1

Introduction

Regulation is increasingly seen as a distinct field of academic inquiry. Yet it is often difficult to obtain a holistic sense of its contours and the nature of its terrain. The primary aim of this book is to provide a map that will help to orientate those encountering this field for the first time. We construct this map by drawing together material from a range of disciplinary perspectives from law and the social sciences. Three objectives flesh out our broad aim. Firstly, we seek to challenge lawyers to look beyond conventional legal sources. Secondly, as a corollary objective for those who are not lawyers, this book seeks to examine the role of law as an instrument of social control within regulation broadly understood. Thirdly, we aim to break down a subject which can be rather daunting for newcomers into digestible and accessible form. The map we draw is structured around four core conceptual facets of regulation: (i) theories of regulation, (ii) techniques and instruments for regulating, (iii) compliance with and enforcement of regulation and (iv) issues of accountability and legitimacy in relation to regulation. We then extend this map, in the penultimate chapter, by applying our conceptual framework to regulation in the supranational context. The resulting taxonomy is intended to provide a descriptive sense of the breadth and variety in approaches to regulation across political studies, economics, law, criminology and sociology.

Although the perception of regulation as a distinct field of social inquiry is a relatively recent development, purposive attempts to influence and control economic and social activity have a long pedigree. Continuity and change in the practice and debates surrounding regulation may be illustrated by comparing Marie Antoinette's indignant response to complaints about rising bread prices in pre-revolutionary France, to France Telecom's contemporary response to complaints about fears of rising local telephone call charges in rural France as a consequence of telecommunications privatisation. Like the latter's protestations that international calls would be so much cheaper (Silbey 1997: 207–208), Marie Antoinette similarly claimed, 'But then let them eat cake.' In other words, both justified the potentially negative distributional impact of a refusal to regulate the price of important goods by invoking the expansion of choice available to citizens. Yet both failed to give credence to the incapacity of particular sectors of the

community to avail themselves of essential commodities, be they bread or local phone calls. Such a failure demonstrates that insensitivity to the political and moral dimensions of regulatory policy and practice has endured, despite the long sweep of time separating the two events.

While bread and local telephone calls may, at first sight, be surprising comparators, these contrasting anecdotes have conceptual parallels that a broad-based study of regulation may illuminate. This book will develop a general analytical framework drawing upon scholarly examination of more contemporary sequences of change occurring in the shifting relations between the state and market in modern industrial states over the last quarter of a century. These changes coalesce around the liberalisation of the post-war welfare state in industrialised democracies in pursuit of values and goals loosely associated with market competition, which has placed increasing pressure on the social democracy and citizenship aspirations fostered by the welfare state. These tensions, which one of us has described elsewhere as 'social citizenship in the shadow of competition', have been a central trope of regulatory politics since the mid to late 1970s (Morgan 2003). The politics of regulation in many different countries is pervaded by a broad sense that state intervention into the economy either bolsters markets or tempers their effects by adding a dimension of social inclusion. The growing trend towards indirect welfare provision (via the regulation of non-state providers and the consequent 'hollowing out of the state') is making the difference between regulatory intervention and direct state provision of welfare increasingly moot. Accordingly, the scope of 'regulatory politics' is now seen to encompass issues that are familiar as regulatory ones, such as environmental regulation, occupational health and safety regulation, financial services regulation and motor vehicle safety regulation, but also extends to state programmes for redistributing income to disadvantaged citizens, mandated health insurance for individuals in need, programmes for subsidising the cost of higher education for selected students or state intervention via statutory marketing collectives for the sale of agricultural products. But although these changes have led to an expansion of the resulting 'regulatory state', they should not mask the continuing importance of ideological battles over the basis and extent of justifiable state intervention into collective choices. It is in this dynamic socio-political context that regulation has emerged in academic literature as a distinct field of social inquiry.

In mapping this field, we select texts from a wide range of writing about regulation in law and social science, and intersperse extracts from these materials with our own commentary. The selection of text extracts is intended to illuminate the considerable variation in the focus and scope of intellectual inquiry ranging, for example, from close examination of regulatory sanctions and liability rules, through to broad questions of democratic legitimacy. In emphasising the breadth of regulation scholarship, our focus extends well beyond utility regulation with which the field it is often associated. We include extracts from the original texts,

often at some length (rather than paraphrasing) to highlight the rich variety of texture in voice and discourse that characterises the field. These extracts illustrate the range of analytical frames used to explore regulation, drawing into sharper focus the differences between alternative perspectives on the regulatory endeavour and its multiple facets. There are, of course, tensions between some of the different disciplinary approaches, and one of the advantages of interleaving extracts from a range of disciplinary perspectives is that such tensions are revealed, and opened up for interrogation. The rather eclectic materials we have selected have been chosen primarily for their accessibility. Thus we have not necessarily selected seminal writings (not least because they can be somewhat inaccessible to the newcomer to the field). These extracts are linked by our commentary, with the latter also serving to highlight common ground and areas of divergence, and sometimes drawing out their wider implications. In particular, one of our aims is to explore the law's various roles in regulation. A discussion of the law's role provides a common thread running throughout the commentary. Taken together, the text and our commentary provide a wide overview of an immensely varied terrain held together by an exploration of the law's role and, to that extent, our commentary may be understood as offering a legal perspective on regulation.

A legal perspective on regulation

Regulation is a phenomenon that is notoriously difficult to define with clarity and precision, as its meaning and the scope of its inquiry are unsettled and contested. That said, a functional approach to regulation, often referred to as a cybernetics perspective, is widely used and accepted, explained by several leading social scientists as:

> . . . any control system in art or nature must by definition contain a minimum of the three components . . . There must be some capacity for *standard-setting*, to allow a distinction to be made between more or less preferred states of the system. There must also be some capacity for *information-gathering* or monitoring to produce knowledge about current or changing states of the system. On top of that must be some capacity for *behaviour-modification* to change the state of the system.
>
> (Hood *et al.* 2001: 23)

By focusing on a tripartite division between regulation's core functions, definitional contestation over the appropriate scope of the regulatory field is avoided. In contrast, attempts to define the proper scope of regulation provoke a much greater level of disagreement, often because of the political and ideological battles referred to above. At their narrowest, definitions of regulation tend to centre on deliberate attempts by the state to influence socially valuable behaviour which may have adverse side-effects by establishing, monitoring and enforcing legal rules. At its broadest, regulation is seen as encompassing all forms of social

control, whether intentional or not, and whether imposed by the state or other social institutions. Lawyers have tended to focus on the narrower definitions, largely because of the state's monopoly over the coercive power of the law. From a traditional legal perspective, one might think of a statute promulgated by a sovereign legislature as the paradigmatic form of regulation. Regulatory scholarship is challenging three assumptions that are inherent in such a perspective.

The first assumption is that the state is the primary locus for articulating the collective goals of a community. Recent scholarship challenges this assumption by highlighting the emergence of non-state institutions, including commercial enterprise and non-governmental organisations, that operate as both a source of social influence and a forum in which public deliberation may occur. The second assumption is the hierarchical nature of the state's role: the idea that the state has final authority is increasingly challenged by the emergence of multiple levels and sites of governance that operate concurrently or in overlapping ways, rather than being vertically arranged. The third assumption is the centrality of rules as 'command' as the primary mode of shaping behaviour: the challenge here is twofold, not only encompassing empirically observed limitations to the effectiveness of legal rules, but also increasing recognition of the potential for alternative techniques of policy implementation.

The combined effect of these three pressures on state-centric and rule-centric notions of regulation is summed up in the notion of what Julia Black calls 'decentred regulation' (Black 2001). However, decentred regulation has not dislodged either the state or law, rather, it generates new questions about the *relationships between* the state and the range of other actors, institutions and techniques highlighted by a decentred approach. While finding answers to these questions will require lawyers to broaden their horizons beyond the vision of the state as a top-down rule-maker, they do not eliminate the relevance of law, nor a legal perspective on regulation.

This raises the question of what we mean by a legal perspective on regulation. It is a perspective that builds upon a dominant strand of regulatory scholarship that views the law as an instrument used by the state to achieve the community's chosen collective goals. Regulatory scholarship of this nature is concerned primarily with effective problem-solving. These approaches tend to downplay the non-instrumental values, institutions and ideals which lawyers often emphasise – the most obvious being the values and institutions encapsulated within the rule of law ideal.

Our legal approach builds on these more instrumentalist strands of regulatory scholarship, by bringing to the fore the political and constitutional context in which regulation is embedded. By political and constitutional context, we mean the social structures and institutions that allocate power at the macro-political level, rather than the more immediate context relevant to problem-solving within a particular policy sector. Our consideration of the macro-political linkages in

which regulation occurs focuses upon the democratic market economy that characterises most Western industrialised countries, rather than considering other forms of political economy such as developing, socialist or Islamic states. Moreover, most of the book's exploration of regulation assumes that the nation-state is the primary forum for collective decision-making at the macro-political level. Whether the analytical framework we provide is capable of being applied in the context of more 'globalised' views of macro-political institutions is a question we address separately in the penultimate chapter.

Although our analytical framework encompasses a 'decentred' approach to regulation, the legal perspective which we adopt assumes, as the main context of analysis, a state-centric conception of law, that is, law as authoritative rules backed by coercive force, exercised by a legitimately constituted (democratic) nation-state. Our legal approach differs from traditional legal scholarship in so far as we do not focus on judicial interpretation of legal rules developed through case law. Rather, we emphasise the social context in which the law operates, thereby highlighting the law's instrumental role in shaping social behaviour. We also extend our examination beyond instrumental conceptions of law by considering the way in which law may give expression to particular values. Thus, we consider two related but distinct roles for law in regulation: the first is facilitative and the second expressive. We describe these roles in what follows in abstract, conceptual terms. They are not intended as philosophical claims about the nature of law, however, but rather as stylised concepts that summarise patterns of empirical variation.

In its *facilitative* role, law forms part of the infrastructure that links the state to the market, to the community and to individuals. For example, the state and the market can be thought of as influencing social and economic behaviour in contrasting ways. A highly simplified version of the contrast could view the state as providing benefits or imposing burdens in terms of the rule of law, in particular on an equal universal basis. By contrast, the market's invisible hand lets the price system dictate the burdens and benefits of exchange in a random, differentiated manner. For example, a community may decide that one of its collective goals is to sustain the quality of its waterways. It might achieve this by promulgating a binding legal rule prohibiting any person from dumping waste exceeding a specified quantity into its public waterways, and imposing a financial penalty on any person who violates this rule. However, the same collective goal might also be achieved by imposing a system of tradeable permits that allows certain amounts of waste to be dumped into public waterways upon payment of a specified sum. While there is a tendency to understand the first method as legal and the second as market-based, the law is in fact involved in both methods, albeit in different ways. In the first, the law's role is a familiar one which may be depicted by the image of *law as threat*. In the second, law facilitates the interaction of state and market, and thereby contributes to delineating the boundary between them. In so doing, law enables transactions to take place in the market just as

Law's role	Law's image	
	Law as *threat*	Law as *umpire*
Law's *facilitative* role: law as an instrument for shaping social behaviour	Proscribing conduct and threatening sanctions for violation to deter that conduct	Creating and policing the boundaries of a space for free and secure interaction between participants
Law's *expressive* role: law institutionalising values	Legitimating coercion	Reflecting shared or agreed morality of the community of players

Figure 1.1. Law's image.

much as it constitutes an expression of state command. We might depict this role for law with the image of *law as umpire*.

This brings to the fore the *expressive* facet of our depiction of the law's role, which also draws on the images of law as threat and as umpire, but to different effect. In providing the framework in which economic and social transactions take place, law interacts with morality and politics. As part of this interaction, the law constructs and constrains democratic institutions that articulate collective choice. In this role, the law has developed a range of ways to shape and constrain the power of institutions, particularly governmental institutions. Because governmental institutions may impose collective choices coercively, law acquires, at least in a democratic state, a normative dimension, for the state must legitimate its use of coercive force. Law may therefore be understood as institutionalising and giving expression to certain values that democracy itself presupposes and that cut across the political programme of particular governments. The law's embodiment of constitutional values represents one of several ways in which the law may have an expressive dimension. In this guise, constitutional values and principles (the separation of powers, the principle of legality, the requirements of due process, etc.) serve as constraints on the exercise of state power. For example, the law would not allow the imposition of a financial penalty upon the polluter of waterways unless due process had been respected: the image of *law as threat* is at play here by its legitimation of the burdensome consequences of violation by demanding conformity with due process requirements.

There might be other ways in which the law could be regarded as expressive. For example, legal standards promulgated by a democratically elected parliament may be thought of as giving expression to the community's general will, or to its shared values. Legal standards may also give expression to ethical principles. So, for example, if the legislative prohibited the dumping of waste into public waterways, imposing a sanction for violation, such a prohibition may be seen as

expressing the community's shared commitment to environmental preservation and public condemnation of polluting behaviour. Others might claim that it is morally wrong to degrade the environment, and therefore the legal prohibition of such conduct may also be regarded as giving expression to this claimed moral principle. The law's expressive role is likely to be most familiar when regulation takes the classic form of rule-based proscription, particularly where legal prohibitions reflect strong condemnation of the prohibited conduct, thus reflecting the image of *law as threat*. Yet an expressive dimension may also be discernible when the law's role reflects the image of *law as umpire*. So, for example, the law would proscribe the issue of a tradeable pollution permit to an applicant who had not met the criteria for purchasing the permit: the image of law as umpire reflects the law's facilitative dimension in helping to create and maintain a structured framework for the free play of choice and creativity within the community of participants while also giving expression to the community's collective will concerning the appropriate conditions under which such interactions should occur.

Stated in summary form, our depiction of the law's facilitative and expressive roles in regulation are highly abstract, but we will elaborate further, locating them in more concrete contexts and providing detailed illustrations of these images as the chapters unfold. In Chapter 2's discussion of theories of regulation, the law's facilitative role will be explored at greater length, while in Chapter 3 the law's umpiring role will be considered alongside its facilitative function when considering regulatory instruments. The law's facilitative and expressive dimensions are both discussed in Chapters 4 to 6 when considering the law's respective roles in regulatory enforcement, legitimacy and accountability, and regulation within the supranational context. Although we will return to a discussion of the law's role in regulation in the concluding chapter, they may be usefully represented in schematic form in Figure 1.1.

Chapter overview

The idea of a legal perspective on regulation is relevant to the question of whether regulation has become more than a distinct and common object of scholarship, amounting to a methodology in itself. In presenting a legal perspective, this book offers a map of regulation scholarship which is ecumenical in outlook. While some scholars of regulation have begun to speak of a 'regulationist' approach (just as one refers to a criminological approach, a feminist approach or a socio-legal approach), we wish neither to construct nor to defend a single definitive vision of regulatory scholarship by bringing these sources together. The map of regulation which we draw in this book is structured around four core conceptual ideas which comprise Chapters 2 to 5, briefly outlined in the following discussion.

Theories of regulation

We begin by examining competing, and sometimes overlapping, theoretical frameworks that seek to explore the relationship between regulatory laws and the various social groups participating in, and affected by, the regulatory process. A theory (or model) of regulation is a set of propositions or hypotheses about why regulation emerges, which actors contribute to that emergence and typical patterns of interaction between regulatory actors. The theories discussed in Chapter 2 span a variety of disciplinary approaches, encompassing both explanatory and prescriptive outlooks. Theories of regulation can be broadly divided into three kinds: public interest, private interest and what may loosely be described as 'institutionalist' approaches. Public interest theories of regulation attribute to legislators and others responsible for the design and implementation of regulation a desire to pursue collective goals with the aim of promoting the general welfare of the community. Such theories are generally prescriptive in orientation, typically concerned to evaluate (often from an explicitly economic or political viewpoint) whether, and to what extent, a regulatory scheme fulfils particular collective goals.

Private interest theories, by contrast, are sceptical of the 'public interestedness' of legislators and policy-makers, recognising that regulation often benefits particular groups in society, and not always those it was ostensibly intended to benefit. Thus, private interest theories conceive of regulation as a contest between selfish 'rent-seeking' participants in the regulatory 'game', analysing the way in which political and law-making processes can be used by these participants to secure regulatory benefits for themselves. Private interest theories are largely explanatory in nature, concerned with explaining how and why regulation emerges and why regulatory processes and outcomes take a particular shape and form. Some private interest theories may also seek prescriptively to assess whether the resulting outcomes are economically efficient, typically observing that resources devoted to winning the regulation game often result in economic waste and are therefore socially unproductive (Ogus 2004: 73).

Unlike either public or private interest theories, which are more actor-centred, the array of approaches which we broadly label as 'institutionalist' tend to analyse regulatory interactions from a higher level of abstraction. Rather than focusing on the dynamics between individual actors, the focus of systems theory, for example, is on the dynamics of the 'legal system', the 'economic system' or the 'political system' – as well as, importantly, the interactions between these different systems. Although the classical version of systems theory, built by Luhmann (Brans and Rossbach 1997) and Teubner (Teubner 1986) on the basis of biological scientists' accounts of how living organisms self-regulate, defines the content and parameters of a system by referring to 'legal', 'economic' and 'political' systems, the contours of these so-called systems are fluid and contested. Moreover, discussions of exactly what is constituted by a 'system' operate at a very high level of abstraction.

So, for example, whereas private interest theorists exploring utilities regulation might investigate the ways in which a regulated industry lobbies regulatory agencies and legislative actors in order to secure regulatory benefits, systems theorists might focus on the way in which the economic and political systems communicate (or fail to communicate) with each other.

Network and 'regulatory space' approaches share with systems approaches a focus on institutional dynamics, and, for this reason, it may be helpful to view them contiguously. Unlike systems approaches, however, they operate from a less abstract base, building their accounts of regulatory dynamics from detailed observation of the patterns of interaction in a particular regulatory context. Accordingly, their unit of analysis tends to be a specific policy sector, such as public health, education or financial services. While these approaches, for those new to the study of regulation, may seem relatively amorphous, they are useful in highlighting complexity. In particular, they challenge divisions between public and private spheres, the existence of which may be too readily taken for granted in public and private interest approaches to regulation.

Regulatory instruments and techniques

While theories of regulation explore *why* regulation emerges, *which* actors contribute to that emergence and typical *patterns of interaction* between regulatory actors, Chapter 3 explores *how* the state attempts to influence social behaviour in pursuit of its policy goals. The discussion begins by exploring the wide array of instruments and techniques used to regulate social behaviour with the aim of understanding their mechanics. Although academics have sought to classify policy instruments in many different ways, no single classification system has emerged as definitive. Chapter 3 adopts a classification system which organises regulatory instruments according to the underlying 'modality' of control through which behaviour is intended to respond, identifying five such modalities: command, competition, communication, consensus and code (or 'architecture'). This schematic division is an oversimplification, adopted primarily as a heuristic device to illuminate the nature of tool-mechanics. As we shall see, many instruments are more accurately characterised as hybrid in nature, relying upon more than one mechanism in attempting to regulate behaviour. Indeed the general trend within literature concerning regulatory tools and techniques is to advocate combining techniques rather than relying upon any single instrument: an approach often referred to as a 'regulatory toolbox' approach.

As the toolbox metaphor implies, much of this literature assumes that questions concerning how to regulate are technocratic ones, driven by the quest to find effective solutions to problems. But one's choice of instrument has inescapable political dimensions, which Chapter 3 also seeks to unpack. So, for example, competition-based approaches that draw upon the competitive discipline of

markets are typically seen as offering a greater degree of autonomy to citizens whose behaviour the state is seeking to influence. But in so doing, such approaches may convey implicit legitimation of that behaviour if the price is right. So, for example, attempts to reduce environmental pollution through a scheme of tradeable permits may imply that polluting activities are socially acceptable, unlike a scheme which prohibits environmental pollution and imposes penal sanctions on those who violate the legal prohibition. These normative dimensions are brought to the fore by examining law's expressive role in elaborating these techniques.

Enforcement and compliance

The exploration of compliance and enforcement undertaken in Chapter 4 focuses on the 'human face' of regulation. It is through the enforcement process that a set of legal standards designed to influence human and institutional behaviour is translated into social reality. Although enforcement action is necessary within all regulatory regimes, whatever modality of control is employed (with the possible exception of code), the literature on enforcement and compliance has focused primarily on enforcement taking place within a traditional command and control regime. Accordingly, this chapter begins with an examination of the problems associated with the interpretation, design and application of the law's command, where that command takes the form of legally enforceable rules. Many of these problems are ultimately attributable to the imprecise and indeterminate contours of human communication. But while the fallibility of human communication generates numerous difficulties, it also provides the creative potential for overcoming the limitations of rule-based control. It is the capacity for human interpretation and judgment exercised by regulatory enforcement officials that has formed the focus of a rich and well-developed literature documenting the findings of a varied range of ethnographic studies that have sought to investigate, understand and explain how regulatory enforcement officers seek to secure compliance. This literature has provided the springboard for further development in academic scholarship, albeit of a more normative kind, in developing prescriptive models intended to guide public officials in making enforcement decisions.

While much of the literature in this field has concerned variety in enforcement styles, there is also a related but distinct strand of literature concerned with variety in regulatory sanctions and the liability rules attaching to those sanctions. We examine these issues in the third part of the chapter, in the course of exploring the role of public and private actors in the enforcement process. The chapter closes by reflecting on the way the law contributes to regulatory enforcement and compliance. As we shall see, central to the study of regulatory enforcement is the width of discretion within regulatory systems (in the hands of both public and private actors), providing ample scope for human action, error, manipulation and creativity.

Legitimacy and accountability

The deeper evaluative questions of the kind touched on at the end of Chapter 4 are further explored in Chapter 5 by examining ideas of regulatory legitimacy and accountability. For this purpose, accountability is conceptualised as a set of mechanisms and processes that impose an obligation to reveal, to explain and to justify regulatory actions, and is therefore instrumental securing regulatory legitimacy. Treating accountability in this way initially involves a primarily functional analysis that identifies who is accountable, to whom, and for what in a particular regulatory arena. An important strand of the literature emphasises the increasing pluralism of actors implicated in accountability regimes, reflecting the general trend towards a decentred account of regulation. In so doing, it highlights not only the role of state institutions (legislatures, administrators, courts), but also the role of markets, consultation processes, third party auditing and accreditation mechanisms, private grievance procedures and so forth. From this perspective, accountability is secured by a complex array of interdependent and overlapping mechanisms rather than through a vertical hierarchy in which top-down state-centred mechanisms and institutions legitimate the activities of regulatory actors.

This approach raises a crucial challenge: identifying how and when to combine different mechanisms of accountability and to understand their interaction. In rising to this challenge, scholars have constructed various models or typologies of legitimacy which link different concrete mechanisms and strategies of accountability to particular sets of values that are considered essential preconditions to the establishment of regulatory legitimation. Legitimation here is a term that seeks to capture the extent to which a broad community acceptance of a regulatory regime subsists — that is, the extent to principal stakeholders and the general public are willing to give it allegiance. The range of these models and typologies is extensive, but they can be broadly organised around a key cleavage between pluralist and expertise models of legitimacy. While much of the literature in this field advocates nuanced combinations of a range of strategies and values, the desirability of any particular combination is ultimately a product of an underlying commitment to a particular political vision of governance. In particular, tensions between pluralism and expertise are concrete manifestations of disagreement over the commitments entailed by democratic governance. We therefore conclude the chapter by briefly considering the implications of contrasting visions of democracy for accountability and regulatory legitimation.

Regulation above and beyond the state

While the conceptual map developed in Chapters 2 through 5 are primarily developed through an exploration of regulation at the national level, Chapter 6

https://doi.org/10.1017/CBO9780511801112.002 Published online by Cambridge University Press

considers regulation occurring at the supranational level. Unlike the preceding four chapters, Chapter 6 has two aims: first, to consider the extent to which the analytic map developed in the first four chapters transposes to regulation in the supranational context, and second, to consider whether the shift to regulation above and beyond the state alters the role of law in regulation. Accordingly, Chapter 6 constructs an argument, supported by brief referenced examples, rather than interleaving commentary and extracts from academic literature in the manner of Chapters 2 to 5. As we shall see, in comparison to regulation at the national level, regulation above and beyond the state raises some common issues, whilst also posing different challenges or shifts in emphasis, from the parameters provided by scholarly examination of national regulation. In particular, when reflecting upon theories and techniques of regulation, compliance and legitimacy in the supranational context, the absence of an overarching authoritative institution equivalent to the nation-state that may legitimately exercise coercive power on the basis of its democratic underpinnings has a variety of implications. These can often be explored using the same theoretical resources already discussed in Chapters 2 to 5. At times, however, the supranational regulatory environment changes the prominence of particular facets of these frameworks. For example, network approaches to regulatory theory gain particular prominence as an inevitable consequence of the absence of an authoritative 'centre'. But the absence of an authoritative 'centre' also alters the context in which private interest theories of regulation operate and, as a result, the implications of their applicability. When exploring regulatory techniques, the range of command vs. competition-based approaches may be readily transposable in conceptual terms but, in practice, the absence of any overarching coercive source of authority seriously impedes their effective deployment. Thus voluntary or consensual-based techniques of regulation tend to be heavily relied upon, although these are often bolstered, albeit indirectly, by law's coercive reach through the harnessing of supranational regulatory programme to binding international trade commitments.

Sometimes the similarities are perhaps more striking than the shifts in emphasis. For example, dependence upon the exercise of discretion by regulatory enforcement officials in giving concrete expression to national regulatory norms resonates strongly with dependence upon the discretion of national legislatures and administrations to implement regulatory norms established at the supranational level in achieving global regulatory goals. Likewise, the monitoring function performed by non-state actors, be they private litigants or civil society groups, has been the focus of scholarly examination in both national and supranational contexts. The tension between pluralism and expertise as different sources of legitimacy in regulatory contexts also applies in a supranational context, as does the scope for participation by non-state actors and the complication of vertical hierarchies by networks of experts. However, the challenge to state sovereignty arising in the supranational context poses the questions of

legitimacy that plague regulatory accountability within national contexts in a more intensely politicised way.

Conclusion

Before proceeding further, it may be helpful to identify how our approach relates to, yet differs from, approaches which other scholars of regulation have adopted. We are, as we stated earlier, hoping to reach both lawyers and non-lawyers, particularly those who are new to the field. However, we also seek to address readers who have some familiarity with the broad field of regulation. For lawyers with some exposure to the field, the idea of a 'legal perspective' on regulation may well evoke two particular strands of literature: the first about the administrative state, particularly analyses by public lawyers of the exercise of legal discretion by independent regulatory agencies; and the second concerning the role of courts and the growing juridification of regulation. While the insights of the first strand of literature are springboards to the approach we adopt in this book, the way we have constructed a map of the field adapts more readily to regulation involving non-state actors and extends more readily beyond the borders of the state. And while the juridification literature is incorporated within our exploration of regulatory legitimacy, our overall aim of incorporating multi-disciplinary material necessitates a more expansive focus. Thus both these literatures are complementary to our approach and, taken together, all contribute to enriched views of the law's relationship to regulation.

In addition, and especially in the context of broader social science approaches to regulation, there are three strands of literature that inhabit overlapping territory to that sketched out in this book. Among the most prominent is the rapidly expanding literature concerning risk, which inhabits even larger territory than that of regulation. The contours of its debates are equally contested and complex, but we consider one aspect of the risk literature — social scientific approaches to risk management — to share our concerns, albeit expressed in different language. The following edited quotation by a leading risk scholar reveals that, absent the detailed context and terminology of risk discourses, the issues raised in this literature are remarkably similar to those of regulation: indeed, the terms 'risk management' and 'regulation' could almost be used interchangeably, at least in this quotation:

> There is no commonly accepted definition for the term risk — neither in the sciences nor in public understanding . . . the term 'risk' is often associated with the possibility that an undesirable state of reality (adverse effects) may occur as a result of natural events or human activities . . . Risk is therefore both a descriptive and normative concept . . . [and] carries the implicit message to reduce undesirable effects through appropriate modification of the causes or, though less desirable, mitigation of the consequences . . . Risk management refers to the process of reducing the risks to a level deemed tolerable by society and to assure control, monitoring and public communication. (Renn 1998: 50–51)

This book overlaps with only one small part of the risk literature and adopts an approach that may differ in both methodological and philosophical fundamentals. The same is true of the literature on governmentality which draws on Foucauldian social theory. While scholars adopting a Foucauldian approach often focus on similar subject matter to that of scholars of regulation, the language they employ and worldview they adopt are radically different, and we have chosen not to explore the potential links or disconnects in this book.

Any attempt to classify theoretical materials is inevitably fraught with problems of boundary-drawing, and this problem is especially acute in an area such as regulation that has no natural disciplinary home. The framework that we offer does not purport to be fully comprehensive of all approaches: other people may draw the boundaries differently. For example, our framework is not structured around the role of various state organs, such as the legislature, executive and judiciary, although many of the issues surrounding their contribution to regulation are discussed in different parts of the book. The index can offer guidance to those interested in particular facets of regulation that are not immediately apparent from the chapter sub-headings. Moreover, with the exception of Chapter 6, each chapter, and sub-sections within chapters, can be read independently. In this way, the book may be a useful reference for those with a tangential interest in regulation, in addition to offering a map of the field to those interested in regulation as a whole. In setting out to construct a framework for thinking about regulation, we are not asserting that it is the best, let alone the only such framework. Grandiosity of this kind would be misplaced, particularly in a text which seeks to be introductory, and to enthuse the uninitiated. We hope that the approach offered here will serve this purpose.

References

Black, J. 2001. 'Decentring regulation: The role of regulation and self regulation in a ''Post Regulatory'' world', *Current Legal Problems* 54: 103–146.

Brans, M. and Rossbach, S. 1997. 'The autopoiesis of administrative systems : Niklas Luhmann on public administration and public policy', *Public Administration* 75: 417–439.

Hood, C., Rothstein, H. and Baldwin, R. 2001. *The Government of Risk*, Oxford: Oxford University Press.

Morgan, B. 2003. *Social Citizenship in the Shadow of Competition*, Law, Power and Justice Series, Aldershot: Ashgate.

Ogus, A. 2004. *Regulation: Legal Form and Economic Theory*, Oxford: Hart Publishing.

Renn, O. 1998. 'Three decades of risk research: Accomplishments and new challenges', *Journal of Risk Research* 1: 49–71.

Silbey, S. 1997. 'Let them eat cake': Globalisation, postmodern colonialism, and the possibilities of justice', *Law and Society Review* 31: 207–235.

Teubner, G. 1986. 'After legal instrumentalism? Strategic models of post - regulatory law', in Teubner, G. (ed.) *Dilemmas of Law in the welfare State*, Berlin: Walter de Gruyter.

Suggested further reading

Baldwin, R. and Cave, M. 1999. *Understanding Regulation: Theory, Strategy and Practice*, Oxford: Oxford University Press.

Baldwin, R., and McCrudden, C. 1987. *Regulation and Public Law*, London: Weidenfeld and Nicholson.

Baldwin, R., Scott, C. and Hood, C. (eds.) 1998. *A Reader on Regulation*, Oxford Readings in Socio-Legal Studies, Oxford: Oxford University Press.

Coglianese, C. and Kagan, R. 2006. *Regulation and Regulatory Processes*, Aldershot: Ashgate.

Daintith, T. 1997. 'Regulation', in Buxbaum, R. and Madl, F. (eds.) *International Encyclopedia of Comparative Law*, Volume XVII, 'State and Economy', Tübingen: J. C. B. Mohr (Paul Siebeck), New York: Oceana.

Derthick, M. and Quirk, P. 1985. *The Politics of Deregulation*, Washington DC: Brookings Institution.

Harlow, C. and Rawlings, R. 2004. *Law and Administration*, Law in Context Series, 2nd edition, Cambridge: Cambridge University Press.

Levy-Faur, D. and Jordana, J. (eds.) 2004. *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, Cheltenham: Edward Elgar.

Moran, M. 2002. 'Understanding the regulatory state', *British Journal of Political Science* 32: 391–413.

Nonet, P. and Selznick, P. 1978. *Law and Society in Transition: Toward Responsive Law*, New York: Harper & Row.

Scott, C. (ed.) 2003. *Regulation*, *The international library of essays in law and legal Theory Series*, Aldershot: Ashgate.

Wilson, J. Q. (ed.) 1982. *The Politics of Regulation*, New York: Basic Books.