Regulation of Advertising, Avshalom Ginosar

This chapter offers a framework for the study of advertising regulation, covering content, administrative and technological issues. The first part introduces three perspectives on this topic: economic, societal and cultural, each offers different justifications for advertising regulation and therefore affects the content of it differently. The second part introduces the mode of regulation, suggesting that while

self-regulation is very common in this industry, there is a growing tendency towards the establishment of co-regulation and various hybrid modes. The third part discusses the level of regulation suggesting that while national regulation is still a common and effective mode of control, international codes and regulations are claiming a more central place. The fourth part addresses the new challenges that advertising regulation faces with the emergence of the new media. The concluding part finds that the new challenges which advertising regulation faces do not dramatically change the basic concerns and therefore the various justifications for regulation.

Chapter 19: Cyberspace Regulation, Andrew D. Murray

The regulation of Cyberspace affords unique challenges to traditional regulatory responses. The move online represents a social move from a community of neighbours to a community of strangers. This, as identified by Cass Sunstein affords for community fracture, or Balkanisation, which breaks the connection between the individual and the socio-political community that represents the traditional relationship with the state. Thus we see in Cyberspace the first truly individualised (or nodal) regulatory space. This has led to a number of proposed models for Cyber-regulation based variously on self-regulation, hybrid design regulation and most recently upon the reconceptualisation of the regulatory community as a communicative community based upon the exchange of information and acceptance of regulatory utterances. This chapter is designed to illustrate these models and to highlight their respective strengths and weaknesses.

V. Risk Regulation

Chapter 20: Risk Regulation and Precaution, Dieter Pesendorfer

The precautionary principle emerged in the 1980s as a new idea in international environmental law and quickly became relevant for risk regulation in general empowering regulators explicitly to take early action in situations of serious harms. This chapter provides a broad overview and a critical discussion of the principle and general patterns of its implementation and application to identify underlying changes

in risk regulatory practices. After a short section on the need for precaution and a discussion of the role of principles in risk regulation it proceeds with the history of the principle and its successful global diffusion, before discussing the controversies about its meanings and weak and strong definitions. Discussing the precautionary principle in practice it will be argued that the moderate versions adopted in international environmental law and at the EU level and political and legal clarifications have especially led to an increased similarity in risk regulatory practices between countries which adopted the precautionary principle and those opposing that idea. With regard to (serious) risks most countries in the world have been moving towards a strict separation of risk assessment and risk management and a systematic use of benefit-cost analysis which makes the real change. Also the deliberative elements of the precautionary principle show ambivalent results as precautionary public policy not always involves more transparency or more participation. It is expected that risk regulation will remain political and controversial despite the various attempts to depoliticize risk governance.

Chapter 21: STRATEGIC ISSUES IN RISK REGULATION, Giandomenico Majone

Today the issue of risk looms so large in public discourse and in popular perceptions that some authors speak of a “risk society”, where problems of “risk distribution” replace those of wealth distribution which characterized industrial society. In such a situation the need of clear and consistent principles for dealing with uncertainty is as urgent in the public sector as it was in the private sector a few decades ago, when the study of decision-making under uncertainty was introduced in the curricula of all major business schools. In the public, as in the private, sector the practical consequences of confused thinking about the logic of decision-making under uncertainty, can be quite serious. The early history of risk regulation provides what is still a very instructive example of the importance of a good grasp of basic principles. This is the *Saccharin Ban* imposed by the US Food and Drug Administration (FDA) in 1977, after a study sponsored by the Canadian government showed a significant increase in bladder tumors among male rats exposed to high levels of saccharin consumption. According to the agency, the ban was made necessary by the wording of the Delaney anti-cancer clause to the 1958 Food Additives Amendment. The

Delaney clause reads in part: “No additive shall be deemed safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of food additives, to induce cancer in animal or man”.

According to FDA officials this proviso authorized the agency to exercise scientific judgment in determining whether a test is an appropriate one, and whether the results demonstrate induction of cancer. But once the agency has made its determinations concerning these two matters, no further inquiry is allowed. In particular, the agency may not authorize further use of an additive based on a judgment that the benefits of continued use outweigh the risks involved. The proposed saccharin ban was very controversial because no acceptable saccharin substitute existed at that time. Actually, the evidence against saccharin was less than overwhelming. Laboratory studies of rats repeatedly showed a weak carcinogenic effect, but retrospective human studies failed to reveal a consistent link between saccharin consumption and bladder cancer. The weight of medical testimony before congressional subcommittees was that saccharin is probably a weak carcinogen, but that a ban on saccharin could also pose risks, especially if saccharin users responded by substantially increasing their consumption of sugar. Despite congressional awareness of these facts, congressional hearings failed to produce any definite conclusion. The only outcome was continuing postponement of the ban, coupled with labeling requirements. The FDA did try, however, to modify in practice a conceptually flawed, but legally binding, no-risk decision rule. Thus, the agency has sometimes concluded that a substance is not a “food additive”, and hence is not subject to the Delaney clause, even though it occurs in food, arguably through human agency. Proceeding in this fashion, by the mid-1980s the agency had effectively narrowed the application of the clause to direct food additives. Throughout the 1970s and 1980s the FDA was caught between consumerist organizations that insisted on a strict precautionary approach--banning any food additive unless they could be shown to present zero risk—and industry groups that wanted additives allowed if the risk was minimal. Congress did not amend the Delaney clause, but passed a law delaying (and ultimately prohibiting) the FDA ban on saccharin.

Several lessons can be drawn from this episode. First, it is clear that risk regulators operate on the basis of great, and in many cases irreducible, uncertainty, see the next section. Such uncertainty is too important to be treated in a purely intuitive and

qualitative way; rather, it should be expressed in terms of numerical probabilities. These probability estimates are necessarily subjective but they are explicit, hence open to scrutiny by third parties, and can be revised in a logically consistent way when new information becomes available. A second important lesson is that a zero-risk approach, such as is implied by the Delaney clause, is practically and conceptually untenable. Since the FDA's saccharin ban, the capacity to detect chemicals in foods in quantities as small as parts per trillion has been perfected. This means that "the FDA was hostage to progress in analytical chemistry: As scientists improved their ability to detect cancer-causing chemicals, the FDA would be obliged to ban those chemicals (and the foods that contained them)...Cancer was a risk, the FDA was told, that it was impermissible to run, whatever the costs. Thus it was to enforce the rule, "no cancer" "(Wilson 1989: 340). A third important lesson, therefore, is that a good decision rule must take into consideration all the important elements of the risk problem: the level of uncertainty, health and other risks, as well as the potential benefits of alternative measures. A decision rule that fails to consider all such elements tends to distort regulatory priorities.

A fourth lesson has significant political implications. As already mentioned, the proposed saccharin ban was very controversial: congressmen reportedly received more mail on saccharin than on any other issue since the Vietnam war. What is remarkable in this case is the widespread opposition to a regulatory decision which took into account the remote risk posed by a product, but not its benefits. According to a number of empirical studies, people tend to overestimate events associated with lower-probability events, while ignoring potential benefits. But in the case of the saccharin ban we have the reverse situation: a public acceptance of some risk for the sake of well-understood benefits. This leads one to suspect that the concentration of some regulators on (often negligible) risks, regardless of foregone benefits, may be politically motivated rather than a reflection of genuine popular preferences. The *Saccharin Ban* case suggests that people are quite prepared to trade off risks and benefits at the margin, as long as both sides of the benefit/cost equation are honestly and convincingly presented to them.

VII. Politics of Regulatory Enforcement and Compliance

Chapter 22: The Politics of Civil and Criminal Enforcement Regimes Michelle Welsh,

Increasingly regulators are provided with civil penalties in addition to traditional criminal sanctions. Often the call to introduce a civil penalty follows a large corporate collapse or other perceived failure in corporate regulation. Regulators who have at their disposal overlapping sanctions and penalties are required to determine which of these enforcement regimes is appropriate, when they are faced with an alleged contravention of the law that they administer.

This chapter examines the policy and political tradeoffs faced by legislatures when they consider the introduction of these enforcement regimes. In addition this chapter examines the dilemma faced by regulators who have been provided with overlapping criminal sanctions and civil penalties. When faced with an alleged contravention of the law these regulators are required to determine which of these two regimes will provide the appropriate regulatory response. This determination will have implications for regulatees, as well as the broader community.

The Australia Securities and Investments Commission (ASIC) is a regulator that has been provided with overlapping criminal sanctions and civil penalties. The chapter examines ASIC's use of these overlapping enforcement mechanisms. ASIC operates in an environment which requires it to take into consideration vigorous public and political debate about its actions. When choosing between the available enforcement mechanisms, ASIC is often required to provide strong justification for any decision not to prosecute criminally. A public desire for persons who commit corporate malfeasance to be subject to criminal prosecutions is not limited to Australia.

Chapter 23: The Pragmatic Politics of Regulatory Enforcement, Salo Coslovsky, Roberto Pires, Susan S. Silbey

This chapter describes regulatory enforcement as an intrinsically political endeavor. We argue that through daily enforcement transactions, regulators and the regulated reshape their interests and the environment in which they operate, reconstructing their perceptions of and preferences for compliance. We call this phenomenon the "sub-politics of regulatory enforcement". After reviewing the trajectory of the field of

regulatory enforcement as well as recent research on inspectors and street-level regulatory agents, we argue for a conception of politics that differs from the idea that predominates in the regulatory enforcement literature. Contrary to those who see enforcement styles and strategies as independent variables determining compliance, we posit that enforcement agencies and regulated entities engage in an indeterminate exploration of their institutional surroundings to create legal, technological, and managerial artifacts to address practical problems of doing business and complying with law. These agents move beyond imposing fines, issuing warnings, or educating their subjects. Rather, the daily routine of front-line enforcers around the world is best described as a political terrain, in which they are constantly building and revising agreements (with the regulated) that realign interests, reshape conflicts and reapportion risks, costs and benefits among various agents so as to make compliance tolerable, sometimes even advantageous to all involved.

**Chapter 24: Five Models of Regulatory Compliance Motivation: Empirical Findings and Normative Implications,
Yuval Feldman**

This chapter suggests that five distinctive assumptions of human motivation can be identified among the existing regulatory models. The first regulatory approach targets the incentive-driven individual. According to this model, the dominant motivation of the individual is based on a cost-benefit calculation and hence the approach of the regulator should focus on deterring the bad apples and providing incentives to the good apples. The second regulatory approach targets the reason-driven individual where the main assumption about human motivation is of an individual who looks to regulators to be convinced about the wisdom of engaging in a certain behavior. The third regulatory approach assumes that the dominant compliance motivation is related to social identity. Hence, most of the attention is focused on demonstrating to the individual that the prevailing norm, either quantitatively or qualitatively, is to obey the law. The fourth regulatory approach, assumes that an individual is mainly motivated by fairness and morality. Finally, the fifth model, focuses on the citizenship-oriented individual, whose main motivation is compliance simply because it is the law, regardless of its content. The main theoretical body for this model is related to certain aspects of institutional legitimacy. Following a discussion of the differences and similarities among the different models, the main normative argument

which will be developed is related to the ability of the policy maker to take advantages of this knowledge to design a behaviorally responsive regulation.

**Chapter 25: Between Soft Law and Greenwash: the Compliance Dynamic of Civil Forms of Environmental Regulation,
Oren Perez**

Over the last years, the environmental regulation system has undergone radical changes. Various private normative schemes, including voluntary corporate codes, environmental management systems, “green label” schemes, environmental reporting standards, green financial schemes and green indexes, have taken an increasingly important role in the environmental regulatory field.

One of the key questions raised by this phenomenon is the issue of efficacy. To what extent, these multiple instruments of private ordering have a meaningful social impact? This question has to be considered in the context of the recurring accusation that these ‘soft’ instruments are nothing but a ‘greenwash’ ploy: a façade of environmental regulation, whose only objective is to enable corporations to continue without disruption with their ecologically destructive practices (Waddock 2008: 105; Schwartz and Tilling 2009: 296). The ‘greenwash’/private regulation conundrum reflects a broader dilemma concerning the circumstances under which firms will take environmental actions that go beyond what is prescribed by law.

The chapter begins by outlining the evolving terrain of private environmental ordering. It argues that these new forms of private governance have taken a globalized ‘face’ – a process that has begun in the mid 1990s. The first section of the chapter discusses the unique features of this emerging field of transnational private governance, highlighting, in particular, the multiple links and cross-sensitivities between the distinct schemes, which create a novel ensemble regulatory structure. The second section discusses the efficacy puzzle, contrasting between different theoretical accounts of compliance. It argues that the commonly used concepts of “soft law” and “green-wash” do not capture the complex social dynamic underlying these new forms of governance and that it is wrong to

dismiss these instruments as ‘cheap talk’. The chapter concludes with a brief exploration of the future of private regulation at the global sphere.

VIII. Toward Better Regulation?

Chapter 26: The New Regulatory Orthodoxy: A Critical Assessment, Tom Christensen and Per Lægreid

This chapter is an analysis based on the new regulatory orthodoxy model. First, the model is presented concerning its main thinking and structural design, in particular the tilting of the balance between control and autonomy. Second, the ideals of the model are confronted with studies of regulatory processes in Norway. We show how the model is modified when entering a national context and adapted. The new regulatory policy in Norway in 2003 is through a political compromise thus characterized by mixing old and new elements into a complex and hybrid policy. The model is also shown to vary in practice depending on what type of policy area we are focusing, from ‘harder’ to ‘softer’ policy areas. We also discuss how the model is used in practice in specific policy areas. The expectations based on the model are that the regulatory practice should be unambiguous, objective and efficient. In reality it is shown that regulation is a political process, where political and experts could disagree, even among themselves, and where the outcomes often are complex and a mixture of formal and informal norms, balanced through a process of negotiations. Third, we discuss the post-NPM reforms related to the NPM reforms in general and the regulation model in particular. Post-NPM focus on centralization and coordination, and is adding to rather than replacing the orthodoxy model in a process of layering, making regulation in practice even more complex.

Chapter 27: Performance-Based Regulation, Peter J. May

Performance-based regulation has been adopted throughout the world for many regulatory sectors as a means for overcoming the restrictions of prescriptive approaches to regulation. The performance-based approach focuses regulatory attention on the achievement of regulatory objectives rather than carrying out

prescribed actions. The ability of regulated entities to choose how to achieve those results provides greater flexibility and opens up possibilities for more cost-effective compliance solutions. Implementation of performance-based regulation requires meaningful performance standards, an ability to gauge adherence to them, and new skill sets for regulatory enforcement agencies. Given variation in regulatory comprehensiveness and different methods for implementation, there is a large array of potential performance-based regulatory regimes. Most of the criticisms that have been raised about the performance-based approach revolve around the uncertainties that are fostered by vague performance goals or standards, and the inability to adequately quantify or otherwise measure performance. Accountability issues loom greatly given the reliance of performance-based regimes on professional judgment and the exercise of professional responsibility. When such expertise is inadequate, as was the case in New Zealand's performance-based building safety regime, shortfalls in regulatory performance arise. Performance-based approaches should be embraced as one of the key elements of the regulatory toolkit. They hold much promise and provide a wide array of possibilities for innovative regulatory regimes when paired with the appropriate combination of prescriptive, systems-based, and risk-based regulatory provisions.

**Chapter 28: The Evolution of Cost-Benefit Analysis in U.S. Regulatory Decisionmaking,
Stuart Shapiro**

Cost-benefit analysis (CBA) has been part of the United States regulatory process for more than thirty years. This chapter examines how the academic debate over the use of CBA has evolved while at the same time its place in the regulatory process has become increasingly firm. The debate over CBA has moved from a clear dichotomy between supporters of regulation who opposed CBA, and opponents of regulation who supported CBA, to a more nuanced discussion of how CBA can be improved. While this change has clear benefits for the use of CBA and for the quality of regulations, we should not forget that some of the earlier criticisms of CBA focused on the way it was implemented. By coupling CBA with presidential review, CBA often takes a backseat to political concerns. The continued relevance of these

criticisms may mean that the next stage in the evolution of the use of CBA may turn to its institutional setting

**Chapter 29: Regulatory Impact Assessment: ambition, design and politics,
Kai Wegrich**

Regulatory Impact Assessment (RIA) is a policy appraisal tool applied during the process of drafting regulations. RIA has been diffused from the US across the wider OECD world and today, it is regarded as a key tool of the ‘regulatory reform’ agenda. Intended to improve regulatory design in generally all policy areas, RIA seeks to base regulatory choices on economic analysis of different options. But RIA has also been regarded as both a tool for limiting regulation and providing a platform for broad and unbiased participation of societal actors. These partially conflicting rationales for RIA are one factor for the controversies around RIA design and the disappointing results of RIA practice. Another is that RIA systems introduce an element of control over regulatory activities of departments and agencies, and such control structures potentially increase the level of conflict within government. The chapter draws on a range of theoretical approaches to develop the claim that amidst a growing consensus regarding the usefulness of some form of RIA, the details of RIA design will be increasingly contested and politicized. This claim contrasts with the textbook image of RIA as an a-political tool to assist regulatory decision-making. Empirically, the chapter puts emphasis on the European experiences with RIA.

**Chapter 30: Valuing Health and Longevity in Regulatory Analysis: Current
Issues and Challenges,
Lisa A. Robinson, and James K. Hammitt**

Economic valuation of health risks plays an important role in informing decisions about environmental, health and safety regulations, indicating the extent to which those affected by a policy or program would agree to exchange income for the benefits it provides. For mortality risks, this willingness to pay is typically expressed as the “Value per Statistical Life” or VSL. The VSL is not the value of a particular

individual's life. Instead, it measures the rate at which individuals are willing to substitute income for small reductions in their own mortality risks within a defined time period. Currently, US agencies rely on similar research but apply varying VSL estimates, raising concerns related to both the standardization and the differentiation of their values. More standardization seems desirable if agencies continue to follow similar approaches. However, the differences in the risks and populations addressed across agencies suggests that greater differentiation in their VSL estimates is desirable, given that preferences for exchanging income for risk reductions vary depending on these characteristics. The approaches used to value nonfatal illnesses and injuries are more diverse, largely because willingness to pay estimates are lacking for many outcomes of concern. Analysts often use estimates of monetized quality-adjusted life years or averted costs as rough proxies. While more willingness to pay research is needed for nonfatal risks, in the interim the methods used to develop these proxy measures could be improved based on recent research and expert panel recommendations.

**Chapter 31: PROCESS-ORIENTED REGULATION: Conceptualization and Assessment,
Sharon Gilad**

Regulators in different countries and domains experiment with regulatory tools that allow firms to adapt regulation to their individual circumstances, while holding them accountable for the adequacy and efficacy of their self-regulation systems. Several labels have been coined to categorize this form of regulation, including systems-based regulation, enforced self-regulation, management-based regulation, principles-based regulation and meta-regulation. In this article, these forms of regulation are classified as belonging to one family of "Process-Oriented" regulatory institutions. Reviewing diverse empirical and theoretical research, it is suggested that the family of process-oriented regulatory institutions tends to have a positive, albeit varied, impact over firms' performance, and the factors that shape this inconsistent effect are analyzed. The conclusion highlights the need for a more realistic process-oriented model, which is sensitive to regulatory uncertainty and to internal conflicts and imperfect control within large and complex corporations.

IX. Civil Regulation

Chapter 32: Certification as a Mode of Social Regulation, Tim Bartley

Recent decades have seen a proliferation of initiatives that certify products or companies based on the social or environmental conditions of production. More than merely a marketing ploy or vehicle for providing information to consumers, certification has become a form of social regulation. Numerous questions about the power of certification initiatives and their operation in practice remain largely unanswered. This chapter unpacks the rise and significance of certification by first situating it as a regulatory form and then by reviewing the existing state of knowledge about three crucial topics—(1) the ascendance of social and environmental certification, (2) the evolution of this regulatory form in the midst of competing initiatives, and (3) the impacts of certification “on the ground.” In general, the chapter suggests that certification systems are more intertwined with states and less straightforward in their effects than many previous discussions imply.

Chapter 33: Regulation of Professions, Nuno Garoupa

In this chapter we analyze the regulation of professions. A profession can be defined as an occupation with the following general characteristics: it requires a specialized skill, that skill is partially or fully acquired by intellectual training; it provides a service, the service calling for a high degree of integrity; and it involves direct or fiduciary relations with clients. Certain professions, namely lawyers, notaries, physicians, pharmacists, accountants, architects and engineers, appear to be relatively highly regulated. A trend for more state intervention and less reliance on self-regulation has been noted in recent times. A critical assessment is offered of the economic theory of the regulation of professions, in particular in relation to the key issues of: (a) Why regulate (in particular, the public interest and private interest theories), (b) How to regulate (including self-regulation), and (c) What to regulate (entry, advertising, fees, structure and professional standards). We focus on the legal and medical professions.

Chapter 34: Varieties of Private Market Regulation: Problems and Prospects, Frans van Waarden

Market transactions engender risks and uncertainties for the transaction partners involved. These generate distrust and could lead to literal ‘market failures’: markets failing to allocate goods and services. In order to overcome such distrust and facilitate transactions, societies have over time and space developed a wide variety of regulatory arrangements. The chapter uses two categorizations to order these: first, second and third party regulation; and regulation by the invisible and visible hand and the invisible and visible handshake. The different modes of regulation are discussed and compared, including on their strengths and weaknesses. Experience with them has also produced combinations of them. They can be considered functional alternatives, with the one offering solutions to the problems of another. Hence, there is a logical order among them, although not necessarily a chronological or historical one.

Chapter 35: Codes as Hybrid Regulation, Mirjan Oude Vrielink, Cor van Montfort and Meike Bokhorst

In this contribution we focus on codes as a particular form of civil regulation that is adopted by non-state actors to regulate internal behaviors. Governments increasingly encourage codes (and other forms of civil regulation) in order to protect or to advance governmental objectives in the public interest. We will argue that codes - and with it civil regulation – have better chances of serving the public interest if (1) government, private actors and stakeholders agree on the norms in the standard-setting process, (2) if the codes are binding and (3) there are mechanisms to enforce compliance.

Chapter 36: Voluntary Approaches to Regulation – Patterns, Causes, and Effects, Annette Elisabeth Töller

This chapter addresses voluntary approaches to regulation (VAR), such as codes of conduct, voluntary agreements and certification schemes, that have emerged in almost all policy areas and on national, transnational and international territorial levels. In examining the patterns, causes and effects of such voluntary regulation, I argue that VAR are not a new phenomenon and that there is no global trend to increase their use.

Voluntary approaches have indeed become common in many areas, but they come and go. If we study VAR in regulatory and temporal contexts, we realize that they are not so much an instrument of deregulation as part of an overall development of *increasing*, yet stepwise and often hybrid kinds of, regulation. Both their emergence and their success are always highly dependent on a shadow either of hierarchy or of the market.

X. Regulatory Governance in the European Union

Chapter 37: European Regulatory Governance, Sandra Eckert

This chapter analyses regulatory governance within the multi-level context of the European Union (EU). Regulation is understood as a broad category which is distinct both from legislation and judicial rule making. To account for the fact that regulation takes place at different territorial levels of governance, and involves a variety of actors, the chapter puts forward a basic distinction between three modes of regulatory governance each time: centralized regulation, multi-level regulation and national regulation on the one hand; public regulation, co-regulation and self-regulation on the other hand. Conceptually the author seeks to link the literature on governance in the EU with broader discussions in political science research on regulation. Empirically the EU is a highly interesting case due to the speed and scope of regulatory expansion. The importance of centralized regulation is increasing, sustained by EU-level legislation and jurisdiction. However, the bulk of rule-making capacity lies in the realm of multi-level and co-regulation, whereas the emergence of self-regulation at the supranational level usually requires a strong and credible regulatory threat to offset coordination costs. There is not a single trend of evolution over time, so that different modes coexist and develop incrementally. Thus the multi-layered and polycentral structure of European regulatory governance is here to stay.

**Chapter 38: Towards a European model of regulatory governance?,
Matthias Finger**

This chapter portrays and analyzes the emergence and institutionalization of a European model of regulatory governance and identifies its key aspect, namely the dynamic and strategic interaction between national political authorities, national independent regulatory agencies, the European Commission, and ever more institutionalized and stronger European regulatory bodies. While this aspect, characterized by collaboration, competition, and strategic behavior vis-à-vis one another, is not untypical in federalist systems (e.g., the USA), the dynamics in the case of Europe – especially the European network industries – is nevertheless particular. It takes place within a new context of economic globalization, characterized by liberalization and the rise of transnational corporations on the one hand and Europe's need to increase its global competitiveness on the other.

**Chapter 39: The Changing Nature of European Regulatory Governance,
Paul James Cardwell**

This chapter considers the ways in which regulatory governance in the European Union (EU) has changed from the emphasis on 'traditional' instruments contained in the original Treaty arrangements – primarily regulations and directive – to encompass new forms of governance as the European integration process has moved to an advanced stage. New institutional actors within the policy- and decision-making processes are examined, including the rapid increase in new EU agencies. The chapter also discusses the new modes of governance, including the Open Method of Coordination (OMC), which have begun to take an increasingly important place alongside the traditional regulatory instruments in the governance of the EU. The chapter concludes that as the enlarged EU of the 21st century will continue to face challenges in terms of legitimacy and its future direction, it will be obliged to continue to seek innovative approaches in regulatory governance. These are likely to exist alongside more established methods and processes in EU regulatory governance.

Chapter 40: Regulatory governance in the European Union: the political struggle over committees, agencies and networks, Martijn Groenleer

This chapter focuses on the institutions of regulatory governance in the European Union (EU). It shows that regulation in the EU is a complex political process in which multiple actors interact across different levels of governance. Over the years such interaction has led to the build-up of regulatory capacity via committees, agencies and networks, and to the institutionalization of the EU's regulatory space. The chapter also demonstrates that European regulatory governance is the product of strategic interaction, actors expecting that they can somehow benefit from further developing the EU's regulatory capacity. Thus, the gradual development from committees and networks to EU agencies does not necessarily signify increased centralization of EU regulation. Committees, agencies and networks exist alongside traditional governmental organizations and established EU institutions, resulting in a multilayered system of governance. However, the growth of regulatory capacity, especially the shift towards EU agencies, is not merely quantitative. It alters EU governance and testifies to the institutional changes to which the Union continues to be subject.

XI. Global Regulation

Chapter 41: Regulating in Global Regimes, Colin Scott

An increased emphasis on global regulation is a response to the recognition of economic, social and cultural interdependence between the world's nations and peoples. Policy problems as diverse as reckless behaviour by financial institutions, exploitation of sweat-shop labour in emerging economies, and the threat of climate change present collective action problems which cannot be resolved through the deployment of the state's authority, capacity and legitimacy alone. Global regulatory regimes which have emerged to address these issues are frequently characterised by participation of both governmental and non-governmental organisations. The chapter addresses concerns about coherence, effectiveness and legitimacy of such regimes. I suggest that a degree of fragmentation is inevitable and may bolster both effectiveness

and legitimacy through the enrolment of a wider range of instruments and actors. The analysis of effectiveness highlights the significance of contractual mechanisms, alongside more traditional legal and soft law instruments for regulating. The issue of legitimacy highlights problems created by the mix of instruments and actors within global regulatory regimes and the ways in which actors involved seek to manage their legitimacy. The chapter concludes that further adaptation to the inevitably fragmented and hybrid character of global regulatory regimes might further exploit the potential of broad proceduralization to engage actors involved both in a degree of learning and of self-determination as central aspects of such regimes.

**Chapter 42: The Geography of Regulation,
Michael W. Dowdle**

This chapter explores how human geography, and in particular economic geography, can critically affect the focus of regulatory structuring. We will see how economic geography causes the regulatory environments found in more economically peripheral, or ‘developing’, countries to differ significantly and fundamentally from those characteristic of the developed, North Atlantic countries that define existing regulatory theory. In particular, the regulatory models of the later presume stable, wealthy and growth-based regulatory environments, whereas the economic geography of more peripheral regions results in innately less access to wealth, innately less capacity for economic growth, and innately more volatile socio-economic environment. Recognizing this, we can see that some of the regulatory features that are commonly found in developing countries, but which are interpreted as dysfunctional, may actually be functional. This include peripheral propensity for relational governance and ambiguation of the public-private divide.

**Chapter 43: Global Governance and the Certification Revolution, Types, Trends
and Challenges,
Axel Marx**

In the last two decades one can observe the emergence and development of private global governance regimes which regulate internationally manufactured and traded products. These private regulatory initiatives develop specific social and/or ecological standards. When products, organisations or production processes meet these standards

they receive a certificate. This chapter outlines different types of private governance initiatives, analyses the major trends with regard to private governance and discusses the main challenges. The chapter stresses that there are many different types of initiative and argues that a typology framework should enable researchers to capture the dynamics in the field of private governance. For this purpose a governance matrix is developed in two dimensions, i.e. who sets the standards and how they are implemented. Secondly, this chapter identifies two major trends, namely a sharp increase in the use of certification systems and increasing recognition from (international) public authorities and policymakers. Finally, the chapter discusses four main challenges with which these systems are confronted, with a specific focus on scale and scope, legitimacy, coordination and cooperation and equity.

**Chapter 44: Global Regulation through a Diversity of Norms; Comparing Hard and Soft Law,
Sylvia I. Karlsson-Vinkhuyzen**

A dichotomy between law and governance appears to have been created by the difference in perspectives between legal scholars who see the rule of law as the fundamental means of creating order and facilitating cooperation in the international system on the one hand and political scientists who see governance as the key process in the same system on the other. However, this dichotomy is a false one. Law is created to achieve specific objectives and is thus one form of governance. Governance often uses law, but also employs a range of ‘softer’ forms of legalization in addition to measures such as capacity building, *ad hoc* policies and projects. This chapter examines international regulation through norms along the continuum from ‘hard law’ to ‘soft law’ and summarizes how the various literatures define and differentiate norms along this continuum. This serves as a basis for outlining the diversity of assumptions and judgements that have been made on the character, strengths and weaknesses of different types of international norms, as well as their mutual dynamics, which are often mirrored in actual negotiations and debates on international regulation and governance.

Chapter 45: Money Laundering Regulation: from Al Capone to Al Qaeda, Brigitte Unger

Global regulation of money laundering became an issue only in the late 1990s as a consequence of the liberalization of financial markets, which attracted both legal and illegal capital. The fact that laundering is a global phenomenon which is not directly harmful, and has no direct negative effects on society or business nor is the scale of it known, is a big challenge to the regulators. As a consequence, the support from business and society for a regulatory policy is weak. Laundering regulation was mainly the result of a failed US war on drugs which turned into a fight to reclaim the proceeds of crime. The Financial Action Task Force implemented this regulation by setting international standards and by blacklisting. In the EU hard law was used. Regulation switched from a rule-based to a risk-based approach, but even this is not well supported. Laundering regulation is still a public policy centered within nation states, however it is slowly becoming an issue of global governance where private organizations and the need for legitimacy are assuming more importance.

Chapter 46: Regulation and Climate Change Mitigation, Ian Bartle

This chapter discusses three key themes of regulatory governance in relation to climate change policy and regulation. Firstly risk-based regulation and the interpretation of risk and uncertainty in climate change policy is considered, particularly in relation to the balance between strategies of mitigation and adaptation and the extent to which they can be traded off using a calculative approach to risk. Second the regulatory approaches and instruments deployed to reduce greenhouse gas emissions are outlined focusing on command and control, market-based and voluntary/civil approaches. It is argued that hybrid or multiple regulatory approaches are preferable. Thirdly, the suitability of independent regulatory agencies to ensure commitment to defined emissions reductions is considered. While independent agencies can contribute it is concluded that this would be too one dimensional and insufficient to ensure commitment to reductions.

**Chapter 47: After the Fall: Regulatory Lessons from the Global Financial Crisis,
John W Cioffi**

The acute global financial crisis of 2007-2009 revealed pervasive and serious failures of financial regulation. In the United States, many of these regulatory failures were end result of anti-regulation ideology and politics that drove financial deregulation and the erosion of regulatory efficacy in recent decades. Subprime mortgage securitization provides a critical case demonstrating political sources, ideological provenance, and malign economic effects of this attack on regulation. A series of linked financial processes and market relationships constituted a “securitization cycle” that recursively inflated the housing, credit, and securitized debt bubbles that ultimately fueled the global financial crisis. This cycle was made possible by financial deregulation (and lax enforcement) and it emerged within the least regulated segments of the financial sector. The process was driven, to a large degree, by the conflicts of interest, poor disclosure and manipulation of information, and opportunism left largely unrestrained by regulation. Theories of regulatory pathology and capture, along with excessive faith in the self-regulating capacity of markets, gave intellectual and ideological support to opponents of regulation. But the financial crisis reminds us once again of the grave dangers posed by market failures, and teaches that those who benefit from market and contracting failures may strategically attack regulation to create them. Paradoxically, politically driven deregulation and regulatory erosion can constitute a form of state and regulatory capture.

**Chapter 48: The Regulatory State and Regulatory Capitalism: An Institutional Perspective,
David Levi-Faur**

This chapter discusses the concepts of the regulatory state and regulatory capitalism in an effort to draw an institutional perspective on the politics of regulation. While the notion of the regulatory state allows us to capture the extent, scope and direction in which regulation shapes national level institutions, that of regulatory capitalism allows us to explore the relations between the state and other political actors to the capitalist order itself. Regulatory capitalism draws attention to the political economy of regulation and it does so without necessarily privileging a state-centered perspective. This may allow us to embed the two notions in the international and comparative political economy literatures and to assess how the regulatory state and

the concept of regulatory capitalism stand in comparison with other forms of states (e.g., the positive state, the developmental state, the competitive state and the welfare state) and the global political economy (e.g., laissez-faire, crony capitalism and transnational elites). At the same time, in the spirit of the governance perspective, I move the discussion beyond the state, not because the state is not important or even the most important actor, but because state-centered analysis is limited and should be augmented by society-centered analysis not only at the national but also at the global level.