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# *Review Article: Understanding the Regulatory State*

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## MISUNDERSTANDING THE REGULATORY STATE?

In the last quarter of the twentieth century something transformed government across the advanced capitalist world, and a large amount of comparative political enquiry is now concerned with pinning a convincing label on that transformation. Of the many candidates the subject of this review article has proved especially popular. As I will show, a regulatory state is now commonly said to exist in a wide range of geographical and institutional settings: writers speak of a regulatory state in the United States and in Britain; of the European regulatory state; and even of refinements like 'a regulatory state inside the state'.[1]

Are we seeing here a response to some common changes in the character of state organization? Are we witnessing the rise of a new way of thinking about the study of the state which escapes the conventional disciplinary boundaries of political science (a claim often made for the concept of 'regulation' itself as a field of study)?[2] Or are we just seeing the spread of a linguistic 'tic' – part of the mania for pinning an adjective on the traditional focus of enquiry in political science, the state? If the regulatory state does indeed exist, is it truly something new, and is its novelty similar in all the various places where it has allegedly been observed? Puzzlement is compounded by the very different problems emphasized in different parts of the literature. As I will show, much discussion of the American regulatory state assumes that it is too hierarchical and command-like. By contrast, in Britain and elsewhere in Europe it has been common to identify the regulatory state with the dissolution of government by command into uncoupled systems of self-steering.[3]

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[1] Christopher Hood, Colin Scott, Oliver James, George Jones and Tony Travers, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters* (Oxford: Oxford University Press, 1999). The phrase provides the title of their opening chapter. It is accompanied by a question mark.

[2] For instance: Roger Noll, ed., *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985), 'Introduction' by Noll, pp. 3–8; and Robert Baldwin, Colin Scott and Christopher Hood, eds, *A Reader on Regulation* (Oxford: Oxford University Press, 1998), pp. 1–55, at p. 35.

[3] For a European view see the citations from Majone at fn. 46 below; R. A. W. Rhodes, *Understanding Governance* (Buckingham: Open University Press, 1997); and Colin Scott, 'Accountability in the Regulatory State', *Journal of Law and Society,* 27 (2000), 38–60.

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The literature on regulation is vast. Selection has to be brutal, and the principles used for this review are eclectic. In part I have been guided by what a political science readership might not be acquainted with. It transpires, for instance, that much writing by those who in the British vernacular are called public lawyers raises issues central to the government of the regulatory state. Thus there is a bias in what follows in favour of the legal literature on regulation. There is also a bias, appropriate in a review article, towards recent literature. But that literature will seem disembodied if not set against long-standing debates. I cannot pretend in the space here to scan all these debates systematically, but I have attempted to range back to recollect some of the 'classics' in the field. The shape of the discussion is then dictated pragmatically. I begin here with the first, and still the largest, literature that thought it was examining something called the regulatory state: that created by the rise of regulation in the United States. I then examine one of the most important links between that literature and the studies produced in, and about, European systems: a link created by the perceived problems of one particularly important mode of regulation, commonly called 'command'. I examine American responses to the supposed crisis of command, and then compare these responses to studies elsewhere, notably those produced in the European literature on the supposed crisis of juridification. At this point I examine also some influential proposed solutions to the 'crisis' of command and control, notably those associated with the work of the Australian criminologist John Braithwaite. Thereafter I turn to work on the regulatory state in Britain and in Europe. I show that while some of this work shares preoccupations with the 'crisis of command' school it actually starts from a very different set of experiences, involving two very different 'crises': that of control via direct public ownership in the economy; and that associated with the collapse of what is sometimes called 'self-regulation'.

## THE AMERICAN REGULATORY STATE: CAPTURE AND COMMAND

Americans virtually invented the modern regulatory state, in the sense that the United States was the great pioneer of the administrative technology of controlling business through law-backed specialized agencies rather than through the technique of public ownership.[4] That pioneering came in two great bursts, the first associated with the Progressive Movement, the second with the New Deal.[5] A vast literature, consisting both of detailed case studies and more general analyses, is essentially organized around two intellectual agendas, each corresponding to a stage in the history of the American regulatory state. The first responds to the Progressive origins of the American regulatory state and worries away at the question: are the agencies truly independent of the interests they try

[4] There is a pre-history of the regulatory state, for instance in Tudor England, explored in Anthony Ogus, 'Regulatory Law: Some Lessons from the Past', *Legal Studies*, 12 (1992), 1–19.

[5] For a study of the inventors, Thomas McGraw, *Prophets of Regulation* (Cambridge, Mass.: Belknap Press, 1984), pp. 57–152.

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to regulate? The second, later, agenda is concerned with issues of regulatory failure and responds to the problems created by the expanded ambitions of the regulatory state in the 1960s.

One of the earliest general accounts couched in the language of political science to address the issues of independence and capture came in Bernstein's theory that agencies went through an evolutionary life cycle.[6] The theory suggested that regulation was initially done by agencies infused with a pioneering, radical spirit; that with maturity they developed close relations with the regulated industry; and that in senescence they fell prey to capture by the industry. Few now hold to this simple life cycle theory. A complex political economy of regulation literature has, broadly, divided into three streams of argument about the public-interest issues raised by regulation.

First, there are the heirs of American pluralism who have emphasized the contingent nature of the regulatory process – contingent, in particular, on the distribution of power resources among different social groups. Regulation is indeed vulnerable to capture by the regulated interests – but whether it is captured, or even develops in the first place, is a function of circumstances that can be expected to vary from case to case. That is the essence of perhaps the most influential middle-range theory to emerge from the regulatory literature, Wilson's model of why regulation develops or fails to develop, which turns on the distribution of the costs of mobilization for regulation and the distribution of the benefits of regulation.[7] A more geographically ambitious version of pluralist contingency theory has been produced by writers like Kelman and Vogel, who stress the role of national political environments in shaping the regulatory process: the best known is perhaps Vogel's account of a contrast between a litigious and adversarial regulatory culture in the United States and a British culture which stresses informal resolution of issues and a culture of consensus between regulators and regulated.[8] Secondly, a variety of structural accounts, broadly descended from Marxism, picture regulation as a response to the power of business in American life: among the most distinguished are Wolfe's account of the American regulatory state as a sort of 'franchise' system in which public power has been apportioned out to the regulated interests, and Noble's study of the Occupational Safety and Health Administration (OSHA).[9]

[6] Marver Bernstein, *Regulating Business by Independent Commission* (Princeton, NJ: Princeton University Press, 1955). Bernstein's work was only the best known of a genre of 'life cycle' studies, reviewed in Barry Mitnick, *The Political Economy of Regulation* (New York: Columbia University Press, 1980), pp. 21–78.

[7] James Q. Wilson, 'The Politics of Regulation' in his edited collection, *The Politics of Regulation* (New York: Basic Books, 1980), pp. 357–94, at pp. 366–70.

[8] Steven Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* (Cambridge, Mass.: MIT Press, 1981); David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca, NY: Cornell University Press, 1986).

[9] Alan Wolfe, *The Limits of Legitimacy: Political Contradictions of Contemporary Capitalism* (New York: Free Press, 1977); Charles Noble, *Liberalism at Work: The Rise and Fall of OSHA* (Phildelphia: Temple University Press, 1986).

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Thirdly, and perhaps formally most rigorous, the Chicago school, led by Stigler, produced a theory of the origins and practice of regulation which pictured it as the outcome of the strategic pursuit of interests by rational actors, notably big firms and regulators in big agencies. The most powerful predictions of this model were that regulation would be prompted by sectional interests, not the public interest, and that the beneficiaries of regulation would be vote- and money-seeking politicians, powerful business interests and powerful bureaucrats. The Chicago school produced models of high predictive accuracy in the era when regulation expanded in the United States; it had more difficulty explaining the onset of deregulation, a problem Peltzman has struggled with in a landmark paper.[10]

The deregulation phenomenon is important for another reason, however, for it is connected to the second important intellectual agenda that has shaped the study of the American regulatory state. Progressive worries about the beneficiaries of regulation persist, but they have been joined by an even more elementary worry: does regulation have any controllable purpose at all? Inside the academy this worry is connected to the substantial political science literature on implementation failure that developed in the 1970s; beyond academic enquiry it connects to the disillusionment among key sections of the American elite with the sort of interventionist state that developed out of the New Deal. The pessimistic academic literature on the implementation of regulation identifies a crisis of the regulatory order in the United States, sees deregulation as one symptom of that crisis, but traces the roots of the crisis to the historical turn taken by the regulatory system in the 1960s – in particular to the expansion of the regulatory domain beyond particular, fairly clearly identifiable sectors and industries to the wider regulation of activities spanning the whole economy, like health and safety at work and the environment. Another way of labelling the turn is as a shift from 'economic' to 'social' regulation. Some of the most distinguished accounts of this 'crisis' theory have come from public lawyers. Here I draw on two, those offered by Stewart and by Sunstein – in part because their arguments provide a bridge to important European scholarship on regulation.

Stewart argues as follows.[11] The turn from economic regulation to social regulation in the 1960s created serious problems, both procedurally and substantively. Before 1960 regulation dealt with particular sectors of the

[10] The original classic paper is George Stigler, 'The Theory of Economic Regulation', *Bell Journal of Economics and Management Science*, 2 (1971), 3–21. Sam Peltzman, 'The Economic Theory of Regulation after a Decade of Deregulation', originally appeared in *Brookings Papers on Microeconomics* (1989), 1–59, and is reprinted in a more accessible form in Baldwin, Scott and Hood, eds, *Reader on Regulation*, pp. 99–130. Peltzman's is also an acute and balanced summary, in non-technical language, of the main themes in the 'economic' approach.

[11] Richard B. Stewart, 'Regulation and the Crisis of Legalisation in the United States', in Terence Daintith, ed., *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: de Gruyter, 1988), pp. 97–133; and 'Regulation in a Liberal State: The Role of Non-Commodity Values', *Yale Law Journal*, 92 (1983), 1537–90.

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economy; litigation, while not unknown, was less important than the negotiation of outcomes between agencies and industries. After 1960 the shift to social regulation – in health and safety, and environment, for instance – created inclusive programmes covering all industries or employers; the controversial and inclusive nature of the regulations made negotiated, case by case solution impossible; the attempt to shift to highly specific regulation of general applicability produced litigation and a growing legalization of regulation. But 'the courts' attempted cure of the regulation crisis has itself created a crisis of legalism … This dual crisis of legalisation stems from the heavy use, in the U.S. regulatory welfare state, of command strategies of law'.[12]

These themes are taken up in a more expanded form in Sunstein's work.[13] The starting point echoes Stewart's argument that from the 1960s the regulatory state moved into new and more difficult to control arenas: 'Between the New Deal and the 1980s the United States witnessed a rights revolution – the creation by Congress of legal entitlements to freedom from risks in the workplace and in consumer products.' But:

> Regulation in the 1960s and 1970s differed both substantively and institutionally from that of the 1930s … the purpose of governmental controls was not primarily to stabilize the economy or to provide price and entry controls … The more recent goals of Congress have been to protect public health and safety from risks of various sorts … and to counteract the social subordination of disadvantaged groups.[14]

Much of the substantive material in Sunstein's work is taken up with examining sources of failure in regulation – an examination which largely redescribes what could (and has been) described in orthodox political science language as implementation failure.[15] But what links Sunstein's work to Stewart's is that both focus on a problem which, we will see, has been prominent in research well beyond the United States: the crisis of legalization, to use Stewart's language. Chapter 5 of *After the Rights Revolution* contains the gist of Sunstein's case.[16] Here he examines what legal principles can guide the creation, understanding and implementation of regulatory measures. That examination is of necessity far more than mechanical; in effect, it is about both the substantive values that should guide the law, and about the role of law itself in social and economic life. The problem of the substantive purpose of regulation is also central to Stewart's examination of the principles that should guide regulation in a liberal state. He starts from the observation that, formally,

[12] Stewart, 'Regulation and the Crisis of Legalisation', p. 108.

[13] Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990). Sunstein's essays are now collected in an accessible form in *Free Markets and Social Justice* (Oxford: Oxford University Press, 1997).

[14] Sunstein, *After the Rights Revolution*, pp. 12–13.

[15] Sunstein's arguments are compressed in chap. 14 of *Free Markets and Social Justice,* 'Congress, Constitutional Moments, and the Cost–Benefit State', pp. 348–83; they most obviously resemble the political science implementation literature in chap. 3 of *After the Rights Revolution*, 'How Regulation Fails', pp. 74–110.

[16] 'Interpretive Principles for the Regulatory State', pp. 160–92.

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liberalism involves neutrality between differing conceptions of the good. But historically liberalism in America was connected to notions of active citizenship and participation in associational life; the exemplars are in de Tocqueville's famous account of American culture. The modern regulatory state, by contrast, commands low esteem because it is seen as the result of the working of competing private interests. Stewart considers and rejects some influential philosophies of regulation – for instance the notion, which he associates with Posner, that regulation should be about enforcing deals made in the political market place – in favour of a philosophy reflecting what he argues are American liberalism's generous associative traditions. In practice this leads to a philosophy which stresses the role of regulation in protecting non-commodity values, for example in respect of the environment, and in the promotion of diversity.[17]

Sunstein's and Stewart's chosen escape route from the cul-de-sac of the American regulatory state is via a reconfiguration of the substantive content of regulation. But two other escape routes also exist. One focuses on institutional design and redesign – a solution that ought to be attractive to a political science discipline which has recently been rediscovering the possibilities of conscious institutional engineering.[18] Some of the most intriguing – and technically complex – come out of a rapidly developing literature which models problems of control over regulatory institutions as part of wider games of control with bureaucracies.[19] These game-theoretic models exploit the institutional segmentation of the American system, as in the 'division of powers game' used to explore relations between regulatory agencies and the courts.[20] A second escape route is to deny that there is a crisis, or at least that the crisis is one of command law. Cole and Grossman, for instance, have recently reanalysed the literature on the supposed failings of command law, and coupled this with a history of US clean air legislation: they conclude that the evidence in the wider literature is nothing like as damning as the critics of 'command' suggest and that the history of command in clean air regulation shows no clear tendency for the effectiveness of command to decline over time.[21]

[17] Stewart, 'Regulation in a Liberal State'.

[18] Robert E. Goodin, ed., *The Theory of Institutional Design* (Cambridge: Cambridge University Press, 1996).

[19] A key originating paper is: Matthew D. McCubbins, Roger G. Noll and Barry R. Weingast, 'Structure and Process; Politics and Policy: Administrative Arrangements and the Political Control of Agencies', *Virginia Law Review*, 75 (1989), 431–82.

[20] For a recent example, Susan K. Snyder and Barry R. Weingast, 'The American System of Shared Powers: The President, Congress and the NLRB', *Journal of Law, Economics and Organization*, 16 (2000), 269–305. This literature, a subtly refined descendant of the original Chicago School, is highly technical. For readers not steeped in the rational choice literature there is an outstandingly accessible survey in Pablo T. Spiller, 'Regulatory Agencies and the Courts' in Peter Newman, ed., *The New Palgrave Dictionary of Economics and the Law* (New York: Stockton Press, 1998), vol. 3, pp. 263–6.

[21] Daniel H. Cole and Peter Z. Grossman, 'When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection', *Wisconsin Law Review* (1999), 887–938.

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Some of these themes from the legal literature will be commonplaces to a political science audience – notably the discovery of the turn to social regulation and the (often associated) problems of implementation failure. But I have spent some time on these accounts of the problems of the American regulatory state for one particular reason. The perceived crisis of 'command' regulation in the American system crystallizes a key issue in the study of the regulatory state. Public policy makers responded to the pathologies of command by deregulating. But the academic literature has fastened on to a different issue: given that, whatever particular episodes of deregulation take place, regulation of complex social processes will be needed, what kind of spirit should animate this regulation? In the next section I describe three important efforts to answer this question.

## THE SPIRIT OF REGULATION

The first of these I call for convenience the 'self-regulation' school. Put crudely, the argument is that the only effective kind of regulation, in the end, is self-regulation. Superficially this looks an odd state of affairs, because much of the history of regulatory scandals and crises on both sides of the Atlantic in recent years has involved problems with traditional forms of self-regulation. But the spread of command regulation is typically seen by this school as a symptom of problems, not a solution. A special issue of *Law and Policy* (1997) gathers together a sustained exploration of self-regulation, prefaced by a long defensive introduction by Gunningham and Rees which argues that there is an international tide favouring self-regulation, and that this tide is the product of regulatory overload.[22]

Granted that there are pathologies of legalism and overload, two linked questions immediately arise: since nobody seriously argues that self-regulation is always and everywhere the only possible model of regulation, when is it appropriate and when not; and what precisely does a successful self-regulatory regime look like?

Thinking about these questions starts to dissolve the simplicities of self-regulation. A number of important contributions show the possibilities. Ogus's landmark paper on varieties of self-regulation offers an argument that has both large policy implications and that generates a set of hypotheses for continuing research: in a nutshell, that appropriate forms of self-regulation will vary depending on transaction costs in different arenas.[23] Furger's institutionally detailed study of the maritime industry shows the range of influences at work. Although centred in the City of London, the industry is international in nature; the traditional command methods of regulation by nation states suffer

[22] Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: an Institutional Perspective', *Law and Policy*, 19 (1997), 363–414.

[23] Anthony Ogus, 'Rethinking Self-Regulation', *Oxford Journal of Legal Studies*, 15 (1995), 97–108; reprinted in Baldwin, Scott and Hood, *Reader on Regulation*, pp. 374–88.

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obvious limitations; the complex structure of the industry involves a wide range of different interests and business communities – shipowners, marine insurers and so on. Yet both here, and in a wide range of other industries cited by Furger, self-regulation continues to adapt and spread.[24] The heart of the problem, as Furger himself makes clear, is Durkheimian in nature. In Durkheim's famous phrase: 'everything in the contract is not contractual'.[25] How can the non-contractual elements of contract be fostered? How, in complex economic structures with actors pursuing strategic interests, can a sense of common obligation and willingness to comply with commonly agreed rules, be created? Solutions to this Durkheimian problem have increasingly converged on the idea of intervening to shape both the structures and cultures of systems of self-regulation. Alders and Wilthagen have produced an empirically rich comparative study of health and safety and environmental regulation which explores the familiar limits of command and argues for a model of reflexive, 'conditioned' self-regulation.[26]

Just what conditioning and reflexivity might amount to is explored with most ambition in the work of the Australian criminologist and theorist of regulation, John Braithwaite, my second major example of attempts to prescribe the spirit of regulation. Many of Braithwaite's arguments about regulation grow out of his wider concerns as a criminologist: from studies of white-collar crime, corporate criminality and his projects for restorative justice.[27] They spring from the problem of creating some sort of moral foundation for compliance with the law. In business regulation – the main focus of Braithwaite's work on regulation itself – this has turned into a concern with the limits of legalism in inducing regulatory co-operation. In some American instances the recognition of these limits has produced a kind of fatalism about the chances of ever achieving regulatory effectiveness – a fatalism that strengthened the deregulation movement in the United States. Braithwaite's concern is to transcend the regulation/deregulation debate – and to transcend the debate about the limits of command. High levels of regulation are necessary both on grounds of economic efficiency and risk management. Effective regulation in conditions of great complexity depends on fostering norms among the regulated such that they will voluntarily comply, and depends upon the creation of a constant dialogue between regulators and regulated: hence 'responsive regulation', the coinage for

[24] Franco Furger, 'Accountability and Systems of Self-Governance: the Case of the Maritime Industry', *Law and Policy*, 19 (1997), 445–76.

[25] Emile Durkheim, *The Division of Labor in Society*, trans. George Simpson (New York: Free Press, 1964, original trans. published 1933), p. 211. There is some irony in the invocation of Durkheim by critics of command regulation, for the phrase from Durkheim quoted here comes from his long critique of Spencer and economic liberalism.

[26] Marius Alders and Ton Wilthagen, 'Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment', *Law and Policy*, 19 (1997), 415–43.

[27] The argument is elaborated in John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989), esp. pp. 69–83.

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which Braithwaite is best known.[28] Braithwaite certainly believes in systems of business regulation that operate 'in the shadow of the law' but his emphasis is on persuasion and dialogue in the regulatory process. Regulation is pictured as a pyramid of activities, beginning with persuasion at the bottom, and ending with a variety of draconian penalties at the top. But the image of a pyramid is quite deliberate: it conveys the notion that most regulation – the big base of the pyramid – consists of persuasion and informal warnings.[29]

One attraction of this literature is that it gives a central place to agency and to normative commitment in the regulatory literature. The notion that we could be self-consciously 'smart' in regulatory design is the central theme of a more recent instalment of Gunningham's work on environmental policy, this time with Grabosky and Sinclair.[30] Gunningham and Braithwaite are emerging as the axis powers in a distinctively Australian intellectual empire of regulation – an empire distinguished by its commitment to the design and redesign of self-regulatory systems.[31] *Smart Regulation* begins to answer the critical question: when can we safely abandon command and control in favour of more subtle strategies? The core answer in industrial regulation is: when an industry perceives a 'community of shared fate' – when poor performance on the part of one damages the collectivity.[32]

These ambitious attempts to transcend the deregulation debate raise one obvious problem: what happens if the culture of the regulated is so opportunistic that regulations are routinely viewed as obstacles to be surmounted in the search for advantage in markets – if there is no community of shared fate? These are problems explored in McBarnet and Whelan's pioneering paper, my third example of efforts to prescribe the spirit of regulation.[33] McBarnet and Whelan's empirical examples come from two specialized areas of regulation, taxation and financial reporting, but their picture of opportunism will be immediately familiar to anyone who has studied the regulation of any highly

[28] The three most important sources are: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992); Peter Grabosky and John Braithwaite, eds, *Business Regulation and Australia's Future* (Canberra: Australian Institute of Criminology, 1993); Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business* (Melbourne: Oxford University Press, 1986). I discuss Braithwaite's more recent work on global regulation in the final section of this article.

[29] The pyramid is described most elaborately in Ayres and Braithwaite, *Responsive Regulation*, pp. 101–32.

[30] Neil Gunningham and Peter Grabosky, with Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998).

[31] The intriguing question of whether this Australian distinctiveness is due to the position of the Australian regulatory state in the world system, or to the distinctiveness and integration of this bit of the Australian social science community, is beyond the scope of this article.

[32] Gunningham and Grabosky, *Smart Regulation,* p. 54. The phrase is actually a quotation from Rees, another collaborator of Gunningham's.

[33] Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control', *Modern Law Review*, 54 (1991), 847–73. I have plagiarized their title for the heading to this section of the article.

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competitive market.[34] They begin at the same point as the critics of legalism as a regulatory strategy: with the way legal formalism is undermined by the creativity of strategic actors searching for advantage. The common regulatory response is to try to reassert control by transcending legal formalism – for instance, by stressing the purpose of law, by trading in broad definitions rather than in exact rules, by relying on systems of self-regulation. But this response to creative opportunism is itself undermined: 'tensions in legal ideology, conflicts within legislative and regulatory approaches, disagreements over how best to achieve efficient control and at what price, vested interests, powerful lobbies against the broad approach, all voiced in the discourse of formalism, have provided the first nail in the coffin of anti-formalist control'.[35]

Hence, non-formal modes of regulation are themselves subject to the same sort of destructive influences as afflict formal modes. At the root of the problem lie rational actors with conscious strategic goals (the pursuit of comparative advantage in markets). Attempts to induce co-operation in the spirit of regulation only produce creative compliance – ingenious obedience that ignores the spirit of regulation if it happens to get in the way of the pursuit of comparative advantage: 'Creative compliance is stimulated by strong motivations for resisting control. These motivations do not disappear with the first threat of a different form of control. On the contrary, they become motivations for resisting and undermining anti-formalism'.[36]

That seems the road to fatalism: the regulatory process is chained to a kind of eternal cycle alternating between formalism and anti-legalism.[37] But the recent work of Black tries to tackle this problem by attempting to understand law's limits and possibilities. The interest of her work is heightened because her most important cases are drawn from financial services, the economic sector where opportunism and creative compliance are rampant. Three themes in her work are particularly revealing. First, if we take seriously the connection between regulation and rules, then possibilities open up for a Wittgensteinian analysis of rules as the product of interpretive communities: the study of self-regulation then becomes, in part, a study of how particular kinds of interpretive communities can be fostered.[38] Secondly, if rules are indeed the product of interpretive communities we have an obvious research agenda: the study of regulation as a conversation.[39] Finally, we can systematically explore

[34] A very good case study applying Whelan and McBarnet to securities regulation is: Atul K. Shah, 'Creative Compliance in Financial Reporting', *Accounting, Organizations and Society*, 21 (1996), 23–39.

[35] McBarnet and Whelan, 'Spirit of the Law', p. 860.

[36] McBarnet and Whelan, 'Spirit of the Law', p. 870.

[37] The most recent instalment in the McBarnet and Whelan saga is the bizarrely titled *Creative Accounting and the Cross-Eyed Javelin Thrower* (Chichester: John Wiley, 1999.)

[38] Julia Black, *Rules and Regulators* (Oxford: Clarendon Press: 1997), esp. pp. 36ff.

[39] Julia Black, 'Talking about Regulation', *Public Law* (1998), 77–105.

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the limits and possibilities of law itself. In this account, law becomes only one of the 'arrows' in the quiver of rules available to the regulator.[40]

In Europe the most influential theoretical inspiration for this sort of work comes from the writings of the German jurist Gunther Teubner.[41] The pathologies of command law are identified by Teubner as part of a crisis of growing juridification. Teubner's account draws inspiration both from Habermas and from Luhmann's systems theory.[42] Command law cannot cope with conditions of high complexity. Attempts to extend modes of command law beyond the legal system to other social systems produce pathological consequences which manifest themselves as implementation failure. That failure itself typically leads to an intensification and elaboration of the modes of command, leading to further pathologies, and the colonization of whole new social arenas by command law; hence the crisis of self-regulation. In the language of systems theory, there develops a negative feedback loop: failure begets failure. At the back of this lies a notion derived from Luhmann: that in conditions of high complexity societies must be viewed as constellations of self-steering systems. Law is itself such a system, and as such is autopoietic in nature: 'law produces internal models of the external world, against which it orients its operations, through information produced internally … [it] is a closed autopoietic system operating in a world of closed autopoietic systems.'[43] Legal systems are autopoietic because law is 'self-reproducing'.[44] Teubner's solution looks strikingly like Braithwaite's. It emphasizes reflexivity, within which other sub-systems will operate. The difficulties in Teubner's account are also obvious. How far can arguments organized at this level of theoretical abstraction actually shape regulatory solutions? The suspicion that the concept of autopoiesis is an empty bucket into which anything can be poured is strengthened by Teubner's

[40] Julia Black, ' "Which Arrow?" Rule Type and Regulatory Policy', *Public Law* (1995), 94–117; Julia Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision-Making', *Law and Policy*, 19 (1997), 51–93.

[41] The canonical statement of Teubner's views in English is: Gunther Teubner, *Law as an Autopoietic System*, trans by A. Bankowski and R. Adler, ed. by Z. Bankowski (Oxford: Blackwell, 1993). A more compressed and updated account is in Teubner, 'After Privatization: The Many Autonomies of Private Law', *Current Legal Problems*, ed. M. Freeman (Oxford: Oxford University Press, 1998), pp. 398–424.

[42] The most complete statement in English of Habermas's account of juridification as colonization of life worlds, the central influence on Teubner, is in his *The Theory of Communicative Action: Vol. 2, Lifeworld and System: The Critique of Functionalist Reason*, trans. by Thomas McCarthy (Cambridge: Polity, 1987), pp. 361–97. Luhmann's work influencing Teubner dates from the 1980s and is now available in English as Niklas Luhmann, *Social Systems*, translated by John Bedmarz Jr with Dirk Baecker (Stanford, Calif.: Stanford University Press, 1995), esp. pp. 34–6 and 437–77 on autopoiesis.

[43] Teubner, *Law as an Autopoietic System*, p. 97.

[44] The clearest short account that I know of autopoiesis is in Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992), p. 255–6. I think I have the phrase in quotation marks from Loughlin but now cannot trace it.

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claim that it is compatible with the preferences of neo-liberals, socialists and ecologists.[45] Autopoiesis is tantalizingly elusive: sometimes it seems so abstract as to amount to a kind of formalism; sometimes it seems to be corporatism by other means.

I have spent some time on the extensive debate about the crisis of legalism in regulation, on both sides of the Atlantic, to show that regulation as an activity is itself highly problematic. Its problematic character might be said to spring, at root, from the failures of command modes that rely on the formal authority of law. How strange, then, that the identification of the regulatory state in Europe has been accompanied by the claim that it is actually a solution to other pathologies of command in political and economic life.

## THE EUROPEAN REGULATORY STATE: MADISONIANISM AND ITS LIMITS

Majone virtually invented the notion of the European Union (EU) as a regulatory state and his work dominates the agenda of scholarly research.[46] His analytical starting point considerably clarifies what the term 'regulatory state' means in Europe. Three major functions are ascribed to the modern state: redistribution; stabilization (for example, in the form associated with Keynesianism); and regulation (meaning promoting efficiency by remedying market failure). The rise of the regulatory state consists of the rise of this third function at the expense of the other two.[47] Within nations this is due to the exhaustion of Keynesianism and some of the modes of command with which it is associated, notably public ownership. At the level of the EU the rise of regulation is due to the weakness of means of command. The EU has neither the budget-raising capacity nor the bureaucratic muscle to impose policies on either national members or private interests. Promulgating regulations potentially solves this problem: 'regulatory policy-making puts a good deal of power into the hands of the Brussels authorities while, at the same time, giving the possibility of avoiding tight budgetary constraints imposed by the members.'[48] Constitutional ideologies, such as subsidiarity, thus allow institutions like the Commission to expand ruling domains while pushing the responsibility, and the cost, of regulation down to national and sub-national levels. The characteristic EU institution is thus the regulatory agency and the problem at the nub of Majone's regulatory state is a long way from the pathologies of command: it is how to legitimize these institutions and the regulatory policies they pursue. Majoritarian democracy,

[45] Teubner, *Law as an Autopoietic System*, pp. 64–5.

[46] Giandomenico Majone's most important papers are collected in *Regulating Europe* (London: Routledge, 1996), which also assembles a range of case studies by other scholars. An accessible up-date of his views is in: 'The Regulatory State and its Legitimacy Problems', *West European Politics*, 22 (1999), 1–24.

[47] Majone, *Regulating Europe*, pp. 34–5.

[48] Majone, *Regulating Europe*, p. 66.

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according to Majone, is not appropriate. The argument seems to be, in part, functional (the world of expert regulation is necessarily separate from the world of majoritarian democracy) and in part to do with the kind of state the EU is:

> The Union is not, and may never become, a state in the modern sense of the concept. It is at most a 'regulatory state' since it exhibits some of the features of statehood only in the important but limited area of economic and social regulation. In this area, however, non-majoritarian institutions are the preferred instruments of governance everywhere.[49]

Thus the appropriate model of democratic legitimation is non-majoritarian (after Dahl, Madisonian): 'the overriding objective is, to use Madisonian language, to protect minorities against the tyranny of the majority.'[50]

Just grant for a moment the powerful, dubious functional argument implied in these passages: the implication that since non-majoritarian institutions are preferred 'everywhere' they must be accepted as the outcome of social fate. An obvious question arises: how can a system with such powerful checks and balances, designed to frustrate the building of majorities for decision, avoid policy stasis?

Two outstanding recent books, both coincidentally by German scholars, and both coincidentally written in English, address this and related questions. The arguments of these books are too subtle to be neatly summed up in a single phrase, but I think it fair to say that Scharpf veers to pessimism while Héritier veers to optimism. Both books are about much more than the regulatory process, but both have regulatory processes at the centre of their analysis. Much of Scharpf's book is about using our present theoretical understanding of game theory to make sense of the varieties of European policy making at the intersection between the EU and nation state. Although the pictures he presents about decision-making capacity are highly contingent on sector, he begins and ends with a pessimistic argument: in essence, a 'loss of problem-solving capacities … brought about by the dual and interrelated processes of economic globalization and European integration' has occurred.[51] A simple-minded response to this proposition is puzzlement: if loss of problem-solving capacity is so great, why is the history of European regulation in the last couple of decades also a history of great innovation? (Of course, the innovations might be bad ones; but that big, albeit maybe bad, decisions have been made is indisputable.)

Puzzlement might be summarized as the starting point of Héritier's book which, though about the range of policy making and implementation in the European Union, is particularly relevant to the European regulatory state. Héritier begins with the problem: decision rules in the EU seem to be loaded

[49] Majone, *Regulating Europe*, p. 287.
[50] Majone, *Regulating Europe*, p. 286.
[51] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999), p. 2, and see also p. 187.

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in favour of consensus; such a complex system, with so many different interests to accommodate, should be stalled in total immobility; yet the history of the EU is one of at least periodic bouts of policy creativity which have dislodged this immobility.[52] Why? A short, dense monograph is devoted to answering the question. Two sets of theories are invoked: bargaining theory and organization theory. These yield a number of different strategies that work differently in different arenas: in market making (examples include classic arenas for regulatory policy, transport, telecommunications and competition policy); provision of collective goods (environmental policy); market correcting, redistributive (regulation and social policy); and market correcting, distributive (research and technology). The way a rich body of original scholarship is synthesized into a general interpretation of regulatory processes in Europe is breathtaking. But this is very much a view of Europe from the top, appropriately in a research project written up from the vantage point of elite institutions in Florence and Bonn. Although the language is restrained, it is difficult not to end up assigning heroic roles to the Commission and the Court of Justice as innovators in breaking deadlocks. Yet as the author admits, this is a policy-making system that is based on subterfuge, and it is striking that only in the last paragraph is any attempt made to answer the obvious question: what constitutes acceptable, and what unacceptable, subterfuge?[53] The works of Héritier and Scharpf are important for the study of regulation in the EU for a simple reason: though they range widely over the policy landscape, they both start from the premise that Majone's great insight must be taken seriously. His insight is that both historical context and institutional constraint have given the EU a distinctive character that allow us to summarize it as a regulatory state. Like many great insights in social science, once stated it just seems obvious; that should not be allowed to detract from Majone's contribution.

Whatever one might as a citizen think of the European regulatory state, it is undeniable that in these volumes it has produced work of great originality. Is the same true of the British regulatory state?

## THE BRITISH REGULATORY STATE: AUDIT, TRUST AND RISK

The study of the regulatory state in Britain is inseparable from the convulsions that came over British government in the last two decades of the twentieth century, notably those associated with the most ambitious programme of privatization in the advanced capitalist world and the changes in the workings of central government sometimes summarized as the 'new public management'.

But we should not assume that regulation only appeared in Britain before the great Thatcher reforms. There has long been a regulatory state in Britain and its history is increasingly analysed in two linked sets of literatures. The first helps

[52] Adrienne Héritier, *Policy-Making and Diversity in Europe: Escape from Deadlock* (Cambridge: Cambridge University Press, 1999), p. 1.

[53] Héritier, *Policy-Making and Diversity in Europe*, p. 98.

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us identify the broad character of the sort of regulatory state that developed in Britain, because it is mostly a literature about self-regulation and its travails. That literature demonstrates that in key social arenas – notably in the regulation of the most important professions, medicine and the law, in the regulation of financial markets, and in the related area of the regulation of financial reporting and accounting – there grew up powerful systems of private interest government. We are only at the beginning of the reconstruction of this 'hidden' history of the regulatory state in Britain, but two features are already clear: the characteristic British system of self-regulation has had a problematic relationship with the institutions of democracy in Britain; and much of this growth of self-regulation turned on appropriating public authority while evading mechanisms of accountability for the exercise of that authority.[54]

These case studies connect to a literature with broader analytical ambitions mostly inspired by the work of the great French sociologist, Foucault. Rose's recent volume very handily summarizes the state of the art in the approach of the Foucault school. All the main themes in Foucauldian analysis are compressed into Rose's book: the broadening of the conventional language of 'government' into a wider conception of 'governmentality', a notion designed to suggest that systems of control go beyond the conventional instruments of the state; the emphasis on the historical foundations of regulatory structures, particularly the connections with Benthamite projects for social control, both in their theoretical form (for instance, the Panopticon) and in concrete historical instances such as the New Poor Law and its workhouses; and the emphasis on regulation as a project that involves the reconstruction of social understanding, such that effective systems of control are those that involve the internalization of control norms.[55] The very best studies of the history of regulation in Britain using a Foucauldian perspective have examined accounting – perhaps because it is a uniquely sensitive meeting point for markets, state power, the practice of surveillance and the internalization of modes of control via the discursive construction of highly elaborate rule systems.[56]

[54] This large case-study literature was often produced without the regulatory state in mind and thus often has to be 'interpreted' – with the danger that it is over-interpreted. It is also dominated by studies of professions, especially of law and medicine. Two distinguished overviews from different disciplinary positions are: Paul Wilding, *Professional Power and Social Welfare* (London: Routledge, 1982); and Harold Perkin, *The Rise of Professional Society: England since 1880* (London: Routledge, 1989).

[55] Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999).

[56] Anthony G. Hopwood, 'The Archaeology of Accounting Systems', *Accounting, Organiations and Society*, 12 (1987), 207–34; Anne Loft, 'Towards a Critical Understanding of Accounting: the Case of Cost Accounting in the U.K., 1914–25', *Accounting, Organizations and Society*, 11 (1986), 137–69; Peter Armstrong, 'The Rise of Accounting Controls in British Capitalist Enterprises', *Accounting, Organizations and Society*, 12 (1987), 415–36; Peter Miller and Ted O'Leary, 'Accounting and the Construction of the Governable Person', *Accounting, Organizations and Society*, 12 (1987), 235–65.

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Although he is barely mentioned, the spirit of Foucault also haunts the book which most concretely addresses issues of regulation in contemporary Britain in the language of accounting, Power's *Audit Society*.[57] Power's book came originally out of an interest in a superficially technical process – audit in business – and the origins are in part autobiographical, reflecting his early practical experience as a young accountant specializing in audit for one of the big accounting firms. That provides a starting point for one of the two main themes of the book: the gap that Power notices (both from his own experience and from sociological studies of the audit process) between the representation of audit as a process of objective verification and the highly subjective, often negotiated, reality. Much of audit in business is, to invoke the subtitle of Power's study, a 'ritual of verification'. That in turn leads to the second major theme of the book, and the one which is of most interest to political scientists. This is what Power elsewhere has called the 'audit explosion': the fact that, well beyond business, there was an explosion of audit and evaluation in both the public and private sectors in Britain in the 1980s and 1990s.[58] This explosion is all the more puzzling for Power precisely because in the arena where audit is best established – in the scrutiny of company records – it has a deeply unsatisfactory, because ritualistic, character. Why should such rituals of verification, which have a problematic connection to their overt original purpose, have spread so rapidly and deeply throughout society? Much of Power's book consists of case studies of the spread of audit in different arenas, and in studies of the limits of numbers in the audit process. The heart of his answer to the puzzle of why these rituals are spreading is that they are prompted by a deficiency of trust. Audit is not needed, nor is it much practised, where social actors can trust each other. Failures – such as regulatory failures – are constructed as crises of trust: 'This is essentially the pathology of an audit society', to avoid which 'one needs to know how to trust trust itself'.[59]

Power's arguments have a particular bearing on our understanding of regulation in Britain because they cut against the grain of our established understanding of the British regulatory system. A number of landmark studies had painted highly distinctive pictures of British regulation. Hawkins's ethnography of water-pollution control stressed the limited role of legal sanctions in the regulation process, emphasized the importance of relations of trust between regulator and regulated and argued for the importance of co-operation in effective regulation.[60] Hutter's more recent study of the Health and Safety Executive – but one largely based on fieldwork done in the

[57] Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press 1997).

[58] Michael Power, *The Audit Explosion* (London: Demos, 1994).

[59] Power, *Audit Society*, p. 137 for the quotations.

[60] Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Oxford: Clarendon Press, 1984), esp. pp. 191–4.

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1980s – paints a similar picture.[61] Vogel's Anglo-American comparative study, researched almost contemporaneously, likewise sketched a co-operative British regulatory culture. But whereas Hawkins and Hutter saw the reliance on co-operation and trust as a response to the limits of command law, Vogel saw it as a contingent sign of British uniqueness. [62]

Whatever the origins of the British regulatory style, Power's book amply demonstrates that it is now passing away. At the root of the audit society is a deficiency of trust in existing regulatory processes and institutions. Why does this deficiency exist? In Power's account, two forces seem to be at work. The first are contingent to Britain: there has occurred a combination of intensified competition in markets, and the increasing resort by the state to formal audit mechanisms in spheres where there previously existed high trust norms, such as those governed by traditional structures of professional organization.[63] But there is a second more general force at work, and it is summed up in one word which has increasingly come to occupy a central place in analyses of the regulatory state: risk. The rise of audit is about what Power calls the 'remanagerialization of risk' – the attempt to subject it to systematic controls so as to increase confidence in social processes.[64]

Power's argument about risk echoes what is now one of the commonest accounts of what is shaping the regulatory state: that risk and its management are critical social processes determining both the generation of regulatory failures, and the expansion of regulatory spheres. Why should risk and its management now assume so central a place in the regulatory process? The literature offers three sorts of answers.

The first, the most 'cataclysmic', comes from theorists of 'risk society', of whom Beck is the best-known popularizer, though in English his argument was anticipated by Giddens's claim that a key condition of modernity was a world structured by humanly-created risk.[65] According to this account modern industrial society has created a historically novel set of risks, of the sort typified by those emanating from the nuclear power industry: these are collective in character in the sense that individuals cannot separately secure protection from them; they are unknowable; and their potential magnitude means that the harm they can inflict is catastrophic.[66] Beck's 'risk society' in turn produces a regulatory society: the new world of risk leads to demands for, to use Power's word, its 'remanagerialization'.

[61] Bridget Hutter, *Compliance: Regulation and Environment* (Oxford: Clarendon Press, 1997).
[62] Vogel, *National Styles of Regulation*, pp. 146–92.
[63] This is how I read Power, *The Audit Society*, pp. 134–8.
[64] The phrase is from Power, *The Audit Society*, p. 138.
[65] Ulrich Beck, *Risk Society: Towards a New Modernity*, trans. M. Ritter (London: Sage, 1992); Anthony Giddens, *The Consequences of Modernity* (Cambridge: Polity, 1990).
[66] Since they are unknowable, strictly we should speak of 'uncertainty', not risk; but whoever became rich and famous writing a book called *The Uncertainty Society*?

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That phrase 'regulatory society' is coined for another general study, by Clarke, which also relies heavily on the notion that risk is a force driving the demand for regulation. But part of the subtitle of Clarke's work ('the social control of business') provides the clue to a second, different, source of risk.[67] As in so many studies of regulation, the ghost of Durkheim haunts Clarke's pages. Modern industrial societies are, he remarks,

> peculiar social entities. The bases of their solidarity and sense of collective identity have been eroded and at the same time the substantially realistic expectations of their citizens as to security, well-being and improvement in their circumstances are constantly increased by the success of their economies and by the application of science and technology.[68]

In market economies business, as a great centre of power, is the focus of regulatory struggle because it has contradictory effects on risk: its innovations are one of the main means by which risk has been diminished; but its great power makes it a continuing source of new risks. Here, then, the key source of risk is the presence of a great concentration of power in society, the business community whose competitive appetites have been unleashed by the deregulation measures of recent years. This is also the clue to what Clarke calls 'the deregulation charade';[69] viewed thus, struggles about deregulation are about how to apportion blame and credit for the risks arising from the activities of powerful business interests.

Business power is also central to the single most important sustained attempt to make sense of the regulatory state in Britain after privatization, that contained in work produced by Prosser over a period of more than a decade.[70] The gist of Prosser's argument can be summarized as follows. Old forms of regulation (notably through public ownership) foundered on problems of both economic efficiency and public accountability. The notion that privatization and deregulation can solve these problems by withdrawing the state from command is an illusion. The power of business means that pressures for regulation of the newly privatized centres of power are irresistible: to control monopoly, enforce competition and manage the social damage caused by externalities.[71] But a spate of privatization and deregulation in a constitutional system without any developed theory of public accountability, and with a crudely anthropomorphic view of public authority which identifies authority with the figure of individual

[67] Michael Clarke, *Regulation: The Social Control of Business between Law and Politics* (Basingstoke, Hants: Macmillan, 2000.)

[68] Clarke, *Regulation*, p. 23.

[69] Clarke, *Regulation*, p. 26.

[70] The most extended statement of Prosser's argument is in Tony Prosser, *Law and the Regulators* (Oxford: Clarendon Press, 1997); an early sketch of the argument is in his 'Constitutions and Political Economy', *Modern Law Review*, 53 (1990), 304–20; and a recent effort which uses autopoiesis to theorize regulation in Britain is in 'Theorising Utility Regulation', *Modern Law Review*, 62 (1999), 196–217.

[71] Prosser, *Law and the Regulators*, pp. 10–11.

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cabinet ministers, has ill equipped the new British regulatory state to operate in a democratically responsive fashion.[72]

We now have two accounts of the way risk, damage to trust and the shaping of regulation are connected: one sees a 'risk society' involving the appearance of catastrophic collective risk; the other sees the power of business in a market economy as both a source of risk and a source of risk reduction. The most important recent work on Britain, influenced heavily by Hood, takes a third tack: it views risk as a cultural construction, and takes a self-consciously cultural approach to the study of regulation. Both in his account of risk, and in his more general approach to regulation, Hood has been heavily influenced by the writings of the anthropologist Mary Douglas, and the work in public administration inspired by Douglas's work – notably that exploring the disjunction that often exists between the perception of risk and what the statistics actually suggest to us about the true degree of exposure to risk.[73]

Hood's work is best approached first through a book which is only peripherally about regulation.[74] *The Art of the State* has a characteristically original take. Much work on regulation is marked by a kind of genteel millenarianism: we always seem to be at the end of some era and the start of another. By contrast, a crude summary of Hood's argument might be: there is nothing new under the sun. The New Public Management is founded on a variety of cultural assumptions which can be traced back, not only to the modern history of administrative science, but to the history of government itself. Following Douglas, cultural theory can be analysed on two dimensions, grid and group:

> 'Grid' denotes the degree to which our lives are circumscribed by conventions or rules, reducing the area of life that is open to individual negotiation … 'Group', by contrast, denotes the extent to which individual choice is constrained by group choice, by binding the individual into a collective body.[75]

This soon generates a simple but powerful typology of styles of public management: fatalist; hierarchist; individualist; and egalitarian. A wonderfully entertaining and exhilarating chapter examines these varying styles in the formal language of rhetorical analysis.[76] There is more about risk than regulation in this extraordinarily original book, and it is approached in the familiar Hood style, full of mordant, deadpan accounts of disasters.[77]

[72] Prosser's argument about the anthropomorphism of British constitutional understandings is in his 'Understanding the British Constitution', *Political Studies*, 44 (1996), 473–87. There is a similar argument about the prevailing assumptions of administrative law in Patrick McAuslan, 'Administrative Law, Collective Consumption and Judicial Policy', *Modern Law Review*, 46 (1983), 1–20.

[73] Douglas has most directly addressed questions of risk and culture in two books: her collection of essays *Risk and Blame: Essays in Cultural Theory* (London: Routledge, 1992); and in Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (Berkeley: University of California Press, 1983).

[74] Christopher Hood, *The Art of the State: Culture, Rhetoric and Public Management* (Oxford: Oxford University Press, 1998), citations here from the paperback edition, 2000.

[75] Hood, *The Art of the State*, p. 8.

[76] Hood, *The Art of the State*, pp. 9 and 171–93.

[77] Especially Hood, *The Art of the State*, pp. 23–48.

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The cultural approach to regulation is more explicitly utilized in two books in which Hood has had a large hand, and which have his theoretical fingerprints on every page. Both have the added value that they do something which few of the existing studies of regulation in Britain attempt: they open up the 'black box' of state regulation. As Hood *et al*. note at the start of their study of regulation of government in Britain most attention is focused on regulation *by* the state.[78] Yet it is arguably the case that the biggest upheavals that have taken place are actually within state structures themselves, as a result of the revolutionary changes usually summarized as the rise of the new public management.[79]

But what is most startling about the comprehensive study of regulation within government – 'the regulatory state within the state' – is the sheer scale and complexity of what is uncovered. In terms of personnel and resources this dwarves what is usually covered in regulation – the regulation of economic activity in the private (including privatized) sectors. Substantively, the book examines five domains: the Whitehall village, local government, prisons, education and 'eurocratic' regulation. Analytically, it revisits Hood's culturally derived categories, adapting the language for the study of control processes within organizations. The pattern that emerges is decline in some traditional modes of collegiate control, such as mutuality, and increasing reliance on mechanisms of oversight and competition. The movement is 'up-grid and up-group': 'Going up-group for regulators means an increasing separation of oversight from other bureaucratic activities and move towards more external regulation. Going up-grid means a pattern of oversight increasingly bound by explicit rules and standards.'[80] In *Regulation Inside Government* many of the themes present in the work of Power and Clarke recur: notably, the turn to formality in the face of failure; scandal; the perception of risk; and the decline of trust. Above all, something plainly inspired by the cultural approach – the sense that regulation, and changes in regulation, are about organizational rituals – lies at the heart of this book.

This attempt to pursue regulatory practice as a species of ritual is even more evident in another instalment of the cultural take on the regulatory state, Hall, Scott and Hood's study of Oftel.[81] The most important evidence in the study comes from the ethnography of Hall, an anthropologist, who 'lived' in the organization for four days a week over two years, returning on the fifth day of each week to report and discuss her observations with the two armchair generals (as they put it) at the London School of Economics. The key to the book is in the subtitle: 'culture, chaos and interdependence'. This is an extended study in organizational culture, notably in leadership styles within the organization: the

[78] Hood, Scott, James, Jones and Travers, *Regulation Inside Government.*

[79] Much of the detail of Power's 'audit society', for instance, is about the growth of audit practices in government.

[80] Hood, Scott, James, Jones and Travers, *Regulation Inside Government*, p. 199.

[81] Clare Hall, Colin Scott and Christopher Hood, *Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process* (London: Routledge, 2000).

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contrast between the formally monarch-like figure of the Director General Oftel and the reality of limited control;[82] the wide range of (mostly culturally derived) decisional-processing styles; and the influence of the fact that Oftel, like other important regulatory institutions, has to operate in a particular, constraining, organizational setting. The upshot is to paint a picture which subverts the efforts in the literature to develop some general theory of regulatory effectiveness. In the end, the themes here reinforce those in *The Art of the State*: that regulatory theory, at least when it has pretensions to offer prescriptions for practice, is in large part a branch of rhetoric. This is a world away from the literature on instrument and institutional design opened up by the rational choice literature surveyed earlier.

Many themes lie buried in the rich seams opened up by Hood's cultural 'turn'. One, beyond the range of this article, concerns the appropriateness of importing Douglas's cultural schemas into the study of regulation – schemas which have proved highly problematic in their original home in anthropology.[83] A second concerns the political environment of the new regulatory agencies, comparatively neglected in the Oftel study by an ethnographic approach which focuses on the internal workings of the institution. We know that the old order of the nationalized industries was partly destroyed by its political environment – in particular because politicians could not bring themselves to allow managers operational control.[84] The new regimes of privatization were supposed to cure this by depoliticizing the industries. Preliminary studies suggest that these attempts at depoliticization have failed, but we need a new generation of detailed case studies of the regulatory agencies to verify this initial finding.[85]

## GLOBALISING THE REGULATORY STATE

It is time to return to the most pressing of our opening questions: does the regulatory state exist, and if so in what does it consist? This review suggests three possible answers.

(1) The regulatory state is a fiction, but why worry? In the adult lifetime of most readers of this journal social science has become increasingly professionalized, which in part means more specialized. Even within political science the sub-specialisms often now have difficulty communicating with each other. 'The regulatory state' provides a sort of intellectual brazier around

[82] Chap. 4, 'Oftel c'est moi: the role of the individual DGT'.

[83] The key work in the Douglas canon is *Natural Symbols: Explorations in Cosmology* (London: Routledge, 1996.) The book appeared originally in 1970; this 1996 edition has a new introduction by Douglas which reflects on some of the controversies created by its original appearance. For the controversies in both Catholic and anthropological circles, see Richard Fardon, *Mary Douglas: An Intellectual Biography* (London: Routledge, 1999), esp. pp. 218–25 for grid and group.

[84] Tony Prosser, *Nationalised Industries and Public Control* (Oxford: Basil Blackwell, 1986).

[85] For the preliminary assessment, Michael Moran, 'The Lost Legitimacy: Property, Business Power and the Constitution', *Public Administration*, 79 (2001), 277–96.

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which we can all gather, to warm our hands and speak to each other, in a world of increasingly fragmented academic professionalism. Who cares about the shape of the brazier or what is providing fuel for the flames, as long as it helps moderate the crisis of communication in the social sciences? On this view the increasing turn to the study of risk is just a sign that scholars are moving along the line to another more attractive brazier.

(2) Regulatory states exist, but their character is contingent on national setting. That is a very obvious conclusion of this literature survey, and I do not think it is simply a function of the way I have organized the material. To take only the most obvious contrast: the American regulatory state is synonymous with a huge expansion of public authority in the decades after the New Deal; the British regulatory state is emblematic of the famed contradictions of Thatcherism, simultaneously involving an attempt to dismantle and to centralize state controls.

(3) The regulatory state is part of a new governing paradigm – an offspring of the 'governance school', in which governing becomes 'governance', a matter of steering networks rather than commanding a single vessel called the state.

These three answers correspond to a hierarchy of intellectual ambition. The third, as the most ambitious of all, indeed implies that we should abandon the phrase itself because it misleadingly focuses us on the Westphalian state. If regulation is about steering networks, we need to think in global, not national, terms. That implication is triumphantly made explicit in Braithwaite and Drahos's recent study of global business regulation.[86] Absorbing this extraordinarily rich work into the study of business regulation will form a large part of our research agenda for some time to come. The book draws on a massive programme of interviews with 500 policy actors in national and international regulatory organizations, in trade associations and in corporations. It sketches the histories of business globalization, from origins in Roman law to the revolutions of the last thirty years; establishes a framework for comparing the mechanisms, principles and actors in global regulation; applies this framework in twelve chapters to case studies of regulation ranging from finance to sea transport to food; synthesizes the results into a theory of the forces driving globalization; and uses the theory to develop a programme for political action. Along the way the book has important things to say about a range of big issues beyond the study of regulation, notably debates about policy transfer and about the relationship between structure and agency.

Of the many themes in this grand canvas I highlight only two, because they offer, respectively, an opportunity and a puzzle. The opportunity comes from the stress which Braithwaite and Drahos lay on agency in the global regulatory process. It amounts to an opportunity in two distinctive senses: it suggests we

[86] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

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need to steer the study of regulation away from the focus on grand structures and cultural patterns which so dominates the existing literature; and it suggests that the webs of global regulation are so fine and complex that ample opportunity exists for 'model mongering', to use their phrase – for the active intervention of policy entrepreneurs, whether individuals or institutions.

The puzzle is created by the reappearance of a familiar form, self-regulation. If there is one persistent substantive theme in national studies it is that self-regulation is in crisis: in retreat, subject to juridification and afflicted with recurrent scandals. Yet in Braithwaite and Drahos's account of global regulation it emerges as a dominant organizing form. Why there exists this gap between the global and the national will provide an important theme of future research.

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