

# 1 Introduction

Our aim in writing this book is to introduce readers to those practical and theoretical issues that we see as central to the study of regulation. We set out to describe the nature of those issues, to indicate how regulatory practitioners and scholars have dealt with them and to offer arguments on potential responses to regulatory difficulties. The focus is not on providing ‘how to’ accounts of regulatory experience. Instead, our aim is to highlight the contested areas and issues that are produced by regulation. We hope that this volume will add to exchanges between different viewpoints. Many of the examples in this book draw on the British experience, but we aim to make the text relevant to a wider international audience interested in regulatory activities broadly defined.

Over the past decades, regulation has been a topic that has stimulated discussions in a host of disciplines—notably law, economics, political science and public policy, sociology, history, psychology, geography, anthropology, management, and social administration. Given this breadth of interest, regulation is a subject or field of study that calls for a multi-disciplinary approach. Economists, for instance, are likely to benefit from the insights of political scientists and sociologists on such matters as the practicalities of implementation and enforcement. Similarly, lawyers’ messages concerning the limitations of different kinds of rules and enforcement processes might profitably be taken on board by economists and others. Analogous points could be made from the perspectives of other disciplines. This edition is written by a lawyer, an economist, and a political scientist, but will attempt both to draw from a wider range of disciplinary perspectives and to be accessible across disciplines. Highly technical approaches and terminology will be avoided where possible. It is hoped, therefore, that the analysis offered will prove useful to regulatory studies in a wide variety of areas.

Regulation has become a matter of topical debate in a way that it was not even a single decade ago. This global phenomenon was partly prompted by the activities of international organizations. Criticisms and concerns with regulatory orthodoxies became increasingly prominent during the financial crisis of 2007–9, when calls for deregulation and ‘light-touch’ regulation suddenly gave way to daily demands for more rigorous regulation of the financial markets. Elsewhere, too, regulation had attracted supporters and opponents alike. Supporters saw regulation as a technocratic device that had the potential to exert rational controls over important economic and social activities. Sceptics regarded regulation as little other than ‘red tape’ and a potential burden on economic activity.

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It is, therefore, fair to say that by 2011, the claim that we are living in an age of the ‘regulatory state’ had become widely accepted as the R-word had penetrated ever more social domains across countries.<sup>1</sup> Over the past decade, regulation has risen in the academic agenda to become both a field of study in its own right and a fertile source of new perspectives on the agendas of longer-established disciplines. Substantial contributions to regulatory debates have been made by political scientists, economists, lawyers, sociologists, anthropologists, and others. Writings on regulation have become well-represented across scholarly publications, and a diversity of university courses and programmes, as well as research centres, have emerged to deal with various aspects of the theory and practice of regulation. Some of these have treated regulation as a generic subject taught in interdisciplinary programmes; others have specialized in specific areas, such as financial services, environmental protection, communications, or utilities.

As a consequence, regulation can be said now to have reached a state of maturity, both in an intellectual and in a practical sense.<sup>2</sup> Intellectually, theoretical perspectives have developed rapidly into an impressive body of scholarship and, in the world of practice, there has developed a distinct and expanding international and national ‘regulatory community’ that shares similar languages, concepts, and concerns. The language of regulation has penetrated diverse policy domains and talk of regulatory strategy has become part of administrative life. In this process, central regulatory issues such as those relating to standard-setting and enforcement have become matters of regular discussion in different policy and academic communities.

## What is Regulation?

Regulation is often spoken of as if an identifiable and discrete mode of governmental activity,<sup>3</sup> yet the term ‘regulation’ has been defined in a number of ways.<sup>4</sup> Selznick’s notion of regulation as sustained and focused control

<sup>1</sup> See M. Moran, *The British Regulatory State* (Oxford, 2003); ‘Understanding the Regulatory State’ (2002) 32 *British Journal of Political Science* 391–413; and contrast this with G. Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17(3) *West European Politics* 77–101.

<sup>2</sup> For comparison with the position a decade ago see R. Baldwin, C. Scott, and C. Hood, ‘Introduction’ in R. Baldwin, C. Scott, and C. Hood (eds), *A Reader on Regulation* (Oxford, 1998). See also R. Baldwin, M. Cave, and M. Lodge, ‘Introduction’ in R. Baldwin, M. Cave, and M. Lodge (eds.), *Oxford Handbook of Regulation* (Oxford, 2010).

<sup>3</sup> See Baldwin, Scott, and Hood, *Regulation*, ch. 1.

<sup>4</sup> See B. Mitnick, *The Political Economy of Regulation* (New York, 1980), ch. 1; A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, 1994), ch. 1; G. Majone (ed.), *De-Regulation or Re-Regulation?* (London, 1989).

exercised by a public agency over activities that are valued by a community has been referred to as expressing a central meaning,<sup>5</sup> but it is perhaps useful to think of the word regulation being used in the following different senses:<sup>6</sup>

*As a specific set of commands*—where regulation involves the promulgation of a binding set of rules to be applied by a body devoted to this purpose. An example would be the health and safety at work legislation as applied by the Health and Safety Executive.

*As deliberate state influence*—where regulation has a more broad sense and covers all state actions that are designed to influence business or social behaviour. Thus, command-based regimes would come within this usage, but so also would a range of other modes of influence—for instance, those based on the use of economic incentives<sup>7</sup> (e.g. taxes or subsidies); contractual powers; deployment of resources; franchises; the supply of information, or other techniques.

*As all forms of social or economic influence*—where all mechanisms affecting behaviour—whether these be state-based or from other sources (e.g. markets)—are deemed regulatory. One of the great contributions of the theory of ‘smart regulation’ has been to point out that regulation may be carried out not merely by state institutions but by a host of other bodies, including corporations, self-regulators, professional or trade bodies, and voluntary organizations.<sup>8</sup> According to this third, broad usage of the term ‘regulation’, there is no requirement that the regulatory effects of a mechanism are deliberate or designed, rather than merely incidental to other objectives.

As a final comment on the concept of regulation, it should be noted that regulation is often thought of as an activity that restricts behaviour and prevents the occurrence of certain undesirable activities (a ‘red light’ concept<sup>9</sup>). The broader view is, however, that the influence of regulation may also be *enabling* or *facilitative* (‘green light’) as, for example, where the airwaves are regulated so as to allow broadcasting operations to be conducted in an ordered fashion, rather than left to the potential chaos of an uncontrolled market.

<sup>5</sup> P. Selznick, ‘Focusing Organisational Research on Regulation’, in R. Noll (ed.), *Regulatory Policy and the Social Sciences* (Berkeley, CA, 1985), 363, quoted Ogus, *Regulation*, 1.

<sup>6</sup> See Baldwin, Scott, and Hood, *Regulation*, ch. 1; J. Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1–95.

<sup>7</sup> On the distinction between command-and incentive-based regimes, see S. Breyer, *Regulation and Its Reform* (Cambridge, MA, 1982); Ogus, *Regulation*, esp. ch. 11; and R. Baldwin, ‘Regulation: After Command and Control’, in K. Hawkins (ed.), *The Human Face of Law* (Oxford, 1997).

<sup>8</sup> See N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford, 1998).

<sup>9</sup> On ‘red light’ and ‘green light’ rules and regulations, see C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, Cambridge, 2009); Ogus, *Regulation*, 2.

## Issues on the Regulatory Agenda

There is a tendency to associate regulation with the post-privatization control of the utilities. The language and practice of regulation, however, looks back on a much longer history. In Britain, regulation has been practised since at least the Tudor and Stuart periods.<sup>10</sup> In the nineteenth century, there was a burgeoning of regulation, with the emergence of specialist regulatory institutions<sup>11</sup> and a host of measures dealing with public health and employment conditions.<sup>12</sup> Developments in the supply of railway, water, gas, and electricity services led to the introduction of controls over prices, safety, and quality of service.<sup>13</sup> Elsewhere, too, regulation was practised widely and transferred from one domain to another. For example, initial railway regulation drew on provisions governing turnpikes.

During the twentieth century, a steady growth in regulation took place from the 1930s onwards. That decade saw the licensing of goods and passenger carryings by road as well as the advent, in the fishing industry, of marketing boards that fulfilled both operational and regulatory functions. The nationalization of core industries, such as the railways, were even framed as issues of regulation. For example, the ‘godfather’ of the UK public corporation model post-1945, Herbert Morrison, defined the ministerial function vis-à-vis public corporations as being ‘regulatory and supervisory in character’.<sup>14</sup>

In the post-war period, marketing boards followed in the cotton, crofting, sugar, and iron and steel industries, and the first US-style independent regulatory agency was established in Britain in 1954 with the Independent Television Authority.<sup>15</sup> The ITA was innovatory in combining a degree of independence from government with the carrying out of adjudicatory and regulatory, as well as policy-developing, functions. In the United States, such independent regulatory bodies had been carrying out key functions of government since the Inter State Commerce Commission was established in 1887 to limit discriminatory pricing by railroads. In the ITA’s wake followed a series of regulatory agencies that were created in the 1960s and

<sup>10</sup> Ogus, *Regulation*, 6–12; ‘Regulatory Law: Some Lessons from the Past’ (1992) 12 *Legal Studies* 1.

<sup>11</sup> O. MacDonagh, ‘The Nineteenth-Century Revolution in Government: A Reappraisal’ (1958) 1 *Historical Journal* 52.

<sup>12</sup> P. Craig, *Administrative Law* (5th edn, London, 2003), ch. 2.

<sup>13</sup> See J. Foreman-Peck and R. Millward, *Public and Private Ownership of British Industry 1820–1990* (Oxford, 1994), esp. chs 1–3; C. Foster, *Privatisation, Public Ownership and the Regulation of Natural Monopoly* (Oxford, 1992), chs. 1 and 2.

<sup>14</sup> H. Morrison, *Taking Stock*, PRO MT 47/15, S.I. (M) (47) (32), 18 July 1947. See also M. Lodge, *On Different Tracks* (Westport, CT, 2002).

<sup>15</sup> B. Sendall, *Independent Television in Britain: Origin and Foundation*, vol. 1: 1946–62 (London, 1982).

1970s to deal with issues in such areas as monopolies, gaming, industrial relations, civil aviation, discrimination, and workplace health and safety.

During the 1980s and 1990s, much stress was placed by governments and commentators on the problems and costs of regulation and the case for deregulating the economy.<sup>16</sup> The privatization drive of the same period, however, produced a new burst of regulation, carried out by a host of new regulatory bodies such as OFTEL (1984), OFGAS (1986), OFFER (1989), OFWAT (1990), and the Office of the Rail Regulator (1993). In addition, administrative changes produced a new Environment Agency in 1996 and from the creation of the National Lottery there emerged an Office of the National Lottery to oversee the providing private operator, Camelot.

By the mid-1990s, some 25 million customers were served by the main four regulated utilities industries alone. Their total annual turnover of £51 billion represented around 8 per cent of the annual gross domestic product of the UK, and not only the results of regulation but the processes used to regulate had prompted unprecedented concern. Regulation and deregulation had moved to positions high on the political agenda. Conservative administrations had sought, since 1985, to deregulate, cut red tape, and substitute competitive pressures for regulatory action. The Department of Trade and Industry's Enterprise and Deregulation Unit had been established in that year in order to review all new legislative instruments and assess the compliance costs they would impose on businesses. That body, later called the Deregulation Unit and housed in the Cabinet Office, had, by 1996, started to subject regulations to a newly taxing process of 'regulatory appraisal',<sup>17</sup> but the high point of deregulatory action had come with the passing of the Deregulation and Contracting Out Act 1994 which *inter alia* had given ministers the power to use secondary legislative to eliminate burdens and controls. No rigorous

<sup>16</sup> See J. Kay, C. Mayer, and D. Thompson (eds), *Privatisation and Regulation: The UK Experience* (Oxford, 1986); D. Swann, *The Retreat of the State: Deregulation and Privatisation in the UK and US* (Brighton, 1988); K. Button and D. Swann (eds), *The Age of Regulatory Reform* (Oxford, 1989); also see the White Papers: *Building Business, Not Barriers*, Cmnd. 9794 (London, 1986); *Lifting the Burden*, Cmnd. 9751 (London, 1985); *Releasing Enterprise*, Cmnd. 512 (London, 1988); Department of Trade and Industry, *Burdens on Business* (London, 1985); Cabinet Office, *Checking the Cost of Regulation* (London, 1996); *Regulation in the Balance* (London, 1996); M. Derthick and P. Quirk, *The Politics of Deregulation* (Washington, 1985); V. Wright, 'Public Administration, Regulation, Deregulation and Reregulation', in E. Eliassen and J. Kooiman (eds), *Managing Public Organisations: Lessons from Contemporary European Experience* (London, 1993).

<sup>17</sup> See *Regulation in the Balance* and Chapter 15 below. Under Labour, the Deregulation Unit was renamed the Better Regulation Unit in 1997. In 2006, these functions were split into two: the Better Regulation Executive (supporting government departments) and the Better Regulation Commission (tasked with overseeing the implementation of initiatives). In 2008, the Better Regulation Commission was replaced by the Risk and Regulation Advisory Council (which in itself ended its activities in 2009). The core of regulatory reform initiatives moved to the then Department of Business, Enterprise and Regulatory Reform (BERR). At the time of writing (2011), the Better Regulation Executive remained located within the (now called) Department of Business, Innovation and Skills.

review of the impact of such initiatives was, however, carried out by the Major government and promises of ‘bonfires of red tape’ were not fulfilled.

It was in the field of utilities regulation that the most urgent political debates took place towards the end of the last millennium.<sup>18</sup> Attention focused on the issues of efficiency, accountability, and fairness in the system of regulating by means of Directors General and their accompanying offices. A host of books and reports emerged from all parts of the political spectrum to put forward a large number of reform proposals.<sup>19</sup> These were accompanied by significant contributions, many of which originated to the practice of economic regulation of utilities, in industrial economics.<sup>20</sup>

In parallel to these developments in the regulation of economic and social activities, there was also the rise of regulation *inside* government. This included a growing prominence of formal auditing and financial controlling activities, the emergence of oversight mechanisms that sought to check on the quality or effectiveness of public services, such as prisons, schools, hospitals, and universities, as well as the growing codification of ethics provisions supposedly guiding public officials. All of these processes had been regulated in one way or another, but, despite considerable variations across domains, the ‘regulation industry’ inside UK government witnessed a considerable growth at a time of wider reductions in public service staff numbers elsewhere.<sup>21</sup>

By the turn of the millennium, the appropriateness of regulatory strategies and structures had become a significant public concern, and this led to a set of responses and debates over the first decade following 2000.<sup>22</sup>

<sup>18</sup> For a review of this debate see R. Baldwin, *Regulation in Question* (London, 1995).

<sup>19</sup> See e.g. C. Veljanovski, *The Future of Industry Regulation in the UK* (London, 1993); Adam Smith Institute, *Who Will Regulate the Regulators?* (London, 1992); P. Hain, *Regulating for the Common Good* (London, 1994); Centre for the Study of Regulated Industries, *Regulating the Utilities: Accountability and Processes* (London, 1994); National Consumer Council, *Paying the Price* (London, 1993); C. Graham, *Is There a Crisis in Regulatory Accountability?* (London, 1995 and reproduced in Baldwin, Scott, and Hood, *Regulation*); D. Helm, *British Utilities Regulation* (Oxford, 1995); M.E. Beesley (ed.), *Regulatory Utilities: A Time for Change?* (London, 1996); *Regulating Utilities: Broadening the Debate* (London, 1997); DTI Green Paper, *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation*, Cmnd 3898 (March, 1998).

<sup>20</sup> J. Vickers and G. Yarrow, *Privatisation: An Economic Analysis* (Cambridge, MA, 1988); M. Armstrong, S. Cowan, and J. Vickers, *Regulatory Reform: Economic Analysis and British Experience* (Cambridge, MA, 1994); D. Newbery, *Privatization, Restructuring and Regulation of Network Utilities* (Cambridge, MA, 1999).

<sup>21</sup> C. Hood, C. Scott, O. James, G. Jones, and T. Travers (eds), *Regulation Inside Government* (Oxford, 1999); C. Hood, O. James, G.B. Peters, and C. Scott (eds), *Controlling Modern Government* (Cheltenham, 2004); M. Lodge and C. Hood, ‘Regulation Inside Government: Retro-Theory Vindicated or Outdated?’ in R. Baldwin, M. Cave, and M. Lodge (eds), *Oxford Handbook of Regulation* (Oxford, 2010).

<sup>22</sup> M. Lodge, ‘Regulation, the Regulatory State and European Politics’ (2008) 30 (1/2) *West European Politics* 280–301; T. Prosser, *The Regulatory Enterprise* (Oxford, 2010); D. Oliver, T. Prosser, and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford, 2010).

One prominent issue was the governance of regulatory bodies. In the British context, debates on this matter led not just to a merger of regulatory bodies in energy and communications, they also produced a change in the leadership structure, with the original, and initially much-fêted ‘Director General’-model being replaced by collective decision-making boards. Indeed, the widely reported collapse of the privatized railway infrastructure provider, Railtrack, and its transfer into a ‘non-dividend paying’ public company, as well as the associated fall-out between ministers and the then regulator, confirmed arguments that the regulatory reforms of the 1980s and 1990s were far from achieving depoliticized stability: instead, the world of regulation continued to be one of high politics.<sup>23</sup>

A second concern related to the effects and biases of regulatory regimes. In particular, there was a growing worry about investments in infrastructures and the environmental effects of regulated industries, especially with regard to climate change.<sup>24</sup>

A third debate that grew in the new millennium was one driven by the emergence of new technologies and products. New products have come to market with increasing speed in recent times and consumers’ preferences have shifted, especially as consumers have become increasingly critical of the food production chain in the light of a series of food safety scandals, starting with so-called ‘Mad Cow Disease’. The arrival of genetically modified (GM) food and the new communications technologies, for instance, are two areas that have produced rafts of new control challenges and in another area—gambling via the internet—new technologies have changed the frontiers of existing regulatory regimes.<sup>25</sup>

With respect to regulatory strategy, the past decade has witnessed a growing appetite to explore the potential of ‘non-traditional’ methods of regulation. Commentators have, for instance, devoted new attention to the potential and limitations of market-based control strategies such as franchising and permit-trading regimes. There has been greater weight given to arguments for controlling not by state regulation but by ‘meta-regulation’ and regimes that focus on auditing the control regimes being operated within businesses and corporations themselves.<sup>26</sup> A further recent change that has emerged in

<sup>23</sup> M. Lodge, ‘The Wrong Type of Regulation?’ (2002) 22(3) *Journal of Public Policy* 271–97.

<sup>24</sup> D. Helm, *The New Regulatory Agenda* (London, 2004). For example, the UK government published proposals to reform energy regulation in late 2010 that was supposed to incentivize low-carbon forms of energy generation; see ‘Nuclear option poised to test coalition further’, *Financial Times*, 17 Dec. 2010.

<sup>25</sup> For a comparison between ‘high’ and ‘low tech’ policy domains and regulatory responses, see J. Black, M. Lodge, and M. Thatcher (eds), *Regulatory Innovation* (Cheltenham, 2005).

<sup>26</sup> J. Braithwaite, ‘Meta Risk Management and Responsive Regulation for Tax System Integrity’ (2003) 25 *Law and Policy* 1–16; C. Coglianese and D. Lazer, ‘Management Based Regulation: Prescribing Private Management to Achieve Public Goals’ (2003) 37 *Law and Society Review* 691–730; P. May, ‘Performance-Based Regulation and Regulatory Regimes: the Saga of Leaky Buildings’ (2003) 25 *Law*

parallel with such ‘auditing’ approaches has been the growth of a tendency to see regulatory issues in terms of risks and to see control issues as questions of risk management.<sup>27</sup> At the same time, governmental bodies have echoed these approaches, and bodies such as the UK’s (then) Better Regulation Task Force have commended the use of ‘more imaginative’ thinking about regulation and have stressed the need to adopt minimalist or self-regulatory controls in the first instance.<sup>28</sup> Similar ideas have also come increasingly on to the agenda of international bodies, such as the OECD with its ‘high-quality regulation’ initiative and the European Union with its own extensive programme on (regulatory) impact assessments. As a result of this international and national concern, the ‘better regulation’ agenda diffused internationally, moving these discourses towards emerging economies such as Brazil.<sup>29</sup>

Such discussions of ‘meta-regulation’ and ‘steering’ raised questions about the bodies that should be given the task of regulating and the level of government at which regulation should be positioned. Just as calls for ‘meta-regulation’ indicated the interest of some commentators in placing the control function within the corporation, others grew more concerned about the degree to which regulation operated inside the government itself and still others saw the important shift to be towards regulation by supra-national bodies (state or private) within a framework of globalization.<sup>30</sup>

Another important focal concern has developed in influence over the last decade. A strand of scholarship has emphasized the degree to which regulatory regimes are fragmented, multi-sourced, and unfocused.<sup>31</sup> On this view, fragmented regulatory authority is frequently encountered within national systems, and public, private, and (increasingly) hybrid organizations often share regulatory authority. This perspective suggests that to study regulation

*and Policy* 381–401; C. Parker, ‘Regulator-Required Corporate Compliance Program Audits’ (2003) 25 *Law and Policy* 221–44; M. Power, *The Audit Society* (Oxford, 1997); M. Power, *Organized Uncertainty: Designing a World of Risk Management* (Oxford, 2007).

<sup>27</sup> J. Black, ‘The Emergence of Risk-based Regulation and the New Public Risk Management in the UK’, (2005) *Public Law* 512–48; C. Hood, H. Rothstein, and R. Baldwin, *The Government of Risk* (Oxford, 2001). See also H. Rothstein, M. Huber, and G. Gaskell, ‘A Theory of Risk Colonization’ (2006) 35 *Economy and Society* 91–112.

<sup>28</sup> Better Regulation Task Force, *More Imaginative Thinking About Regulation* (London, 2003).

<sup>29</sup> K. Wegrich, *Das Leitbild “Better Regulation”: Ziele, Instrumente, Wirkungsweise* (Berlin, 2011); M. Lodge and K. Wegrich, ‘High Quality Regulation: Its Popularity, Its Tools and Its Future’ (2009) 29 (3) *Public Money and Management* 145–52.

<sup>30</sup> J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge, 2000); D. Kerwer, ‘Rules that Many Use: Standards and Global Regulation’ (2005) 18 *Governance* 611–32; E. Meidinger, *Competitive Supra-Governmental Regulation: How Could it be Democratic?* Buffalo Legal Studies Research Paper Series 2007-007 available at <http://ssrn.com/abstract=1001770>; P. Pattberg, ‘The Institutionalization of Private Governance: How Business and Nonprofit Organizations Agree on Transnational Rules’ (2005) 18 *Governance* 589–610.

<sup>31</sup> J. Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103–47.



by looking at single regulatory agencies is to adopt rather a limited viewpoint. Such ‘decentred’ interpretations of regulation have also highlighted the need to take on board the multi-level character of regulation, in which standards may be set or agreed at supranational or international levels and enforcement may take place in the locality.

When more specific regulatory questions have been explored, there have also been dramatic changes of treatment during the new millennium. A regulatory issue that has been particularly productive of fresh theories and approaches has been that of enforcement and compliance. Long gone are the days when one might comfortably profess to be an advocate of either ‘compliance’ or ‘deterrence’ approaches. In the wake of the well-established theories of ‘responsive regulation’<sup>32</sup> and ‘smart regulation’,<sup>33</sup> newer theories of ‘problem-centred’<sup>34</sup> regulation have moved compliance theory onwards, and have then been both exposed to criticism and refined. More attention has been paid to motivations and behaviours,<sup>35</sup> to interactions of control systems,<sup>36</sup> and to ‘risk-based’ and ‘principles-based’ approaches to regulatory enforcement.<sup>37</sup>

As regulation has come to the forefront of public debates in recent years, some particular issues have exerted an especially strong grasp on public and political attentions—on either a continuing or an ephemeral basis. There has, for instance, been a sustained concern about the ‘evils’ of regulation, such as ‘red tape’, overload, and the excessive bureaucratization of economic and social life. Critics have suggested that regulation creates major barriers to competitiveness and economic growth, and such worries have been fuelled by benchmarking exercises and league tables such as the World Bank’s ‘Doing Business’ reports.

In some cases, particular items have shifted place on the regulation agenda—so that debates about the virtues and vices of deregulation and privatization have, as noted, given way to post-millennium discussions of regulatory improvement and ‘better regulation’. In these newer conversations about regulation, it has become accepted, not only that regulation is necessary for the functioning of a market economy, but that regulatory oversight remains essential in the running of public services, especially those involving

<sup>32</sup> I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford, 1992).

<sup>33</sup> N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford, 1998).

<sup>34</sup> M. Sparrow, *The Regulatory Craft* (Washington DC, 2000).

<sup>35</sup> C. Sunstein and R. Thaler, *Nudge* (New Haven, 2008); C. Jolls, C. Sunstein, and R. Thaler, ‘A Behavioural Approach to Law and Economics’ in C. Sunstein (ed.), *Behavioural Law and Economics* (Cambridge, 2008).

<sup>36</sup> R. Baldwin and J. Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59–94; J. Black and R. Baldwin, ‘Really Responsive Risk-Based Regulation’ (2010) 32(2) *Law and Policy* 181–213.

<sup>37</sup> See Chapters 13 and 14 below.

naturally monopolistic elements, such as networks. An initial emphasis on economic regulation that was supposed to ‘wither away’ over time has been replaced by a realization that there is a continuing need for regulatory oversight and an imperative to add environmental and sustainability objectives to the earlier, primarily economic and social, objectives.

These freshly developing agendas of regulation have not, however, always gelled into highly coherent packages of policy or theory. The ‘better regulation’ group of initiatives can, for instance, be seen as rich in tensions and contradictions. Thus, calls have been made for more evidence-based regulation (and data-intensive, risk-based regulation) but, at the same time, governments have demanded that regulators make fewer informational and data supply demands on businesses. Similarly, the past decade or so has seen the spread of rationalistic and formal modes of evaluating regulatory proposals (notably ‘Regulatory Impact Assessments’) and, at the same time, many governments have urged regulators to move towards the kinds of regulatory styles that are least likely to score convincingly in RIA appraisals—such as more user-friendly and less formal modes of control (see, further, Chapter 15). In itself, the ‘better regulation’ agenda could be seen as an uneasy rhetorical package that combines a continuation of the ‘anti-red tape’ message and the belief in technocratic and ‘rationalizing’ tools for enhancing regulatory quality.<sup>38</sup>

By 2010, regulation had come to occupy a place at the forefront of public debate in more than one domain. The financial crisis that was initially to have led to a ‘return of the state’ pointed to the problems that could be caused by an over-reliance on the self-regulatory capacities of private organization.<sup>39</sup> It also highlighted a series of issues regarding enforcement styles and overall regulatory arrangements. By 2011, regulatory debates continued to be dominated by demands and warnings, on the one side, to impose ‘more’ regulation (in many variants: more rules, tougher sanctions, growing distinctiveness and ‘professionalization’ of regulators) and, on the other, cautioning that ‘more’ regulation would have considerable undesirable effects. The financial crisis also added to global regulation debates on such matters as how systemic risks could be coped with across jurisdictions, and how national regulators (through the Basel III agreement) could coordinate their ‘macroprudential’ actions and impose capital requirements to cope with overheated national economies.<sup>40</sup> Environmental disasters, such as the Louisiana oil-spill of 2010, brought their own regulatory disputes.<sup>41</sup>

<sup>38</sup> T.O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (Cambridge, 1991).

<sup>39</sup> M. Lodge and K. Wegrich, ‘Letter to the Editor’, *Public Administration Review* (2010).

<sup>40</sup> ‘Bank Regulators Agree on Global Sweep to Tackle Credit Bubbles’, *Financial Times*, 11 Jan. 2011.

<sup>41</sup> National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (2011), *Final Report* ([www.oilspillcommission.gov/final-report](http://www.oilspillcommission.gov/final-report), last accessed 14 January 2011). The ‘National Commission on the BP spill’ criticized the lack of resources allocated to the regulator and called for the

As a result of such developments and crises, regulation now occupies its place as a central organizing concern for the worlds of practice and research alike. At the same time, it has increasingly been asked whether regimes of regulation or self-regulation can satisfactorily solve complex problems—and not just in the context of the financial crisis. Advocacy of different regulatory strategies has, moreover, tended to proceed on a cautious basis and critiques of regulation have tended to emerge in a process of interaction between the study and the practice of regulation.

## The Organization of the Book

Part I of the book reviews a series of general issues in regulation, namely: why regulate at all (Chapter 2); how ‘good’ regulation can be identified (Chapter 3); how the origins of regulation and regulatory changes can be explained (Chapter 4); and how regulatory failures can be understood (Chapter 5). It also considers, in Chapter 6, the challenges of regulating risks and the vision of regulation as a risk-centred activity.

Part II of the book then looks at strategic issues and how regulation can be carried out. Central concerns are: choices of regulatory strategy (Chapter 7); self-regulatory, ‘meta-regulatory’, and complex regimes (Chapter 8); franchising (Chapter 9); and emissions trading (Chapter 10). Part III examines enforcement and implementation matters. It starts with a general review of these issues in Chapter 11 before looking at the more particular approaches of responsive regulation (Chapter 12); and risk-based regulation (Chapter 13). The problems that are encountered in choosing types of regulatory standards are considered in Chapter 14, together with the case for principles-based regulation.

Part IV turns attention to questions of evaluation of the quality of regulation. Cost-benefit testing and Regulatory Impact Assessment are looked at in Chapter 15. Accountability and procedural fairness concerns are discussed in Chapter 16. Finally, the role and incidence of competition and coordination between regulators is addressed in Chapter 17.

Part V reviews a host of issues that relate to the governmental levels at which regulatory systems are located. Chapter 18 deals generally with regulation at different levels before Chapter 19 considers the European

creation of a new safety regulator. The Commission also criticized the prevalence of self-regulation in the sector, especially the role in which the ‘American Petroleum Institute’ which produced national and global technical standards, was predisposed to rely on ‘industry autonomy’. It called for the creation of an industry-based safety standard-setting body and enforcing—a demand that was widely contested, with opponents noting in particular the financial implications of these proposals—see ‘US “cannot walk away” from oil in deep water’, *Financial Times*, 12 Jan. 2011.

## **12 INTRODUCTION**

dimension to regulation. Development and globalization issues are covered by Chapters 20 and 21, respectively. Part VI then looks at utility or network industry issues, and focuses on: price setting in natural monopolies (Chapter 22); using competition in network industries (Chapter 23); separation and contestability in network industries (Chapter 24); implementing price controls (Chapter 25); and efficiency and innovation in network industries (Chapter 26). Conclusions are offered in Chapter 27.