

Regulation scholarship in crisis?

Edited by Martin Lodge

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Regulation scholarship in crisis?

Martin Lodge

Regulation remains at the centre of public attention. Whether it is about the regulation of financial markets, concerns with eating habits, or criticism of red tape, debates about the appropriate level of regulation are never far away. But how well placed is scholarship on regulation to respond to this continued high degree of attention? Such a question might at first sight appear superfluous: regulation has, over the course of the past three decades, become a recognised institutional field, with its own dedicated journal (*Regulation & Governance*), its handbooks, textbooks and teaching programmes (Baldwin et al. 2010, 2012; Levi-Faur 2011; Lodge and Wegrich 2012), its own conference (the ECPR Regulatory Governance biennial conference), and considerable presence at other professional conferences, especially in socio-legal studies and political science. In light of all these esteemed factors, why should there be an interest in the state of scholarship?

Beyond the habitual temptation to engage in soul-searching about one's own field of study in order to declare either that the future is bright or not, or under threat from some hegemonic disciplines, there is considerable value in questioning the state of scholarship in regulation. John Braithwaite (2014), for example, in a recent contribution noted how regulatory scholarship had 'failed' to displace existing disciplinary silos in the social science. This Discussion Paper brings together a range of contributions from international regulation-interested scholars from a variety of disciplines. The basic questions underpinning the contributions are: can scholarship on regulation be considered to be in crisis? Have existing theories and approaches been seen as sufficient to address important phenomena, such as the financial crisis?

Why the 'in crisis?' question is important

Why then pose the question as to whether regulatory scholarship is in crisis? After all, the past two decades have seen considerable advances in knowledge. There have been the development of distinct lines of regulatory scholarship that target particular questions (see Koop and Lodge 2015), a growing insight into varieties of regulatory agency design and behaviour, growing interest in transnational and other non-state regulatory regimes, and a growing realisation of the role of procedural 'better regulation' tools, such as cost-benefit analysis.

However, at the same time, the past two decades have witnessed acute and salient crises that might be seen as major challenges to scholarship on regulation. One is that regulated sectors have witnessed considerable crises, especially following the financial crisis since the late 2000s. Other crises

involve food, such as the horsemeat scandal which involved mislabelled products, nuclear safety (Fukushima) or mining (River Pike). The question was not whether regulatory scholarship failed to predict these incidents, but whether the literature was pointing to the kind of vulnerabilities that were identified post-crises, and whether existing approaches and theories have proven sufficiently robust to analyse the aftermath of these various crises. In other words, it is worth questioning whether the financial crisis and other crises associated with regulatory failings constituted rude surprises for regulation scholarship.

Another challenge is that regulatory institutions and instruments are arguably in crisis as well. The call for 'independent' regulatory agencies has become increasingly weaker (see **carr** discussion paper 81, Eyre et al. 2016). Key regulatory instruments that were seen to be at the heart of the world of economic regulation, such as the price cap RPI-X, are increasingly viewed as problematic, even by former enthusiasts (Heims and Lodge 2016). So-called better regulation tools are also widely seen as largely of a symbolic nature; they raise attention, but usually fade away as political priorities take over. It is also difficult to suggest that regulation has achieved developmental outcomes. In short, in the world of practice, there is considerable concern about regulation. The initial appeal of regulation – that it would steer actors towards an outcome at minimal governmental resource expense – has been disappointed. Regulation in the world of practice may have been the future once.

Such a diagnosis also has fundamental implications for the study of regulation. One of the key animating themes in the study of regulation has been the idea of the 'regulatory state' (Majone 1997). This particular version of the regulatory state was characterised by an emphasis on the privatised provision of public services, the prominence of regulatory agencies separate from political ministerial decision making and from providers of services, and formalised contractual arrangements. Overall, this set of institutional arrangements was to ensure 'depoliticisation': the time-inconsistency problem of electoral politics and the control problem of having to regulate information-rich businesses. The underlying electoral coalition that supported this regulatory state was arguably one that was increasingly hostile to redistribution and sceptical about political decision making (Lodge 2008).

Two earlier accounts that pointed to the inherent instability of this regulatory state included Michael Moran's study of the British regulatory state that noted the competing logics (of synoptic high modernist control and of informal traditional club government) that were inevitably going to lead to policy fiascos (Moran 2003). The other was Al Robert's account of the 'logic of discipline' that more broadly suggested that institutional

arrangements had come unstuck in the face of political and popular contestation (Roberts 2010).

The past decade suggests that these vulnerabilities and inherent instabilities of the regulatory state have become more prevalent. A number of trends can be identified and one factor might be the growing shift to 'post-fact democracy' in which there is a growing political movement against institutions that resist 'responsive' governing. In other words, we may be moving from an age that rewarded 'responsible government' to an age where 'responsiveness' is valued. This has fundamental implications for questions of regulatory and other institutions. This tension between responsiveness and responsibility needs to be added to more long-standing conflicts that characterise contemporary executive government surrounding the renationalisation of politics despite a context of transboundary crises, debates about the long versus short termism of particular decision-making horizons, and concerns between the need for differentiated governance and overall co-ordination in governance approaches. The contemporary 'habitat' might be said to be increasingly hostile to the kind of regulatory state that emerged in the 1980s and 1990s.

The second factor is the impact of the financial crisis. Apart from the question as to whether particular institutional designs are more likely than others to handle inevitable over- and underlap issues, there are also questions about the continued attraction of regulation (and 'regulatory independence') as a policy idea. After all, the supposedly high intelligence, high rationality world of UK regulation failed spectacularly in the case of the financial crisis. More indirectly, there are also issues as to whether the 'age of austerity' that followed the financial crisis degraded regulatory capacities, as budget cuts hit local enforcement capacities in particular.

A third factor is technology. The arrival of technologies that appear problematic in terms of fitting them into existing regulatory categories is a long-standing theme in regulation (see, for example, the arrival of the railways in the early 19th century). However, the arrival of 'big data' and the centrality of the algorithm in detecting personal preferences and shaping them, raises considerable concerns about the kind of questions and methods that will concern scholarship in regulation in future.

Fourthly, there is also the question of the positioning of regulation scholarship vis-à-vis the world of practice. In a recent critical comment, Steve Tombs (2015) revisited a long-standing dispute of the 1980s to allege that regulation scholarship (and **carr** in particular) had become part of a 'regulatory orthodoxy' in that it had uncritically endorsed neoliberal governing approaches and had become intellectually lazy. **carr** in particular was alleged to have become 'the central institutional vehicle in defining the field of legitimate regulatory study in Britain and beyond' (Tombs 2015: 66)

where scholarship had become a 'small industry, a torrent of self-referential banality from which considerations of power, capital class *and even crime* are notable for their absences' (Tombs 2015: 67).

Whatever the rationale of such conspirational punditry, these comments should motivate some reflection, whether it is about the underlying theories that underpin particular regulatory approaches, or about the appropriate relationship between the worlds of research and practice. A lack of critical comment might, after all, be the product of 'conceptual capture', namely the dominance of certain models in scholarship and practice that remain unchallenged given a lack of venues to articulate challenges without risking career advancement.

Finally, there is also a question as to the biases within scholarship itself. The need to appeal to dominant questions in particular disciplines means that regulation scholarship might be driven more by questions and methodologies that appear legitimate, but might be of limited applicability to researching questions of substantive relevance in the field of regulation. More importantly, there is also a question regarding the 'global North' bias of much regulation research, and with it comes the question to what extent assumptions about regulatory institutions need to be revisited in the context of regulation in the 'global South'.

What crisis?

What, then, might be said about theories of regulation that might be in crisis? This is not to suggest that one should expect a theory of regulation to exist that could explain all regulatory phenomena at all times. However, the field of regulation scholarship is characterised by some dominant concepts – and underlying theories – that have a strong influence on debates.

One such concept is the notion of 'capture'. Much has been said about the problems with capture and the overall theory of economic regulation (Stigler 1971; Peltzman 1976). In a recent volume, David Carpenter and David Moss (2014) noted how the capture concept needed to be more carefully operationalised to be of value, and, as noted by Novak (2013), on what flimsy foundations the evidence for capture stood. Similarly, considerable attention has been paid to the notion of 'credible commitment'. Here it is argued that institutional devices need to be established that ensure that the principal will not, over time, drift away from the terms of the initial agreement. In the world of regulation, credible commitment has been used to restrict the discretion of government to intervene in regulation so as not to deter private investment, for example (see Levy and Spiller 1994). Subsequent research has suggested that formal institutional architectures will only shape behaviour so much. Instead, behaviours in regulated fields need to be understood far more as a product of informal institutions and understandings – as the more recent interest in reputation-based theories has suggested. Furthermore, if we are indeed living in

an age of growing disrespect for 'competence', as noted above, then important questions about the ways in which supposedly technocratic regulatory bodies maintain their autonomy arise.

Another area concerns questions about standard setting and enforcement. Dominant frameworks here have highlighted the limits of 'command and control' (which in themselves may be seen as men of straw) and of hierarchy (Ayres and Braithwaite 1992; Baldwin 1990; Coglianese and Lazer 2003). Instead, much has been said about responsive strategies in enforcement that involve third parties, as well as about meta-regulation that relies first and foremost on the capacities and motivation of the regulated. These approaches have offered considerable insights into the regulatory process and informed both the worlds of research and of practice. At the same time, these approaches have been criticised for their over-functional character and for underplaying the significance of political and administrative feasibility in particular sectoral and national settings.

Finally, one of the main lines of investigation (and division) within regulation scholarship is the interest in non-hierarchical forms of regulation. Hancher and Moran's original contribution on regulatory space highlighted that regulation needed to be understood in relational terms and where there was no clear demarcation between public authority and the regulated (Hancher and Moran (1989). Since then, the notion of 'decentred regulation' has reinforced this message (Scott 2001, Black 2002). However, more theorising could be undertaken to advance different perspectives on the many varied forms of decentredness across different regulatory fields.

So what?

This note was not intended to perform a soul-searching litany of missed opportunities and concern about the future – nor was it intended as a 'self-serving form of reflection' (Tombs 2015: 66) to justify resource-intensive research into regulatory phenomena. Nearly two decades ago, Robert Baldwin, Colin Scott and Christopher Hood (1998: 34-40) noted that a future research agenda should focus on questions of the language, culture and consequences of regulation. Some limited work on these themes has been undertaken, although maybe not to the extent that these authors may have wished for. Nevertheless, regulation is a flourishing field in terms of important and exciting fields for research. Methodological advances have also been forthcoming. The presence of a field of research into regulation that brings together different disciplines – as reflected in the various contributions in this Discussion Paper – highlights how concepts and phenomena can be fruitfully explored in a trans-disciplinary way.

These are all reasons to be cheerful about the state of scholarship in regulation. It has often been said that innovation in science comes from the periphery; it is here where dominant frameworks are challenged given the presence of alternatives, and the reduced scope for control by the disciplinary centre. Regulation may no longer be peripheral in status, but it can benefit from its

placing at the boundaries of different disciplines. This status however represents a clear threat for continued refreshment if careers are made within disciplines and their (alleged) 'top three' journals, the less interest there will be in engaging in challenging disciplinary orthodoxies.

Furthermore, the incentive to engage in measurement and advanced methods should not come at the expense of engagement with the theories of regulation. Otherwise the field will become impoverished, being accused of offering little else than informed commentary on the latest (technocratic) regulatory fashions in the world of practice. A continued and critical engagement with concepts and underlying theories that draws on different disciplinary perspectives is therefore critical for a flourishing field of study.

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On the size and kind of influential stakeholder communities and regulatory governance

Caelesta Braun

Introduction

The theory of regulatory capture has increasingly attracted attention within academic circles since the outburst of the financial crisis in 2008. The perceived coziness between the financial industry and financial regulators has been dubbed as a process of the industry hijacking the regulator (Aalbers et al. 2011: 1779), an accusation others refer to as the [notorious] ‘money-as-smoking-gun argument’ for evidence of business influence on policy outcomes (cf. Lowery et al. 2005: 49). In addition, recent accounts of industry influence on (financial) regulatory agencies emphasise the role of framing and ideology (Johnson and Kwak 2010), illustrated by the following quote:

Campaign contributions and the revolving door between the private sector and government service gave Wall Street banks influence in Washington, but their ultimate victory lay in shifting the conventional wisdom in their favor, to the point where their lobbyists’ talking points seemed self-evident to congressmen and administration officials (Johnson and Kwak 2010: 5–6).

Overall, regulatory capture as a theory of regulatory influence is very much alive, and recently being further developed to include multiple mechanisms of political influence (Carpenter and Moss 2014).

Yet, for a regulatory outcome to be designated as a case of regulatory capture, several propositions need to be fulfilled, which are very demanding to test empirically. As Carpenter argues in a recent and thoughtful contribution on the measurement of regulatory capture:

... we conclude then that a full diagnosis of capture needs (a) to posit a defensible model of public interest, (b) to show action and intent by the regulated industry, and (c) to demonstrate that the ultimate policy is shifted away from the public interest and toward industry interest (Carpenter 2014: 63).

Apart from the challenges in conceptualising and measuring the element ‘the public interest’ in this definition of regulatory capture, the size and kind of ‘the regulated industry’ associated with regulatory influence is not mentioned. This is surprising, because, most, if not all, traditional accounts of regulatory capture posit a direct relationship between the size of special interests and regulatory capture (Pelzman 1976; Posner 1974; Stigler 1971). In this position paper, I add to the recent advancement in the study of regulatory capture by exploring a set of

meaningful and testable hypotheses on the size and kind of regulatory constituencies associated with regulatory influence.

The size and kind of influential constituencies

One of the key explanatory factors in most traditional interest group theories of regulation is the size of an agency's constituency. The argument is well known. Industries with a small number of big players easily overcome collective-action problems. Their individual share of potential gains (for instance entrance barriers) is high given the small number of players; a situation commonly hypothesised to predict collective action (cf. Olson 1965). So, what the economic theory of regulation suggests is that collective action of the regulated industry depends on its size. As Posner (1974: 347) put it:

... formally, this [the size of a winning coalition, CB] is the number beyond which the loss of group cohesiveness caused by adding another member would outweigh the increase in feasibility and attractiveness of becoming regulated produced by greater voting power and by greater demand for regulation due to greater difficulty of cartelizing privately.

Such factors are often operationalised as measures tapping industry concentration. Tellingly, recent studies empirically testing such operationalizations find mixed results (Brasher and Lowery 2006) or have difficulties in significantly explaining corporate political behaviour in the EU (Bernhagen and Mitchell 2009).

One of the missing elements in explaining regulatory capture or stakeholder influence on regulatory decision making thus still is: which stakeholder community size is under which circumstances sufficient for successfully employing political strategies and securing favourable regulation? Indeed, we encounter at least several formally defined situations where we would establish industry influence in the literature: small groups with equivalent interests, or big groups characterised by asymmetry and equivalent interests. And, in addition, when we take into account voting power and legitimacy (see Pelzman 1976; Posner 1974), we would argue that larger, limitedly heterogeneous groups would also be able to obtain favourable regulation as well. As, again, Posner (1974: 347) already observed:

... the economic theory has not been refined to the point where it enables us to predict specific industries in which regulation will be found. That is because the theory does not tell us *what (under various conditions) is the number of members of a coalition that maximizes the likelihood of regulation* (italics added, CB).

Unpacking a winning regulatory crowd: density, diversity and volatility

In the study of political mobilization and interest group politics, one particular subset of models designed to explain the size and characteristics of interest group communities concerns the population-ecology of interest group communities (Lowery et al. 2015, Gray and Lowery 1996). The defining mechanism, according to these models, of a given size and kind (i.e. the density and diversity) of a viable organizational community is density-dependent growth. That is, the number of viable interest groups (or politically active organizations for that matter) can be largely predicted by the number of potential constituents within a given community. For example, the number of politically active interest organizations representing chocolate factories is determined by the number of existing chocolate firms within a community and ultimately, of course, by the number of chocolate-addicts (and buyers) in a given constituency.

A key assumption of such a population ecology theory of interest group mobilization is that a direct relationship between mobilization and final policy outcomes does not automatically exist (Lowery and Gray 1995). This is in contrast with the interest theory of regulation, where size of the industry is traditionally used to predict favourable regulation (Pelzman 1976; Posner 1974). The main explanatory mechanism for this indirect rather than direct relationship between mobilization rates and political outcomes, is the inter-organizational context of interest groups and stakeholders. That is, stakeholders primarily need to maintain themselves before engaging in any meaningful political exercise (Braun 2015; Halpin 2014; Halpin and Jordan 2009). Explaining how a stakeholder community engages in political activity, thus first requires being attentive to the driving forces of organizational maintenance.

According to these population-ecology models (Hannan and Freeman 1977; Lowery and Gray 1995), organizational establishment and maintenance are fundamentally affected by two mechanisms, namely legitimation and competition. Legitimation, conceived of as a taken-for-granted organizational format, is important in the early stages of population growth. When a certain organizational format or organizational goal is considered legitimate, it provides an opportunity for others to mimic and hence stimulates a sharply rising growth curve. When density increases, competition for vital resources sets in, causing growth to slow down. As a result, the function of population growth is characterised by an S-shaped curve, with a slow early rise, followed by a steep increase and a final equilibrium (also called carrying capacity), where founding and disbanding rates indicate a relatively stable population size over time (Lowery and Gray 1995). Interest group communities in the US and elsewhere are shown to exhibit such a curvilinear growth pattern where potential constituency (i.e. the potential pool of members of an interest group), as well as legislative or activity (efforts governments put into developing legislation) are the most important explanatory factors of interest group density (Berkhout et al. 2015; Halpin et al. 2015; Hanegraaff et al. 2011). In sum, the organizational context, in particular, the number and type of competitors and collaborators

matters in explaining the size and kind of stakeholder communities that is capable of engaging in the exercise of political (and regulatory) influence.

Stakeholder communities and regulatory agencies

Adopting a population perspective to the study of regulatory capture might help us better estimate the size and type of industries associated with favourable regulation. Consider the establishment of a hypothetical regulatory agency (say the EU financial authorities) and assume that the development of active stakeholder constituency is characterised by a density-dependent growth curve and maximum carrying capacity. In the early stages of the agency's life, the active stakeholder population is most likely to be relatively small. This should change, as increasing levels of government activity generally attract interest group activity (Baumgartner et al 2011; Leech et al. 2005) and after a while the lobbying population may settle around an equilibrium given density-dependence growth. This growth function might have important implications for their exercise of political influence (and, hence, the likelihood of capture). In the early stages of agency's life cycle, there might be only a few constituents, which is beneficial in terms of collective action potential and thus in obtaining favourable regulation if we follow conventional explanations of constituency influence on regulatory decision making. In the period of rapid growth, matters become more difficult in terms of predicting collective action potential and the situation is likely more beneficial for the agency in question as it might draw other, countervailing power into the 'charmed circle' (cf. Pelzman 1976: 222), thereby reducing the likelihood of capture. The likelihood of capture during equilibrium of the population depends on the level where competition sets in and the population reaches its peak or its maturity. High numbers might indicate a bigger and more heterogeneous population (Lowery et al. 2005), giving rise to asymmetrical constituency subsets (earlier posited to be related to regulatory capture), but might also suggest that agencies are better capable of employing a tactic of rule and divide. The exact equilibrium of a stakeholder community is largely determined by density-dependent growth, as well as by the output and activity of regulatory agencies (Arras and Braun 2016; cf. Baumgartner et al. 2011).

In sum, the size and kind of communities of agency stakeholders are likely to vary over time, across agencies and across regulatory domains. Taking into account how such stakeholder communities are affected by the contextual factors of density-dependent growth and agency activity could help to more precisely conceptualise and explain the size and kind of agency constituencies.

Conclusion

Adding a contextual explanation of density (and diversity) to regulatory agency's constituencies facilitates the formulation of testable hypotheses on the density and diversity of agency constituencies. And, subsequently, the formulation of hypotheses on the size (and kind) associated with various regulatory outcomes. As the size and kind of special interests are traditionally associated with an

agency's vulnerability to regulatory capture, adding such a contextual approach helps to empirically test such hypothesised relationships. Overall, adopting such a theoretical approach implies that we need to be more attentive to the impact of the organizational context on political activities of agency stakeholders, which are likely to vary across countries, agencies, and policy domains. And, more importantly, this theoretical approach speaks to the necessity of adopting more general interest-based explanations of regulatory governance, rather than holding on to a theoretically narrow and empirically very demanding explanation of regulatory capture.

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Why it is hard to attribute regulatory crises to capture

Cary Coglianese*

[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.

– Stigler (1971)

The notion of rent is a slippery one, largely because economists themselves have never agreed upon any one conventional use for the term.

– Fred S. McChesney (1997)

Nearly everyone ‘sees’ regulatory capture today, especially in the wake of the global financial crisis and other disasters.¹ And yet, for a phenomenon so universally condemned, capture actually remains quite hard to pin down. Since capture has been so roundly decried, one would think that someone could reliably determine which regulatory institutions are most captured, measure with precision whether regulatory capture is getting better or worse over time, or evaluate reforms to see which ones yield the greatest reductions in regulatory capture. But that is not the case. More than four decades after the publication of George Stigler’s (1971) classic ‘Theory of economic regulation’, research on capture remains remarkably undeveloped.² Clear measures of capture do not exist. At best, regulatory capture as a social phenomenon remains a lot like how former US Supreme Court Justice Potter Stewart’s defined obscenity: ‘I know it when I see it.’

A major problem with capture is that different people see different things. Those on the political left see signs of capture in lax laws or law enforcement, while those on the political right see capture in strict laws imposing burdens on smaller businesses or new competitors.³ Can both perspectives be correct? Perhaps they can. Nevertheless, it has been far too easy for people to talk past each other when talking about capture, and far too difficult to pin the phenomenon down. Capture’s elusiveness stems from four principal factors.

Firstly, as already suggested, different people mean different things by ‘capture’. Not only do they worry about different policy manifestations, some people mean

* An earlier version of this paper shared with participants in this workshop draws on an essay that appeared in *RegBlog* in July 2016, entitled ‘The elusiveness of regulatory capture’, <<http://www.regblog.org/2016/07/05/coglianese-the-elusiveness-of-regulatory-capture/>>

¹ A series of essays on *RegBlog* exemplifies the bipartisan concern about regulatory capture, featuring denunciations of capture by, among others, both Democratic US Senator Elizabeth Warren as well as Republican US Senator Mike Lee. See *RegBlog*, ‘Rooting out regulatory capture’, <<http://www.regblog.org/2016/06/13/rooting-out-regulatory-capture/>>

² For a retrospective on Stigler’s classic treatment, see Carrigan and Coglianese (2015).

³ Dan Carpenter and David Moss (2014) refer to the former as corrosive capture, the latter as anti-competitive capture.

by capture simply that public policy outcomes exhibit a general bias in favour of one segment of society, such as the wealthy. Others mean not a general policy bias, but a specific and consistent bias toward firms in the regulated industry, as those firms succeed in influencing policy outcomes to reap benefits for themselves at the expense of society overall. Economists sometimes call these undue or excessive benefits 'rents'; the lobbying activity that precedes capture is often called 'rent-seeking'.

Secondly, in addition to differences in how people define capture, unanswered questions remain about the level and nature of proof that is needed to reach the conclusion that regulation has been captured. Some people view capture as binary condition – a regulatory agency either is or is not captured – while others view capture as arrayed along a spectrum, with greater or lesser degrees of capture. Both views demand a showing of some level of bias, whether general or specific. But how much bias must exist to say that a regulator has been captured, even if is just to a small degree? Does just one instance – say, a single rule slightly weakened, or a single inspection not conducted – constitute capture? Presumably not, but exactly how much is 'too' much? To avoid this question, sometimes people consider the existence of rent-seeking behaviour itself to demonstrate bias, such as when they point to the well documented imbalance in lobbying by regulated industry versus that by public advocacy groups or individual citizens.⁴ Unfortunately, there exists no accepted standard for how much imbalance must exist in order to support a finding of regulatory capture, just as there is none for how much influence must be found, let alone any agreement on relevant units of measure with which to track these sorts of things.

Thirdly, although capture might be intrinsically problematic, it often is viewed as a cause of other problems, such as industrial accidents, cases of fraud, or instances of monopolization. People readily observe these other problems, concluding that regulation has failed to prevent them. They then surmise that capture must have been the root cause. This is why a resurgence of interest in regulatory capture in the United States has arisen in the wake of the 2008 financial crisis, the Gulf Coast oil spill, and other perceived regulatory failures.⁵ However, regulatory problems can have other causes too. Laziness, shortsightedness and incompetence can also lead to policies that end up favouring some interests in society at the expense of others. Capture is not the only source of bad public policy outcomes; finding the latter does not *ipso facto* prove the former.

What distinguishes capture from other sources of bad public policy outcomes? Answering that question reveals a fourth and final reason for capture's elusiveness: the analytic complexity in its blend of empirical and normative

⁴ For evidence of this imbalance in the number of comments filed on proposed regulations by businesses, see Coglianese (2006).

⁵ For discussion of the string of recent disasters attributed to regulatory failure, see Coglianese (2012).

components. Notwithstanding differences in definitions, most conceptions of capture tend, at least implicitly, to share three components: (1) industry actors influence policymakers, which leads to (2) industry reaping private benefits that (3) come at the expense of the overall public interest. Each of these steps is hard to demonstrate, some more than others, but in combination they make it extremely difficult to pin down capture as an underlying cause of regulatory failure. Consider each of these steps in turn:

Step 1: Influence. Influence is not the same as lobbying. Lobbying is an activity undertaken in an effort *to influence* – that is, to make regulators act in ways they would not have otherwise acted in the absence of the lobbying. Lobbying is observable; influence is not. Finding influence requires assuming or estimating a counterfactual world without the lobbying activity, and then comparing what regulators did with what they would have otherwise done in that counterfactual world, were it not for industry lobbying. That is not easy to do. Even the best research only finds correlations, not causality. A showing of influence calls for causation.

Step 2: Industry benefits. It is also not always easy to discern what counts as industry benefits. Suppose an industry consistently seeks to convince a regulator not to impose a new regulatory standard. Suppose further that, as a result of the industrial lobbying, the eventual policy turns out to be different from the counterfactual one. Instead of a regulation that would have imposed, say, tens of billions of dollars in regulatory costs, the regulators adopt that which imposes ‘only’ billions in costs on industry. Has industry benefited? It has clearly fared better than had it not tried to influence the regulator, but it also seems hardly ‘advantaged’ relative to its preferred world of no regulation.

Step 3: Public-interest detriment. Just because industry may reap benefits from its influence, this does not necessarily mean that the public interest has been compromised. Most policies require a balancing of benefits and costs; indeed, in the United States, some statutes even require such a balancing. If an industry’s influence only counteracts a regulator’s tendency to adopt policies that would impose costs grossly disproportionate to benefits, then business influence may actually advance the public interest, not detract from it. Moreover, just as we cannot readily observe counterfactuals in order to demonstrate influence, we also cannot readily observe the optimal points at which regulatory policies should be set or enforced. Political leaders, activists, scholars, and members of the public disagree with one another over where those points lie. Disagreement does not mean, of course, that anything goes. But it does provide an explanation for why everyone seems to ‘see’ capture – because there are plenty of regulatory policies and practices over which to disagree.

All sides think they are right in seeing capture when they do. What they see as capture, though, depends crucially on the definitions they have in mind, the assumptions they make about counterfactuals, and the value choices they

embrace. This is why it is so difficult to capture ‘capture’. It is also why undertaking the pursuit, through rigorous social science research, demands still more careful thought and analysis. In the wake of recent crises in regulation, regulatory scholars should resist any impulse to leap to the conclusion that capture is the source of regulatory crisis and instead renew their efforts to define and study intensively the phenomena of private influence over public regulation.

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Bureaucratic discretion, credible commitment, and trust

Gary J. Miller and Andrew B. Whitford

Our argument in our book *Above Politics** centres on four observations. Firstly, government is integral for long term economic growth and stability in markets. Secondly, given time-inconsistent preferences, politicians' promises are often not credible. They are expected not to intervene on the behalf of specific market actors adversely affected by government's actions in the markets via regulation or management of the money supply. Thirdly, we argue that agencies are central to understanding the relationship between government and markets because delegation from politicians to bureaus solves a broader problem of credible commitment – but only if bureaus (like politicians) 'tie their own hands'.

Lastly, our claim is that this implicit agreement is two-sided: that politicians could violate this agreement by intervening in the markets – by pushing bureaus to take actions that do not pursue social welfare or by acting in ways to circumvent the actions of bureaus. Likewise, bureaus could violate this agreement if they use their positions for ill, for the good of the bureau alone, or for the good of specific market actors. With regard to these restrictions on bureaus, we argue that professionalism is a form of social delegation to groups – of perhaps economists, engineers, lawyers, or doctors – that are bound by agreements to serve 'higher goods'.

Our claims are not about any 'universal good', or any 'unavoidable equilibrium'. Rather, as with Djankov et al. (2003), we see this agreement as a kind of trade-off – as a possible outcome that results from a dilemma about minimising both the social costs of disorder and the social costs of dictatorship. The benefits of having independent regulators and central banks staffed by professionalised bureaucrats is an outcome that was largely unanticipated by their designers. Indeed, even debates in political science and public administration about accountability and responsibility mostly focus on the role of hierarchical control by elected political principals of their unelected bureaucratic agents. We believe our focus on both the 'principal's problem' and the 'bureaucrat's burden' presents political science and public administration with an opportunity to help answer questions asked by economists like Estache and Wren-Lewis (2009: 757) when they observe regulatory independence and credible commitment in market settings around the world, such as 'which [mechanisms] are likely to be more important and which are likely to have the greatest risks'.

* This paper is an abbreviated version of the concluding chapter of the authors' recently published book, *Above politics: bureaucratic discretion and credible commitment*, Cambridge University Press, 2016.

We believe there are inherent risks in a 'delegation to professionals' arrangement. We recognise that there are no perfect mechanisms – that all management strategies and all organizational arrangements are themselves a set of interlocking dilemmas (Miller 1992). We call one such risk 'the campaign against bureaucrats'. As then Governor Rick Perry of Texas once said about Chairman Ben Bernanke of the Federal Reserve, 'If this guy prints more money between now and the election, I dunno what y'all would do to him in Iowa but we would treat him pretty ugly down in Texas. Printing more money to play politics at this particular time in American history is almost treasonous in my opinion' (quoted in Benen 2011). In the long run, professionals are more credible than their political overseers. Of course, smart politicians probably know this – thus the incentive for 'bureau-bashing'.

The campaign against bureaucrats is by no means unprecedented. As Kaufman (1981) reminds us, hostility towards 'unelected bureaucrats' has been present throughout much of history. The point of such initiatives was often clear; those that were not elected should be made responsive to the electoral majority through the spoils system. The Progressives were relatively unique in arguing that accountability to politicians (in the form of party bosses and machine henchmen) was a danger in itself (Knott & Miller 1987). Their criticism of bureaucrats was inseparable from their criticism of the party machines that the spoils system made possible. Progressives allied with professionals and technicians, supported the creation of agencies staffed by these types, and insulated from too much political interference.

But consider the incentives here for politicians. With the waning of the New Deal, the more Populist critique of bureaucrats (based on their elitism, incompetence, laziness, and power hunger) reasserted itself, with a larger number of targets in the newly expanded number and size of the executive agencies. As social conservatives broke away from the New Deal coalition, any remaining patience with the bureaucracy seemed to disappear. George Wallace, in his northern primary races in 1964, tried out a campaign based on resentment of elites, especially college professors, Supreme Court justices, and pointy-headed bureaucrats.

As social conservatives entered Reagan's big-tent Republican coalition, one thing that united social conservatives with traditional pro-business Rockefeller Republicans was the antipathy for regulation and for bureaucrats, an antipathy fed by Reagan himself. Reagan attacked 'fraud, waste, and abuse', and with it the bureaucrats who benefited from it. Many politicians have followed Reagan down this path, but it is hard to imagine a more telling example than Michele Bachman, at the beginning of her presidential campaign, who accused the Obama administration, saying '... the number of federal limousines for bureaucrats [has] increased 73 percent in two years. I can't think of anything more reprehensible than seeing bureaucrats on their cell phones in the back' (Madison 2011). This

image combines the underlying fear and loathing of privilege and elites, making irresponsible decisions in the back seat of a limo.

In all of these cases, a legitimate concern for bureaucratic accountability is transformed into a belittling of bureaucratic professionalism and expertise, and hostility towards bureaucratic independence and bureaucrats themselves. Bureaucrats are always going to create enemies. These enemies can use the incompleteness of bureaucratic solutions as evidence supporting an anti-bureaucratic political stance: 'bureaucrats are inept but power-hungry; don't give them the autonomy they desire.' This would be of little concern, except that this kind of politicised attack on bureaucracies deprives them of the independence that allows them to contribute to the credible commitment of the state to the kind of economic conditions that are requisites for economic development.

The problem is worse when bureaucrats are charged with solving technical problems for which ultimate resolution is unlikely or impossible. One thinks readily of global warming, guiding the economy through a financial panic, or even teaching third grade. All of these are issues of sufficient complexity and subtlety that they cannot be articulated on a bumper sticker or lawn sign, where politicians feel most comfortable.

More disturbing, perhaps, is if large parts of society draw what we think is exactly the wrong conclusion – that 'experts' are the problem, and the less we support them, listen to them, or defer to them, the better off society will be. But Douglass North's views still apply: economic development requires a level playing field in the form of contract enforcement and transparency in property rights. We fail to imagine how majority rule politicians with short term election goals can supply these requirements.

If professionalised bureaucracies were just as volatile as legislative politics, then there would be no reason to write our book. However, there are good reasons to think that decision making is different in professionalised bureaucracies. This does not mean that bureaucratic decision making is untouched by the politics of legislature and politicised members of the executive branch. But it does mean that political decisions are often different than they would be if made on the floor of Congress or in a presidential cabinet meeting, for instance. And the differences are not so much biased towards business, as they are biased towards a stability that comes from expertise itself. Credible commitment requires professionalised bureaucracies, with enough resources and respect to get their job done.

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When regulation goes too far: legitimacy and the legal control of regulatory agencies

Lindsay Stirton

Two recurrent themes in regulatory theory have been: (a) the question of legitimacy of the decisions of regulators; and (b) the extent (and quality) of control of regulatory agencies by legal and political means. This position paper brings these themes together by reflecting on what I identify as shortcomings in the phenomenon and the theory of control of regulators, and how this contributes to a perceived crisis of regulatory legitimacy. Particular emphasis is given to one kind of regulatory failure, namely the disregard of individual interests in pursuit of the public interest.

As a motivating example, consider the case of *Marcic v. Thames Water Utilities* (House of Lords 2003). Peter Marcic was in the unfortunate situation that a sewer ran under his property. The capacity of the sewer was insufficient, and as a consequence, Marcic's house was repeatedly flooded with sewage. Remedying the situation would have required some expenditure which, no doubt, Thames Water could have met. More broadly, however, doing the same for all those in a similar position to Marcic's would have cost Thames Water £1 billion. The case was an ultimately unsuccessful action in the common law tort of nuisance, and the details are not relevant for present discussion.

What is relevant for present discussion is that Marcic was forced to contemplate such an action because the Director-General of Water Supply (DGWS) declined to make an enforcement order against Thames Water under Section 18 of the Water Industry Act 1991. The DGWS was, it was held, under no obligation to make an order if doing so was incompatible with the policy objectives set out in the Act. These included the refinancing duty in Section 2. Clearly, requiring Thames Water to make improvements, not just for Marcic, but to all similarly situated householders, would have made it difficult for the sewerage provider 'to finance the proper carrying out of [its] functions'.¹

So here we have a situation where Marcic's interests were directly contrary to the policy objectives given to the regulator. The necessary investment may well have been unaffordable, as the DGWS found in refusing to make an order. But outside of human rights law, the law gives no form of action, and no doctrinal basis to question whether the DGWS reached the right balance – as long as his actions were in pursuit of one of the objectives of the Act, ensuring the financial viability of the industry, his decision was legally unimpeachable.

¹ Water Industry Act 1991 Section 2 (2) (b). This provision has subsequently been modified, but the substance of the refinancing duty remains.

In thinking about the control of regulatory agencies (of whatever kind) the standard question to ask is a variant on one or other of the questions: 'how much?' and 'what kind?' Less often does one ask the question: 'why?' Moreover, when one starts to look at the answers that have been given to this question over time, what one sees is a shift in regulation scholarship not only to how much and what kind of control of regulation, but more fundamentally in terms of why and to what end such control should be exercised.

Pioneering scholars of the incipient interdisciplinary field of regulation such as W.A. Robson (1951, 1960) gave one kind of answer. The state, so the argument went, had taken on functions in relation to the management of the economy that took activities out of the realm of individual decision making and under collective control. This gave administrators certain functions in the management of the economy that required them to alter the lawful claims and duties, privileges and immunities of individuals, what Hohfeld (1913) had earlier called 'jural relations'. This was all to the good, but gave rise to a risk that in pursuit of the collective interest, the interests of individuals would be overlooked, in other words, that regulation would go too far. There was a need therefore to establish limits to the pursuit of the public interest – indeed there was no contradiction between such limits and the public interest, since they were considered to be part of the public interest broadly conceived. The aim of political and legal control (against which questions of 'what kind?' and 'how much?' were to be answered) was that administrators should – like judges – exercise their powers with 'a judicial mindset' or 'in the spirit of justice' (or various other phrases that Robson used to mean roughly the same thing).

Robson himself took a rather sceptical view about the ability of the courts to bring about the necessary attitude in the exercise of what was tellingly described in the jargon of the time as 'the judicial powers of the executive'. The common law, so Robson and his fellow travellers supposed, was beyond reform, incapable of escaping the blind alley of technical decisions in which it had become enmeshed. A system of tribunals, relatively insulated from the common law courts offered a better means.² But the key point concerns the criterion of justice in primary decision making against which such institutional recommendations are to be judged.

This view is virtually unrecognizable today. On the one hand, the role of the courts in relation to regulatory agencies seems relatively settled and assured – though proposals still abound to take technical aspects of regulatory decision making out of the purview of the common law courts, for example in the realm of financial regulation. On the other hand, the idea that regulatory decisions should

² Others offered different institutional recipes – Conservative and Unionist lawyers supported the transformation of the Privy Council into a British Conseil d'État, an imaginative engagement with European legal traditions unimaginable among Conservatives today – but the important point is that the underlying concern was the same.

be guided primarily by a spirit of justice (rather than by technical, economic or more broadly public policy criteria) seems by contemporary standards almost quaint, and certainly out of kilter with current legal thinking. There are many who would challenge the neo-functional view that regulatory agencies represent a domain of decision making according to technical criteria in pursuit of efficiency-promoting outcomes. But there are few who would see value in designing legal and political controls so as to *limit* the pursuit of regulatory objectives (as opposed to ensuring their faithful execution).

This shifting orientation of regulatory scholarship has gone hand in hand with a shift in legal consciousness. I have told the story in more detail elsewhere (Arvind and Stirton, forthcoming). In essence, the courts did in fact escape the shackles of an excessively technical body of law relating to the prerogative remedies in order to fashion a modern law of judicial review. But in doing so, they re-focused the primary purpose of legal control as one of 'enforcing public duties on behalf of the public as a whole' (Woolf 1990: 34). Such a doctrinal focus directs attention to the public responsibilities of regulators, to be determined by reference to the relevant regulatory statutes rather than any broader enquiry about the purposes promoted by statute and common law. It is adequate to an assessment of whether the regulator considered the policy issues deemed relevant by law though it rarely has much 'bite' when it comes to challenging the adequacy of the way particular issues are addressed. And the law's approach to assessing whether regulators 'went too far', i.e. if in zealously pursuing a particular objective, they unduly burdened some private interest, is at best indirect. In ongoing work, also with T. T. Arvind, I suggest that the approach of the courts towards regulatory excess has more in common with Bentham's 'securities against misrule' (Scholfield 1990) than with earlier traditions of regulatory or administrative law scholarship.

This is not to say that such issues do not come before the courts – they do, and often successfully so, from the point of those wishing to challenge the regulator. The point is that legal doctrine – the norms and principles which give direction to judges in deciding cases – provide little guidance in doing so, because while the law can on occasion restrain regulators who go too far, it is incapable of mediating between the legitimate if over-zealous pursuit of public policy goals and the private interests that may from time to time have to be sacrificed in pursuit of the public interest. This is a problem for regulators as much as those wishing to challenge them because the law lacks any capacity for guidance – what P.S. Atiyah (1978) called the 'hortatory' function of law. For a regulator, the experience of judicial review is unpredictable, and the judgment does little to shape practice beyond the specific narrow confines of the decision itself. For the challenger, pleading becomes a purely strategic exercise of identifying ways in which a decision might be legally vulnerable – while the resulting litigation fails to address the matter of the underlying dispute.

This all suggests that the particular answer that the present day law gives to the 'why?' question of legal supervision of regulation – in order to ensure the performance of public duties – may in fact be related to the perceived crisis of regulatory legitimacy. Dissatisfaction with regulation that goes too far cannot be aired – at least not in any forum capable of giving a remedy – because the law gives offers no language for articulating this particular concern.

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Did we do enough to understand EU conflicts over risk and regulation before Brexit?

Henry Rothstein

In 2007, the UK won a protracted battle with the European Commission over its explicit framing of workplace health and safety regulation as a trade-off between safety and cost (C-127/05, *Commission v. UK* [2007] ECR I-4619) (Rothstein et al. 2015). The controversy began a decade earlier when the EC complained to the European Court of Justice (ECJ) that the UK's stipulation that workers should only be protected against harm 'so far as is reasonably practicable' was inconsistent with the Framework Directive's (89/391/EEC) requirement to 'ensure the safety and health of workers in every aspect related to the work'. Other EU member states such as France and Germany had transposed the Directive into national law in ways that emphasised the aim of reducing workplace risks to the minimum possible, and so – the Commission argued – should the UK. The UK responded, however, that it was 'impossible to eliminate all [workplace] risks' (HSE 1989: 17). Rather than mandate safety, the UK contended that the goal of Occupational Health and Safety (OHS) regulation should be 'risk-based'; i.e. the cost, time and effort required to reduce potential harm should not be grossly disproportionate to the probability and consequence of harm occurring.

While the UK won that case, this conflict speaks to wider conflicts over EU risk regulation and the extent to which it should be risk-based. On one side of the debate, many Anglo-Saxon commentators have identified a European proclivity for what they regard as disproportionate, costly and precautionary regulation that inhibits growth (e.g. Sunstein 2005; Vogel 2012). From that perspective, seemingly overly stringent EU regulation of environmental or human health and safety harms is at best explained as thinly disguised trade protectionism, and at worst, as simple irrationality. On the other side of the debate, critics of Anglo-Saxon neoliberalism often decry the turn to risk-based rationales as deregulatory assaults that threaten to undermine public and environmental protections by individualising responsibilities for failure onto victims rather than the risk creators, be it the risk-based qualifications of the goal of workplace health and safety or risk-based conceits at the heart of financial regulation (e.g. Dodds 2006; Tombs and Whyte 2013).

Such debates have been played out through endless conflicts within the EU and between the EU and US over a wide range of human and environmental harms, be it BSE and other food safety crises, chemical safety or genetically modified organisms. Now that the UK has voted to leave the EU, however, it seems appropriate to reflect on these debates and to consider whether regulatory scholarship did enough to explain what was at stake.

Over the past 40 years or so, risk governance has become central to the EU project. Pan-EU risk governance frameworks have served a number of goals. They have been critical in creating a level regulatory playing field for European business, provided the necessary coordination to tackle harms that cross the jurisdictional boundaries of member states, and they have brought harms under control that member state governments have neither capacity nor will in the political cycle to focus on. However, as the EU has extended its writ over ever more domains of risk, so have its risk decision making processes and principles increasingly become the subject of controversy and challenge.

Questions about how far governments should go to eliminate harms, how they should act under uncertainty, or manage the distributional outcomes of decision making are, of course, universal questions to which there are no easy answers. Increasingly, however, governments around the world have started to pay more attention to risk ideas in an attempt to better understand the problems that they confront. By taking into account *probability* as well as the *impact* of potential adverse regulatory outcomes, risk-based approaches to policymaking offer the promise of helping policymakers make more efficient and rational decisions. To do otherwise, so the argument goes, would not just be disproportionately costly, but could distract attention from more serious problems (Breyer 1993; Graham 2010). As such, they have been proselytised across the Anglo-Saxon world and beyond by the OECD and WTO, have become mandated in the UK, and provide a key decision criteria in the legalistic regulatory world of the US (OECD 2010).

Yet this conceptual approach is far from being accepted universally across even the advanced democratic states of the EU, as the ECJ case over the goal of workplace health and safety regulation illustrates. Comparative regulatory scholarship offers some clues to why this might be, in so far as it has long shown how risk regulation debates across policy domains and countries are driven by conflicts over the international distribution of risks, costs, and benefits (Hood et al. 2001). Fear of public pillory can make it difficult for decision makers in any country to frame policy in risk terms that entail acceptable probabilities of deaths, financial losses, or other adverse governance outcomes. In those countries where the green movement is a powerful political force, it is perhaps not that surprising that those countries may be more disposed to tough environmental action than others. Likewise, the interests of national businesses may be aligned with resisting risk-based approaches in order to raise national regulatory barriers to competition. As Vogel (1995) has pointed out, the concentration and distribution of power between producers and consumers in international markets can go a long way to explain risk regulation outcomes.

Such arguments can take us a long way, but regulatory scholarship has tended to pay less attention to the way that ideas of risk and regulation are filtered and shaped through deeply nationally entrenched governance cultures that can rest on very different founding assumptions. For example, ideas of risk-based regulation are predicated on certain expectations of the state that are often hard

to reconcile with the constitutional settings of different national polities (Rothstein et al. 2013). Thus the utilitarian philosophy that underpins risk-based regulation could be argued to fit with the conceits of ‘what the state is for’ in many Anglo-Saxon polities. In the UK, for example, risk ideas have emerged in the absence of any written constitution that accords rights to individuals that could conflict with utilitarian calculations of how to achieve optimal social welfare. As Lord Irvine of Lairg (2000) has put it, ‘English Law observes rights as residual, comprising the range of conduct that has not been in terms cut down by statute or common law rules’. Parliament is sovereign and if it chooses to qualify regulatory requirements through risk-based rationalizations that use the toolkit of probability and consequence to differentiate between who or what gets targeted and who or what doesn’t, then that is its prerogative. In that context, the elaboration of risk-based regulation principles have served the function of limiting the discretion of regulators and trying to make parliament think twice before it acts. Critics may well be right that risk tools have sometimes served as instruments of deregulation that have favoured powerful organised interests. But such criticisms miss the point that in a polity where the potential for state intervention is, in principle, boundless, risk ideas serve to offer a set of principles that can draw some kind of rational boundary to state action.

A quick glance at other advanced European member states, however, suggests that the norms that underlie risk ideas conflict with deeply entrenched governance philosophies of other European countries. In France, for example, one might expect the French ‘technocratic’ culture to be sympathetic to risk-based approaches. Indeed, the US Supreme Court judge and leading advocate of risk-based governance, Stephen Breyer (1993), argued long ago that the French *Conseil d’Etat*, which acts as a supreme arbiter of the ‘general interest’, should serve as a model for combating often observed risk governance irrationalities in the United States. Yet in France, an implicit expectation that the state will provide ‘security’ for its citizens and the constitutional guarantee of equality, work against the way in which risk-based approaches explicitly tolerate adverse outcomes and imply that some people may have to suffer for the collective good. One example was during the 2009 H1N1-flu pandemic, when the French Minister of Health decided to vaccinate everyone rather than the third of the population needed to provide herd immunity, having no legal grounds to decide which third should get preferential treatment (Assemblée Nationale 2010).

Indeed, in recent years the French state has made much of the concept of *sécurité sanitaire*, invoking risk in ways that reinforce idea of the ‘protective state’, i.e. protecting individuals against all harms rather than as a rationale for defining the limits of state action. But while this appears from an Anglo-Saxon perspective to be at best utopian, and at worst irrational, criticism tends to overlook the complex way in which safety is conceived in France. Safety – which translates as *sécurité* – cannot be easily disentangled in France from deeply entrenched constitutional commitments to *solidarité* and *fraternité*; concepts that focus attention as much on *ex post* compensation as on *ex ante* prevention. For example,

as Mares (2003) shows the 19th-century *théorie du risque professionnel*, which provided a founding rationale of the French social insurance system, was based on the idea that workers risking their wellbeing for the good of the nation should be compensated for the unavoidable consequences of workplace accidents and ill-health. Thus the conceit at the heart of the *théorie du risque professionnel* was the opposite of the conceit at the heart of the UK's approach to risk in workplace settings. In the UK, risk ideas and concepts served as a way of qualifying which harmful outcomes employers should be held responsible for. In France, however, the *théorie du risque professionnel* was concerned with ensuring that workers were looked after once they were hurt.

In Germany, by contrast, risk-based approaches are constrained by legalistic policy cultures that find it difficult to handle risk ideas. Governance traditions that stretch back to the 19th century regarded the protection of people from 'dangers' to life, freedom, and property as one of the few legitimate grounds for state action (Huber 2009). But 'dangers' were broadly dealt with in binary terms; if there was no danger then there were no grounds for state action. While the courts recognise that some small 'residual risk' can be tolerated, they have struggled to reconcile historically entrenched ideas of danger and safety with the more nuanced idea of acceptable risk. For example, when the anti-nuclear movement challenged the authorities over the safety of nuclear power, the German courts found it impossible to agree on a definition of acceptable risk throughout the 1970s and 1980s (Proske 2004: 466).

One consequence is that the German legal system has created a plethora of relatively new legal categories to justify a wide range of interventions, not least the infamous 'precautionary principle' to justify action in the absence of certain knowledge of danger. It's not hard to see the source of the Anglo-Saxon complaint about the principle. In the UK the precautionary principle imposes an unnecessary constraint on policymaking, given that parliament is free to take action about uncertain harms according to political preference. But Anglo-Saxon complaints misunderstand that in the German context, where the constitution jealously guards the negative rights of individuals against the state, the precautionary principle is less an expression of excessive caution than simply a legal category that gives the German state legal grounds to intervene.

Another example of a cleavage in the way that EU member states think about risk and regulation that has received relatively little attention in the literature is that of legal tradition, not least the different importance placed on headline law in the common and civil law traditions (Rothstein et al. 2015). The common law tradition constrains judges to interpret statutes according to their literal or plain meaning to help ensure consistent judicial interpretation of the law. That tradition helps explain why the UK fought so hard to succeed at the ECJ over its implementation of the workplace health and safety Framework Directive. Without qualifying the goal of the Directive to 'ensure' the health and safety of

workers, legal literalism would have made – more or less – every workplace in breach of the law.

The wording of the directive was less important, however, in civil law systems, such as found in France and Germany because they place less emphasis on the wording of headline law. In civil law systems, literal interpretation is not expected, making general duties *aspirational*, rather than *unambiguous*, requirements. Instead, legal consistency and predictability tend to come from extensive codes of legal rules and guidance that give expression to the meaning of general statutes. Thus ‘ensuring’ safety in a continental jurisdiction does not prohibit activities that could possibly lead to harm, as it would be interpreted in a common law system. Rather it puts greater emphasis on compliance with the rules, codes and guidance which give expression to that aspiration. In effect, safety is defined in terms of specified rules rather than the absence of harm. Those differences suggest that sometimes arguments about the supposedly absurd regulatory burdens that the EU places on the UK may be missing the point that headline rules simply have a different meaning and significance in civil and common law countries.

The way that different constitutional settings and legal systems shape conflicts over risk regulation within the EU and between the EU and US are just two examples of the fundamental differences that shape the way that countries think about the relationship between risk and regulation, but which to date have received relatively little attention. Recognition of such fundamental differences offer an opportunity to go beyond conventional explanations that focus on divergent political and economic interests, such as social and environmental protectionism vs neoliberal deregulation, or even in some cases crude caricatures of irrational Europeans vs rational Anglo-Saxons. It is just a shame that now the UK has voted to leave the EU – making us likely passive recipients of, rather than active players in, European regulation – we may have missed the chance to not just understand, but also change the terms of, the debate.

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State of the art of regulation scholarship in Italy and some thoughts on cognitive-based regulation

Fabiana Di Porto

In these brief notes, I am going to make two claims. The first might sound a little provocative and it is that regulation scholarship, intended as a comprehensive truly multidisciplinary field of research, in Italy has only partially developed. At the same time, some Italian scholars have contributed enormously to the development of regulation scholarship worldwide. The second one is that despite a growing claim that regulation scholarship is losing its grip, a promising avenue comes from the incorporation of cognitive insights into the regulatory discourse. Such integration, indeed, calls for a reconsideration of the whole regulatory process and marks a new phase of the regulatory state.

Regulation scholarship in Italy

Based on a literature review and some interviews I am conducting with leading Italian scholars from political, economic and legal sciences, there is extensive convergence over the observation that regulation scholarship – intended as a comprehensive discipline that studies regulation by integrating different scientific perspectives (e.g. economic, managerial, legal, political, governmental, psychological) – has hardly developed in Italy,¹ That does not mean that the debate and the (mostly) Anglo-American literature on regulation is neither studied nor discussed in Italy; quite to the contrary, the latter has been highly influential for the debate, and Italian scholars are known to be particularly talented in comparative studies. What I mean, however, is that there has been little systematic truly multidisciplinary scholarship, academic degrees, and ultimate handbooks specifically devoted to regulation in contrast to law and economics scholarship, that experienced a greater fortune.

Since the 1990s, we have witnessed an abundant scientific production on liberalization, privatization, regulatory authorities, services of general economic interest stemming from all the social sciences. Moreover, a whole set of sectorial hyper-specialised books have been published, and equally specialised academic courses have been instituted. For instance, there are highly reputed masters programmes on utility regulation, or energy, telecommunications and transport regulation, all of which might include engineering, law, economics and management, as taught courses. One could say that there are a course and a handbook for nearly all economic sectors (e.g. regulation on financial markets,

¹ So far, I interviewed three scholars: two in law and one in the economics. More are planned for the next months. Such interviews are part of a research project on the 'State of the art and perspectives of regulation scholarship in Italy' that will include a literature review and analysis of the most prominent contributions in this field of research. I am grateful to Professors Sabino Cassese, Mario Sebastiani and Nicoletta Rangone for contributing their interviews to this research project.

insurance, transport and so forth), and for each discipline (private law, public law, political economy, industrial economy, political science, administrative science, etc.).

Of course, there have also been significant contributions made by Italian scholars to the international debate on regulation, the most widely known of which are probably Giandomenico Majone's theorization of the Regulatory State, or Sabino Cassese's contributions on global governance and regulation; or Fabrizio Cafaggi's work on self – yet private – regulation. Despite this, however, the emergence of a comprehensive formal study and research on regulation, one that transcends the boundaries of each branch of knowledge and establishes its theoretical underpinnings on none and all of them at the same time, encountered large scale resistance in Italy, as in other countries with a civil law tradition (like France, for instance). I will focus on some of obstacles from the perspective of a legal scholar.

Legal terminology: regulation vs regolamentazione

The first obstacle was terminology. When the EU institutions started championing neoliberal regulatory reforms, the only legal terms approximating to regulation existing in the Italian legal system were *regolamentazione* and *regolamento*, which referred to a formal governmental source of law; while 'regulation' (*regolazione*) did not have any legally relevant meaning. Therefore, the need to first establish the kind of source of law regulation was, combined with the confusion between the two terms *regolazione* and *regolamentazione*, made most scholars devote many efforts in defining regulation from a legal point of view. Thus, the regulation phenomenon as a whole discounted for some (long) time its 'inherent' interdisciplinary character. For instance, economists, although being familiar with notions such as market failures and monopoly regulation, avoided using the term regulation to refer to other forms of public intentional interference with economic activity. The same was true for jurists, who were reluctant to admit a new source of law that had no correspondent in the Italian legal system.

It is only very recently that the term regulation has been recognised as having a substantive (yet functional) meaning, irrespective of its source and legal value. Regulation is now understood as any rules (be they legally binding or not) that interfere directly (i.e. with no intermediation), with the behaviour or the organisation of its addressees. A proposal has been made very recently (as of April 2016) to amend the RIA regulation² to finally substitute the term *regolamentazione* with *regolazione*.

Path-dependence: constitutional and administrative law traditions

The second source of resistance was path dependence. Italy has a long lasting history of administrative and constitutional law traditions. The advent of the

² DPCM (Premier's Office Decree) no. 170/2008.

regulatory state in the early 1990s coincided with the establishment of independent authorities (IAs e.g. the competition authority, the privacy authority, the energy and the telecom regulators, etc.). The debate has therefore been dominated by public law scholars (mainly administrative and constitutional lawyers), who were interested especially in establishing the constitutional legitimacy of independent regulators and the legal value of the regulation they adopted. With regard to the first problem, much has been written on how to admit entities that enjoyed, at the same time, regulatory, administrative and quasi-judicial (i.e. sanctioning and adjudicative) powers, in contravention of the *trias politica* principle (separation of powers).

Once the administrative nature of such bodies was finally established by the courts (all acts of IAs are indeed subject to administrative judicial review), scholars mainly focused on IAs' acts enjoying normative status, thus paving the way to a methodological mistake that conditioned all subsequent scholarship. Regulation was in fact understood as only one category of acts adopted by IAs, with the consequence that all sectors where no IAs existed, were simply dismissed as a subject matter of theoretical research. So, for instance, a lot has been written on notice and comment as a means to provide IAs with democratic legitimacy; however, administrative and governmental measures that do have regulatory content are still not adopted following notice and comment or public hearings which results in lack of transparency and accountability.

Politics

A third source of resistance has been politics. If the 1990s witnessed the separation of regulation from politics – due to extensive programmes of privatization of publicly owned enterprises and the earlier mentioned establishment of IAs – in the 21st century, politics tried to recover power. Examples include energy reforms adopted in 2003–2004, that returned some powers of the IAs to the Ministry of Industry; the spending review campaign of 2014, where budget constraints were imposed onto regulators, and some IAs were suppressed through an emergency governmental decree (i.e. Decree law no. 90/2014). Furthermore, the crisis which began in 2008 has contributed enormously to the return of the state and especially politics. From this limited perspective i.e. from the viewpoint of the relationship between politics and regulation, one could say that regulation scholarship is in crisis because regulation itself is plodding under the pressures of politics.

State of the art – consensus on interdisciplinary character of regulation

Despite attempts from politics to undermine the autonomy and independence of regulation, and notwithstanding some delay with which Italian scholarship in different disciplines agreed on a broad, functional notion of regulation, the research concerns have significantly mirrored those of other countries. For instance, while no deep analysis on 'institutional and ideational accounts' for regulation has developed, much has been written on cost-benefit analysis, regulatory impact assessment and other tools to improve the quality of Italian

regulation. Also, while there are many publications on the regulatory state and regulatory authorities, it is (only) recently that scholars have appreciated the real need to overcome the barriers among disciplines and to embrace a 'substantive', multidisciplinary notion of regulation³.

Let us say that when in the UK we reflect upon 'the crisis' or 'the end' of regulation scholarship, in Italy times are mature to embark in a comprehensive multi-disciplinary scholarship on regulation. Here I come to my second point is behaviourally-informed regulation or – as I prefer (Di Porto and Rangone 2015) – cognitive-based regulation.

Cognitive-based regulation

One of the most promising points of convergence among disciplines that has been emerging in recent years is that between regulation and cognitive sciences, understood as the sum of social psychology, behavioural economics, and neurosciences.⁴ The assumption is as simple as that because regulation is about modifying human and organizational behaviour, regulators should not ignore how real people act and decide. Failing to do so can result in regulatory failure, something public regulators can no longer bear for budgetary reasons to say the least.

Together with a colleague, I have been devoting some efforts to this subject (Di Porto and Rangone 2013, 2015, and unpublished). Our assertion is that incorporating knowledge about cognitive biases and heuristics of the target population of regulatees means reconsidering all the regulatory processes. Not only can insights from cognitive sciences help regulators understand why some regulation failed to deliver the expected results (e.g. why consumers stick to bad deals despite liberalization spurring better offers in the market). Cognitive sciences are also able to contribute to design traditional regulatory tools such as command and control (C&C) and disclosure regulation in a more tailored, effective and ultimately proportionate way. For example, oversimplified framing of information may be used to help naïve savers to understand better and assess the financial risk associated with a given financial product; at the same time, regulators may oblige intermediaries to provide smart savers with more information. Regulators, in other words, can target their intervention based on real knowledge rather than a supposed one of the target population, and thus adjust regulation according to the incidence of biases and heuristics in the target population. That, in turn, allows for reducing the risk of over-regulation by not exceeding what is strictly necessary to achieve the regulatory goal.

³ According to Professor Sabino Cassese in an interview: 'Disciplinary fences are lowering progressively. The myth of a method that is conceived as purely legal is over. There is a need to establish stricter links between law, economics, behavioural and organizational sciences'.

⁴ Now accepted also at EU level, see EU Commission (2016: 10) which speaks of 'behavioural insights' to encompass nudges and behavioural economics, but also 'multidisciplinary research in fields such as economics, psychology, and neuroscience, to understand how humans behave and make decisions in everyday life'.

Moreover, taking into account cognitive insights will enrich the regulatory toolkit by two further strategies: nudging and empowerment. These are two new ways to cope with cognitive and behavioural limitations by either exploiting them (e.g. default rules use inertia to increase organ donation) or by helping people overcoming them (e.g. cooling-off rules help reconsidering compulsive buying), respectively. Although diverging on the way they cope with biases, both nudging and empowerment preserve individual autonomy; they, therefore, represent a new step in the regulatory state, collocated 'centrally within economic liberalism and deregulation'. (McCrudden 2015).

Even designing enforcement benefits from cognitive insights, as compliance is highly dependent on social norms. Biases are also widespread. For instance, multiple fiscal inspections might be planned at the very beginning of firms' life, provided that evidence shows a great incidence of an 'echo effect' (i.e. the tendency to evade standards increases immediately after being inspected) in the target population.

Clearly, integrating such insights into the regulatory discourse is not without limitations, suffices it to mention the huge debate about paternalism and the risk of manipulation generated by the popular book *Nudge* and libertarian paternalism more broadly. Integrating cognitive insights might also expand the length and costs of the rule making process excessively, particularly if the information-gathering phase includes cognitive studies such as laboratory or field experiments, randomised control trials and such like.

Based on the above, the result of incorporating cognitive insights strengthen regulation in giving it proportionality,⁵ and thus save costs of possible regulatory failure (White House, 2015). Regulation based on empirical evidence of the behaviour of regulatees can indeed: (1) provide regulators with more fine-tuned information; (2) help design more effective regulation (i.e. regulation that is outcome-oriented), eventually leading to group-specific differentiated regulation, and (3) help design more targeted controls and enforcement strategies. Cognitive insights are thus useful in that they can help regulators to put the least possible burden on regulatees, thus avoiding 'shooting at sparrows with cannons' (F. Fleiner 1913: 376) or, in the English version, 'using a steam hammer to crack a nut, if a nutcracker would do' (Lord Diplock 1983: 155).

My final remark is a theoretical one and refers to what the literature is insistently and, in my view, mistakenly referring to as 'behavioural market failures'. Biases and heuristics should never be seen as just 'another' case of market failure justifying regulatory intervention (Bubb and Pildes 2014; Viscusi and Gayer

⁵ As the Italian Council of State has expressly recognized in a recent opinion no. 515 of 24 February 2016; <<https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=ICFD7MT4S4JKTWAWXYBEGAD55U&q=>> Accessed 8 October 2016.

2015).⁶ We should not support the idea of 'behavioural or reasoning failure' that requires 'correction' by regulation. The fact that biases are 'systematic' deviations from rationality does only mean that they can be 'treated' through regulation, not that they must be corrected through regulation. A state that intervenes to correct individual choice by departure from some rational, abstract model, would be far beyond a paternalistic state. It would mean, somehow paradoxically, that the state tries to correct how 'real' people decide, think and behave to pursue an unrealistic typological model of a human being. The public interest regulation grasps should never coincide with the aim of preventing or avoiding biased behaviour itself. Only where the incidence of cognitive and behavioural limitations is so high in the target population, that it can cause regulation to fail to achieve its goals, with a foreseeable degree of certitude, can rule makers give room to cognitive and behavioural considerations.

To put it more elegantly, only if a 'behavioural element' exists, and is a relevant one, can regulators according to the proportionality principle, intervene to pursue a given public goal (e.g. increased competition or better health conditions) through cognitive-based regulation. So relevance exists if it is empirically demonstrated that either a regulation failed due to diffused cognitive and behavioural limitations (*ex post* vision); or if such limited capabilities may affect a significant part of the regulatees or may have significant consequences for society (*ex ante* vision). Giving consideration to cognitive insights into regulation means paying greater attention to its effectiveness to lower the risk of regulatory failure.

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⁶ Viscusi and Gayer (2015: 975, 986–7) speak of 'behavioural failure' to mean that 'cognitive limitations and psychological biases that lead people to make choices that cause self-harm' are 'another type of market failure that justifies government intervention'.

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Regulating for the voiceless? Putting participatory regulation on the research agenda

Hanan Haber and Eva Heims

This short paper raises three distinct yet related issues about newly emerging forms of regulation. The first relates to a regulatory goal, the other to a regulatory technique, and the third to regulatory legitimacy. Firstly, it asks why regulation is increasingly created for individuals, groups or causes lacking significant political voice (termed here as voiceless causes). Secondly, it asks to what extent and why there has been a rise in citizen participation in regulatory policymaking. Thirdly, it asks how both of these issues impact on the legitimacy and reputation of regulation and regulators.

While all three issues may be addressed and discussed separately, the overlap between them raises interesting empirical questions. Firstly, why regulate for 'voiceless causes' in the first place? Secondly, how do citizens participate in policy making relating to those whose interests are either difficult or impossible to represent directly? Thirdly, what kind of impact does participatory regulation in such fields have on those participating, those represented, and especially on the reputation and legitimacy of regulators and regulation? The rest of the paper aims to substantiate the relevance of these questions in order to highlight an emerging research agenda in this field.

Regulation for the masses – the well-being of future generations

In 2015, the Well-being of Future Generations (Wales) Act 2015 was enacted, aimed at 'improving the social, economic, environmental and cultural well-being of Wales'. The Act (Welsh Government 2015) will require public bodies to 'think long term', involve the public and those affected by policy (presumably via some form of citizen participation in decision making) and ambitiously 'take action to try and stop problems getting worse – or even stop them happening in the first place'.¹ The Act also establishes the post of a Future Generations Commissioner, as well as Public Services Boards in each local authority area in Wales. A short animated video commissioned by government illustrates the purpose of the Act by following the future life trajectory of a new-born, Megan,² depicting how the Act will enable her to have a fulfilling and secure future, in employment, health, culture and environmental terms.

Adorable as this animated infant may be, it is also clear that animated (or actual) babies do not lobby for legislation, nor do they organise in interest groups, vote or make political contributions. While in theory all would agree that society at large and particularly Megan's parents should care about and be responsible for

¹ <<http://gov.wales/topics/people-and-communities/people/future-generations-act/?lang=en>>

² <<http://gov.wales/topics/people-and-communities/people/future-generations-act/future-generations-act-video/?lang=en>>

Megan's interests, the very legislation of this Act hints at this not quite being the case. This is owing first to what we know about people's behavioural tendencies (strong preference for the present over the future) and in terms of their choices as voters and consumers, exemplified in over-consumption of goods and energy, but also in growing generational cleavages and disparities in pensions, housing and other areas. That is, explaining how such regulation might come about is difficult enough, but the notion of involving 'those affected' seems impossible. Who might be able to represent Megan's best future interests, if her parents' generation is seemingly so myopic and self-interested that a government commissioner had to be called to step in?

In other words, we find ourselves puzzled by both the creation of this kind of regulation, and by the prospect of citizen participation in its operation. Taking a step back from this example, we ask what explains change in regulation for those with little political voice: 'future generations', the poor, SMEs and environmental conservation? Further, if we are to take the intention to involve citizens in regulatory policymaking seriously, how is this done in these 'voiceless' areas? Finally, how does such participatory regulation effect the legitimacy of regulatory policy making more generally?

What we know, what we'd like to know

More regulation for social purposes

We can make a reasonable argument that regulation for social and distributive purposes is growing in scope and significance. This is specifically so with reference to vulnerable citizens, increasingly shielded from the market in different national settings and across sectors, from the regulation of the disconnection due to non-payment in the utilities, to 'mortgage rescue' schemes in housing credit, to regulating fees in pension markets, with wide variation between sectors and national settings (Benish et al., forthcoming; Caporaso and Tarrow 2009; Haber 2011, 2015, 2016; Leisering and Mabbett, 2011; Levi-Faur, 2013, 2014; Mabbett 2014; Pflieger 2014). However, the insight on this trend still requires more in the way of explanation: what are the forces driving this type of policy? Why has regulating *for* welfare become more prevalent?

While it may be fairly intuitive to explain policy which overlooks individuals, causes or groups with little political clout, owing to the ever present assumptions of political and regulatory capture, the growth of regulation aiming at protecting those with little political voice poses more of an explanatory challenge. Alternatively, while public opinion, public interest or mass-based interest group focused perspectives would try and explain the existence of such socially minded regulation, they would still struggle to explain policy aimed at the socially marginalised, or at groups or causes which lack actual or even potential members or advocates. In this regard, expanding the inquiry to sectors with varying types and degrees of possible mobilization, representation and participation by those

effected by policy may be a useful avenue towards offering an answer for the question of why such policy develops, if at all.

Regulatory participation

The second point this paper's aims relates to 'participatory regulation', in which formerly expert-dominated regulatory decision making processes now show an increase in citizen involvement (Ansell 2012; Dorf and Sabel 1998; Lobel 2004, 2012; Sabel and Zeitlin 2008). Examples range from policing to environmental regulation, demonstrating citizens' increasing involvement in governance processes at the local level by deliberating, rather than voting, about how government policy or services affect them (Dorf and Sabel 1998; Lobel 2004), but also in utility and airport regulation from North America to Australia to the UK (Doucet and Littlechild 2009; Littlechild 2008, 2009; CAA 2005; UKWIR 2015). At the same time, this has not been a shift to homogenous forms of participatory regulation. Even in two jurisdictions of the UK, England and Wales, and Scotland, we have seen different types of participation emerge in the same sector at the same time, namely in price-setting in water regulation (Heims and Lodge 2016).

Interestingly, it can be noted that increased participation has often been accompanied by a stronger representation of the vulnerable groups. For example, despite the different nature of customer engagement in water regulation in the two UK jurisdictions, customer representatives in both cases were able to push water companies to be more mindful of their most vulnerable customers, particularly large families on low incomes.

However, as will be detailed below, we lack a more solid basis for understanding participatory regulation beyond the Anglo-American context; we lack an understanding of how this practice varies between contexts, and we lack an understanding of why this practice occurs. Comparative research on the emergence and the functioning of participatory regulation across sectors and countries hence represent a fruitful avenue for future research.

Regulatory participation and legitimacy

A third topic that warrants further exploration is the link between participatory regulation, representation of the vulnerable, and the legitimacy of regulatory processes. Given that the proliferation of expert-led non-majoritarian regulatory bodies has long been accompanied by questions about their legitimacy (Black 2008; Lodge and Stirton 2010, Majone 1999; Scott 2000), can increasingly participatory approaches to regulation indeed remedy the 'legitimacy deficit' of regulation?

The spread of participatory regulation raises the question on whether we will move from a firm embedment of long term goals and stability in regulation to increasingly volatile regulatory outputs more focused on short term interests of 'citizens' or particularistic interest of the 'voiceless', for example in their role as customers demanding lower utility prices, especially for the vulnerable

(something that may need to be studied empirically, rather than merely asserted theoretically).

Equally, tensions between 'old' and 'new' forms of representation have been neglected since 'more' representation of any kind is usually too easily assumed to provide an inevitable boost for input legitimacy. In the 'participatory regulatory state' representation through election of political representatives who delegate to independent regulators is combined with direct representation of citizens in regulatory processes. This inevitably raises the question on how possibly conflicting mandates from different chains of delegation are to be reconciled. Empirical research may help to answer whether such tensions are indeed observable, while theoretical discussion are needed to establish how, if at all, such tensions can be reconciled (cf. Dean 2016).

Regulating for and with the masses? A research agenda

Taken together, regulating for the voiceless and regulatory participation in these fields offer the possibility for insight into the goals of regulation, the forms they take, and their legitimacy. While there are theoretical arguments about the merits of participatory forms of governance, the inclusion of the voiceless, and evidence of empirical cases of participation and theoretical mapping exercises of different types of participation (Dean 2016), we arguably lack insights about which regulators have actually adopted decision making processes in which citizens 'participate' and the vulnerable are represented, let alone understanding why regulators or decision makers move to such models. Literature and empirical evidence at this stage seems to rely on Anglo-American jurisdictions to a large extent, but we lack evidence of any more wide spread of participatory regulation across sectors and jurisdictions. Equally, it remains unclear to what extent this supposed shift remains restricted to the inclusion of 'citizens', 'consumers', 'customers' or to what extent the 'vulnerable' have been explicitly been given a voice.

Large scale empirical research is needed in order to gain an insight into why new forms of citizen participation in regulatory decision making have become more prevalent at the national, sub-national and supra-national levels. More specifically, empirical research needs to ask what characterizes citizen/consumer participation in regulatory decision making at the national, sub-national and supra-national levels, how it differs from participation in the political sphere and in the market, and why has it become more prevalent in recent years in these contexts.

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Introducing regulatory intermediaries*

Kenneth W. Abbott, David Levi-Faur and Duncan Snidal

Regulation is frequently viewed as a two-party relationship between a regulator (R) and the targets of its regulation (T). We conceive of regulation as a three-party system, in which diverse intermediaries (I) provide assistance to regulators and/or targets, drawing on their own capabilities, authority and legitimacy. In this short contribution, we set out a general theoretical model (the RIT model) for analysing the roles and implications of regulatory intermediaries in diverse settings.

Examples of this three-party 'RIT model' of regulation abound. The US Food and Drug Administration supplements its own inspectors by engaging private auditors to monitor food imports, and empowers other private bodies to accredit auditors (Lytton 2017). Private transnational regulatory schemes such as the Marine Stewardship Council (MSC) and Fairtrade International (FLO) also rely on independent auditors and accreditors (Auld and Renckens 2017; Loconto 2017). Some recent international human rights treaties require ratifying states to establish independent domestic bodies to promote treaty implementation (Pegram 2017). And the International Criminal Court enlists non-governmental organisations (NGOs) to advocate for support and cooperation from national governments (De Silva 2017).

As these examples suggest, the RIT model is not limited to the activities of regulatory agencies, or even of the state. Rather, it characterises all forms of regulation: public, private and hybrid; national, international and transnational; formal and informal. In this sense it is consistent with a broad 'regulatory governance' approach. Our goal is to uncover common insights about the impacts of intermediaries to expand our understanding of all areas of regulation.

Regulatory intermediaries range from profit making firms such as inspection companies and credit ratings agencies, to NGOs, such as human rights advocacy groups, to transgovernmental networks of regulatory agencies. Intermediaries often enter the regulatory system through formal engagement, as by contract or delegated authority, or through orchestration, with a regulator or target encouraging a third party to intervene in desired ways and providing support to facilitate its activities. In other cases, the intermediary relationship is only tacit, for example, a regulator may adopt a rule expecting that its beneficiaries or

* This is an abridged version of the introduction to a forthcoming special issue on 'Regulatory Intermediaries in the Age of Governance', to be published in the *Annals of the American Academy of Political and Social Sciences*. The special issue is edited by Kenneth Abbott, David Levi-Faur and Duncan Snidal and includes contributions on a wide range of substantive issues by a diverse set of scholars, as shown in the table of contents presented at the end of this paper.

other interested parties will play this role by observing and publicising target non-compliance.

Intermediaries play diverse roles in regulation throughout the policy cycle. The special issue focuses on the 'downstream' stages of the regulatory process after a rule has been adopted. Intermediaries play important roles in the implementation of rules: interpreting and elaborating them for specific circumstances; 'translating' them into practical forms useful to targets; providing assistance to targets; and evaluating alternative modes of implementation. Intermediaries often monitor compliance, especially where they possess greater expertise, operational capacity or access to targets than regulators themselves. 'Meta-intermediaries' accredit and supervise monitors to ensure their trustworthiness. Intermediaries help create dialogue and trust between regulators and targets, and communities of practice and compliance among targets. They even enforce rules, as by disclosing non-compliance to generate public pressure, or by withdrawing valuable certifications.

Because of their central position between regulators and targets, intermediaries provide valuable feedback to regulators. They pass on the views and experiences of targets, and also draw on their own experiences to advise regulators of rule ambiguities, problems of implementation, and potentially more efficient approaches. In many cases, regulators and targets alike come to depend heavily on the services intermediaries provide.

The basic RIT model can be varied and extended in many ways. For example, regulation often operates through chains of actors and mechanisms, with multiple regulators and/or intermediaries operating 'in series'. In complex regimes, multiple regulatory systems, each with its own chain of RIT relationships, may also operate 'in parallel'. Particular actors can occupy influential focal positions in complex regimes by operating across systems, e.g. by providing auditing services for both public and private regulation.

In addition, the beneficiaries of regulation figure in regulatory systems in diverse ways. They clamour for rules that will benefit them. Once rules are adopted, they may operate as an external constituency, evaluating the rules and their implementation and enforcement, and proposing improvements. They, or groups that claim to represent them, may play various intermediary roles, e.g. as monitors and sources of feedback. And they may overlap with or even constitute the regulator (or sometimes the targets).

Building on the understanding of intermediaries reflected in the RIT model and its extensions, we also problematise their role. Even when other regulatory actors have engaged them, intermediaries have to be understood as pursuing their own private interests. These include both institutional interests, such as compensation and organizational influence, and substantive interests in the area of regulation. Institutional and substantive interests may lead particular

intermediaries to ally with the regulator, with the targets or with other regulatory actors, and to attempt to shape the content of regulation, as well as its implementation, to their own benefit. The activities of intermediaries therefore have to be analysed in terms of legitimacy, democracy and distributive impact, as well as efficiency. Conflicts of interest and issues of accountability, transparency and fairness are central to evaluating their participation in regulation.

Incorporating intermediaries into the conceptualization of regulation not only reveals new issues, but also brings a fresh perspective to bear on long-standing issues. An important example is 'regulatory capture', the domination of one regulatory actor by another. A three-party regulatory system provides new opportunities for capture. It also, at the same time, establishes new barriers against capture. Targets may seek the engagement of intermediaries, not to advance sound regulation, but to facilitate capture. Capture is facilitated where the target needs to capture only the regulator *or* the intermediary, whichever is less costly; but it becomes more difficult when the target has to capture both the regulator *and* the intermediary, and where regulator and intermediaries can monitor each other for indications of capture. In addition, the intermediary itself may seek to capture the regulator, to ensure its influence in the regulatory system, to expand its role or to advance its substantive goals. Finally, capture of the intermediary by the regulator may also become an issue, especially when intermediary independence is crucial for regulatory outcomes. Many of these forms of capture have previously been conceptually underdeveloped.

Empirical studies (those that feature in the forthcoming special issue on the RIT model in *Annals of the American Academy of Political and Social Sciences*) highlight the varied roles of regulatory intermediaries and offer important insights into the advantages and pathologies of such arrangements. They also introduce important normative implications, while advancing the systematic study of complex governance arrangements. The table of contents (below) makes apparent the wide ranging importance of intermediaries in all areas of regulation.

Table of contents from *Introducing regulatory intermediaries* edited by Kenneth W. Abbott, David Levi-Faur and Duncan Snidal.

- (1) Theorizing regulatory intermediaries: The RIT model, Kenneth W. Abbott, David Levi-Faur and Duncan Snidal
- (2) The role of beneficiaries in transnational regulatory processes, Mathias Koenig-Archibugi and Kate Macdonald
- (3) Understanding complex governance relationships in food safety regulation: The RIT model as theoretical lens, Tetty Havinga and Paul Verbruggen
- (4) The taming of the stew: Regulatory intermediaries in food safety governance
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- (5) Rule-making feedbacks through intermediation and evaluation in transnational private governance, Graeme Auld and Stefan Renckens
- (6) Models of assurance: Diversity and standardization of modes of intermediation, Allison Marie Loconto
- (7) Asymmetry in empowering and dis-empowering private intermediaries: The case of credit rating agencies, Andreas Kruck
- (8) Not quite the same: Regulatory intermediaries in the governance of pharmaceuticals and medical devices, Martino Maggetti, Christian Ewert and Philipp Trein
- (9) Intermediary Complexity in Regulatory Governance: The International Criminal Court's Use of NGOs in Regulating International Crimes, Nicole De Silva
- (10) Rule intermediaries in global labor governance, Axel Marx and Jan Wouters
- (11) Brighter and darker sides of intermediation: Target-oriented and self-interested intermediaries in the regulatory governance of buildings, Jeroen van der Heijden
- (12) Regulatory stewardship and intermediation: Comparative lessons from human rights governance, Tom Pegram
- (13) Transgovernmental networks as regulatory intermediaries: Global governance and the realities of soft power, Jacint Jordana
- (14) Big third-party certifiers and the construction of transnational regulation, Jean-Pierre Galland
- (15) Enriching the RIT Framework, Kenneth W. Abbott, David Levi-Faur and Duncan Snidal

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Algorithmic regulation and intelligent enforcement

Karen Yeung

Background

It's time for government to enter the age of big data. Algorithmic regulation is an idea whose time has come.

– Tim O'Reilly, CEO of O'Reilly Media Inc.

This paper provides a sketch of my ongoing reflections on the phenomenon of 'algorithmic regulation'. Although there is a large and rapidly growing interdisciplinary literature concerned with 'critical algorithm studies', it has not yet been explored in depth through the lens of regulatory governance (cf. Yeung 2016), although Foucauldian perspectives are popular.

What is algorithmic regulation?

O'Reilly's definition

Technology writer Evgeny Morozov credits Tim O'Reilly, founder and CEO of O'Reilly Media Inc. with coining the term (Morozov 2014; O'Reilly 2013). Yet O'Reilly (2013) fails to offer a clear definition of algorithmic regulation, pointing instead to a set of technological systems (namely, motor vehicle fuel emissions systems, airline automatic pilot systems, credit card fraud detection systems, drug dosage monitoring by medical professionals, internet spam filters and general internet search engines) which he claims share four features: (a) a deep understanding of the desired outcome; (b) real-time measurement to determine if that outcome is being achieved; (c) algorithms (i.e. a set of rules) that make adjustments based on new data; and (d) periodic, deeper analysis of whether the algorithms themselves are correct and performing as expected.

Working definition

Drawing on Gillespie's analysis of algorithms (Gillespie 2013), I propose the following working definition of algorithmic regulation as 'a system that regulates a domain of activity through continual *computational* generation of knowledge from data emitted directly from numerous dynamic components within and pertaining to the regulated environment that is collected and fed into the system (preferably in real time on a continuous basis) in order to identify and, if necessary, automatically execute, refinements to the system's operations with the aim of achieving a pre-specified goal.'

Forms of algorithmic regulation

I suggest that two broad forms of algorithmic regulation can be identified. Both can be employed by state or non-state institutions.

(1) *Intelligent enforcement* refers to algorithmic systems that detect and automatically enforce regulatory violations in real time. No human intervention in the enforcement process is needed, thus offering the promise of 'perfect enforcement'. The behavioural norm which the system enforces may be a:

- *fixed* (but reprogrammable) standard of behaviour. This is the most basic form of algorithmic intervention. For example, Proctor and Gamble's smart soap dispenser, used in some public conveniences in the Philippines, has sensors monitoring the doors of each stall. Once you leave the stall, the alarm starts ringing and can only be stopped by a push of the soap-dispensing button (Morozov 2014);
- *variable* behavioural standard in line with whatever fixed (but reprogrammable) system goal which the algorithmic system is designed to optimise in order to produce system stability: e.g. a smart transportation system which varies vehicle speed limits depending upon traffic volume and distribution to optimise efficient traffic flow and minimise congestion.

Intelligent enforcement can also be applied for detecting and monitoring performance of contractual terms between parties of a contract. Hal Varian (2014), Google's chief economist, provides the following examples:

- remote vehicle monitoring systems that verify whether driver behaviour conforms with the desired standard. Hence car rental companies could continuously monitor and verify whether a driver is honouring his/her contractual obligation to operate the car in a safe manner;
- This, in turn, enables automated remote enforcement. For example, if an individual who has bought a car on loan finance fails to make monthly repayments, the lender could instruct the vehicle monitoring system to prevent the car from starting, whilst sending a representative to attend the vehicle's location in order to repossess it.

Automatic enforcement also makes possible new forms of pricing because consumption activity can now be tracked and measured at a highly granular level. For example, real time contractual monitoring of individual behaviour enables activity-based pricing in ways that were not previously feasible in that, say, the cost of digital advertising can be based on the number of times it has been viewed.

While Varian celebrates these computer mediated contracts, algorithmic systems of this kind also underpin growing labour market practices including:

- the use of 'zero-hour' contracts which subject workers to variable scheduling, focuses on paid work hours to times of high demand. The algorithmic organization of labour shifts the risk of changing demand onto workers and increases work intensity (Wood 2016);

- algorithmic performance management techniques based on micro-level surveillance of call centre workers in order to optimise worker productivity (Kuchler 2014).

(2) *Pre-emptive enforcement*, utilises algorithmic systems (driven by machine learning algorithms and big data) to sort and identify individual candidates within a regulated population which have been algorithmically assessed as ‘high risk’, thus warranting further investigation. These systems are designed to operate pre-emptively in order to anticipate potential violations or harm before violation or harm occurs thus enabling preventive action to be taken by regulatory enforcement officials (e.g. predictive policing).

The obvious private sector analogue is, of course, big-data driven risk assessment undertaken by companies providing insurance or loan finance though it is increasingly being rolled out in a variety of sectors including personnel hiring, education and housing. For example, payday loan company Wonga offers ‘instant’ loans based on real time algorithmic evaluation of the applicant’s risk profile in order to determine, automatically, whether to make funds available.

The logic of algorithmic regulation as ‘smart’ cybernetic control

Algorithmic regulation has antecedents in the interdisciplinary science of cybernetics that emerged in the aftermath of World War II. Cybernetic analysis sought to move away from linear understandings of cause and effect and towards investigations of control through circular causality, or feedback (Medina 2015). The common logic underpinning these systems rests on the continuous collection and analysis of primary data combined with metadata, which logs the frequency, time and duration of device usage and which communicates directly with other networked digital devices so that the combined data can be algorithmically mined in order to produce actionable insight (Morozov 2014).

Understanding algorithmic regulation

There are several ways in which algorithmic regulation may be understood through the lens of regulatory governance scholarship:

- *As a form of design-based regulation.* Although scholars from several social scientific disciplines have observed the ways in which the design of the urban environment and an object’s affordances shape user behaviour, Lawrence Lessig popularised the idea of ‘code as law’ to highlight how hardware and software shapes the behaviour of participants in cyberspace (Lessig 1999; Yeung 2008);
- *As a form of outcome-based regulation.* O’Reilly’s conception of algorithmic regulation shares with advocates of outcome-focused regulation a belief that regulatory regimes should focus on the achievement of observable (and preferably measurable) outcomes, rather than regulating the process by which the desired outcome is achieved (O’Reilly 2013);

- *As a system of data-driven performance management.* Parallels can readily be drawn between the performance management techniques, such as the system of ‘governance by targets’ adopted by the Blair government to oversee the delivery of public services. Based on their study of governance by targets in the NHS, Bevan and Hood (2016) demonstrate that the theory of governance by targets requires two sets of heroic assumptions: of robust synecdoche and game proof design, which their study indicated were not justified. So although there were dramatic improvements in reported performance of NHS organizations, the extent to which the improvements were genuine or offset by gaming that resulted in reductions in performance that were not captured by targets are unknown (Bevan and Hood 2006);
- *As a form of risk-based regulation.* The UK government now requires all regulators to adopt a ‘risk based’ approach to the targeting of inspections in order to ease administrative burdens on regulated organizations and to ensure the proportionality of enforcement action (Rothstein and Downer 2012). Accordingly, various UK regulators have developed statistical surveillance tools which are intended to monitor the performance of regulated entities in order to identify those which are considered ‘high risk’ and thus prioritised for attention (Griffiths et al. 2016). Algorithmic regulation in the form of anticipatory prediction techniques to assist in the allocation of enforcement resources can be understood as risk-based regulation on steroids.

A critical interrogation

Algorithmic regulation builds upon the combined lineage of code-based, outcome-based, performance management and risk-based regulation but with three claimed advantages. Firstly, by replacing the need for human monitors and overseers with ubiquitous, networked digital sensors, algorithmic systems enable the monitoring of performance against targets at massively reduced cost and human effort. Secondly, it operates dynamically in real-time, allowing immediate adjustment of behaviour in response to data feedback thereby avoiding problems arising from out-of-date performance data. Thirdly, it appears to provide objective, verifiable evidence because knowledge of system performance is provided by data emitted directly from a multitude of behavioural sensors embedded into the environment, thereby holding out the prospect of ‘game proof’ design. All these claims, however, warrant further scrutiny. For example, financial trading algorithms have been ‘gamed’ (Arnoldi 2016) and the notion of digital data as objective is a myth (boyd and Crawford 2012).

Algorithmic regulation as perfect enforcement

Although automatic, self-executing capacity of algorithmic regulation holds considerable allure (O’Reilly 2013), the legitimacy of ‘perfect enforcement’ was challenged by cyber lawyer Jonathan back in 2009 who highlighted the dangers of smart devices (which he termed ‘tethered appliances’) emerging in an earlier internet age because they ‘invite regulatory intervention that disrupts a wise

equilibrium that depends upon regulators acting with a light touch, as they traditionally have done within liberal societies' (Zittrain 2009: 103).

Algorithmic regulation as a system of social ordering

Sociologist A. Aneesh (2009) identified a system of governance which he termed 'algocracy' based on 'rule of the algorithm' or 'rule of the code' that is distinct from both bureaucratic and market systems of social ordering. Aneesh sought to understand how the labour practice of 'off-shoring' is organised, through ethnographic observation of Indian workers providing IT and IT-enabled services to US firms. He identified software programming schedules as critical to the organization of globally dispersed labour through data servers. He noted that although algocracy may appear to have bureaucratic structures embedded in it (e.g. legally permissible operations for a teller or a greater access to the same transaction available to the manager) the underlying software program is driven by the algorithm, or more deeply, the binary code. Imperatives of programming are not bureaucratic but *mathematical* (Aneesh 2009: 350).

Politics and ideology of algorithmic regulation

Aneesh's characterization of algorithmic systems as a distinct system of social ordering provides an enormously fruitful vantage point from which to begin a critical examination of the underlying politics, logics and ideologies of algorithmic forms of governance. In particular, it sheds light on two dramatically opposed visions of algorithmic regulation. On the one hand, Tim O'Reilly (2013) portrays algorithmic regulation as a seamlessly efficient, fully automated, data-driven approach that will enable us to resolve societal co-ordination problems with the technological prowess and efficiency of Google's search engine, while Evgeny Morozov provides a stinging critique of Silicon Valley 'solutionism' (Morozov 2013, 2014).

Morozov's critique of Silicon Valley's political vision

Morozov seeks to expose what he perceives is the hidden, anti-democratic political vision of Silicon Valley's belief that technological innovation can solve social problems efficiently simply by harnessing the power of the internet. His critique grows out of the observation that the means by which we seek to govern have inescapably political and ideological dimensions which invariably shape our substantive political goals. But Morozov points out that, unlike the relatively recent past, when the political and ideological dimensions of choices about means were clearly evident when faced with the stark political choice of the 'state vs market', this ideological clarity evaporates when the presumed choice is between the digital and the analog, or dynamic feedback and static law. Advocates of algorithmic solutions present these options 'as if the very choice of how to achieve those "desired outcomes" was apolitical and didn't force us to choose between different and often incompatible visions of communal living' (Morozov 2014). For him, the politics and ideology of Silicon Valley solution bears the following characteristics:

- (a) *Govern effects not causes*: deal with problems via apps, sensors and feedback loops – all provided by start-ups. Underlying this obsession with internet-enabled devices to solve problems lies a set of political assumptions which Morozov associates with the work of Giorgio Agamben, an Italian philosopher who refers to an epochal transformation in the idea of government, ‘whereby the traditional hierarchical relation between causes and effects is inverted, so that instead of governing the causes – a difficult and expensive undertaking – governments simply try to govern the effects’.
- (b) *Expand oversight and collect as much data as you can*: For O’Reilly, algorithmic regulation will reduce the number of regulations while ‘increasing the power of regulators and the amount of oversight and production of desirable outcomes’ (O’Reilly 2013) which, as Morozov points out, is not the vision of the small libertarian state.
- (c) *Encourage individuals to take responsibility for problems*: Morozov (2014) claims that Silicon Valley’s answer to the problems which social welfare nets have conventionally sought to address is to encourage citizens to ‘take responsibility for their own welfare’, maintaining their health through self-tracking apps and data sharing platforms to monitor and track biometric indicators of health, availing themselves of home sensing devices (subsidised by their insurer) which automatically alerts the fire department when the insured’s smoke alarm is triggered. The implied moral message is that more responsible individuals will utilise these technologies to take better care of their health, their personal security and their productivity. For the moment, the use of tracking systems is portrayed by private sector providers as an optional extra, enabling users to benefit from reduced insurance premiums. In future, however, Morozov warns that failure to use them may be seen as a deviation, or even an act of concealment punishable by higher premiums for ‘failing to act responsibly’. Yet, as Morozov points out, social injustice is much harder to track than the everyday lives of those individuals it affects.
- (d) *Characterise individuals as entrepreneurs & the sharing economy as the new welfare state*: Morozov argues that Silicon Valley’s political vision positions citizens vis-à-vis the state as small stockholders in a giant enterprise – we are entrepreneurs first, and citizens second, empowered to take care of our own affairs thanks to ubiquitous digital feedback loops. The role of the algorithmic state is to make reputation into a feedback-friendly social net in which honest hardworking individuals will generate high online reputations producing a highly personalised social net that is ‘ultra stable’. Unlike the welfare state, the algorithmic state makes no assumptions about the existence of specific social evils which require concerted collective action by the state, and if there are, we can only tackle them via individual action (Morozov 2014).

The end of privacy, due process and the rule of law?

Legal critiques of algorithmic power identify several concerns including:

- (a) The rapid erosion of the right to privacy. Algorithmic regulation threatens the right to informational privacy, given its continuous monitoring of individuals and the collection and algorithmic processing of digital data pertaining to individual that it entails. Contemporary data protection scholars have strenuously criticised the ‘privacy self management’ model which characterises the informational privacy laws of most developed states (Solove 2013), demonstrating that for a variety of reasons, the ‘notice and consent’ paradigm upon which such laws rests provide inadequate protection in a big data environment (Yeung 2016);
- (b) The irresistible temptation to exchange privacy for convenience and efficiency. In public regulatory contexts, the state may legislate to legalise what would otherwise be illegitimate privacy invasions if considered necessary and proportionate to serve the greater good. But whether we can trust the state with our most intimate data is highly questionable given that personal data is now understood as a ‘new asset class’ (World Economic Forum 2011) and governments are struggling with enormous pressure to pursue fiscal restraint. Consider, for example, the recent decision by three London hospitals run by the Royal Free NHS trust to allow Google’s London-based Artificial Intelligence arm, DeepMind to access the NHS records of 1.6 million patients who use them. But whether the purpose is to develop big data driven predictive analytics for healthcare, or to automate regulatory systems, the underlying logic is clear: we suspend our privacy rights in return for new technology built with our data and the convenience and efficiency that they offer. Meanwhile, the high priests of Silicon Valley are anxious to disabuse us of our anachronistic inclination to romanticise privacy. As co-founder of Sun Microsystems founder Scott McNealy proclaimed back in 1999, ‘You have no privacy anyway. Get over it.’

Freedom, democracy and the rule of law

Several legal scholars have pointed out that there is more at stake than privacy, including core legal and constitutional principles that are: considered fundamental within liberal democratic societies, such as:

- *transparency and accountability* – algorithmic processes that utilise machine learning techniques are highly opaque and impossible for the lay user to comprehend, while the algorithms themselves are typically protected from disclosure as trade secrets (Pasquale 2015);
- *due process and the rule of law* – one cannot challenge the validity of a cubicle door which sounds an alarm until I press the soap dispenser, even though I have used the cubicle solely to obtain some personal privacy so I can change my shirt (Davidow 2014);
- *equality of treatment* – considerable anxiety has been expressed about the capacity for algorithmic systems to result in discrimination and the exclusion of social groups (White House 2016). One extraordinary example of this is Facebook’s race specific advertising content-targeting in which individuals algorithmically identified as Black, Hispanic or White (the latter also including

any non-Black and non-Hispanic individuals) were shown different movie trailers for the same film;¹

Legal philosopher Mireille Hildebrandt (2016) digs even deeper. She argues that within constitutional democracies, sovereign rule is rendered legitimate through a double form of transparency: firstly, people live under rules of their own making (i.e. democratic participation), and secondly, the application of those rules can be contested in a contradictory procedure that is capable of opening the black box of their interpretation (the rule of law). It is these two elements through which modern legal systems establish one of the most successful (albeit imperfect) cybernetic systems: constitutional democracy. It is a system of governance that rests on a series of checks and balances which institutes a perfect feedback loop that operates in two directions between the rulers and the ruled. Hence all who live under the rule of law are not regarded as mere objects to be controlled, but subjects participating in collective self-rule, accountable for their actions, to their government, and to each other (Hildebrandt 2016). The turn to algorithmic regulation and the data-driven agency which it sustains threatens this equilibrium. Algorithmic regulation entails the continuous tracking of individuals at a highly granular level; it is a one-way mirror that allows those looking down to surveil those below, but who lack any realistic prospect of peering into, let alone comprehending, the algorithmic black boxes that regulate every aspect of their lives.

New surveillance, surveillance capitalism and Big Other

- (a) *The privacy commons* – Other philosophically oriented critiques of algorithmic power point out that privacy is not a marketised commodity that can be traded off at will to the highest bidder. Rather, privacy refers to a zone of protection around each individual's activities within a society that makes possible the capacity for individual flourishing and self-creation that allows us to play around with who we are, with whom we wish to relate and on what terms, and in which our sense of our self and our individuality can emerge, mutate and stabilise (Cohen 2012). Yet the importance of the privacy commons as part of a critical moral and social infrastructure that is vital to human flourishing and democratic freedom is overlooked in contemporary debates.
- (b) *The new surveillance* – The rise of algorithmic power is fuelled primarily by Silicon Valley's technology giants (although states wishing to surveil their citizens are lucrative customers) channelling and controlling flows of personal information while seeking to convert them to flows of profit, in ways that are highly opaque to their users (Zuboff 2015). As Julie Cohen (2014) perceptively observes, '[w]e are witnessing the emergence of a distinctly Western, democratic type of surveillance society, in which surveillance is conceptualised first and foremost as a matter of efficiency and

¹ <<http://thenextweb.com/insider/2016/03/18/facebook-showed-us-all-very-different-straight-outta-compton-trailers-based-on-race/>> Accessed 8 October 2016.

convenience'. Unlike the repressive forms of visual surveillance evoked by George Orwell's Big Brother, we willingly allow ourselves to be subject to algorithmic surveillance in exchange for the convenience and efficiency which the big data barons offer in the form of 'free' services. But our consent to pervasive digital surveillance may be more akin to that of the compulsive gambling addict than that of the politically active citizen that personifies the liberal ideal of the autonomous self (Yeung 2016: 15). In contemplating algorithmic regulation, we face a *collective* cognitive dissonance problem, given our collective craving for the seamless convenience and efficiency which big data driven algorithmic systems appear to offer. Like the smoker who finds it impossible to kick the habit despite full awareness of its potentially fatal long run consequences, we are unwilling to forgo the benefits which algorithmic regulation appears to offer despite the long term political, social, legal and moral risks.

- (c) *The emergence of 'surveillance capitalism'* – Yet if we are to find a more sustainable, progressive vision of our algorithmic future, which allows us to reap its efficiency and convenience without necessarily having to swallow its disturbing side-effects, we face an uphill battle of very serious proportions for, as Shoshana Zuboff (2015: 80) suggests, it is not Big Brother that we should fear, but 'Big Other,' referring to the powerful 'hyperscale high tech companies that achieve growth mainly by leveraging automation'. She contends that these firms are pioneering a powerful emerging logic of accumulation associated with big data (and spearheaded by Google) which she dubs 'surveillance capitalism' in which revenues depend upon data assets appropriated through ubiquitous automated operations constituting a new asset class: surveillance assets. These surveillance assets attract significant investment ('surveillance capital') which enable surveillance capitalists to profit from the global networked environment. This extractive variant of information capitalism has generated a new default business model where company valuations routinely depend upon 'eyeballs' rather than revenue as a predictor of remunerative surveillance assets.
- (d) *Apocalyptic visions of the algorithmic endgame?* – If O'Reilly's techno-utopian vision is pursued to its logical conclusion, then according to legal philosophers Ian Kerr and Roger Brownsword the resulting fully automated, technologically managed society is one in which our behaviours and decisions have been so technologically mediated by the external environment that the opportunity to do wrong is removed. Hence we can no longer regard ourselves as free moral agents (Brownsword 2005). Zuboff's assessment of the implications of the rise of surveillance capitalism could scarcely be more chilling, referring to the vision of a computer mediated world painted by Google's chief economist, Hal Varian thus:

... Varian's vision of a computer-mediated world strikes me as an arid wasteland – not a community of equals bound through laws in the inevitable and ultimately fruitful human struggle with uncertainty. In this futurescape, the human community has already failed. It is a place

adapted to the normalization of chaos and terror where the last vestiges of trust have long since withered and died. Human replenishment for the failures and triumphs of asserting predictability and exercising our will in the face of natural uncertainty gives way to the blankness of perpetual compliance... It is a ubiquitous networked institutional regime that records, modifies, and commodifies everyday experience from toasters to bodies, communication to thought, all with a view to establishing new pathways to monetization and profit. Big Other is the sovereign power of a near future that annihilates the freedom achieved by the rule of law (Zuboff 2015: 81–2).

(e) *Where to from here?* – Whether one eschews or embraces Zuboff’s assessment (contrast World Economic Forum 2011), there is clearly a very rich set of (increasingly urgent) questions that the turn to algorithmic regulation evokes. I offer in Table 1 (below) a highly provisional sketch of three ideal type systems of governance for reflection and discussion.

Table 1 Contemporary systems of democratic social organisation (highly provisional)

	Welfare state	Regulatory state	Algorithmic state (?)
System of governance – underlying form of social ordering	Hierarchy - bureaucratic	Market	Algorithm
Role of state	Direct service and welfare provision	Regulation of provision of services by non-state providers	Regulate effects rather than causes. Ensuring open data + trusted and secure networked infrastructure thus enabling data driven service delivery by innovators
Role of citizen	Citizen as individual with needs	Citizen as consumer	Citizen as entrepreneur
Role of firms and non-state organisations	Industrial production supplies employment and tax receipts to fund welfare provision	Co-provision of regulatory functions	Data-driven innovation. Big data platform providers prosper while automation results in mass worker redundancy
Ideology	Welfarism (solidarity)	Neoliberalism	Solutionism
Varieties of capitalism	Welfare capitalism	Regulatory capitalism	Surveillance capitalism

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Enforcement in post-crisis financial regulation

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The financial crisis of 2008–2009 and its aftermath have provided key questions for the study of regulation. Considerable attention has already been paid to ‘light touch regulation’ as one of the factors contributing to the build-up of the crisis, and to the changes in financial rules after the crisis, including the watering down of proposals for rule change. The future of regulatory enforcement, however, has not been discussed in as much detail. This is partially due to the fact that the early post-crisis period was about reforming the rules; the question of rule enforcement quite naturally follows the question of rule formulation. Nonetheless, as many of the proposals for rule change have now been adopted (or rejected), and as the crisis exposed deficiencies in enforcement which are of a more general nature, it is worth reflecting on this part of the regulatory process.

As in the case of financial rule-making, complexity is a key concept in financial regulatory enforcement. The complexity of financial markets and products not only enhances information asymmetries between regulators and regulatees, but it also raises questions of responsibility within financial institutions. Both are of critical importance for the effectiveness of regulatory enforcement. In this short paper, we focus on different ways in which complexity matters for regulatory enforcement, suggesting that the questions that follow from the discussion need to be given more attention by regulatory scholars.

Expertise and capture

The literature on enforcement has increasingly focused on the cooperation between regulators and the regulated sector; for instance, as part of ‘smart regulation’ (Gunningham and Grabosky 1998) and ‘management-based regulation’ (Coglianese and Lazer 2003). The trade-off between expertise and capture is taken seriously here, with the argument being that under some conditions, cooperation is possible and desirable.

Expertise may be particularly relevant in finance. As activities in the financial sector are difficult to monitor due to the complexity of the market and its products, it may be useful for regulators to build on the expertise of the sector in the enforcement process. Yet, the very same feature makes it easier for financial institutions to misuse their informational advantage. If monitoring is hard, effective cooperation in financial regulation either depends on financial institutions having a material interest in overall and long term risk reduction, or on these institutions being motivated to comply with the rules even if this is not in their material interest; that is, on them acting as ‘good citizens’ (cf. Ayres and Braithwaite 1992: chapter 2; Kagan and Scholz 1980). In the financial sector, we may not necessarily find these conditions. This raises more general questions of effective enforcement of financial regulation. The different enforcement options

that are out there all have their advantages and disadvantages, which makes it difficult to come to a single prescription. Moreover, it makes it more likely that the strategy that policymakers ultimately choose is contingent on the prevailing political and academic ideas in a specific period of time.

In the decades before the financial crisis, financial institutions were, in many countries, strongly involved in the enforcement process; for instance, by being responsible for internal risk assessment in the enforcement of capital requirements. This partially reflected an underlying belief that (the lack of) expertise was a more important problem in enforcement than capture. However, the cooperation turned out to be problematic, and to have contributed to the crisis (e.g., Helleiner 2011). The approach has changed in recent years, with a reduction in the responsibilities of financial institutions in the enforcement process, and an increase in those of regulators (Pagliari 2012). This partially reflects a belief that capture is the more important problem. Given the monitoring problems and the extremely high stakes in finance – which make assumptions of short term profit maximization more plausible – this belief is sensible.

Yet, the trade-off is not gone, and the changes will have implications for the expertise incorporated into the enforcement process. That is, the problem of capture may have been reduced, but enforcement may now miss its objectives by being either too soft or too harsh due to a lack of information. Even if we do not believe that high levels of effectiveness are possible in financial regulatory enforcement, we should be interested in the assumptions behind, and the implications of, different levels of cooperation.

Financial power

Regulatory enforcement in finance inevitably touches upon wider issues of business power (Block 1977; Lindblom 1977, 1982). Informational approaches assume that policymakers rely on the provision of scarce information to enforce (and design) regulation, much of which is held by business. The structural source of business power originates from the fact that firms have an incentive to exploit these information asymmetries by exaggerating the anticipated economic costs of regulation and threats of disinvestment (Bernhagen and Bräuninger 2005: 46). A signalling game ensues in which regulators must try to assess the veracity and credibility of business signals about the impact of new regulation proposals (Grossman and Helpman 2001; Sloof 1998).

Informational theories of business power have been widely applied to the design of financial rules, both before and after the crisis (Carpenter 2010, Bell and Hindmoor 2015; Young and Pagliari 2016). Intriguingly, however, we know less about how financial power impacts on regulatory enforcement or the factors that cause it to vary over time. There are at least three dimensions worthy of further investigation: policy stages, issue salience, and institutional governance.

The first concerns how financial industry influence varies across different stages of the policy process. Each stage is defined by a different set of actors, modes of interaction, and rules of the game. How does the enforcement stage compare to other stages of the policy process? Different hypotheses may be generated. For example, if most business lobbying takes place behind the scenes at the agenda-setting stage, then attention to more or less transparent regulatory decision making is less important for explaining financial regulatory outcomes. By contrast, if the main details of regulation are defined after the legislative process, and through dialogue between regulators and regulatees, industry influence may be much greater at the enforcement stage; in effect, enabling regulatory objectives to be relaxed and watered down. A series of empirical questions follows. What channels and mechanisms of business power are relevant at different stages of the financial regulatory process? Are regulators more or less prone to capture with respect to regulatory enforcement?

The second dimension relates to how business power varies according to issue salience, a variable which can either overlap or cut across policy stages (Culpepper 2011; Culpepper and Reinke 2014). Under low salience, industry can rely on the 'quiet politics' of access, networks and knowledge to influence regulation, including regulatory enforcement. This is because regulators are more likely to defer to the expertise of industry, and non-financial groups are less likely to be mobilised. As an issue becomes more salient, however, the value of industry expertise is undermined by reputational damage, and non-financial groups will increasingly mobilise to challenge their influence. Yet, on occasion, businesses – including financial firms – can turn issue salience to their advantage, stoking public opinion against new regulatory proposals by warning of the dangers to economic growth and job security. This has important implications for financial regulatory enforcement. How does salience impact on regulatory capacity and effectiveness? Does a high salience issue help or hinder enforcement by regulators?

Thirdly, business power is mediated by institutional governance. For instance, regulatory decisions that are delegated to informal institutions may be more prone to industry capture because they are less accessible to non-financial interests. Yet, although political and bureaucratic actors are constrained by informational asymmetries, they possess unique powers to define the rules of the institutional game with industry in such a way as to potentially constrain firm influence (Carpenter et al. 1998). Governments can escalate issues to formal institutional arenas in an effort to raise political awareness and secure wider sources of public legitimacy for regulatory decisions (Culpepper 2011). Well-designed regulatory structures can therefore help to enhance the capacity of regulators to assess the credibility of business claims by raising the signalling costs to industry of lobbying, strengthening political commitments to regulatory objectives, and/or by increasing the reputational risk for business of making non-credible claims (Bernhagen and Bräuninger 2005). Future analysis of institutional governance may address several questions. How do institutions

mediate and filter industry signals about the impact of financial regulations? What institutional arrangements – formal or informal, more or less insulated from politics – strengthen regulators’ capacity to enforce regulation independently from the regulated sector?

Responsive regulation

The notion of ‘responsive regulation’ – with enforcement strategies that combine persuasion and sanctions, depending on the behaviour of firms (Ayres and Braithwaite 1992) – has not affected financial regulation as much as other areas of regulation. There may be reasons for this; for example, motivations in the financial sector may to a larger extent be assumed and the levels of monitoring and information-gathering that are needed for a tit-for-tat strategy to work may not actually be present due to the levels of complexity (cf. Gunningham 2010).

Yet, the increase in attention focused on the role of business ethics and corporate social responsibility in finance (e.g. Gurría 2009; Santoro and Strauss 2012; but see de Bruin 2015), and calls for an extension of the hierarchy of sanctions – for instance, in the form of criminal penalties (see Ferguson 2012; *Telegraph* 2014) – suggest responsive regulation can play a role. Indeed, although the question of monitoring is important, its importance can be mitigated by the use of suasion. Also, the tit-for-tat strategy takes the trade-off between expertise and capture seriously by allowing for forms of self-regulation and enforced self-regulation. So key questions are: What hierarchy of sanctions is appropriate? Under what conditions can suasion work? And what could suasion look like?

Re-assessing the possibilities for responsive regulation and suasion may come at a good moment. As the strand of behavioural economics is gaining prominence, assumptions about the motivations of individuals and organizations are relaxed and analyzed, and the effectiveness of different enforcement strategies is further explored. Though research has mainly looked at the responses of individuals citizens to different strategies, organizational responses are increasingly the focus, which may have a lot of potential for the area of financial regulation.

The question of responsibility

A third question of post-crisis enforcement where regulatory scholarship can offer a clear contribution is the question of responsibility. Most enforcement in financial regulation targets organizations, though non-compliance may be the result of the rent-seeking behaviour of certain employees – employees who may have left the firm already by the time that the non-compliance or its consequences are discovered. However, it is difficult for prosecutors to connect misbehaviour in large financial organizations to specific individuals – particularly, to top officials. Important questions have also been raised about the willingness of prosecutors to pursue such strategies (Garrett 2014). In addition, though the boards members are responsible for major organizational decisions, there may be large information asymmetries between those proposing decisions and those taking them; again, as a consequence of the complexity of the market

and its products. Board members may not be aware of, or understand, the risks involved in the products that their organization sells, and those employees that do understand may not have incentives to be transparent about it.

This all raises the question of who should be considered responsible for compliance or – if different types of sanctions are based on different assumptions about responsibility – which form of responsibility should apply and when. For instance, in the aftermath of the financial crisis, financial regulators have been accused of not using the possibility of criminal sanctions often enough. It also raises the question whether regulators and prosecutors can – in one way or another – be empowered when it comes to establishing who was responsible for certain conduct.

As the financial sector has changed so rapidly over the past decades, as many financial firms have expanded massively, and as the increased complexity has enhanced information asymmetries within organizations, we may need to rethink the question of responsibility for compliance. Such a reconsideration should take a normative form – what can employees reasonably be considered responsible for – but studies should also address the question of responsibility and incentives. For example, if criminal charges are an option, does this at all change the preference structure of employees?

Concluding remarks

Looking at enforcement after the financial crisis, this short research note has emphasised a number of avenues for research rather than regulatory scholarship in crisis. The enforcement of financial regulation faces major challenges, and these include the challenge of monitoring compliance in a highly complex sector with major information asymmetries within organizations, and between regulators and regulatees. This may mean that enforcement can never be as effective in practice as it can be on paper. However, unless we come to the conclusion that financial regulation can never produce better outcomes than can complete non-intervention, there is an important role that regulatory scholarship can play. This may include a re-assessment of regulatory cooperation with the financial industry, a re-assessment of financial industry power, a re-assessment of responsive regulation, and a re-assessment of the question of responsibility for compliance.

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Regulatory enforcement and changes in Brazilian environmental regulation¹

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One of the primary points established during our debates on regulatory enforcement was that the way in which we study regulation in the developed world might not suit the context of developing countries. The way in which regulatory enforcement has been studied in developing countries, might, however contribute to more traditional perspectives.

As highlighted in the literature on the enforcement of Brazilian environmental regulations, situations in which traditional enforcement agencies have limited regulatory enforcement capacity (in terms of staff, resources or legitimacy), alternative institutions such as public prosecutors and courts can assume more decisive roles (McAllister 2008). In addition, the role of enforcement culture and social perceptions of law enforcement can directly affect the process and results of law enforcement. In what follows I emphasise two crucial features of regulatory enforcement in Brazil that might contribute to studies of regulatory enforcement elsewhere. Thereafter, I use the example of forest regulations to point to perceived changes in these two features and highlight its consequences in terms of adjustments in the content of regulations.

Particularities of regulatory enforcement in Brazil

Two cultural and institutional aspects have directly affected regulatory enforcement throughout Brazilian history and have often been emphasised in the literature on environmental regulatory enforcement in the country. The first is the institutional capacity of the Ministério Público (approximately equivalent to the US Office of the Attorney General) to prosecute its own state – an emblematic case of justice actors strengthening weak regulatory enforcement. This has been noted as a *sui generis* Brazilian enforcement mechanism without clear parallels in other parts of the world and has helped to improve regulatory enforcement in the country, particularly in reference to environmental regulation (McAllister 2008; Shi and van Rooij 2016). The second – related to enforcement culture – is the idea of *jeitinho* or ‘little way’, which refers to culturally accepted strategies that seek to deviate slightly from, or ‘creatively’, comply with laws considered to be unrealistic or unfair, thereby weakening regulatory enforcement. The *jeitinho* often involves using personal connections for private benefit and is a cultural

¹ This paper is a result of reflections that arose from our two days of extremely rich and stimulating debates on regulation. I have tried to apply the knowledge generated during our debates to my current research topic – Brazilian environmental regulation – and, in particular, to the example of Brazilian forest regulation. I am immensely grateful to all the participants who directed my attention to these themes and helped me to develop these insights.

tendency in regulatory enforcement that is widely acknowledged by Brazilians (Amado and Brasil 1991).

A new phase of regulatory enforcement?

Brazilian environmental law enforcement appears to have changed considerably over the past decade. Although the role of the Ministério Público in law enforcement might still be strong nowadays, the past reality of severe weaknesses in the issuance and collection of administrative penalties by the Brazilian environmental agency (IBAMA; identified by McAllister in the 1990s) have since undergone a gradual change, with noticeable improvements in enforcement capacity.

The enforcement of forest regulation is an enlightening example. In 2004, the government launched the PPCDam (the Plan for Prevention and Control of Deforestation in the Legal Amazon), which resulted in a striking reduction in deforestation levels in the Amazon rainforest (see Figure 1 below). PPCDam had noticeably strict command and control strategies of monitoring and punishment of illegal deforestation. It is often described as one of the main policies underlying the marked reduction in deforestation levels in the Amazon rainforest since 2004 (IPEA-Giz-CEPAL 2011).²

Figure 1 Historical series of deforestation levels in the Amazon rainforest (km²/year)



Source: INPE <http://www.inpe.br/noticias/noticia.php?Cod_Noticia=3944>

In addition to more effective enforcement of forest regulation, another consequence that attests to, but also emerges as a side-effect, of the strengthened enforcement capacity of IBAMA was a surge of change in the content of regulations towards less strict environmental controls. Although also motivated by other factors, I hypothesise, therefore, that the buttressed enforcement played

² Although other factors such as the world economic crisis of 2008 and falling commodity prices have also been pointed as potential causes of deforestation decline (Hall 2012), the world economic recovery and high commodity prices after 2010 confirm the relevance of PPCDam in keeping deforestation levels low.

a significant role in catalyzing a roll-back in the stringency of environmental regulation.

The specific example of forest regulations (although others might also have been used here), a new forest regulation was approved in the country in 2012, which weakened forest preservation requirements for private land owners. A fundamental trigger for the reform proposals of the forest code was found to be the executive Decree 7.029/09 published in 2009. This decree fixed a deadline for all farmers to comply with previous forest regulations whereby they were to be compliant with legal reserves regulations by 2011, or faced penalties (Lower Chamber Agency News 2011). This was an official warning by the state that the *jeitinho* would no longer work in circumventing Brazilian forest regulation and the credibility of such a warning was certainly enhanced by the success of the enforcement of PPCDam. This trend of regulatory change towards less stringent standards coupled with less tolerance for *jeitinho* goes, moreover, beyond the example of forestry regulation, involving areas as diverse as pesticides, environmental licensing for infra-structure projects (see Fearnside 2016) and policies for protected areas (Pack et al. 2016).

In short, this piece briefly proposes that analyses of regulatory enforcement in Brazil might contribute to the study of enforcement elsewhere by signalling the importance of alternative enforcement institutions (such as judicial power) and of enforcement culture. Additionally, it hypothesises that changes in the enforcement capacity and culture in Brazil since the 1990s resulted in a trend of stronger environmental regulatory enforcement, based on more traditional enforcement institutions that are no longer as dependent on the leadership of the Ministério Público, and a move away from *jeitinho*. Attesting to this hypothesis are both the increased effectiveness of policies and regulations in tackling environmental problems and the surge in regulatory change that has emerged in the Brazilian environmental sector towards less stringent environmental standards.

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Regulation and its crisis¹

Diogo R. Coutinho

'Regulatory scholarship in crisis' hypothesis

The claim that the regulatory scholarship is in crisis seems to derive from the detection of several concrete regulatory failures in the last years, particularly after the big financial crisis that broke out in 2007–2008. If that assumption holds, i.e. if we basically argue that the regulatory scholarship is in crisis because actual regulation has failed (in some cases spectacularly), then I think that this very interesting discussion deserves refinement.

Regulation – financial, food and drug, infrastructure, utilities, media and communication regulation, among others – usually fails regardless of what academics who study regulation say about what regulation is, should be or should do in the real policy world. While the regulatory scholarship may (and I think it is indeed supposed to do that) contribute to prevent undesirable concrete outcomes, it cannot avoid regulatory failures at all. Actual regulation may fail – resulting in flawed exemptions, poor compliance, higher prices, asymmetric information, lower quality and capture, for instance – even when the correspondent regulatory scholarship 'works well' in providing sound analyses, precautionary recommendations or good guidelines to a particular sector or market. By the same token, the regulatory scholarship also works well when it is able to find good *ex post* reasons for regulatory policy mistakes and unexpected outcomes. In other words: the malaise that nowadays affects academics who study regulation in their descriptive and normative efforts is not to be confused with the failures associated with what practicing regulators do.

The crisis behind regulatory scholarship is, in my view, more about the intricate and catch-all nature of regulation as a field. Regulation is an umbrella term that encompasses several economic sectors with several particular features, dynamics and reasons to be regulated. The crisis that affects the regulatory scholarship is, thus and more than anything, a consequence of an epistemological puzzle that challenges regulationists (regulation scholars) in their ambitious academic mission. At the limit, such puzzle obliterates our capacity to study regulation as an essentially applied and historically situated field because – provocatively speaking – it makes us think (sometimes unconsciously) that there should be something like an autonomous or abstract 'general theory' of regulation.

If regulation is, to some extent, about policymaking (or policy implementing), all complex analytical variables and challenges apply. The reasons, rationales and

¹ I thank Martin Lodge for the invitation to take part in such a rich discussion, and stress the fact that this is a just an opinion in the sense that the ideas I bring are preliminary and somehow provocative.

tools to regulate are sector-specific, historically influenced and permanently affected by political economy environments. The image of a stable and Cartesian regulatory institutional and legal framework therefore ends up naive if we bear in mind the fact that both regulation and regulatory scholarship evolve constantly alongside the regulated sectors themselves, their correspondent markets and actors. In other words, regulation changes according to political economy 'moments' and varieties of capitalism. This is not to say, however, that the regulatory scholarship should not be revisited from a critical perspective, that it cannot be reconceived from an epistemological/methodological angle, and that intellectual lessons cannot be drawn from regulatory failures.

Enriching regulatory scholarship – towards a critical institutionalist approach

Revisiting regulatory scholarship requires 'reconsideration of the dominant theories in which regulation has been approached', claimed Lodge and Wegrich (2010). They also reckon that 'what is required is a more reflective and in-depth exchange about regulatory issues – beyond the fads and fashions of particular instruments and institutional arrangements'. I fundamentally agree with that point and also think that with 'more conscious efforts at devising ways of reflection within government will it be possible to reduce perversity and failure'. And, indeed, the more open is the 'debate regarding trade-offs, competing approaches and contesting rationalities', to quote Lodge and Wegrich again, the richer and useful regulation as a field will become.

The idea that there is always an underpinning political economy of regulation, and that in such arena, regulation (in practical terms) itself is a constantly changing and mutating policy approach subject to permanent controversies goes way beyond the orthodox regulatory paradigm i.e. public choice politics, rent seeking regulators, captured agencies, and opportunistic industries. A critical political economy view behind regulatory scholarship can also supplant both pure market failure neoclassical justifications and the neoliberal dogma of a regulatory commitment (according to which, at the limit, regulation as the 'rule of the game' should never change because that ultimately means asset and rent expropriation). By injecting political economy in regulatory analysis it becomes possible to reconsider regulation as a field from the political, institutional and legal viewpoints simultaneously.

The interdisciplinary political economy approach towards regulation can be indeed enriched by a critical institutional analysis. As put by Chang (2001: 6):

... for the institutionalist economists, who regard the market as only one of the many institutions that make up the capitalist economic system, market failures may not matter as much, because they know that there are many institutions other than markets and state intervention through which we can organise, and have organised, our economic activities.

A critical institutionalist analysis also challenges the establishment and distribution of property rights and other entitlements that define the 'endowments' of market participants, which neoliberal economists take as given, is a highly political, thus far from consensual, exercise, adds Chang (2000, 2001). Besides that, a critical approach also sees the market ultimately as a political construct: a full de-politicization of the market is not only an impossibility, but also has a dangerous anti-democratic undertone. Finally, such perspective assumes that institutional arrangements that constitute the regulatory state are context-specific (despite acknowledging that some degree of emulation and transplant can be helpful), reasons why blueprints and best practices are to be considered cautiously. In other words, it provides some room for institutional experimentation and adaptation.

To sum it up, it occurs to me that the so-called institutional political economy (broadly encompassing authors such as Chang, Evans, Rodrik, Hodgson, Pistor and others) is a particularly interesting approach with the potential to add complexity and volume to the regulatory field and scholarship.² This is not to say that in order to study regulation we should all become institutional political economists or that there is a silver bullet able to save regulatory scholarship. I understand that defending such a naive idea compromises the valuable premise that regulation is open to several types of academic and critical approaches.

But because the institutional political economy sheds critical light on power disputes, legitimising and democratic procedures, institutional arrangements that embody laws, regulations and policy tools, and because it sees market failures, capture and depoliticization as limited analytical tools, I believe regulationists should dialogue with it more frequently, with qualitative gains. Such a dialogue would indeed connect regulatory scholarship with economic development literature – a missing link in my view – and would strengthen the argument that regulatory regimes, and thus the academic reflection about regulation, are contingent, disputable, adaptable up to certain constraining limits, and are also part of democracy as a long term institutional effort.

Conclusion: a very brief systematising attempt

A very rough and dichotomic comparison between orthodox and heterodox (institutionalist political economy) regulatory scholarships would be the following:

² See Chang and Evans (2005), Deakin et al (2015), Lodge and Mennicken (2014), Hodgson (2015, 1998), Rodrik (2004, 2008) and Caillé (2008)

Orthodox regulatory scholarship	Institutional political economy of regulation
Neoclassic microeconomics, new institutional economics	Institutional political economy
Capture	Multi-stakeholder participation ³
Regulatory commitment	Public-private synergy and coordination towards policy implementation
Depoliticised 'technical' regulation	Accountability, transparency, deliberation
Market failures	Institutional/democratic construction
Best practices and blueprint	Conscious experimentation, learning and transplanting
Command and control/incentives dichotomy	Selective tool combination
Pure cost-benefit analysis	Public deliberation about priorities
'Fads and fashions of particular instruments and institutional arrangements' (Lodge & Wegrich 2010)	Pluralistic view of regulation as democratic and institutional development
General theory of regulation	Regulation theory in permanent construction

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³ I thank Colin Scott for suggesting that I should replace 'embedded autonomy' for 'multi-stakeholder participation'.

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The value of regulatory ‘look-backs’: bringing historical approaches to bear on the analysis of regulatory governance

Edward Balleisen

The reflections prompted by this **carr** workshop touched on several tensions at the core of modern regulatory governance, many of which have been highlighted by the dynamics and aftermath of the global financial crisis of 2007–2008. These tensions include those between/among:

- (1) technocratic expertise and popular participation/democratic legitimacy;
- (2) short term and generational policy horizons;
- (3) competing policy goals, such as the fostering of economic growth, improvement of public health/workplace safety/environmental protection, furthering of macro-prudential financial stability; protection of incumbent business interests; strengthening of competitive conditions; the redress of economic inequality, etc.
- (4) the often conflicting regulatory agendas of international bodies, national governments, and sub-national units, as well as separate regulatory bodies within the same governmental level;
- (5) regulatory strategies predicated on coercion or suasion/education; inflexible means or flexible modes of attaining objectives; bright legal lines or adaptive guidance; public agencies and quasi public or private regulatory bodies; constituting/restructuring markets or nudging behaviour.

This collection of short papers also reflects parallel tensions in academic work on regulatory governance. These include:

- (1) the inclination to develop instructive case studies/intensive assessment of a single regulatory policy domain in one jurisdiction, as opposed to policy comparisons across multiple regulatory domains or jurisdictions, or quantitative analyses of institutional behaviour in many contexts linked to formal behavioural models;
- (2) a primary focus on rule making/standard setting, as opposed to analysis of implementation (not only monitoring and enforcement, but also education/suasion) and/or impact (the causal consequences of policy on economy/society);
- (3) the predisposition to emphasise the role of ‘interests’ in shaping regulatory outcomes, or rather the tendency to stress institutional arrangements and cultural values as explanatory variables

- (4) the proclivity to investigate the dynamics of regulatory policymaking in 'crisis' conditions, as opposed to the penchant for assessing how regulation works in 'normal' contexts; and
- (5) the impulse to describe the dynamics of modern regulatory governance, as compared a normative stance of critiquing its shortcomings, and the companion desire to assist regulatory officials as they confront specific dilemmas and trade-offs.

Historical perspective has much to offer scholars of regulation and regulatory decision makers as they try to navigate these myriad tensions. Historical awareness allows one to see how interests coalesce into coalitions and how ideas move from one policy context to another. It shows how people use narrative strategies to generate perceptions of crisis that demand regulatory reforms, or tamp down calls for action in the aftermath of some specific disaster that attracts great public attention. It offers inoculation against policy amnesia (and I would argue that such amnesia helped to produce the 2007–2008 financial crisis, by minimising the risks of a nationwide downturn of housing prices in the United States). It expands imaginations about potential policy options and institutional arrangements (much as does societal comparison). It cultivates a dialectical sensibility, allowing one, for example, to see how the initial technocratic impulse of late 19th-century policymakers (take difficult, technical questions out of the direct hands of elected officials and delegate authority over them to experts, who ostensibly could deal with them more expeditiously, knowledgeably, and adaptively) generated democratic and legal critiques, which in turn generated procedural reforms and new institutional rigidities.

Historians, moreover, possess important methodological tools for coming to terms with modern regulatory governance. At the micro level, their capacity to navigate archival records and to undertake oral history facilitates ethnographic analysis of regulatory policy in action, within the bowels of agencies and in the interactions between regulators and regulated entities. At the macro level, they are trained in exploring the linkages among economic structures, politics, culture/ideology, and ideas, and how institutions and regimes of governance change over time. At both scales, they are attuned to the interplay between structural forces and the strategic actions of individuals, including bureaucratic entrepreneurs. These skills are especially relevant to analysing how specific events or trends come to take on the gloss of 'crisis' within political discourse, and how regulatory institutions then respond to the political imperative of action that crisis implies (see Balliesen 2015 for an overview).

Intriguingly, governments across the globe are increasingly demanding systematic 'retrospective review' of regulatory policies. Thus in a very direct way, meta-regulators in the industrialised world have proclaimed that historical

evaluation of outcomes should help to set the direction and redirection of policy (Aldy 2014). So far, however, historians have remained aloof from this call for regulatory look-backs; and the staff undertaking this work in regulatory agencies are far more likely to have training in economics or law than history.

Slobodan Tomic's fascinating analysis of the articles in *Regulation & Governance* in this Discussion Paper does not include an overview of the disciplinary background of authors. My strong supposition is that most of the articles have been written by political scientists, sociologists, and legal scholars, with a smattering of economists, and almost no cultural anthropologists or historians. Although we have much very good history of regulatory policy, especially of the United States, the members of my discipline have mostly remained on the sidelines of recent debates. As scholarly interest in regulatory governance has mushroomed, the number of historians who study regulatory institutions remain a small fraction even of those historians who study law, politics, or policy. And very few of that small band of regulatory historians write for broad social science audiences, much less interact directly with regulatory protagonists.

In his contribution to this collection, Colin Scott makes two pleas. The first call is for more engaged research – that is, more posing of big questions informed by contemporary policy dilemmas/debates. These might include how regulatory policies could better cope with the negative social impacts of extraordinarily fast-moving technologies; or when and how governments should reconfigure regulatory policies in the wake of crisis events; or how we can encourage wider and more informed public participation around such complex regulatory issues as global financial stability or climate change. The second appeal is for more interdisciplinary, collaborative endeavour in the hope of addressing such big questions. I applaud these entreaties, but I do hope that the resulting research teams have space for engagement with historical context, and that historians meet their responsibilities to join in.

Finally, a couple of thoughts about the challenges of such interdisciplinary, collaborative undertakings. I have some experience in helping to organise such efforts. As part of the Tobin Project, David Moss and I spearheaded the discussions and conferences that culminated in the publication of *Government and markets: toward a new theory of regulation* (Balleisen and Moss 2010). At Duke, I founded an interdisciplinary group, 'Rethinking Regulation', that has produced a forthcoming volume with Cambridge University Press entitled *Policy shock: recalibrating risk and regulation after oil spills, nuclear accidents, and financial crises*. Each of these volumes depended on contributions from far-flung scholars from across the social sciences (including history), who could only meet occasionally. More recently, the Rethinking Regulation group has embarked on an ambitious study of retrospective regulatory review, this time drawing more

substantially on the work of Duke students (undergraduates as well as doctoral students).

At the risk of stating the obvious, it's important to keep in mind that such undertakings take time and financial resources. Participants have to get to know each other, sometimes learn how to translate across disciplinary boundaries, and collectively agree on research questions and methodological approaches. It also helps to bring current and former policymakers (as well as representatives of NGOs and regulated businesses) into the mix early, to get their perspectives on the most salient questions and potential relevance for policy. That step helps to move discussions away from narrower debates that matter within sub-fields, but that are far less likely to produce insights that will influence actual policy.

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Regulatory change in the post-financial crisis

John McEldowney

Introduction

Legal and constitutional considerations help define the powers and responsibilities of regulators as well as more generally their accountability to the public. In the UK, the current constitutional arrangements have not proved satisfactory in ensuring that regulatory bodies are adequately monitored and that the public are assured that confidence in independent bodies is fully justified. Such concerns are not helped by doubts about how the actual form regulation should take since the 2008 financial crisis raised criticisms about the effectiveness of principled base regulation. Lessons gained from the financial crisis led to far-reaching reforms of banking regulation. These include the abolition of the unitary system of financial regulation under the Financial Services Authority and its replacement with the Bank of England having more robust financial powers. The long term implications of the financial crisis, when banks were allowed to inflate their balance sheets in pursuit of short term profits leaving them exposed, cast a dangerously long shadow. The outcome in terms of regulatory systems is far from clear. Regulation and regulatory systems seem unable to cope with many of the tasks they are expected to perform, leaving doubts and uncertainties about their fitness for purpose. There is no grand regulatory design at work and lessons from the financial crisis may not be fully understood or accepted across every sector. There is a profound lack of connectivity or coordination of regulatory systems. This is not assisted by the fact that the regulatory landscape is forever changing. Different bodies are created on an ad hoc basis, often with individual and specialised remits and invariably linked to the political system of control. For example, regulatory bodies may be found inside government departments as well as outside. This may result in potential conflicts of interest that may test regulatory independence. Under current arrangements, blameworthiness is often shifted between regulatory bodies as regulators and policymakers. This does not fit easily into systems of governance and democratic forms of control and accountability. The scale, content and complexity of the regulatory landscape gives rise to confusion and there is a great deal of fluidity in how the systems can be explained and defined. The vote to leave the European Union further complicates matters by raising expectations that cutting red tape and reducing regulatory burdens will determine Britain's future.

The politics of an idea

Ayres and Braithwaite (1992: 3) correctly identified the 'stalemate between those who favour strong state regulation of business and those who advocate deregulation'. Even today the stalemate remains largely unresolved amidst a changing global economy struggling to cope with the financial crisis that has questioned the rationale and effectiveness of different forms of regulation. The

Deregulation Act 2015 is an example of attempts to address red tape and reduce regulatory burdens. The deeper and often overlooked question is the role of the nation state that has relegated much of its sovereignty to supra-national bodies. These take many important decisions particularly in terms of trade and tend towards harmonised systems that seek common rules of engagement between nation states. This sets a political dilemma for elected forms of government and systems of internal accountability. There are clear tensions between the economic incentives of globalization and the tendency to assume national sovereignty. The latter may explain the tendencies of many countries to become isolationist and reactive to global change. Taking charge of national sovereignty is not just political rhetoric but the consequences of policymakers finding it difficult to reconcile contradictory forces. Mindful of democratic choices and inward tendencies towards national self-determination, hyper-globalization is likely to stall. Rodrik argues that some countries such as Canada and Sweden have maintained an independent fiscal stance in contrast to various Eurozone countries that may have less room to manoeuvre. One explanation for the recent UK referendum to leave the EU maybe from concerns about national identity and an antagonism to 'red tape' or rules-based controls over capital and labour. Concerns about inequality may also underpin political upheaval instability. Precisely the sort of reasoning that may explain the apparent retreat from traditional political parties in the UK (Bovens 2006; Scott 2010: 15–34).

It is argued that regulatory systems have to be considered in the overall context of global change and the overarching political responses that individual countries are called upon to make. At the same time there are increasing pressures on regulatory systems to be fully accountable and responsive to citizens' (Bovens 2006; House of Lords 2007; Magetti 2010; Ménard and Ghertman 2009; Scott 2000). As Julia Black (2012: 37) has observed '... the capacity of different actors to call regulators to account is highly variable' (see also Marcou 2006). This gives rise to complexities in ensuring that democratic systems of accountability are not damaged by allocating too much power to independent regulators.

The financial crisis raised questions on the type of regulation attributed to be the cause. It remains unclear how best to design regulatory systems given the uncertainties of financial failure as predicting the next regulatory problem is difficult to judge. It is clear that in the 1980s and 1990s the expansion of regulation and regulatory bodies was accompanied by a growth in risk-based approaches to regulation as well as opposition to regulation in favour of a deregulation agenda (Majone 1994). Equally important has been the operation of light touch regulation in the aftermath of the Hampton (2005) and Macrory (2006a, 2006b) reviews. This continues to be broadly encouraged, despite the lessons of the financial crisis. A reduction in regulatory burdens and costs are in vogue and there are renewed attempts to introduce de-regulation to save costs on business.

Another important consequence of the large bank bailouts is an increase in public sector debt. The consequences of increased public sector debt that followed the financial crisis spending has led to unprecedented levels of spending cuts across the public sector. Public sector cuts have consequences for the funding of regulatory agencies and regulators. The effectiveness of regulation depends, not only on the form of regulation but the ability of regulators to carry out their role. Emphasis on different forms of risk regulation are in vogue setting interesting challenges on how to prioritise risks and how to problem solve. Commonly regulatory techniques may be problem-centred or risk-based. In both cases the regulatory framework is at its most challenging, leaving a large margin of discretion as to how it is interpreted in each sector it is applied.

Regulation, law and government

Regulating public utilities including telecommunications, energy and rail as well as the financial services, has attracted the attention of many lawyers. This includes the drafting of licences and contracts. There is also considerable interest in understanding the consequences of the withdrawal of state/nationalised ownership arrangements to private companies and their regulation by agencies. The term 'the regulatory state' is much in vogue. It is clear that regulation is central to economic life and has significance for pricing, social welfare and setting controls over the free market. Arrangements for utility regulation, the drawing up of licences and contracts have spawned a global business with many key London law firms at the centre of a new competitive framework for the selling and purchasing of many services connected to regulatory systems. The Utilities Act 2000 set a new framework with a template of regulation that has been followed beyond the energy sector where it was first adopted. Various primary duties such as protecting the interests of consumers has been included with competition obligations as well as subsidiary duties to assist the elderly, sick and disabled. Social and environmental obligations are also part of the general regulatory framework. The mix of regulatory aims and objectives provides a widely drawn spectrum of policymaking and politically driven outcomes. In many instances regulatory systems emerge as an effective alternative to traditional forms of government and accountability. This leaves, however, questions about how parliamentary supervision and independence may be best combined in overseeing the activities of regulators. Oversight of regulatory systems and bodies strains existing constitutional arrangements and leaves awkward gaps and uncertainties which question how future regulatory systems will cope with constitutional change. The traditional arrangement whereby ministers are accountable to Parliament does not easily fit the new arrangements of independent regulatory agencies.

Regulatory shifts and directions of change

The deregulation agenda continues and its latest iteration was the creation of a new directorate to focus on regulation and enforcement within the (former)

Department for Business Innovation and Skills (BIS). The aim was to ensure that the way regulation is enforced is proportionate and risk based.¹ Changing the nature and shape of regulatory agencies is an important element in re-focusing the use of regulation and the culture of regulatory bodies.

A good example of this approach is the adoption of so called self-regulation. A three-year investigation of the use of self-regulatory approaches in the energy market has concluded that many electrical goods commonly used in home appliances use more electricity than claimed (Simkins 2016: 27). It is estimated by Market Watch, an independent consortium of green and environmental friendly organizations, that 20 percent of energy-using projects fail EU, standards, rules and performance indicators.

In addition there are new forms of regulatory bodies being created almost on an ad hoc basis. The Energy Bill 2015–16 envisages the creation of a new Oil and Gas Authority (OGA), a new independent regulator to regulate oil and gas companies in the UK's territory. The new regulator will take the form of a government company. This will also entail the transfer of the powers to the new company/regulator of the Secretary of State for Energy and Climate Change over offshore oil and gas. Such a regulator will have a controversial role in ensuring the main objective of the industry will be to maximise the economic recovery of the UK (House of Commons 2016).

Cost-cutting regulatory funding

One example of the prevailing cost-cutting side in the public sector is in the funding available for regulators. The Health and Safety Executive (HSE) is a case in point. Its 2016–2017 business plan envisages an income of £234.9 million consisting of £140.9 million from the government and £94 million from fees. This will mean that the government will have reduced its contribution by over half this decade. By 2019–2020 the government amount will be reduced to £123.4 million. The expenditure in 2009–2010 was £330 million and such reductions comes despite the analysis of a few years ago that the regulator was essential with increasingly important regulatory responsibilities. These relate to noxious substances as well as air pollution. HSE responsibilities are expanding at a time of cuts and reductions in staff. The optimistic analysis suggests that effective spending and more efficient use of resources will result in more targeted regulatory approaches. Pessimists may see an overburdened regulator that will be more thinly spread leaving businesses and industries with the sure knowledge that the regulator may never catch up with their activities.

Regulatory examples

Public lawyers have rather belatedly realised that the regulatory changes in the key sectors of the economy have wide impacts on society, the institutions of

¹ The new directorate brings together the Better Regulation Delivery Office (BRDO) and the National Measurement and Regulation Office (NMRO) (Kaminski 2016).

government and the constitutional mechanisms used to hold them in check. The number of regulatory bodies is increasing and their powers have often been expanded. The newly created Office of Students proposed in the recent Higher Education White paper will not only regulate the sector but will uniquely be a funding agency. Examples proliferate where existing regulatory agencies such as the Care Quality Commission (CQC) received extended powers and additional financial burdens. Issues that are likely to dominate regulation in the future are the following:

- How do regulators make their decisions and is there sufficient transparency in the process?
- Direct democratic legitimacy is often absent from the system of control;
- Very often the organizations lack parliamentary approval for the rules, procedures and processes that they apply;
- Fitting existing regulatory systems into a coherent constitutional framework is challenging;
- The sheer size, complexity and scope of the various regulatory bodies is hard to keep pace with and this leaves highly specialised discussion beyond the remit of even parliamentary select committees;
- Lifting regulatory burdens and tinkering with the system through constant adjustment is hard to assess, but is unlikely to give rise to effective policymaking or sustainable goals;
- Setting regulatory procedures and principles requires an understanding of why regulation is needed. What are its aims and objectives? What is the relationship between economic and social goals?
- Constitutional accountability is a necessary first step to ensure that there is a coherent system of regulation as well as effective controls and outcomes (Prosser 2010, 2016: 329).

Conclusions: identifying the main challenges

Julia Black (2013) has helpfully identified a wide range of accountability issues that set the challenges for calling regulators to account. This includes the size, scale and scope of regulatory bodies, the inter-connection between regulatory bodies, technical complexity of the regulatory systems, systems of transparency surrounding regulatory bodies, and willingness of regulatory bodies to be called to account. Designing and setting regulatory capacity is a first step but parliamentary oversight is critical. As Black (2013: 388) notes: 'Regulators operate in a broader context of multi-level and polycentric regimes in which responsibilities are widely dispersed, even at the national level.'

The tensions and conflicts that may arise between the regulatory systems and regulators are challenging but they are necessary as a means of sifting and evaluating policy matters that might eventually lead to improved decision making. An important issue for debate will be the evaluation of the impact of the EU on regulatory and arrangements for Brexit which will provide an important opportunity for analysis. This may yet prove to be the most challenging of all the

issues to confront Parliament and regulatory bodies. Establishing a regulatory framework when the UK leaves the EU is an opportunity to settle the main constitutional framework for regulatory bodies including influencing the arrangements for the future of EU and UK relations. The UK will need to decide whether or not to join the EEA and in the banking/financial sectors questions about whether or not to implement the recommendations of the Basel committee on Banking Supervision (Allen & Overy 2016) will have to be addressed.

It is clear that regardless of how well accountability systems may be improved there will remain many outstanding issues as to how to bring coherence to regulation in a period of turbulence and change. Primary attention needs to be given to ensure that realistic democratic systems of accountability are in place. Sectoral responsibilities will have to be examined and re-defined in the aftermath of Brexit leaving further uncertainties as to the future direction of regulation (King's Fund 2016).

Regulation throws up a host of issues clustered around competing ideas about the purposes of regulation and the forms of accountability that are most effective. Public money often funds regulatory bodies. Direct parliamentary oversight holds a heavy responsibility to determine systems of control and accountability but often this is complicated by departmental spending budgetary systems. Yet this capacity has proved to be limited and circumscribed by broader overarching political decisions, for example, around consumer protection. Departmental select committees may investigate regulators within their remit but there is no select committee reporting across departments and no general oversight of regulators (Scott 2000; ². Undoubtedly, the National Audit Office (NAO) has an important role in offering oversight of regulators but this is confined to the bodies for which it has legal powers to investigate. Expanding its remit may offer one possible way forward, especially in strengthening parliamentary systems of control. A start might be made by clarifying its role over every regulator body including the bodies for which it is responsible. The vote to leave the EU is likely to ignite an intense debate about whether or not regulation in its many forms is needed. Opinions include the view that the UK's continued trade with the EU will prevent divergent regulations. As Springford has noted, expectations are raised that de-regulation might lead to large gains in economic output. More likely than not trade the UK's continued trade with the EU will be inhibited if there were divergent regulations between the EU and the UK (Springford 2016).

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Challenges for regulation in crisis

Colin Scott

Introduction

The financial crisis of the period from 2007 raised some important questions about the capacity both of governments and scholars to understand the potential for effective regulation to contribute to the stability or instability of financial markets. It is striking that there is not much consensus on the regulatory lessons to draw from the crisis. While international oversight bodies have been strengthened (especially in the European Union) and systematic risk is an object of greater attention at national and international level, it is not clear that we can say that financial markets regulation is more robust than it was and in the right ways (Scott 2014a). In part, this is because regulation is often associated with the promulgation of rules with the consequence that problems are addressed with new or enhanced rules.

To the extent that regulation was a cause of the financial crisis (also contested), it may have been as much a problem of implementation as of rules. While capacity for rule making is shared between national and international level, capacity for implementation, or monitoring and enforcement in regulation-speak) remains concentrated at the national level. As to the potential problems with rules, light touch or principles-based regulation has been subjected to considerable criticism (Black 2011). If the weaknesses are more substantially ones of implementation, then this is about how the monitoring of principles-based regulation (PBR) was carried out rather than a concern with the PBR per se. For some, the key to PBR is to trust less and to verify more (Briault 2009). In general, approaches to regulation which delegate significant responsibility to market actors require both strong commitment and capacity for oversight by regulators (Gilad 2010). The key case of financial regulation demonstrates the challenges for anything resembling regulatory science to identify cause and effect between regulatory regimes and market (or social) problems), and to suggest how to resolve pervasive economic and social problems (see generally, Coglianese 2012)). These factors may generate a sense of crisis in regulation arising from the financial turmoil.

Regulatory governance as a scholarly field

As a field of scholarship, research and education, regulation appears to be thriving. The emergence of scholars from a variety of disciplines self-identifying as specialists in regulatory governance, and the existence of very successful conferences (notably the ECPR Standing Group on Regulatory Governance biennial conference,¹ but also others) and journals (notably *Regulation &*

¹ See <<http://regulation.upf.edu>>

Governance, but also strong regulatory literatures in other more general journals²) testify to the vibrancy of the field. But, the field is not devoid of challenges.

Focus of research and education

Scholarship on regulatory governance is quite diverse in its focal points, with much reading across from established areas into new areas of inquiry. An organizational focus on agencies, a significant aspect of political science studies, for example, concerning the rise of the regulatory state, agencification and regulatory capitalism, has obvious attractions because it can be well specified and both qualitative and quantitative data can be developed and analysed (Levi-Faur 2005; Majone 1994). A theoretical literature with a more sociological orientation is suggestive of a decentring of regulation, captured by the political science concept of regulation occurring in regimes, and which is, to a degree, captured by the concept of regulatory capitalism (Black 2001; Braithwaite 2008).

The concept of decentred regulation makes for more challenging empirical research, since it acknowledges a wider range of actors involved in making rules, monitoring and enforcing, requiring careful selection and justification for boundaries of the concept of regulation (does it include the individual or aggregated actions of market actors in exercising contractual choices, or the individual or aggregated actions of community actors in developing and implementing norms that steer the behaviour of others with or without intention?). Relatedly a decentred approach also implies a wider range of instruments extending beyond rules to other kinds of norms (and even nudges) (Black 2012; Lunn 2014). And if the locus of regulation is decentred, what about the focus on the state as observer and enroller of others in public policy objectives, for example, through processes of meta-regulation (Parker and Braithwaite 2003)?

Decentring raises normative challenges also, concerning the appropriate role of the state, its relationship both to intentional private regimes (for example, transnational private regulation) and to less intended activities with regulatory effects. As to private regimes themselves their distance from elected government (a feature they share to a degree with intergovernmental and EU regimes) creates a normative problem of democratic governance (Scott 2014b). There has been a trend within private regulatory governance to seek to engage all those affected by the regime (Cafaggi 2016). Does this create the potential for identifying a demos which may legitimate private governance? Finally, the recognition of a wide variety of self-regulatory and private governance regimes has tended to focus more attention on rule making than implementation, risking the same weaknesses in understanding that may occur in public regulatory regimes. Yet, the study of implementation in diffuse private or hybrid regulatory regimes is

² Other key journals include *Governance*, *Journal of Law and Society*, *Law and Policy*, *Law and Social Inquiry*, *Law and Society Review*, and *Public Administration*.

even more challenging than is true for public regulation, with a wide variety of actors, lots of moving parts, problems of identifying cause and effect and so on.

Methods

The field of regulatory governance is also diverse methodologically. There is a good deal of theoretical work on the changing nature of the state and the role of regulation within this. The socio-legal tradition has arguably been dominated by empirical investigations of implementation processes with a particular focus on regulatory enforcement. Political science has developed more quantitative approaches, with a particular focus on regulatory institutions, their growth, the indexing of their accountability, relationships to others, and also processes of accountability (Gilardi 2008; Maggetti 2012). While the potential for ethnographic research in public policy has been noted (Cappellaro forthcoming), there has been remarkably little ethnographic research concerned either with the making or implementation of regulatory rules (but see Hall, Scott and Hood 2000). The potential of more diverse methods is better match for a wider range of challenging questions to appropriate ways to answer them. Distinctions in methodological priorities can isolate disciplines from each other and inhibit collaboration and shared understanding. One way to address this is to think more systematically about assembling multidisciplinary teams in larger projects, as happens when particular methodological skills or disciplinary background is identified as a way to enhance the capacity within a funded project.

Engagement

How well does regulatory scholarship engage with policy practice so as to better understand practice problems and ways of thinking, and to be able to offer better ways of thinking about and addressing policy problems? My impression is that this is quite variable. Some of the leading centres, for example at the Australian National University, LSE and the University of Pennsylvania have worked hard through a variety of mechanisms to engage wide constituencies with the findings and significance of their research outputs. The OECD and, to a lesser extent, the European Commission, have been very open to engaging with and commissioning scholarship. Nationally the picture is more variable. The introduction of behavioural insight teams in the UK, US and parts of Australia has systemised relations to one branch of scholarship in relation to public policy generally, with significant effects for experimentation in regulation. Indeed, the United States recently mandated behavioural approaches in policymaking (White House 2015). The EU established a community of practice on self-regulation which has engaged policymakers and practitioners with think-tanks and academics at quite a high level and which has fed into the 2015 Better Regulation package (European Commission 2015). This provides a potential model for the future at national level also, and something in which universities could take a lead.

Scholarship in the field of regulatory governance is thriving. Yet the field faces major challenges of focus, method and engagement to develop itself to the next stage of significance.

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Trends in regulation scholarship

Slobodan Tomic

To get an appreciation of recent trends in the regulation scholarship, this piece offers a survey of the regulation articles published between 2009 and 2015 in prominent international academic journals.

Firstly, this paper considers articles published in *Regulation & Governance* (R&G). This journal does not offer an exhaustive account of all regulation scholarship. However as the pre-eminent forum for exchange of research and ideas in the field of regulation it provides insights into the wider trends as to how scholarship has been evolving. The following analyses 119 R&G articles in total, excluding special issue and symposium papers.

The analysis also includes regulation articles¹ from the top journals from the fields of public policy and administration, and political science.² The public policy and administration journals are: 1. *Journal of Public Administration Research and Theory* (JPART); 2. *Policy Studies Journal* (PSJ); 3. *Public Administration Review* (PAR); 4. *Governance* (GOV); 5. *Public Administration* (PA). The political science journals include: 1. *American Journal of Political Science* (AJPS); 2. *American Political Science Review* (APSR); 3. *Journal of Politics* (JoP); 4. *Journal of Common Market Studies* (JCMS); 5. *Comparative Political Studies* (CPS).

The paper is interested in three major questions:

- (a) What have been key policy areas, methods, and analytical interests in the regulation scholarship?
- (b) How responsive has the scholarship been to the 2008 global financial crisis which exposed major flaws in the system of financial regulation?
- (c) Which of the three scenarios raised about a decade ago to predict the future direction of regulation scholarship – (i) ‘fading away’, (ii) ‘plodding along’, or (iii) ‘rejuvenation’ (Lodge 2008) – has materialised in the meantime?

¹ Those featuring ‘regulat*’ in the abstract, excluding articles that are ruled out upon a closer reading (due to the lack of regulatory perspective).

² As ranked by Google Metrics.

Dominant approaches and interests

Approach

The first question concerns the articles' focus, namely their analytical interest. Four broad variants can be distinguished, as illustrated in Table 1.

Table 1 Four possible analytical interests in regulation articles.

Approach	Focus	Typical questions
1. Enforcement as the independent variable	How does the enforcement of an actor, programme, policy, or regulatory regime unfold in practice?	<ul style="list-style-type: none"> - What the observed effects are? - Are there unintended consequences; does a given approach produce the effects assumed by the underlying theory? - Under what conditions does a specific outcome occur? - What are the determinants of outcome variations?
2. Decision-making/regulatory regime as the dependent variable	Explain the evolution of a regulatory regime, norm, instrument, arrangement.	<ul style="list-style-type: none"> - What were the factors shaping its development? - If variations in policies/regulatory regimes are observed, what caused them?
3. Conceptual contributions	Build and alter concepts, frameworks, and indicators related to regulation issues.	<ul style="list-style-type: none"> - How can we facilitate study of a regulatory phenomenon? - How can we measure or compare regulatory phenomena?
4. Normative considerations	Consider the merits and pitfalls of particular regulatory approaches, and why they are theoretically (un)suitable.	<ul style="list-style-type: none"> - Why a certain regulatory approach is wrong/promising? - What would be better alternatives for a given problem?

The empirical analysis reveals that a large majority of the R&G articles falls in the first group which mainly features empirical testing of the effects of a specific regulatory regime, norm, instrument, or actor (e.g. does a risk-based regime work and under what conditions; what are the effects of procedural justice or impact assessments; observed benefits and drawbacks of self-regulation; what are regulatory outcomes of a particular institutional design). More than 80 percent of R&G articles explore enforcement in a particular context, outnumbering the other three analytical interests.

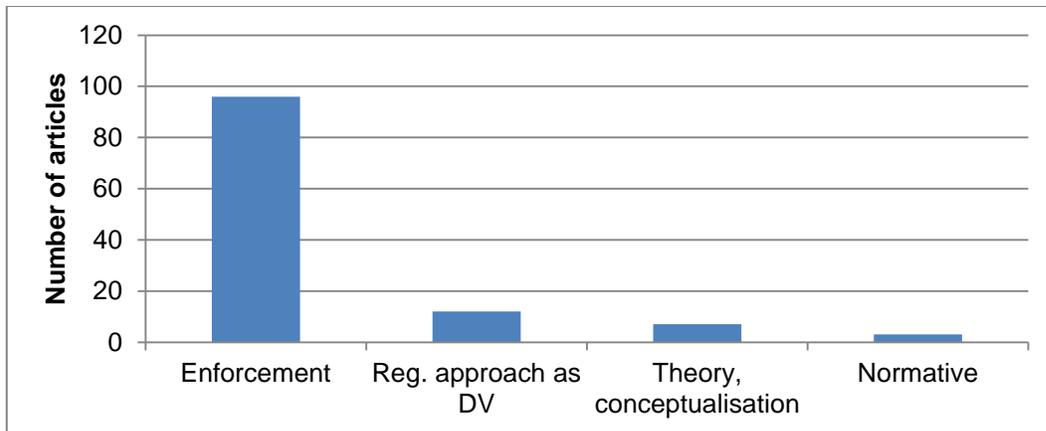


Figure 1 Key concerns in R&G articles.

Only 12 (about 10 percent) of the articles focused on explaining the development or adoption of a policy/regulatory regime/mechanism (e.g. how global trade standards evolved; why varying risk-approaches were adopted across states; why an EU policy was adopted in its original form, defying external pressures), 7 articles were predominantly concerned with analytical frameworks (e.g. how to measure cooperation in international competition; what capacity-building means as a notion), and only 3 articles offered normative views on particular regulation-related issues (e.g. why it is not legitimate to comply with transnational regulation).

This suggests that the R&G scholarship has placed most emphasis on trying to understand the logics of operation and consequences of ‘big’ regulatory doctrines (meta-regulation; self-regulation; responsive-regulation), tools, and institutions. Interest in understanding the origins of those policies and instruments, in specific contexts, has been lower. The low number of contributions that focus on conceptual issues implies that either the field has already gone through a stage of ‘concept maturation’ in which most of the necessary frameworks were elaborated, or that regulation scholarship has no difficulty borrowing concepts from other fields in public policy or public administration to examine regulatory phenomena. The lack of interest in normative issues suggests that regulation scholarship is first and foremost preoccupied with empirical questions, whereas other fields such as political theory or sociology are more natural habitats for ‘value-laden’ concerns.

The following graph compares approaches across the 10 selected journals from the fields of public policy and administration, and political science:

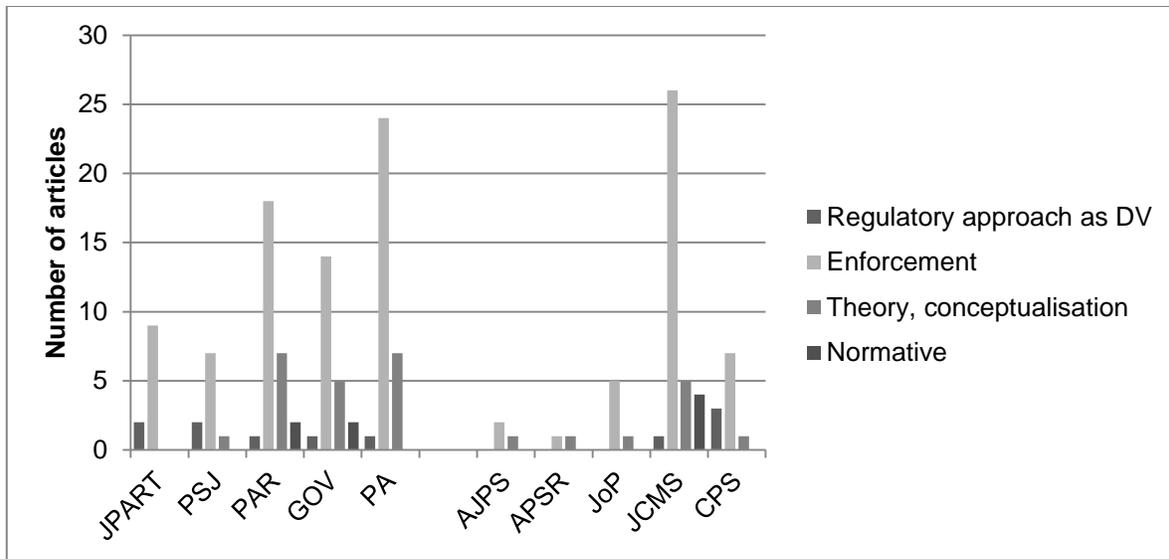


Figure 2 Left: key concerns in the top 5 public policy and administration journals; right: top 5 political science journals.

It is noticeable that the 'enforcement approach' has been most present in the journals, both in total and more or less in each journal respectively (AJPS and APSR had only a few regulation related articles, so their empirical basis is insufficient for such considerations). Interestingly, in some of journals, articles featuring 'theory/conceptualisation' approach have outnumbered those focusing on explaining regulatory regimes, but other journals (e.g. the first two in public policy and public administration – JPART and PSJ; or CPS) featured more articles that have a regulatory regime/case as the dependent variable than those aimed at theorising or conceptualisation. At the same time, in journals like PAR, GOV, and JCMS 'normative' concerns have been more prevalent than those explaining regulatory regimes. Although the absolute number of articles is low, this pattern may indicate that there is no particular hierarchy of interest among the other areas of analytical concern.

In sum, therefore, one can identify a common pattern in regulation scholarship, both in the specialist *Regulation & Governance* journal and in other journals; there is a strong dominance in terms of interest in exploring enforcement-related questions.

Methodology

What methodologies have been deployed in the regulation articles? Has there been a 'quantitative' turn relying on the application of econometric methods, or qualitative case studies have kept dominating the scholarship?

The graph below suggests that the qualitative approach, based on in-depth case studies which usually rely on process-tracing, comprises half the R&G sample. However, roughly every sixth article applied econometrics, on a large-N sample of

data, and every tenth article used a ‘simpler’ form of quantitative analysis. Overall, qualitative case studies (62) outnumber quantitative analyses (37).

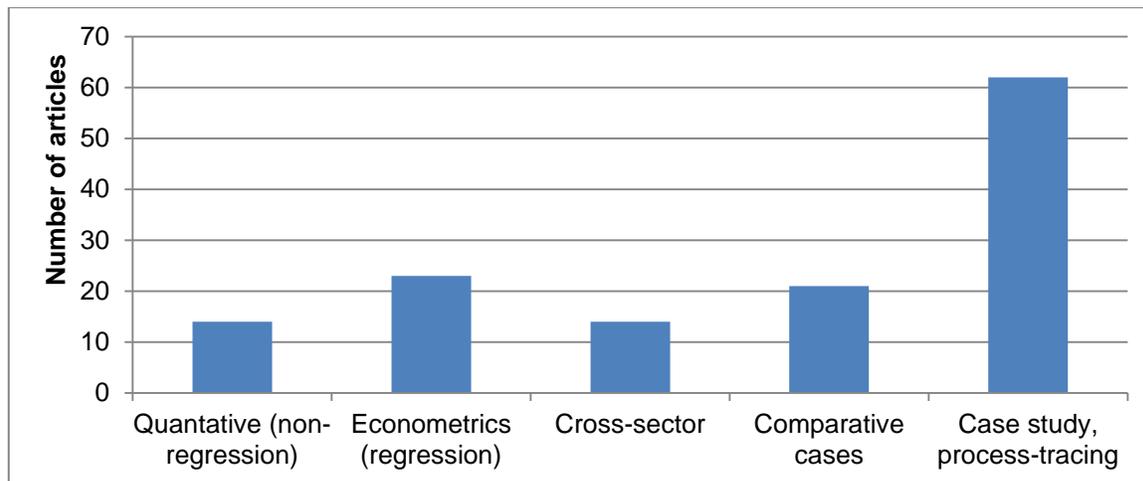


Figure 3 Methodologies used in R&G.

Since 14 articles featured cross-policy comparisons, it may be concluded that the R&G scholarship has done little to bridge the cross-sector gap and that an ‘atomised’, single-policy focus, has taken hold. The ‘comparative cases’ category in Figure 2 denotes articles featuring small-N comparisons –mainly cross-country but there are also cross-programme or cross-agency comparisons within the same country. Some of these studies include qualitative case studies of the cases used in the comparison (the categories in the graph are not necessarily mutually exclusive). The structure of methodologies in the other 10 journals corresponds to the respective journals’ wider overarching methodological outlook.

Where empirical evidence comes from

Though a majority of analyses continues to involve the OECD world, the impression is that the gap between OECD and non-OECD world studies has been diminishing.³ A comparison with a sample of regulation articles from a pre-2009 period would reveal whether empirical research of non-OECD territories have been ‘catching up’ with OECD ones over time, but regrettably such data is not available as R&G was founded in 2007.

One portion of the R&G articles – almost one third of the sample – does not draw on empirical material from any of the two worlds. These articles either do not feature an empirical analysis or are focused on transnational regulation. Finally, there are only few studies that compare OECD and non-OECD countries⁴ and

³ Most of the OECD studies are from a US or EU context, whereas in the non-OECD world large countries such as Brazil, China, or Mexico are drawing increasing interest.

⁴ Such articles were double-coded, that is one article is assigned to both the ‘OECD’ and ‘non-OECD’ group.

explore the differences in regulatory logics between them (only a small number studies in the whole sample of 119 articles).

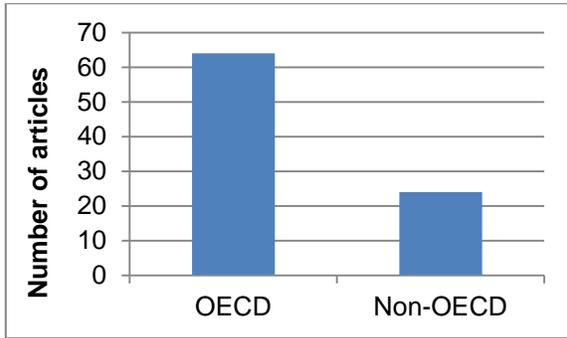


Figure 4 Where empirical evidence comes from.

A similar picture emerges in the other 10 journals:

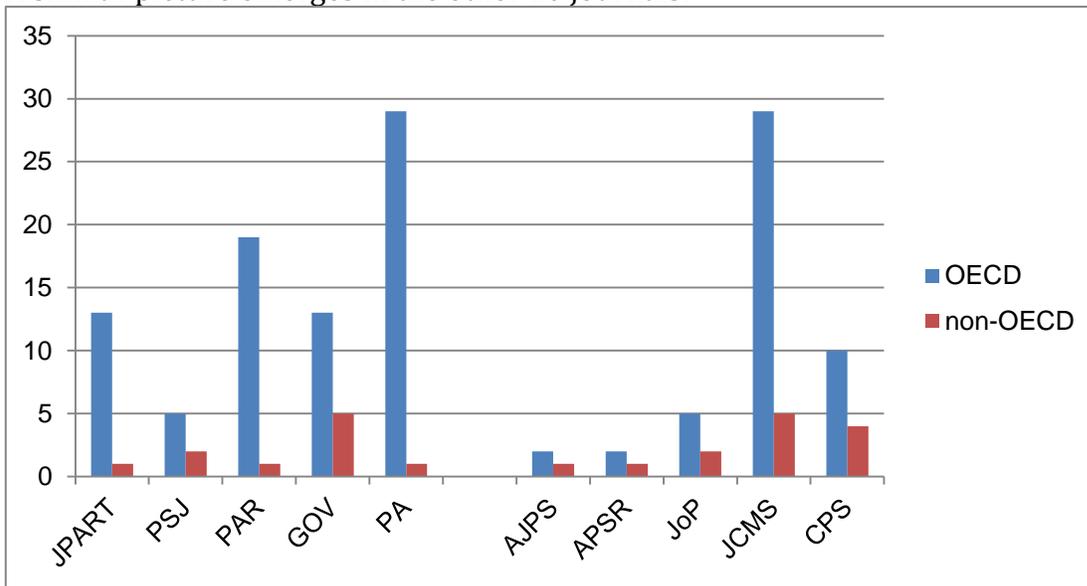


Figure 5 Where empirical evidence comes from, in public policy and public administration, and political science articles.

Every journal in this sample featured more studies from the OECD world than from developing countries, but while the gap between OECD and non-OECD is large in some journals (e.g. PA and JPART), in journals like GOV and CPS the non-OECD pool constituted about 40 percent of all regulation studies. The more regulation-related studies a journal publishes, the larger this gap seems to be. One possible explanation is that its empirical evidence is harder to come by when researching non-OECD countries .

Policy sectors

As can be seen in Table 2 below, regulation scholarship has analysed a wide variety of policy sectors. Categorising articles into policies/sectors is not without

Table 2 Number of R&G articles per policy/sector.

Policy/sector	R&G	JPART	PSJ	PAR	GOV	P A	AJP S	APSR	JoP	JCMS	CPS
Environment, sustainability, and wildlife	16	4	7	4	2				3	2	3
Healthcare	11			3	1	5					
Finance, financial regulation, and banking	11	1		7	4	2			1	5	
Prosecution, corruption, and financial crime	6				3					1	
Food and food safety	5			1	1	3				3	
Market competition and property rights	4					1				7	1
Security and defense	4									2	
Labour policy	4	1			1					1	
Disasters and transnational crises	4					1				1	
Global trade and fair trade	4									1	
Taxation	3						1				
Internet	3				1						
Retail	3										
Energy	3				1						
Construction, building, infrastructure	2			2							
Procurements	2			1							
Education, skills formation, science, culture	4	1		1		2				1	
Transportation	2			1	1	1				1	
Audit and accounting	2										
Production standards	2										
Social security/justice	2	1		1		3		1			2
Law enforcement	1										
Public admin, gov. structure, agencies	1	2		6	2	5			1	5	
Nanotechnologies	1										
Non-profit economics	1										
NGO	1			1							
Synthetic biology	1										
Media	1			1			1				
Technology	1									1	2
Lobbying, business interests		2	1					1	1	2	
Global trade	1										
Tobacco	1										
Energy	1		1								
Industrial policy	1										
Telecoms	1		1								
Transparency, ethics, integrity				3	1					1	
(De)regulation, regulatory approaches, tools	1	2			2	4	1	1	1	1	3

difficulties – sometimes one issue concerns two overlapping sectors, at other times several policy categories can be grouped into a ‘unifying’ policy group, certain policy fields can be broken down into sub-categories and so on. Regardless of this ‘classification bias’, Table 2 indicates the diversity of sectors and issues that have been explored in the articles.

In the R&G articles, social regulation has been studied more frequently than economic regulation. Environment and healthcare issues drew more interest than financial regulation, with food (safety) and prosecution/corruption/crime coming behind, followed by market competition, security and defence, and labour policy.

Environment has been the most studied field in a number of other journals, like JPART, PAR, and GOV, but in other places, such as PA and JCMS, environment has been among the less or even least studied topics. Journals that placed a greater emphasis on financial and market regulation are JCMS and GOV. Public administration, government structure and architecture of public services have been common topics across all journals. Overall, while social regulation seems to have dominated scholarship, there is considerable variation across journals. This might be a reflection of journals’ editorial policies, or stem from the fact that certain articles trigger ‘successor’ articles in the same journal.

Summary

What trends can be gleaned from the above? In short, regulation scholarship seems to have been preoccupied with empirical explorations of how regulation works in practice – whether and when various approaches lead to optimal or unintended outcomes; the exploration of these issues has largely been carried out in a qualitative manner, through case studies, though the number of quantitative analyses is not negligible and also certain journals, according to its editorial policy, prefer quantitative methodology over qualitative; most empirical material is gathered from OECD countries; a wide variety of policy sectors/fields has been studied, with no dominant topic across the journals. There has been a trend of ‘atomisation’ in the regulation scholarship, with a high number of single-issue pieces of research and rare studies straddling cross-sector divides, and with little overarching theory (frameworks) that would build on the extant findings.

Financial crisis and surge in interest in financial regulation

Has the 2008 financial crisis shifted the key interests of the regulation scholarship, in the direction of increasing study of financial regulation? Among the various hypothetical scenarios could be:

- (1) Yes, the financial breakdown has turned the scholarship's attention to the issues of (global) financial regulation and vulnerabilities of the extant financial regime(s), including debates about remedies and trade-offs;
- (2) Some reflections concerning the crisis were made, but this has not fundamentally altered the structure of the regulation scholarship;
- (3) The scholarship did not reflect on the crisis in a way in which such a big shock would lead us to expect; this scenario can be called 'business as usual', that is – as if nothing happened.

It can be seen in Table 2 above that finance, financial regulation, and banking has been among the most studied phenomena in some journals (JCMS, R&G, GOV, PAR). At the same time, a considerable portion of these articles were not about the financial crisis strictly defined. Some examine particular instruments of regulation in the banking sector, others discuss the alleged ineffectiveness of offshore zones regulation, and there also were concerns related to inherent organisational tensions within banks (e.g. focusing on trade-offs between commercial gains and internal management compliance). Other studies concern accounting standards in the finance industry, microfinance instruments, or who the winners and losers of a global financial regulation are.

Thus, it seems safe to say that the crisis has not fundamentally shaped regulation scholarship by shifting its key focus on the question of financial regulation and post-crisis responses. While some journals may have devoted more attention to the financial crisis and financial regulation (including the publication of special issues devoted to the crisis), there is little evidence that this has been the dominant trend in regulation scholarship. Instead, recent developments in regulation scholarship seem to lie somewhere between the second and third scenario, depending on journal. (This, of course, is not to negate the possibility that in other disciplines and forums, the financial crisis and the regulation of financial markets might have attracted greater interest.)

What future has held for regulation scholarship?

Nearly a decade ago, Lodge (2008: 295–8) discussed three possible scenarios for the future development of regulation scholarship:

Table 3 Three scenarios for regulation scholarship (adopted from Lodge 2008).

Scenario	Characteristics
1 'Fading away'	<ul style="list-style-type: none"> - Core concerns of the regulation scholarship become less relevant over time; the 'passing fad' eventually leads to the disappearance of the field; - Unclear disciplinary boundaries or exhaustion of intellectual effort ('regulation becomes the study of everything') are factors contributing to the marginalisation/disappearance of the field.
2 'Plodding along'	<ul style="list-style-type: none"> - Expansion of disciplinary interest toward new fields and emerging issues (e.g. fast developing technologies); - Increasing exploration of phenomena that we still have to learn about from empirical cases (e.g. in the fields of utility networks, social regulation, or risk management); - Discovery of niche topics, which could come at the cost of possible fragmentation of knowledge ('knowing more and more about less and less')
3 'Rejuvenation'	<ul style="list-style-type: none"> - Stronger focus on the language, cultures and side-effects of regulation; - Need for better understanding of competing logics of regulation, different regulatory regimes, and the impact of ongoing worldwide governance trends (e.g. rising internationalisation, labour mobility, liberalisation) on regulatory practices; - Inquiring capacity of nation states to address regulatory challenges, at the national and international level; - Invention of advanced methodologies for the study of the above concerns.

Nearly a decade later – are there any emerging patterns? Table 4 may provide indicators of the 10 public policy and public administration, and political science journals' publications in the field of regulation:

Table 4 Presence of regulation articles in the analysed journals.

Journal	Overall number of articles (2009-2015)	Number of regulation articles	Percentage of regulation articles
<i>Public policy & administration</i>			
JPART	309	14	4,5%
PSJ	208	10	4,8%
PAR	565	32	5,7%
GOV	200	20	10%
PA	359	29	8,1%
<i>Political science</i>			
AJPS	412	3	0,7%
APSR	321	3	0,9%
JoP	583	7	1,2%
JCMS	335	36	10,8%
CPS	420	11	2,6%

While public policy and administration has obviously seen a greater interest in regulation studies than political science, the topic of regulation has attracted only limited attention across all of these fields' journals. With the exception of two journals – GOV and JCMC, and to an extent PA, regulation-related articles

constitute less than 10 percent of the journals' overall output. This seems to indicate a moderate decline in interest in the study of regulation compared to the pre-2009 period; for example, based on a different set of journals (in the field of European politics) and exploring the time period between 2003 and 2007, Lodge (2008: 281) noted that approximately 10 percent of journal articles were regulation related.

At first, this may be a sign of the 'fade away' scenario – the study of regulation has seen saturation, the unclear boundaries of regulation studies study played into the hands of political science and public administration that deployed own concepts, methods, and language to take over the content and concerns of the study of regulation. Only those few journals that have achieved a 10 percent ratio of regulation articles have sustained some level of interest in regulation studies.

However, it is important to note that concomitantly with the above trend one particular journal – R&G – has managed to consolidate the field of regulation by generating and sustaining significant interest in the study of regulation, solidifying its terminological and conceptual apparatus and advancing a distinct platform for regulatory perspectives. Despite certain similarities and overlapping questions, as well as its interdisciplinary appeal, the study of regulation advanced here seems to have managed to profile itself as a distinct field. In that sense, in parallel with a relatively low amount of interest in regulation in the field of political science and, to a slightly lesser extent, in the field of public policy and administration, a countervailing trend of regulation's maturation and consolidation has unfolded over the course of the last six years.

Whether R&G has just served to attract those regulation concerns that would have otherwise ended up in the public policy and administration journals, or whether R&G acted itself as a generator of interest in the study of regulation, the following seems certain: the field of regulation has seen many elements of the 'rejuvenation' scenario materialise since 2009. Rising interest in understanding competing logics of regulation, the effects of different regulatory regimes and tools, the interaction between national and supra-national level as well as role of transnational regulation, or how globalisation and related trends of capital and labour mobility affect regulatory practices, have been among the key concerns in the study of regulation advanced in R&G. Although the exploration of these issues has not seen the introduction of novel methodologies, the study of regulation has proven capable of addressing its key questions using the 'standard' qualitative and quantitative methods, well established and practised in political science and related (sub)disciplines.

At the same time, there is little evidence of 'plodding along'. While regulation scholarship has shown interest in investigating emerging and little explored

fields such as those associated with the explosive rise of technology (e.g. nano-technologies, bio-technology, medicine, GMO, some recently advanced environmental issues, internet governance), the interest in these niche topics remains marginal when compared to the long-standing concerns such as those related to regulation of health and healthcare practices, financial markets and market competition, as well as abiding environmental issues. Much of the regulation literature has shown interest in the empirical testing of 'grand' theoretical approaches. Rather than producing more and more knowledge about 'smaller and smaller' corners of regulatory interest – regulation scholarship has gravitated towards linking empirical cases to overriding regulatory philosophies and strategies. It is therefore difficult to suggest that there has been a trend towards 'niche-isation' ('knowing more and more about less and less') over the course of the past decade.

In summary, while signs of 'fading away' could be observed across the public policy and administration, and particularly across political science scholarship, the major platform for the study of regulation – R&G – seems to have succeeded in sustaining an opposite trend of 'rejuvenation'. This may indicate a growing interest in the study of regulation, but another viable interpretation would be that the channels of production and dissemination of regulation knowledge have shifted away from the classic political science and public policy and administration platforms to those fully dedicated to regulation concerns only.

Concluding remarks

Returning to the three major questions posed at the outset of the paper, the following conclusions can be made. Firstly, the study of regulation has been dominated by efforts of empirical assessments of particular regimes and tools, and what the lessons of these cases are for broader theoretical approaches and regulatory doctrines. The majority of studies still come from the OECD world, are carried out mostly in qualitative manner – though quantitative regulation studies are far from rare, though with little cross-sectoral but more single-issue/single-field explorations. Secondly, the major financial crisis (2007–2008) has not triggered a fundamental shift in the regulation scholarship in terms of an increasing interest in financial regulation. This topic has remained an important concern for regulation scholars, but has not become as dominant, at least not in the journals examined as part of this study. Thirdly, regulation scholarship has neither faded away nor plodded along. Instead, elements of rejuvenation could be observed in the recent developments in the study of regulation, with a shift away from public administration and political science to dedicated regulation forums.

Reference

Lodge, M. (2008) 'Regulation, the regulatory state and European politics', *West European Politics* 31(1–2): 280–301.

Journals analysed (2009–2016)

Regulation & Governance

Journal of Public Administration Research and Theory

Policy Studies Journal

Public Administration Review

Governance

Public Administration

American Journal of Political Science

American Political Science Review

Journal of Politics

Journal of Common Market Studies

Comparative Political Studies

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