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Introduction: Regulation—the Field and the Developing Agenda

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The Oxford Handbook of Regulation
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[-] Abstract and Keywords

This text seeks to highlight the growing importance of the language, practice, and study of regulation for contemporary social life, to show how the theory and practice of regulation have developed through a process of continuous interaction, to explore key themes in the study and practice of regulation, to assess developments, and to suggest how these trajectories will develop in the future. The challenge for this book is not only to account for this broadening and maturation of interest, but also to illustrate how regulation has remained a moving target, both in the fields of practice and study, for the past three decades. The very concept of regulation has evolved so that study in this area is no longer confined to the examination of dedicated 'command' regimes that are designed to offer continuing and direct control over an area of economic life.

Keywords: regulation, language, social life, command regimes, economic life

> Everybodies talking about…revolution, evolution,…regulations
>
> John Lennon[1]

1.1 Introduction

Listeners to the BBC's Radio 4 morning news programme were treated, one early morning in July 2008, to three stories giving airspace to the words 'regulation' and 'regulating'. One story was about reforms of US financial market regulation in the light of the so-called credit crunch. The second was about British opposition to a (p. 4) proposed revised EU Directive on pesticides that shifted the regulatory approach away from a 'risk-assessment' to a more 'toxicological hazard'-based approach. The third item concerned the regulation of perks for parliamentarians in the UK House of Commons.

A number of things were notable about these news pieces and indicated that, indeed, everyone is talking about regulation. Two of the stories, those concerning the pesticide directive and parliamentary pay, would not have been associated with the language of regulation two decades ago. Furthermore, the financial regulation and the pesticide directive stories point to the international interest in national approaches towards regulation as well as to the penetration of national policy interventions by transnational approaches to regulation. What unites all three stories is the revealing of 'regulation' as both a technical fix to a problem and a source of problems itself and as inherently a site where different political and economic forces come into contest.

If the three stories noted above appear relatively un-noteworthy to readers in the UK or elsewhere this is because the language and practice of regulation has, over the past three decades, entered the language of public policy, law, and economics. Indeed, by 2010, calls for 'more regulation' in financial markets were widespread both at the national and international level and the boundaries between states and markets were redrawn almost on a daily basis following large-scale nationalisations of the banking sector. The practice of regulating markets, for example through licensing or planning permits, belongs to the oldest functions of the state but the language of regulation has penetrated ever more social domains, leading some observers to declare that we are living in the age of the 'regulatory state' (Moran, 2002 and 2003; Majone, 1994 and 1997). Regulation, and its attendant language, has not just penetrated policy discussions and, in turn, academic debates, but regulation as a field of study has impacted materially on the social sciences. One such impact has been the rediscovery and refocusing of discussions about control as a central aspect of policy analysis.

This Handbook has been put together at a critical and challenging time. The study of regulation has long been monopolised by economists with some occasional contributions by students of public administration in the public law tradition (Robson, 1962). As this Handbook illustrates, regulation has become a multi-disciplinary field, with substantial contributions to regulatory debates being made by political scientists, lawyers, sociologists, anthropologists, and others. Writings on regulation are well-represented across scholarly publication outlets and there has also been the inevitable arrival of a journal with the word regulation in its title, *Regulation and Governance*. In addition, a diversity of university courses and programmes, as well as research centres have emerged in order to deal with various aspects of the theory and practice of regulation. Some of these treat regulation as a generic subject taught in interdisciplinary programmes and others specialise in specific areas, such as financial services, communications or utilities, or discrete academic disciplines.

(p. 5) Regulation, as a consequence, has reached a state of maturity, both in an intellectual and in a 'world of practice' sense that has moved on considerably over the past decade or so (see Baldwin, Scott, and Hood, 1998). Intellectually, there has been a distinct process of maturation in the development of theoretical perspectives and lenses that are capable of application to the analysis of generic processes of regulation across specific sectors and across cultural contexts.

In the world of practice, maturity has meant both processes of growing commonality, as well as growing specialisation. That growing commonality has been evidenced by the emergence of a distinct international and national 'regulatory community' that shares similar languages and concepts. The language of regulation has penetrated not only diverse policy domains, but has also become part of non-English speaking legal systems, 'regulatory agencies' as well as 'better regulation' or 'high quality regulation' initiatives have become part of the administrative landscape, and ideas of standard-setting and enforcement have penetrated different policy and academic communities. This contrasts with an earlier age in which conversations remained distinctly within domains, whether these are energy, telecommunications, food safety, occupational health, environmental or financial regulation.

This rise in commonality has been accompanied by a simultaneous specialisation within regulated industries. This specialisation is linked to a burgeoning of the 'regulation industry': in the early days of 'regulatory reform', regulation and regulatory reform experiences (largely those of the network industries) were shared within a small set of individuals. A broadening of that discussion was, however, driven forward as career paths and domain-specific concerns triggered growing trends towards specialisation—in a movement that was framed, configured, and generated through the language of regulation.

The challenge for a *Handbook of Regulation* is not only to account for this broadening and maturation of interest, but also to illustrate how regulation has remained a moving target, both in the fields of practice and study, for the past three decades. The very concept of regulation has evolved so that study in this area is no longer confined to the examination of dedicated 'command' regimes that are designed to offer continuing and direct control over an area of economic life. The 'regulator' on the book cover represents this kind of traditional vision (and, arguably, continuing rhetorical attraction) of regulation as a 'red light' concept, an idea that through the rule of law a system could 'maintain its designated characteristics'. The same idea is represented in the idea of a 'regulator' (in 1758) as 'a clock by which other timepieces are set'.

In contrast to this 'fixed' view, the practice and study of regulation has increasingly moved towards more flexible understandings. This includes, for example, the indirect regulatory effects of control systems that are set up with aims other than regulation (e.g. taxation mechanisms). Similarly, it has become widely accepted that regulation can be carried out by numerous mechanisms other than those (p. 6) commonly typified as 'command and control'. Thus, scholars of regulation will see emissions trading mechanisms or 'name and shame' devices as being well within the province of their concerns.

The vocabulary of regulation has, moreover, impacted on more traditional areas of study—so that volumes on, say, family law, contracts, or environmental controls have come to approach the relevant issues in regulatory terms (Eekelaar, 1991; Collins, 2002; Stoloff, 1991; Handler, 1997). This has often tended to enrich analyses as it has become more generally accepted that regulation is a subject that is best dealt with from a trans- or multi-disciplinary perspective. Finally, regulation, as a field of practice and study, has had to come to grips with a central factor of regulatory life—the rate of change that affects most regulated sectors. New regulatory challenges are, thus, thrown up as technologies develop, as new products are devised and sold, as new types of actor enter the scene and as consumers' preferences shift. One example is the challenge presented by the arrival of genetically-modified (GM) food where conflicts about regulation have shaped local, national, and international regulatory regimes and geopolitics. In this context, regulation has become a central feature not just in the debates regarding the control of new or changing technologies, but also in the context of new technologies that change the frontiers of existing regulatory regimes—as with the array of possibilities and control issues that arise with the development of gambling via the Internet.

This Handbook therefore brings together a group of contributions that seek to highlight the growing importance of the language, practice, and study of regulation for contemporary social life, to show how the theory and practice of regulation have developed through a process of continuous interaction, to explore key themes in the study and practice of regulation, to assess developments, and to suggest how these trajectories will develop in the future.

1.2 Broadening Understandings of Regulation

As already noted, regulation has become a much wider concern than an interest in 'governing by rule'. The idea that we are living in an era of the 'regulatory state' (Majone, 1994 and 1997; Moran, 2002 and 2003) has been furthered by the spread of the language of regulation across social systems as well as state organisations and government strategies. The associated suggestion is that regulation, its practice and study, are central to the interaction between economic, legal, political, and social spheres. Indeed, the centrality of regulation to contemporary political, economic, (p. 7) and social life, as captured by the notion that we are living in the age of the 'regulatory state', points to significant implications for our understanding of the state, the power of non-elected administrative bodies, and ongoing attempts to standardise and control ever more social domains.

The past thirty years have witnessed a crystallisation of paradoxes in regulatory dynamics. First of all, there has been a continued concern with the 'evils' of regulation, such as 'red tape', overload, and excessive bureaucratisation of economic and social life. Such concerns have been sustained even in the wake of the credit crisis of 2007–9 (Arculus, 2009). Contemporary critics suggest that regulation represents major barriers towards competitiveness and economic growth and such criticism is fuelled by some international organisation's attempts at benchmarking regulatory and administrative constraints on business environments (such as the World Bank's 'Doing Business'). Such critics find plenty of agreement with the 19th century anti-red tape campaign in the UK supported by Charles Dickens, and made famous in his description of the Circumlocution Office (Dickens, 1857: esp. chapter 10).

A second policy dynamic became focused on the quality and direction of regulation, and stemmed from widespread advocacy of 'deregulation' in key industries, such as utilities. Therefore, the literature has observed a privatisation bandwagon (Ikenberry, 1988), where markets were liberalised, state-owned enterprises transferred into private ownership, and regulatory agencies and other devices, such as long-term contracts, became prominent features of the policy landscape. However, three decades of regulatory reform in infrastructure regulation suggest that regulation is not only necessary for the functioning of a market economy but that regulatory oversight remains essential in the running of such public services, in particular in those aspects that reflect genuine natural monopoly elements, such as networks. A growing importance has, moreover, become attached to quality and direction in regulatory activities—as can be seen in the growth of the objectives that have been imposed on regulatory agencies. The initial emphasis on economic regulation that was supposed to 'wither away' over time has been replaced by a realisation of the continued need for oversight and the addition of environmental and sustainability objectives to the earlier primarily economic and social objectives. Again, such a trend is not surprising for observers of historical trends, given the incremental and 'layered' growth of regulation that has characterised the past centuries, in such fields as market practices (licenses and weights), occupational health, or social and environmental concerns (see, for example, MacDonagh, 1958).

The rise of a 'better regulation' agenda is arguably a rhetorical device designed to hold out the prospect of coherence and consistency between these 'red tape' and 'regulatory quality' developments. On the one hand, 'better regulation' relates to the second of these developments and attaches increasing importance to the nature and performance of regulation. The UK witnessed in 1997 the move from a ' (p. 8) Deregulation Unit' to a 'Better Regulation Task Force' at the centre of government. On the other hand, 'better regulation' also represents a continuation of the 'anti-red tape' agenda. For example, interest in administrative cost reduction methods, as initially developed by the Netherlands' 'standard cost model' that was later endorsed by European and non-European countries, was directed at reducing the 'burden' of regulation on business and individual subjects.

Apart from representing an uneasy compromise between the two trends noted above, the 'better regulation' agenda was also fuelled by a third dynamic, namely a long-standing interest in introducing 'rational planning' tools into regulatory policy-making and thereby limiting the scope for bureaucratic and political knee-jerk regulation. One key example of such rationalist tendencies in the practice of regulation has been the spread of 'regulatory impact assessments' and 'cost–benefit analysis'.

The language of 'better regulation' or 'high quality regulation' was therefore an attempt to bridge these three related, but also conflicting dynamics (Lodge and Wegrich, 2009). The language of 'better regulation' and the endorsement of regulatory impact assessments were adopted by the European Union, in particular as part of the EU's so-called 'Lisbon Agenda' that sought to raise European industries' competitiveness. Similarly, the OECD (Organisation for Economic and Co-operation Development) moved, under the influence of member state interests, towards a greater emphasis on peer-review, comparative evaluation, and the endorsement of 'high quality regulation'. From the mid-1990s onwards, the OECD sought to develop indicators of regulatory quality (OECD, 1995 and 2002) and to devise strategies for improving regulatory policies, tools, and institutions. As a result, debates regarding the quality of regulation spread beyond European countries towards emerging economies such as India and Brazil, embedding these countries further in a globalised regulatory discourse.

The World Bank, too, regarded regulation—and the way in which 'regulatory governance' could contribute to developmental goals—as an increasingly important policy issue that replaced an earlier emphasis on privatisation per se. The World Bank endorsed the argument that emphasised the importance of 'fit' between institutional endowment (i.e. broader political and administrative institutions) and regulatory structures, rather than advocating a reliance on a one-size-fits-all 'best in world' type model of regulation (Levy and Spiller, 1994; Lodge and Stirton, 2006). This reflected, also, considerable disappointment in initial reform outcomes. These different trends have encouraged increased attention paid to the impact (and therefore quality) of regulation as well as a growing recognition of the need for 'bespoke' institutional design. A third associated phenomena can be broadly classified as a move away from command and control towards 'market based' systems.

These trends in governmental fashions have been echoed (if not led) by changing focal concerns of scholars of regulation. So-called 'command and control' was the traditional starting point of both regulators and regulatory scholars in the 1960s (p. 9) and 1970s, but by the 1980s, the deficiencies of such systems were outlined in numerous studies (Breyer, 1982) and calls were made for the introduction of 'less-restrictive' and 'incentive-based' controls. Both governmental and academic bodies of literature devoted attention to such 'alternative' modes of influence as taxation regimes and systems of information disclosure. Bodies such as the UK's Better Regulation Task Force (BRTF) began to commend the use of 'more imaginative' thinking about regulation and to stress the need to adopt minimalist or self-regulatory controls in the first instance (BRTF, 2003). Commentators moved on to consider the potential of more market-based strategies such as franchising and the use of trading regimes. It was a short step from that point to assess the argument for controlling not by regulating but by auditing the control regimes being operated within corporations, and thereby relying on schemes of 'meta regulation' (Braithwaite, 2000 and 2003; Coglianese and Lazar, 2003; May, 2003; Power, 1997; Parker, 2003). A further change came in parallel with such 'auditing' approaches—which was to see regulatory issues in terms of risks and to see control issues as questions of risk management (Black, 2005; Hutter, 2001; Hood, Rothstein, and Baldwin, 2001).

Such discussions of 'meta regulation' and 'steering' raised the questions of who should be given the task of regulating and the level of government at which regulation should be positioned. Just as 'meta regulation' indicated the interest of some commentators in placing the control function within the corporation, others were more concerned with the degree to which regulation operated inside the government itself (Hood et al., 1999 and 2004) and still others saw the important shift to be towards regulation by supra-national bodies (state or private) within a framework of globalisation (Braithwaite and Drahos, 2000; Chayes and Chayes, 1993; Kerwer, 2005; Meidinger, 2007; Pattberg, 2005).

Yet a further perspective emphasised that regulatory regimes are fragmented, multi-sourced and unfocused (Black, 2001; Hancher and Moran, 1989). On this view, a fragmented regulatory authority is frequently encountered within national systems, and public, private and (increasingly) hybrid organisations often share regulatory authority. This, in turn, was argued to make a sole focus on regulatory agencies rather limited. Decentred interpretations of regulation also pointed to the increasing emphasis on the multilevel character of regulation, for example in food safety regulation (in the sense of standards being agreed at supranational or international levels, enforcement taking place at the local level and information gathering by another unit of government).

In short, regulation as a programmatic idea as well as a technology of governing social systems has become a central organising principle for worlds of practice and research alike. Technologies of regulation, whether motivated by economic analysis, legal prescription, or political processes, have emerged in a process of interaction between the study and the practice of regulation. It is this interaction and the spread across domains, as well as the increasing understanding of regulation as ‘ (p. 10) decentred’ and as more discretionary, that has dominated the literature for the past two decades. It makes for a particularly interesting and challenging contrast between the appeal of ‘regulation’ as the programmatic idea of a ‘regulator’ or automatic system of control and its practice as an inherently non-hierarchical and (systematically) discretionary regime.

1.3 Broadening Theories of Regulation

As the concerns of governments, regulatory practitioners, and commentators have developed, a corresponding change has taken place in the perspectives that provide foundations for the study of regulation. Traditional functional and ‘public interest’ accounts of regulation tended to see both the emergence of regulation and regulatory developments as driven by market failures, the nature of the task at hand, and by disinterested actors engaged in the pursuit of some public interest. These perspectives proved vulnerable to many of the criticisms made by adherents to the diverse set of ‘economic’, ‘public choice’, or ‘private interest’ approaches to regulation, namely that the observed effects of many regulatory systems were consistent with ‘capture’ by the economically powerful, instead of regulation appearing to benefit the ‘public interest’ (see Stigler, 1971; Kolko, 1965; Bernstein, 1955; Breyer, 1982).

A variety of perspectives have questioned and refined the notion of the politician-regulator trading regulation for re-election in the light of interest-group demands for regulation. Considerable effort has been placed in moving beyond the seminal hypothesis by George Stigler that: ‘as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit’ (1971: 3). Furthermore, the realisation that regulatory authority has, historically, been inherently fragmented and decentralised has moved the study of regulation away from a sole focus on regulatory agencies (or commissions) and interest group politics. This encouraged numerous efforts to revise the ‘economic theory’ (Peltzman, 1976 and 1989; Barke and Riker, 1982) and to the emerging influence of, inter alia, the interest group (Wilson, 1980), ‘regulatory space’ (Hancher and Moran, 1989; Scott, 2001), principal–agent and transaction cost-based (McCubbins, Noll, and Weingast, 1987; Horn, 1995; Levy and Spiller, 1996), ‘cultural’ (Hood et al., 1999 and 2004) and ‘discourse’ (Black, 2002) schools of analysis. One key theme across the literature has united principal–agent and cultural theory approaches in the course of focusing on types of control and their operation in the context of changing political constellations. In their different ways, this has also encouraged a growing interest in various regulatory strategies and motivations, in particular regarding ‘blame-shifting’. Regulatory space and discourse analyses of regulation have pointed to (p. 11) another key theme, namely the importance of understanding regulation as communication and as a network that requires its own specific codes of communication to deal with unexpected surprises within such a setting of diffused power. Arguably, an emphasis on shared regulatory authority across private and public actors has been a distinct European contribution to the study of regulation, whereas North American scholarship (and the scholarship seeking to appeal to North American concerns) has remained primarily interested in the activities of regulatory agencies, such as the Environmental Protection Agency (EPA). A third key theme that emerges from these theoretical advances is an increased attention to explaining regulatory failures and unintended consequences. This latter theme has also encouraged a greater emphasis on looking at behaviours and motivations.

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 (Baldwin, 1995). Influential theories of 'responsive regulation' (Ayres and Braithwaite, 1992), 'smart regulation' (Gunningham and Grabosky, 1999) and 'problem-centred' regulation (Sparrow, 2000) have moved compliance theory onwards, and these theories, in turn, have been both exposed to criticism and refined with more attention being paid to motivations and behaviours (see Sunstein and Thaler, 2008; Jolls, Sunstein, and Thaler, 2000; Baldwin and Black, 2008 and in other areas of public policy, see LeGrand, 2003). Further new perspectives have, in turn, added fresh theories that have proved attractive to policymakers as well as the academy. There is, accordingly much talk in the new millennium of 'risk-based' and 'principles-based' approaches to regulatory enforcement with considerable attention regarding side-effects and behavioural implications of such strategies.

If challenged to offer a shorthand summary of theoretical developments in the field of regulation, it might thus be said that there has been a movement away from a pure interest-group driven analysis, towards a growing emphasis on institutional design and a coupling of this with a more detailed differentiation of motivations and behaviours as these are encountered in the body of politicians, regulators, and the regulated that makes up the regulation community.

1.4 Regulation as a Trans-Disciplinary and Inter-Disciplinary Field of Study

Finally, how can we define regulation? Defining what regulation is and, arguably more importantly, what regulation is not, has remained at the centre of (p. 12) considerable debate. A field of study that does not know its boundaries could be accused of youthful empire-building or unimaginative scholarship: if regulation is everything, then it is nothing. Varying definitions of regulation range from references to: a specific set of commands; to deliberate state influence; to all forms of social control. Without entering further into this definitional debate, it can be noted that all three of these definitions suffer from under- and over-inclusiveness. It is nevertheless fair to suggest that regulation, at its broadest level, has allowed scholarship to return to issues of control (whether studied through principal–agent, cybernetic, cultural, or institutionalist lenses).

As this brief introduction illustrates, Philip Selznick's seminal definition of regulation as 'the sustained and focused control exercised by a public authority over activities valued by the community' (Selznick, 1985: 363) can now be seen as highly problematic. The distribution of 'public authority' over levels of government and between private and state sectors varies and is highly contested, debates regarding decision-rules to establish 'values' feature prominently, in particular in areas regarding risk, ideas about how to exercise 'control' are controversially considered, and what is constituted by 'community' is similarly problematic in the light of transnational and supranational sources of regulation or indeed cross-border policy issues. Therefore, we follow Julia Black's more wide-ranging definition of regulation as 'the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification' (Black, 2001).

In addition to these debates regarding definitional clarity, the status of regulation as a field of study remains an area of contention. Regulation is clearly not a 'sub-discipline' in the sense of being an area of study in which phenomena are investigated in the light of dominant methodologies or analytical frameworks from any one discipline. It might be regarded as a 'sub-discipline' for lawyers, economists, political scientists, sociologists and other social scientists when it comes to justifying research and teaching interests within disciplinary silos. However, as the composition of this editorial team, the following contributions, and the bibliography suggest, the study of regulation is informed by debates from a range of disciplinary backgrounds. Regulation is much more than a convenient uniting label that allows different disciplines to conduct their own insular research or to re-heat their own debates under new labels.

It is therefore more accurate to see regulation as a field of study that operates between 'trans-disciplinary' and 'inter-disciplinary' conversations. A trans-disciplinary field can be seen as an area of study where different disciplines and research traditions talk to each other and where work is informed and influenced by these conversations. As the following chapters suggest, there is a conversation across literatures and authors from different traditional disciplines that occurs across all aspects of regulation research and it is arguably at such boundary-lines between different disciplines and methodologies that innovation in the social sciences occurs.

(p. 13) Arguably, regulation has not yet achieved the status of true inter-disciplinarity—if this term refers to a state of play where researchers from various initial disciplines are transformed by their interchanges with fellow researchers and thereby create a new discipline that is characterised by its own dominant understandings and research methodologies. As for the causes of this non-achievement, this may have something to do with the continued importance of traditional disciplines in running degree programmes or, more importantly, promotion-criteria based on publications on discipline-based 'top journals'. At the same time, though, true inter-disciplinarity is extremely hard to achieve.

We do not aspire, with this Handbook, to offer a manifesto for advancing regulation towards a truly inter-disciplinary future, but we do hope that this collection of leading authors and dominant themes paves the way for a more advanced conversation and engagement between scholars from different backgrounds. We aim to contribute to a movement that goes beyond lip-service to trans-disciplinarity and which encourages genuine conversations that will advance our knowledge of the theory and practice of regulation.

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Notes:

(1.) From 'Give Peace a Chance' (in Lennon's original spelling).

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